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The normativity of possession. Rethinking land relations in early-modern Spanish America, ca. 1500–1800

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Introduction

This article advocates a critical reading of the historiography of land rights in early-modern Spanish America. The main argument is that since the 1940s' tradition of the *derecho indiano*, rights to land have been understood fundamentally under the anachronistic idea of private property. This has become increasingly problematic in more recent historiography, which focuses on the intersection of indigenous and Spanish land relations, presented as a conflict between individual and collective notions of property. While this emphasis on the 'cultural' differences of ownership and tenure representations is certainly important, more often than not it rests on the assumption that historians know much more about the European worldview than the indigenous worldview. And though this may be true of the *archive* available to the historian,¹ which reveals the vision of the Spanish conquerors more than that of the indigenous populations of America, the dichotomous representation of land relations as a difference between European and indigenous-American cultures has constructed a blind spot for historical research: the focus on the otherness of indigenous modes of land tenure and use has led historians to neglect the otherness of the normative order that regulated land relations within the framework of the European *ius commune*. From a twenty-first-century perspective, *both* indigenous *and* Spanish representations of land tenure are incommensurable with our contemporary notions of land, property, and rights.

The anachronistic reading of the law of the early modern period began in the nineteenth century with the beginning of the theoretical and institutional separation of the public from the private (Blaufarb 2016). The radical transformation in legal thought that began with the rise of private law was reflected, unlike in any other legal category, in the institution of possession. Within the emerging *legalist* framework, jurists struggled to make sense of possession as the actual holding of a thing: if only the owner had the right to possess a thing, how could mere possession be a basis for rights? This question addressed the difficulty of explaining why the law protected possession regardless of whether the possessor was the owner or not: 'if the possessor who is not the owner is acting without right, the law is protecting the will to do something wrongful' (Gordley and Mattei 1996, 298). As James Gordley and Ugo Mattei argue, nineteenth-century legal scholars were unable to provide a satisfactory answer to the tensions posed by the

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contradiction generated by the legal protection of possession because the problem itself was constructed on an inadequate premise:

Once continental jurists had defined the owner as a person with the right to possession, it seemed to them that they had to define the mere possessor as a person without this right. Once they had done so they entered a theoretical box canyon from which they never emerged. (Gordley and Mattei 1996, 293)

This manner of addressing the issues of ownership and possession not only had consequences for legal doctrine, but also permeated much of the historical research on land relations in Spanish America.² While the *derecho indiano* tradition of legal historical research created an image of legislatively guided distribution of land among Spaniards and the recognition of existing ‘property rights’ for indigenous populations, more recent social historical research based on judicial records presents a more dynamic picture. Instead of the allocation of land rights by virtue of a central policy, land was at the center of conflictive relations, occupation, and dispossession, thus creating an overall image of more fluid relations of ownership. However, despite the methodological difference between both traditions, they share the assumption that law should have protected property rights and that the judicial protection of possession—considered as a merely factual, mostly ‘illegal,’ form of tenure—was the consequence of the imperfect functioning of law.

This article argues that, in order to better interpret judicial sources on land relations in Spanish America, it is essential to move away from the category of ‘property’ and move toward an understanding of the peculiar normative order in which the legal protection of possession made sense. The following sections will present this argument in three steps. First, the literature on land rights produced by the tradition of the *derecho indiano*, which has been one of the central sources for understanding land relations in the historiography of Spanish America, will be discussed. While producing some of the seminal studies concerned with how Spain governed in the Americas, its characterization of the legal model of land tenure has been one of the main means of misrepresentation regarding how Europeans viewed property more generally. Second, by acknowledging the more recent legal-historical research on the European *ius commune* and its jurisdictional culture, the ways in which this manner of representing law could help better understand the logic of judicial sources for historical research will be expanded on. Third, some of the more recent studies into land tenure will be revisited in order to illustrate that different manners of understanding the functioning of law can lead to widely diverging historical interpretations.

Land rights in the tradition of the *derecho indiano*

The scholarly tradition of the *derecho indiano* has arguably played the leading role in the reconstruction of the legal history of Spanish America. Although it is supposed to refer to the legal situation in colonial Spanish America, the term has suffered broad reformulations since Ricardo Levene (1916) first coined it in the early twentieth century. Initially conceived as a sociology of the law in the Indies, seen by Levene as an outcome of the ‘social life’ of the peoples governed by the Spanish Crown in the sixteenth, seventeenth, and eighteenth centuries, it later took on a more narrow focus on the ‘laws’ that governed

Spanish rule in the Americas. While this shift can already be seen in the 1940s in the work of José María de Ots Capdequí, it was Alfonso García Gallo (1970) who, in the 1950s, reduced the *derecho indiano* to a legislative outcome of the action of the Spanish state.³ Despite recent attempts by Victor Tau Anzoátegui (1982, 1992) to move away from this stricter definition, the emphasis on the legislative action of the state has had an enduring influence in shaping the representations of land relations in Spanish America. As a detailed discussion of the contributions of the *derecho indiano* for the (legal) historiography of Spanish America would exceed the scope of this article, in this section, the focus lies less on the historical research carried out by the historians of the *derecho indiano* and more on their representation of land relations in Spanish America.

