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# Jurisdictional Autonomy and the Autonomy of Law: End of Empire and the Functional Differentiation of Law in 19th-century Latin America

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Abstract

This contribution discusses the collapse of the Iberian Empire and the transformation of legal regimes in 19th-century Latin America. While most of the literature on this period centers on the process of state-building and the reform of legal institutions, my discussion will focus on the important changes produced in the form of law according to Luhmann's theory of functional differentiation. The main argument is that systems theory can provide a re-evaluation of the history of law in the 19th and 20th centuries if one focuses on the idea of the autonomy of law. I argue that this way of reading the functioning of law is analogous to the legal historical re-evaluation of early-modern Iberian legal regimes through the idea of jurisdictional autonomy. Taken together both ways of understanding autonomy in legal observation direct our attention to shifts in law that go beyond the question of empire and nation-state building.

Keywords: empire, Latin America, legal history, indigenous peoples, frontiers

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# Jurisdictional Autonomy and the Autonomy of Law:End of Empire and the Functional Differentiation of Law in 19th-century Latin America*

## I. Introduction

It seems that reconstructing the history of 19th-century Latin America inevitably leads to a primacy of the political. There are certainly compelling reasons that lead the historian in this direction, not least because of the paradigm shift implied in the collapse of the Spanish Empire and the onset of the process of nation-state building across the Americas. But this also should direct attention to the relation between law and political power, and thus to the question of how historians are to think about the autonomy of law. The manner in which this relation is reconstructed will, of course, determine how the history of the 19th century is described: if law is the instrument of empire, then the history of law will be an appendix to the history of politics. On the contrary, if we reaffirm the autonomy of law, then writing the history of 19th-century Latin America would require a conceptual framework to account for the development of legal institutions and practices beyond state and empire.

Though recent legal-historical research has provided a stark reassessment of the normative order that sustained the Spanish expansion into the New World by emphasizing the *unavailability* of law, there has been no equivalent framework for understanding the relation between law and political power in the contemporary world. And despite the advantages of rewriting the history of the *ancien régime* through the lens of its jurisdictional culture, it seems that this historical reassessment is still content with sustaining the state as the main protagonist of the 19th century. This paper argues that the deconstruction of state-centered narratives, which has proven so valuable for the study of the Ibero-American world between the 15th and 18th centuries, has to be extended into the intervening period. By recourse to Luhmann's theory of functional differentiation, I will suggest that, fundamentally, the 19th century was characterized by a shift in the form of law, which substantially transformed the premises that governed the jurisdictional culture of the *ancien régime* but did not collapse law into the state.

In the following, I will unfold this argument in three steps. First, I will discuss how the idea of jurisdictional autonomy served as a way of reconstructing the historical narratives of the broader *ancien régime* culture. This framework was important for correcting the interpretations on the relations between law and political power, on the role of imperial law in the Spanish territories, and on the constitution of the nation-state during the 19th century. Second, I argue that this jurisdictional vision of political power reaches its limits in the 19th century because, being structured on the ›otherness‹ and the particularities of the *ancien régime*, it is not able to account for the changes that are happening on a societal level. In this sense, the systems-theoretical conception of the autonomy of law presents a complementary framework for sustaining the analytical distinction between law and political power. In the third part, I present the shifts observed in sales of indigenous land in southern Chile as an example of how applying both ideas of autonomy to the analysis of a historical case reveals shifts that are not necessarily tied to developments traditionally observed by historians or legal historians.

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## II. Jurisdictional Autonomy: Deconstructing the Statist Paradigm for Early-Modern Hispanic America

Recent legal historical research has begun to deconstruct the nationalist and statist representations of early-modern law and has provided a reconstruction of the normative order of the early-modern period. This new manner of reading the juridical order of the *ancien régime* has also provided a different characterization of the process of European expansion as extending and replicating the juridical conceptions of the metropolis throughout the empire.[1] This model of imperial law, of course, presents an alternative narrative to traditional approaches to colonial law. While traditional approaches view colonial territories as spaces of imperial domination through law,[2] recent approaches strive to demonstrate how local autonomy was possible in the colonies as a result of the constraints on imperial power imposed by law.

