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New Horizons in Spanish Colonial Law

Contributions to Transnational
Early Modern Legal History

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Introduction: New Horizons of *Derecho Indiano* | 1–8



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Introduction: New Horizons of *Derecho Indiano*

The historiography of *derecho indiano* – a term traditionally employed by legal historians to refer to norms that were used in the overseas territories of the Spanish Crown in the early modern period – was essentially a creation of the Argentine historian Ricardo Levene (1885–1958). His first publication on Spanish colonial law, *Introducción al estudio del derecho Indiano* (1916), can largely be viewed as a foundational work for the discipline in conjunction with subsequent publications that further elaborate on this topic (e.g. Levene 1918, 1924). Between the late 1930s and 1940s, other scholars, like Rafael Altamira (Altamira 1938, 1939, 1948), Jorge Basadre (1937), Ots Capdequi (1943), and Manuel Belaunde Guinassi (1947), took it upon themselves to build on the notion of *derecho indiano* and in general on Levene’s work, which itself had been influenced by his own teachers and developed in close collaboration with other jurists and historians (Levene 1953; Tau Anzoátegui 1990, 2006). From the 1950s on, Alfonso García-Gallo of Spain emerged as the leading scholar in the field (García-Gallo 1951, 1952, 1953, 1955). For the next three decades, his writings would set the agenda for legal historical studies on the overseas territories of the Spanish crown. Together with Alamiro Ávila-Martel and Ricardo Zorraquín Becú, García-Gallo founded the Instituto Internacional de la Historia del Derecho Indiano (IIHDI) in 1966. With his keynote address entitled *Problemas metodológicos de la historia del derecho indiano* (García-Gallo, 1967), held at the first international meeting of legal historians working on the *derecho indiano*, he set the agenda for further research. In his subsequent works, he presented important reflections and advances in research methods and key topics concerning *derecho indiano* (García-Gallo 1970, 1972, 1987). In this regard, the manifold contributions of scholars from both sides of the Atlantic cannot be emphasized enough, for it is no exaggeration to state that for more than two decades, both Latin American and Spanish scholarship relied on the epistemic framework delineated by García-Gallo, to which leading scholars of the subsequent generation, like Tau Anzoátegui (1993), Martiré (1996), and

Sánchez Bella (1996), testify. Moreover, since its foundation, the IIHDI has been organizing a series of congresses at locations alternating between Spain and Latin America. This has helped to build a transnational scholarly community that serves as a forum for debates and scholarly exchanges. The published *acta* of the IIHDI conferences provide an excellent window to the state of the research within the field between the 1970s and the 1990s (De la Hera et al., 1989).¹

Nearly thirty years later, in 1995, the 11th Congress of the same Institute, held in Buenos Aires, heralded the revival of the discipline, when the Argentinian legal historian, Víctor Tau Anzoátegui, seized the opportunity to address questions on methodology and on the future orientations of the discipline. In so doing, he also invoked the writings of European legal historians like Paolo Grossi, Antonio Manuel Hespanha, Bartolomé Clavero, and others. At the same time, he drew on his own intense legal historical research carried out in the previous decades, starting with research on the codification of civil law in Argentina (Tau Anzoátegui 1977) and working his way through to the foundational structures of *derecho indiano* (Tau Anzoátegui 1992), demonstrating sound historiographical reflection (Tau Anzoátegui 1990, 1993, 1996). His inaugural lecture at the 11th Congress, which was published in 1997 under the title *Nuevos Horizontes en el Estudio Histórico del Derecho Indiano* (Tau Anzoátegui 1997), can be considered part of a broader tendency to revisit and reflect upon the early scholarship on *derecho indiano* undertaken by the first two generations of legal historians from Latin America and Europe, especially from Spain, that generated comprehensive bibliographical studies in the 1980s and the 1990s.²

At the outset, Tau Anzoátegui proposes going beyond conceiving the paradigm of legal history purely as a history of legal norms. He first describes the *Methodenstreit* of the 1970s, which had considerable influence on how legal history – and Spanish colonial law – was understood, in that either

1 For a list of the Congresses with a complete digital library of all the publications of the Congress see: <http://web.ua.es/es/institutoderechoindiano/>.

2 Outstanding in this context is the work of DAGROSSA (1998); see also BERNAL GÓMEZ (1989); DE LA HERA et al. (1989); FLORIS MARGADANT (2000); GONZÁLEZ (1995); MARILUZ URQUIJO (1990); MARTIRÉ (2003); MURO ROMERO (1996); SALINAS ARANEDA (1984, 1994, 1998); SÁNCHEZ BELLO (1989, 1990); TAU ANZOÁTEGUI (1996); ZORRAQUÍN BECÚ (1995), (1997).