The discussion of the legal foundations of the Spanish American land regime has particularly been shaped by José María Ots Capdequí, Mario Góngora, and José María Mariluz Urquijo. All begin with the assumption that Roman law played an important role in configuring land relations in Spanish America, specifically focusing on the idea of absolute, private property rights. While Ots Capdequí uses the distinction of public and private law to present the historical development of land relations as a permanent conflict between the interests of the Crown and of private landholders, Mariluz Urquijo follows Góngora in suggesting that the Spanish Crown used the public/private distinction to recognize the preexistence of indigenous property rights. Although different, these interpretations suggest that the *derecho indiano* theoretically distinguished two quite different property regimes: one in which the state created land rights and one in which private property existed independently from state action.

Ots Capdequí traces the introduction of the distinction between public and private law to the reception of the Justinian Code in Europe in the twelfth and thirteenth centuries and credits its influence to the rise of the monarchic state. According to him, this normative shift transformed the definition of the royal land holdings, the *realengo*, rendering them a *regalía*, thus no longer considered part of the personal holdings of the king, but part of the ‘assets of the Crown, the Monarchy, the State’ (Ots Capdequí 1946, 21; italics in original). The reception of Roman law, thus, led to the rise of the absolutist monarchy in which public powers were concentrated in the person of the king, in his role as head of state, and no longer in the patrimonial sense characteristic of the late Middle Ages. Ots Capdequí follows Sólorzano’s *Política Indiana* to argue that the *regalía* was the fundamental institution that shaped land rights in Spanish America—‘land was a *regalía*, and thus all possible rights to particular domain to land had to originally derive from *grace*, from a *merced real*’ (Ots Capdequí 1946, 41; italics in original). The distribution of rights to land was therefore subordinated to the public interests of the Crown, thus making most *mercedes* conditional to effective occupation, residence, and tillage. The legal doctrine Ots Capdequí (1946, 77–78; 1959, 76–77) identifies as prevailing in the Indies was one of private ownership of land tied to the exercise of a ‘social function,’ thus making property rights conditional to the public interests of the Spanish ‘state.’⁴

This doctrine is seen by Ots Capdequí as part of the specific norms of the *derecho indiano*, what he calls ‘*el derecho propiamente indiano*,’ which, according to the author, did not recognize the influence of the Roman concepts of absolute, intangible property present, in Spanish law. The tension between Spanish laws—as influenced by Roman law—and the *derecho propiamente indiano*—centered on the primacy of the monarchic state—set the stage for the evolution of land relations in Spanish America. Thus, the

problem of land tenure in Spanish America was the result of the coexistence of two 'legal systems'—the Spanish and the *indiano*—whereby the laws designed by the Crown for the Indies were not applied by the magistrates, who instead favored 'the introduction of Justinian law and impeded the reduction of the powers of ownership (*facultades dominicales*) over the land, whether the land possessed was abundant or little, whether it was cultivated or uncultivated' (Ots Capdequí 1946, 78). In this sense, the laws of the state, designed to protect and enhance the common good, were undermined by the convictions and decisions of magistrates who, with a bias towards learned law, tended to favor the Roman conceptions of private ownership.

While Ots Capdequí begins with the institution of the *regalía*, Mario Góngora's view of the land problem is shaped by the importance he places on the institution of the *encomienda* in the early stages of the Spanish conquest. Land, Góngora (1951, 149) correctly notes, had very little value if it did not have a stable workforce. Accordingly, the occupation of land in Spanish America began with the occupation of lands by the *encomendero* in proximity to the *pueblos* where his *encomienda* had been granted, giving him access to fertile lands and labor. However, since the institution of the *encomienda* gave a right to usufruct from the labor of the indigenous community and did not grant the *encomendero* a right over the land, this institution was an instrument of territorial colonization that did not generate land rights (Borde and Góngora 1956, 29). This was convincingly argued by Silvio Zavala (1940, 25), who showed that the *encomienda* did not generate rights to the land for the *encomendero*, and that his access to land had to occur through other institutions, such as a *merced* or through purchase. The importance of the *encomienda* for Góngora was connected to the question it raised regarding the legal condition of the land occupied by the *pueblo*: if the indigenous community owns the land, under what title is it owned? Góngora answers this question by drawing on the Roman law distinction between public and private law, arguing that while all Spanish private ownership had to be obtained through a *merced*, the institution of the *encomienda* revealed that the Crown recognized indigenous property as preexistent and, therefore, intangible; 'The constitution of Spanish territorial property, thus, derives first and foremost from *mercedes* from the state, while that of the Indians subsisted, as preexistent and intangible to royal law, due to the Roman difference of public and private law' (Góngora 1951, 150).