The statist paradigm has been criticized because it did not allow the observation of the otherness of the *ancien régime* and a reconstruction of its peculiar anthropology.[3] Instead of a narrative that pursued the teleological reconstruction of the present-day state, the emergence of the monarchy has been reconstructed as a process of corporative integration into larger units within the semantic and normative order of the late-medieval period.[4] On the one hand, the normative order was seen as deriving from divine creation and, as such, preceded and transcended human intervention. On the other hand, human existence was not understood as the unfolding of individual will but rather gave ontological and juridical primacy to the community and the corporative organization of society.[5] Insofar as the monarch could not freely alter the transcendent order or the corporate structure of traditional society, these ontological premises served as structural limitations to the ›centralization‹ of power.[6]

One difficulty of this approach is that any idea of the law becomes diffuse and has to be subsumed within notions such as ›juridical mentality‹, ›juridical culture‹, or even broader notions such as ›*ancien régime* culture‹. Paolo Grossi's conception of the juridical experience as an *ordo iuris* pointed towards the law's radical, foundational, and (quasi-) ontological role in medieval society.[7] In this worldview, the law was seen as being structured according to varying degrees of hierarchy and unavailability.[8] Human law was subordinated to the divine order of *aequitas* and *iustitia*, and as such human law-making was always a process of declaring or revealing, but not creating, the law. Jesús Vallejo has described this as the distinction made between *rudis aequitas* and *aequitas constituta*: »Esta aequitas constituta es reflejo de la rudis aequitas, y como tal no puede contradecirla. Lo que hace la primera con respecto a la segunda no es más que expresarla en términos concretos, delimitarla, declararla, hacerla visible.«[9]

This capacity to transform the divine, natural order into law was at the root of the *ancien régime*'s conception of political power. Power relations were encompassed under the concept of *iurisdictio*, understood as the primary manifestation of political power, which gave the holder the power to ›declare the law‹ and ›establish fairness‹ (*aequitas*).[10] This conception tied the legitimate exercise of power to the theological notion of justice, thus subordinating political power to the original normative order and making every act of authority an expression of that order.[11] In this judicial model of government, the power to rule was inseparable from the power to judge.[12]

This manner of conceiving political power was coherent with the corporative structure of society in which diverse holders of jurisdiction operated simultaneously and exercised varying magnitudes of power over partially or totally coinciding territories or groups of persons.[13] The holder of jurisdiction, as the head of the social body, was seen as exercising the aptitude of self-government that was inherent to every human community. Paolo Grossi has argued that, in this sense, the law was not a monopoly of power but rather »la voz de la sociedad, voz de innumerables grupos sociales cada uno de los cuales encarna un ordenamiento jurídi-

1 Among others, Hespanha (2013).
2 Mommsen Moor (1992); Benton (2010).
3 Clavero (1986); Clavero (1991); Garriga (2004); Hespanha (2002).
4 Garriga (2004) 7–8.
5 Agüero (2008) 34; Agüero (2007) 27.
6 Garriga (2004) 8.
7 Grossi (1995) 35.
8 Hespanha (2015) 148.
9 Vallejo (2009) 8.
10 Hespanha (2015) 35.
11 Agüero (2007) 31.
12 Garriga (2004) 18.
13 Vallejo (1992) 3.

co.«[14] And insofar as the legitimacy of the exercise of jurisdictional power within each corporation arose from within itself, each sphere of jurisdiction was considered to have an autonomous origin.[15] The origin of royal power through the principle of *translatio imperii*, which gave supremacy to the prince as the source of all jurisdictions, was tied to this corporative image and thus presupposed the limitations of that power: »For none of the holders of political power was it possible to constitute unilaterally a new form of relationship affecting all of them universally. None of them disposed of the necessary constituent powers.«[16]

This jurisdictional conception of political power, therefore, occupied the place of a *constitution*[17] that limited the power of the monarch from above and from below. The monarch could not dispose of the law at his will but could only act so as to sustain the natural order through justice, or perfect it by grace.[18] But the power of the Crown was also limited by the jurisdictional structure of government which, although organized through relations of super- and subordination, precluded a unitary and hierarchical integration of political power.[19] This premise has shaped the critique of the statist paradigm for the early modern period because the increasing importance of monarchical power after the 15th century, rather than expanding the executive functions of the prince, produced a progressive specialization in the exercise of jurisdiction.[20] The expansion of the early modern monarchies thus occurred through the development of a dual jurisdictional order: that of the king and his judge-administrators and that of the traditional corporative social structure.[21]

Recent research has not only argued that this model of political power persisted until the late-18th century, but also that it accompanied the colonial expansion of the Ibero-American monarchies. In the case of Hispanic America, Carlos Garriga has argued that the process of Spanish colonization of the Indies applied a model of ›medieval colonialism,‹ which did not imply regional subordination but rather a process of replicating the metropolitan order and society in the New World. In substance this process consisted in creating territories, i. e. producing and organizing space provided with jurisdiction through the foundation of cities and villages (*republics*) and the constitution of provinces. The Kingdoms and Lordships of the Indies thus constituted were (i) structured as jurisdictional entities with capacity for self-government and standing in relations of potential conflict; (ii) governed as jurisdictional domain thus subjecting royal domain to law; and (iii) controlled by an institutional apparatus of magistrates through the *Audiencias*.[22] On a normative level, the process of accession and domain over the Indies can only be understood within the framework of the juridical culture of the *ius commune*. Thus the distinction between Castilian law and the municipal law of the Indies sustained rules of conflict common to that juridical culture and did not create a law substantially different from that which governed the metropolis.[23]