some scholars emphasized the character of the discipline as a legal science (García-Gallo, Zorraquín Becú), while others, mainly Spanish scholars, such as Francisco Tomás y Valiente and Bartolomé Clavero, chose to situate legal history within a social science framework. Tau Anzoátegui now linked the methodological development of legal history to what he called “the posture superseding rational and statutory state law,”³ so that normativity, as it was now being conceived by scholars, related more to the autonomy of different levels of social organization, different modes of normative creativity, diverse notions of law and justice, the jurist’s position as an artifact of law, and the casuistic character of legal decisions. All of these, according to Tau Anzoátegui, were now to be seen as alternatives to the old conception of law as a matter of state hegemony. This changed conception of modern law opened up new horizons for legal historians and scholars of Spanish colonial law, aiding them to broaden their understanding of the workings of previous laws.⁴ But the wider conception of normativity advocated by Tau Anzoátegui also led him to make an appeal to the legal historians to use a broader array of sources in the study of legal norms than just the textual sources. Scholars had to “substitute the *legalist* culture for a *juridical* culture, which would permit [the scholar] to place the law in its proper place within the [social] system, depending on the substance and the epoch, and which would enable an ‘intelligent reading’ – which is neither ingenuous nor malicious – of the legal texts, asking them questions in the light of a wide conception of the legal phenomenon.”⁵

Furthermore, Tau Anzoátegui elevated certain areas of Spanish colonial law, which he thought deserved more attention than they had hitherto received. One such area was the history of the learned jurist, or the *letrado*, who was to be studied within the social, political, economic and bureaucratic context. Another neglected area that Tau Anzoátegui identified was book history: the circulation of printed books, libraries, and the different

3 «[...] una postura superadora del dominante Derecho racional, estatal y legal.», TAU ANZOÁTEGUI (1997) 20.

4 TAU ANZOÁTEGUI (1997) 19–20.

5 TAU ANZOÁTEGUI (1997) 43. «[...] reemplazar la cultura legalista por la cultura jurídica, que permita colocar a la ley dentro del ordenamiento en su verdadero lugar, según la materia y las época, y que posibilite una ‘lectura inteligente’ – que no es ingenua ni maliciosa – de los textos legales, interrogándolos a la luz de una concepción amplia del fenómeno jurídico.»

interpretations of legal texts. Provincial and local *derecho indiano* had received scant scholarly attention, so that even a “microhistory” was well within the scope of the endeavor. And last but not least, Tau Anzoátegui wished to see more scholarship on the “continuities and ruptures” of colonial legal legacy in the nineteenth century, in the aftermath of the colonial period.⁶

Tau Anzoátegui’s “new horizons” were thus wide open: even if he had not envisaged a comprehensive revolution of the field, his program paved the way for revising the history of Spanish colonial law in order to gain a radically new understanding of it. While his positions were far from radical as far as historical scholarship was concerned, within the mainstream Latin American legal history and *derecho indiano*, his voice was authoritative. There is no doubt that areas of research in many fields that Tau Anzoátegui identified as important have witnessed major progress in the ensuing two decades.

However, in the seventeen years that have passed since Tau Anzoátegui’s programmatic declaration first appeared, new challenges have also emerged. The challenges of globalization are felt both in the historical and the legal sciences, and thus, unsurprisingly, also in the field of legal history. Broader issues have experienced resurgence as a result, for instance, the importance accorded to religious normativity within the normative setting of societies is a direct result of that. They have raised awareness of the need to reconceive the circulation of ideas and juridical practices, and reiterated the significance of drawing attention to the layers of cultural translation that these ideas underwent in the process of reinterpretation in different contexts. Not least, the growing consciousness of and the strong call to reconsider and interrogate colonial history from the postcolonial perspective unexpectedly necessitated a thorough reexamination of the foundational concepts of the discipline. What concept of law best serves our historical studies in consideration of the multinormative settings? How do we define the spatial dimension of our work? How do we analyze the entanglements in legal history? Even if the answer may at first glance seem rather easy, endless controversies have erupted every time scholars have tried to redefine these pivotal terms.

The aim of this volume is not to serve in the same capacity as Tau Anzoátegui’s book from 1997, which essentially reoriented a whole discipline’s

6 TAU ANZOÁTEGUI (1997) 57–126.

research agenda. Rather, it draws rich insights from Tau Anzoátegui's work in order to address some new challenges confronting the discipline. Not least, it hopes to help to integrate the study on *derecho indiano* into a broader field, especially with research in the English-speaking world. It starts and ends with some considerations regarding the historiography of *derecho Indiano*: Luigi Nuzzo's introduction reflects upon the history of the historiography, and Ezequiel Abásolo offers a dedication to Tau Anzoátegui's work. Richard Ross, Tamar Herzog and Heikki Pihlajamäki present three studies, which integrate *derecho indiano* into an Atlantic perspective. Brian Owensby, Marta Lorente and Víctor Tau Anzoátegui take up key aspects that Tau Anzoátegui had raised in his *Nuevos Horizontes*.

Together, the contributions, which were the result of a small workshop in Berlin, in June 2012, show that many of Tau Anzoátegui's wishes, which he expressed in *Nuevos Horizontes* in 1997, have indeed borne fruit. But even if considerable results have been achieved. It is equally clear that new demands are being placed on the study of *derecho indiano*. Some of the new questions have been treated in this volume, but much remains to be done. Twenty years after the 11th Congress of the *IIHDI*, where Tau Anzoátegui presented his reflections on *Nuevos Horizontes*, many of these challenges will have to be discussed on a global scale. If this volume helps to shed light on these *New Horizons*, its goal will have been achieved.

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