Finally, José María Mariluz Urquijo expanded on the principles established by Ots Capdequí and Góngora by certifying the public/private distinction as a well-established '*fact*' of the juridical reality of Spanish America. The state, he argued, was the only owner of lands in America, but this ownership was only considered eminent domain or sovereignty and not property in terms of private law. Proof of this, argued Mariluz Urquijo (1968, 22), was that the state 'respects the preexistent property of the Indians.' This sleight of hand not only neatly reconciled both arguments discussed above, but it also went further by recognizing private property as the only manner of land tenure in Spanish America—irrespective of if it meant indigenous or Spanish property. The significance of this shift in interpretation should not be underestimated: the theoretical origin of land rights in Spanish America went from being derivative, conditional rights bestowed on particular owners by the Crown in the 1940s to being preexistent, absolute ownership rights founded on the doctrinal distinction between territorial sovereignty and private property in the 1970s.

***Ius commune*, jurisdictional culture, and possession**

As discussed above, the manner in which land rights are interpreted hinges upon how both law and the theoretical origins of land rights are characterized by the historian. The insistence by the historians of the *derecho indiano* on the existence of a monarchic *state*, on the importance of the Roman law distinction between public and private, and on the idea that legitimate land titles derived from state sanction, constructs an image of law and political power that resembles that of the nineteenth century. These assumptions about European law, however, have been starkly reassessed since the late 1970s by legal-historical research.⁵ The idea of the existence of an absolutist state in the Iberian Peninsula before the eighteenth century, as well as the colonial model of empire as an accurate depiction of the Iberian expansion to Asia, Africa, and America, has been wholly called into question.⁶ Likewise, António Manuel Hespanha has spoken of the contemporary distinction between public and private law as a ‘frequent anachronism’ attributed to Roman law or the European *ius commune*. In the latter normative systems, the voice ‘public’ was used topically, and ‘public law’ did not begin to constitute a doctrinal system until the late seventeenth century (Hespanha 2015).⁷ The question of how land rights were constituted, however, has not yet received such detailed attention. The aim of this section is to attempt a reconstruction of how land rights should be understood within the early-modern normative order once the anachronisms of the state and of the public/private distinction have been removed.

This article argues that the best way to understand land relations in Spanish America is not to begin with the *regalía* or the *encomienda* but with the institution of *possession*. First, this makes sense because it is a category that has begun to appear frequently in more recent historiographical research of Spanish America (e.g. Adorno 2007; Herzog 2015; Owensby 2008; Seed 1995). Second, it is central because it is an institution which does not arise from the power of the monarch, through grace, but is rather the outcome of discrete processes of demographic change, migration, and occupation.

To understand possession, however, it is necessary to briefly describe the broader normative universe in which it functioned as an important category: the *ius commune*. This was a complex normative corpus that was built up across almost six centuries, from the twelfth to the eighteenth. It may perhaps be best represented as the ongoing effort by learned jurists to arrange, in a rational and elegant fashion, a multiplicity of juridical orders (Hespanha 2013, 183). In a worldview in which the law was identified with a transcendental order of divine creation, human law was subordinated to the divine authority of *aequitas* and *iustitia*, and as such human law-making was always a process of revealing or declaring, but not creating, the law (Vallejo 2009, 7 ff.). This meant that alongside the unavailable orders of divine and natural law, which could not be modified by human will, laws could originate from multiple jurisdictional orders—including professional guilds, municipalities and city councils, kings, the church, communities, and magistrates. Different rules thus applied, variably, in the same territories and over the same populations, creating a complex set of overlapping juridical orders that were not hierarchically organized and, therefore, allowed for various simultaneous juridical solutions to any given circumstance (Vallejo 2009, 13). The *ius commune* was thus the manner in which jurists, throughout the early-modern period, sought to organize these norms, adapt them to changing circumstances, and provide insights into how diverse sources of law interacted in particular cases.

One manner of looking at this normative order within the Spanish American context is by rethinking the role of the *Siete Partidas* (Bravo Lira 1985). Originally composed in the thirteenth century, the *Partidas*' influence grew in the Spanish Peninsula in the late fourteenth century and it became the most prominent doctrinal text in Spanish America in the course of the sixteenth century. It influenced the juridical practice not only in Spanish America, but also in the territories of the Portuguese Empire due to their reception in the *Ordenações Alfonsinas* of 1446. While Ots Capdequí (1946, 78) viewed the *Siete Partidas* as the embodiment of Roman law in Spanish law, they have more recently been depicted as a “nationalized” version of the *ius commune*’ (Decock 2013, 34) or, perhaps more accurately, as ‘a text of almost pure *ius commune* translated into the national language’ (Grossi 2010, 33). As a legislative text, the *Siete Partidas* drew mainly on the tradition of Roman and canon law that had been informing European legal culture since the late Middle Ages. But crucially it placed law and political power within the framework of the *ius commune* and thus, though being an oeuvre handed down by the king, it clearly reflected the importance of the transcendental order in the creation of law and political power. The first line of the Prologue accordingly states: ‘God is beginning, middle, and end of all things, and without him nothing can be’ (*Las Siete Partidas* 1555, 1:3). Though the *Siete Partidas* cannot provide an exhaustive representation of the ‘overload’ of norms that characterized the early-modern period (Duve, 2020), it nevertheless offers a good entry point for understanding the normative background that informed juridical practice in the Americas.⁸

Within this juridical worldview no distinction existed between public and private law; the more important distinction was between general and special laws. As Alejandro Agüero has argued, in the 1555 glosses of Gregorio López to the *Siete Partidas*, the autonomy of norm-making by local jurisdictions was sustained alongside the power of the king or emperor to make general laws for the kingdom. Even in nineteenth-century editions of the *Partidas*, the *ius commune* principles persisted, allowing a conciliation of ‘the legislative power of the [prince] and the *natural* power of self-regulation assigned to every human community’ (Agüero 2016, 105). Local regulatory powers, such as statutes, custom, and privileges, whether written or not, were thus not subordinated to but rather stood alongside the general laws enacted by royal power, according to the principle that they were all jurisdictional acts that ultimately derived from the same substance of *aequitas* (Vallejo 2009, 12). This means that it is not possible for the historian to draw conclusions from the legislation of the Spanish Crown or emphasize a form of overarching ‘policy,’ since local ordinances and custom always operated simultaneously and had the power to supersede general laws (Tau Anzoátegui 2000).

Additionally, within the jurisdictional culture of the *ius commune*, ‘rules did not work as rigid abstract standards’ (Agüero 2016, 111). This was again related to the idea of *aequitas*, in which the functions of justice and law-making were tied to their correspondence with a natural order of things. Within this conception of law, existing states of affairs carried, in and of themselves, normative force; the task of law-making was thus to reveal the rules that already existed in social and natural life—and thus constituted a reflection of the divine order. The importance of factuality—of things as they are; the conservative force of the status quo—tied the function of law-making to that of interpretation. Laws could not be *applied* to any given situation. Rather, diverse juridical orders and a multiplicity of norms, which over centuries had accumulated to inform the juridical

culture of the *ius commune*, had to be mobilized and adapted by the interpreter of law to the particular circumstances of the case at hand.⁹

It is within this normative worldview that the institution of possession must be understood. Possession is a complex juridical category due to its combination of factual and legal circumstances. It did not simply mean the physical taking hold of things but was rather a particular juridical situation that can be defined as existing states of affairs that were just or according to law. This can be seen in the way possession was defined in the *Siete Partidas*, as well as how it was distinguished from other forms of holding things. Law 1, title 30 of the Third *Partida* defines possession as the ‘lawful holding that man has in corporeal things with the help of body and mind’ (*Las Siete Partidas* 1555, 2:172v.). Possession thus required the ‘deliberate state of mind’ of acting as the owner of the thing alongside the bodily act of taking hold of it (Vizcaino Pérez 1784, 27). The distinction between physical holding and state of mind is relevant because it allows for distinguishing a possessor from tenants, settlers, or administrators who, though physically occupying the thing, do not possess ‘because they possess on behalf of another.’ Possession could also be acquired through tradition (*traditio*) or judicial resolution; but whoever entered the thing ‘by force, or stole it, or whichever way in which he holds it, does not therefore have true possession’ (*Las Siete Partidas* 1555, 2:174). Possession was therefore not the purely factual act of taking hold of a thing; instead, it was a specific legal relationship in which *a title was generated through consolidated practices* and it was a distinct category—different not only from dominion (*señorío*), but also from other forms of tenure.

The manner in which possession generated a title to land can be seen in other sections of the *Partidas*. Law 50, title 28 of the Third *Partida*, which relates to how dominion of land can be acquired, indicates that whoever ‘forsakes’ the land loses his dominion over it and henceforth ‘whoever first enters gains dominion of it’ (*Las Siete Partidas* 1555, 2:165). This conception is reinforced in procedural terms. Law 28, title 2 of the Third *Partida* indicates that in case of litigation,

Great benefit comes to the holders of things, whether they have them lawfully or not; because even though those who demand them say they are theirs, if they cannot prove their dominion of them, the tenure always remains with those who have them even though they cannot prove the right through which they have them. (*Las Siete Partidas* 1555, 2:10)

Solórzano Pereira also interpreted the functioning of these principles in the government of Spanish America when speaking of the *composiciones* carried out in the late sixteenth century. He praised the *Real Cédula* of 1591 for the fact that when it demanded the presentation of titles and measurements of the land it also advised the convenience of ‘not proceeding with a disposition of depriving and dispossessing the lands from their longstanding possessors and laborers’ (Solórzano Pereira 1648, 993). Solórzano noted that, by doing this, the *Real Cédula* of 1591 followed the ‘ancient wisdom’ that it would be best to ‘dissimulate [...] on account of past time’ and profit from their labor in the future (Solórzano Pereira 1648, 993). The reference to the ‘ancient wisdom’ shows that the norm was rooted in longstanding doctrine and not in royal legislation. This manner of framing the problem corresponded with a juridical worldview which protected existing states of affairs and sets of relations that were recognized as such by the community (Bastias Saavedra 2018b).

The self-regulation of the community is what ultimately distinguished possession from other forms of occupation that could have been deemed unlawful. In judicial proceedings witnesses, often persons who had standing within the community, provided the evidence of rightful possession. These testimonies were often in and of themselves the title that proved the possessor's ownership of the tracts of land (Bastias Saavedra 2018b, 17–18; Dias Paes 2018, 29 ff.). Further, as suggested in a recent study, the difference between possessors and squatters seems to have been solely based on the recognition of the local community. In a study of common lands in Santo Domingo, Andrew Walker has shown how new occupants who began to till and use common lands acquired the status of co-owners through the recognition of already established neighbors. Squatters, on the other hand, though fundamentally carrying out similar activities, such as tilling and using the land, lacked this social recognition (Walker 2018, 172 ff.). The fine line between lawful and unlawful occupation was ultimately based on communitarian self-regulation.

Before moving on, it must be noted that, given the importance of local specificity in the functioning of norms, generalizing about specific laws and institutions in Spanish America must be done carefully. Even though doctrine was in a constant process of adaptation to respond to shifts in practice, it cannot be said that any given doctrine was prevalent *everywhere* in Spanish America at any given time. This was coherent with the manner of norm-production in the early-modern world, in which new norms did not derogate older ones, thus leading to an ever-growing accumulation of legal rules. A consequence of this situation meant the simultaneous existence of contradictory norms and, even when new rules were intended to apply to specific circumstances, older rules could always be called upon due to the persistence of their condition as having arisen from *aequitas* (Vallejo 2009, 12). This, of course, tied the operation of law to the spaces in which it functioned, which could sometimes vary from one town or province to the next (Agüero 2016; Hespanha 2013), and was not necessarily tied to the chronology of doctrinal change. The flexibility of this kind of juridical order therefore calls upon the sensibility of the historian to be able to learn from the doctrinal texts while abstaining from considering them as rules that had to be *applied* henceforth. When studying a juridical culture tied to local circumstances, factualism, and casuistry, the historian must act accordingly, learning inductively from case to case, and respecting the local particularities in the jurisdictional operation of law.

Land relations and conflict in Spanish America

To compound the complexity of the juridical order prevalent in Spanish America, one must also consider the fact that the continent was a vast and diversely inhabited space, where Spanish occupation was fragmentary and discontinuous, and the question of land and claims to land necessarily involves the methodological problem of how the indigenous inhabitants conceived their own claims to the spaces in which they lived (see, for example, Owensby and Ross 2018). Furthermore, the structural openness of the *ius commune* allowed the asymmetrical, conditional, and discontinuous integration of indigenous norms, habits, and customs into the normative landscape of the Spanish expansion, making the interactions between conquerors and the native inhabitants of the continent a dynamic process of 'hybridization between indigenous and non-indigenous justice systems' (Duve 2017, 12).¹⁰ This, again, tied the functioning of norms to specific

local contexts and periods, and understanding how land relations were normatively structured in Spanish America still requires abundant empirical research, particularly into the non-written sources of law.

Our understanding of the situation of land relations has, nevertheless, come a long way since the 1970s when Mariluz Urquijo noted that ‘most of the studies we rely on are based on the *Recopilación de Indias* or on other pertinent legal dispositions. Generally, judicial and notarial records that could shed light onto the application of law and the characteristics of custom have not been explored’ (Mariluz Urquijo 1970, 156–57). Recent historical research has concentrated on court records and other legal documentation found in the archives, but historians have also begun to focus particularly on the legal clauses found therein. Acts of *possession*, references to an *immemorial* past, *quiet and pacific* possession, *titles*, *consent*, *knowledge*, and *absence of contradiction* are all becoming part of a new vocabulary for historians interested in land relations in Spanish America.¹¹ However, identifying these normatively laden words in the sources is still a much easier task than interpreting the norms and rules which organized the distribution of land across the continent. This means that getting the basic underlying assumptions right is important because it conditions the manner in which historians read their sources.

The discussion in the preceding sections has shown that the normative structure of the Spanish empire in the Americas can be characterized in two relatively irreconcilable manners and taking these divergent legal assumptions for granted can lead to widely contradictory interpretations of what is actually happening on the ground. Accordingly, the way contemporary historians treat the issue of land rights in Spanish America falls within a broad spectrum. On one extreme, there are those who argue that the Spaniards, upon their arrival in the sixteenth century, introduced individual, private property into America. In this conception, Spanish American land relations were characterized by a European law that came armed with an institutional apparatus of private law and native representations of land rights that were fundamentally different, based more on collective than on individual rights (Adorno 1993, 65; Graubart 2017, 63, 65; Míguez Núñez 2013, 26; Puente Luna 2008, 128). On the other extreme of the spectrum are those who, like Alan Greer (2018), argue that there was no such thing as private property, either in Europe or in America, until the late eighteenth century. Most authors fall somewhere in between these positions. Very few authors, however, explicitly state what they understand to be the theoretical origins of land rights in Spanish America, and those who do usually adopt some version of the *derecho indiano* tradition.

Ots Capdequí’s influence is found, for example, in Agustín Parise’s (2017) characterization of the early modern Spanish American land regime as an ‘allocation paradigm of ownership.’ According to Parise, Spanish monarchs held all discovered territories in *regalía*, which gave them something resembling ‘primordial ownership,’ ‘eminent domain,’ or dominium and jurisdiction over the American territories, and as such ‘any possible rights of others on the land had to be granted by the monarch, by means of a grace (*gracia*)’ (Parise 2017, 65). Native Americans and European settlers could obtain individual private ownership of lands through the system of *mercedes*, while common ownership of lands was allotted by the Crown through the ‘transplantation’ of institutions from the Peninsula (*ejidos*, *dehesas*, *propios*, *montes*, *pastos*, among others) or through the creation of *pueblos* (Parise 2017, 95–125). Brian Owensby follows Ots Capdequí’s characterization of the Spanish American land regime even more closely when he argues that the

Crown's conception of property as a 'social function' clashed with that of individual Spaniards in Mexico, who 'appear to have been moving toward a more individualized, Roman conception of ownership' (Owensby 2008, 94). Elsewhere, in a sense actualizing Ots Capdequí's argument about the differences between Spanish law and the *derecho propiamente indiano*, Owensby reconstructs the difference between land tenure in Spain and land tenure in the Americas. While 'the law of property relations in Spain [...] was fairly orderly,' he argues, there was 'no order to property relations' in the New World (Owensby 2008, 96–97). This is partly because, in the encounter between indigenous and Spanish property norms, the Crown found itself trying to satisfy the Spanish demand for property and the indigenous demand for protection of their possessions.

When it comes to justifying the theoretical origins of indigenous land rights, Góngora's influence is less straightforward, since most of the authors who make the point about their preexistence do not mention him among their references. The main inspirations for Góngora's discussion on the *encomienda* and the question of the title by which the indigenous populations held their land were the questions on monarchic authority raised by Francisco de Vitoria and others (Pagden 1987, 82 ff.). Góngora saw the centrality of the *encomienda* because, in his view, it allowed the Crown to solve, at once, the pragmatic problem of populating the American territory and the normative problem created after the controversies of 1511 on the legitimacy of the Spanish claims to the Indies. The system of the *encomienda*, for Góngora, safeguarded the liberty and the lands of the indigenous peoples while facilitating Spanish settlement by providing a controlled system of tribute in compensation for services to the Crown. In this way, the system of the *encomienda*

... is an eminently 'colonial' salaried service provided by free men, owners of their lands [the natives], which benefits the settlement of the Spanish population without the law suppressing their situation of freedom and capacity to have property, nor modifying the juridical status of their lands. (Góngora 1951, 106)

Alan Greer (2018, 2), who has argued forcefully, and correctly, against the naïve and anachronistic view of property with which historians tend to write the history of the New World, has nevertheless taken up some of the ideas traditionally endorsed by the *derecho indiano*. Almost paraphrasing Góngora, he argues that, in the context of New Spain, 'Native property was [...] primordial, and imperial authorities accepted the fact that its existence and legitimacy predated any European property' (Greer 2018, 131–32). Elsewhere, when discussing the Mexican conquest, Greer (2018, 72–73) adds that 'Cortés did not grant land to the Indian pueblos and their caciques, nor did Charles V: they both basically accepted the prior existence and legitimacy of native property.' While he does not indicate the source of these claims, in another passage Greer (2018, 110) refers to Owensby's book to support his statement that 'courts treated Indian community lands as primordial.' In his study of indigenous *amparos* and litigation, Owensby (2008, 92) attributes this doctrine to Francisco de Vitoria, whom he credits with putting forth the idea that, since the original inhabitants of America had been in possession of their lands before conquest, 'they could not "be dispossessed without due cause," making indigenous rights to their land 'unassailable at law.'

The questions that arise from these characterizations include how the historian expects conflicts over land to be decided under these conditions and what this says about law more generally. The assumption appears to be that since law had defined a place for either

Spanish or indigenous property this also meant that ‘property’ was somehow protected either through the judicial process or through political recourse. Yet what historians are confronted with in the use of judicial sources reveals something quite different, riddled with ‘countless occupations, usurpations, and sales’ (Owensby 2008), leading to ‘confusion’ and ‘ambiguities’ (Graubart 2017; Stavig 2000). These kinds of statements, which are quite common, reveal the historian’s underlying expectations about what law is and does or, at least, should do: protect property.¹² However, as has been said, law in Spanish America was not structured to guarantee the *application* of rules, laws, or norms, but was rather a continuously open process of normative production in which primacy was given to existing states of affairs. This meant that the ‘legality’ of acts could not simply be derived from the bodies of laws because exceptions to the rule, under certain conditions, were always possible. Although it was commonly understood, for example, that holdings in *mayorazgo* or of the Church were inalienable, this rule could always be circumvented given that there was a *cause* of necessity, utility, piety, or other, and certain formal and solemn requirements were fulfilled (Dios 2015, esp. 52 ff.). These requisites of form ultimately justified changes to situations that were otherwise considered to be legally immutable. Salustiano de Dios argues that Castillo de Bobadilla went as far as arguing that cause of necessity could alter longstanding precepts not only of human law, but also of divine and natural law (Dios 2015, 68). In such a normative system, it must be stressed, law was not concerned primarily with protecting ‘property.’

While the focus on judicial practice brought about by the more recent historiography is certainly important, its overall assumptions of how law functioned and how land rights were asserted needs correcting. The granting of titles through *merced*, for example, did not create perpetual and judicially enforceable rights to land because, as grace, once they were granted, they became situations of justice, which strived to preserve the natural and social order, and were thus submitted to the contingencies of experience. The *merced* was, in this sense, one title among many others, but a holder of a *merced* could not claim the land thus granted as his own if it had not been possessed or if it had later been forsaken. The administration of law could not simply presume that titles granted rights because, as we have discussed, norms could not simply be *applied* deductively to the cases but had to be *derived* from them. In addition, according to the logic of the early-modern juridical culture, the exercise of jurisdiction and the administration of justice occurred in situations of conflict resolution. This gave the procedural level of judicial practice an important deliberative role, which included not only the intervention of norms, but also the ascertainment of the facts of the case by hearing the affected parties (Agüero 2007, 41–43). Affected parties could include not only the litigants, but also heirs, neighbors, members of the community, and anyone who stood to suffer injury from any changes to the status quo.

Attention to this aspect of judicial practice is therefore central to understanding how certain decisions were reached. Titles were important in early-modern law, but so were settled social situations—situations conceived as such by the community. References to an *immemorial* past, as well as clauses often used in judicial and scribal documents, which indicate *consent*, *knowledge*, and *absence of contradiction* thus refer to the ‘necessary and ongoing search for consensus on what could be considered just or fair according to local circumstances’ (Agüero 2016, 113). Elsewhere, it has been argued that ownership and possession were closely intertwined because owners as well as dimensions of pieces

of land could only be determined by recourse to the history of the space which resided in the social knowledge and memory of the community (Bastias Saavedra 2018b). Ward Stavig's (2000) interesting case study on landholdings in rural Cuzco also highlights many examples that reflect these communitarian aspects of securing rights to land. The value of the concept of possession is that, ultimately, it sheds light on the customary arrangements achieved by local communities and the legal recognition given to such settled states of affairs.

Conclusions

Making sense of the important role of possession in the structuring of land relations in early-modern Spanish America calls for a better understanding of the more general way law functioned in the context of the *ius commune*. It also requires abandoning the statist and legalist mindsets that shape our contemporary representations of the relation between persons and things. In a sense, this means *provincializing* European law; the Spaniards that came to America, and their legal representation of the world, were not modern—they were not rational economic actors and their worldview was not utilitarian and scientific. And they certainly did not bring with them an image of individual private property or an institutional apparatus of private law.

Rather, the juridical worldview introduced into the New World was tied to the primacy of divine creation and theological notions such as *aequitas* and *iustitia*. The application of law was also less a courtroom procedural, with lawyerly argumentation and clever uses of legal artifices, than a casuistic, commonsense manner of finding solutions that different kinds of magistrates would use to restore the social peace according to the very specific conditions of the local community (Tau Anzoátegui 1992). The Crown, in particular, could not neatly dispose of and organize its territorial domains through laws and ordinances, could not enact sweeping colonial policy, and could not govern through legislation, because the body of norms tended to accumulate throughout the centuries, deriving from multiple sources of both divine and human law, and the norms themselves would change and adapt to local social practices (Hespanha 2006). The often 'confusing' and 'ambiguous' character of judicial decisions found across the literature on Spanish America is due to the fact that the European *ius commune* was structurally bound to local and personal jurisdictions and was thus organized in a much more (micro-)spatial than chronological manner. Ultimately, in order to interpret judicial sources on land relations in Spanish America, it is essential to understand the peculiar normative order in which the legal protection of possession actually made sense. Possession was a central juridical category in a worldview in which existing states of affairs carried, in and of themselves, normative value.

Finally, indicating the anachronistic use of private property is not simply a trivial technical debate in the interest of legal historians. The fundamental problem with the anachronistic use of the concept of property when speaking of land relations in Spanish America should not be understated; however well intentioned, it serves as an implicit narrative device to highlight the 'modernity' of European man in contrast to the 'otherness' of the indigenous experience. It *temporalizes* the indigenous and the European experience in the early-modern Spanish American world, and fundamentally transforms the notion of hybridization into what the indigenous populations gained and lost with the 'arrival'

of modern conceptions of property. This, ultimately, serves as a way of concealing the alterity of the juridical worldview that characterized the European expansion into the New World, which did not entail a framework of judicial protection of private property rights. Instead, it tied land rights to effective possession and use, as well as to communitarian relations which were seen as a manifestation of the religious obligations of the king and his people to cultivate and populate the land.

Notes

1. In its ethnographic sense, understood not only as a space where documents are stored but where knowledge is produced. On this, see Stoler 2002.
2. For some recent related literature, see, for example, Ebright 2014; Míguez Núñez 2013; Parise 2017.
3. For a critical overview, see Garriga 2017; Hespanha 2017; Nuzzo 2015.
4. Ots Capdequí is aware of the anachronism he uses when referring to this as indicating a 'social function' of property.
5. Two books any historian interested in early-modern law should have in her library are Grossi 1995 and Hespanha 2015.
6. For a brief overview, also Bastias Saavedra 2018a.
7. Perhaps the best critical essay against using both the concept of state and the private/public dichotomy in the early-modern period is Garriga 2004.
8. For recent studies on the *ius commune* in the Portuguese context, see Cabral 2016.
9. A good example is the way religious and theological norms were used in adjudicating cases in Spanish America. See Herzog 1995.
10. A very nuanced approach to Spanish-indigenous interactions can be found in García Ruiz 2015.
11. Examples can be found in Bastias Saavedra 2018b; Graubart 2017; Herzog 2013; Owensby 2008; Stavig 2000. For a similar perspective in the case of Portuguese America, see Dias Paes 2017.
12. Tamar Herzog (2013, 304) approaches this problem in a different manner, by studying the processes of 'translation and mediation' that ultimately reveal the underlying rules that were being constructed on the ground.

Biographical note

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