The jurisdictional deconstruction of the state was thus also a deconstruction of the modern, colonial model of empire. Some authors have therefore argued that, rather than speaking of a ›colonial‹ arrangement, it may be better to understand the presence of the Spanish and the Portuguese monarchies in Africa, America, Asia, and Europe under the idea of polycentric monarchies.[24] »[U]nlike the classical imperial model, inspired by the imagery of a uniform territorial domination, which allowed the construction of a strong political reputation«, António Manuel Hespanha has recently characterized the Portuguese Empire as a non-imperial empire whose logic »entailed a plurality of uneven sources of regulation and a diversity of political status of territories and subjects«.[25] The bias of a unitary imperial law and administration was, thus, more a matter of historiographical discourse than an element of institutional life. Rather, the localism and contextualization of law provided by the *ius commune* culture endowed local colonial settings with political and juridical autonomy that precluded pervasive rule

14 Grossi (1995) 67.
15 Vallejo (2009) 11.
16 Vallejo (1992) 3.
17 Cardim (2001) 137; Garriga (2004) 16; Hespanha (2000).
18 Hespanha (2015) 66.
19 Vallejo (2009) 8.
20 Mannori (2007) 132.
21 Hespanha (1986) 55.
22 Garriga (2009) 6–19.
23 Of course, this introduction of European law destroyed or modified the vernacular normative orders.
24 Cardim et al. (2012).
25 Hespanha (2013) 201.

and determination from the metropolitan center.[26]

Ultimately this manner of understanding empire implied a reorganization of the narrative of the crisis of the Spanish Empire and the formation of the nation-state in the nineteenth century. In general terms, the nation-state is not seen as an immediate and self-evident outcome of the constitutional crisis of the *ancien régime* but as an unfolding of continuity and innovation[27] – or as a process of conflictive and discrete negotiation between traditional and modern society. Alejandro Agüero, for example, has argued that the home rule tradition left an enduring imprint on the Argentinean post-colonial order, particularly in the way the provincial states, rather than sustaining the administrative logic of royal provincial jurisdictions, were construed as extensions of the jurisdiction of the city-*republics*.[28] Early constitutionalism has also gained attention from this perspective, particularly in the way the production of written constitutions in the 19th-century Hispanic world struggled to reconcile the pluralist, corporative, and religious foundations of traditional society with the emerging ideas of the French revolution.[29]

As Federica Morelli has correctly suggested, refocusing on the continuities and discontinuities of the early-19th century, can perhaps lead to understanding this period as a third moment between the *ancien régime* and the individualistic modern societies.[30] But the emphasis on the jurisdictional culture also reaches its limits when it comes to describing the emerging order and the transformations that it produces in the form of law. Where are these changes leading, and how is law affected by these transformations? Historians and legal historians have alternatively enumerated the rise of the administrative state, the increasing importance of individualism in society, an emphasis on national law, codes, and formalism, etc., among the main outcomes of this convoluted period.[31] While the idea of modernization has often been used to sum up these changes, it has been long evident that viewing this process uncritically entails pitfalls of its own.[32] And returning to the question of the relation between law and political power, the state seems to come back in through the back door in the discussion of administration, codification, and legislation. The lack of a theoretical framework to understand these changes ultimately suggests that the jurisdictional deconstruction of the statist paradigm is insufficient insofar as it ultimately only delays the dominance of the state until the 19th century.[33]

To address some of these issues, in the following, I will argue that the idea of jurisdictional autonomy has to be complemented by a framework for studying the autonomy of law. The importance of the jurisdictional turn was not only the unveiling of an alternative juridical order, but fundamentally that it prompted a more nuanced and specific historical reconstruction of law and power within the society of the *ancien régime*. The main argument is that Luhmann's characterization of modern society as a society, which is fragmented into functionally autonomous communicative systems, may provide a framework for sustaining the *analytical* distinction between law and political power. This way of reading the functioning of law could be analogous to the legal historical re-evaluation of early-modern legal regimes through the idea of jurisdictional autonomy. What follows will thus proceed with this analogy in mind: How is law understood in modern society? What place does law occupy in relation to political power? And, finally, how does this apply to writing the history of 19th-century Latin America?

## III. The Autonomy of Law: Deconstructing the Representation of Ontological Unity

Though many legal historians have described the foundational character of the natural order and its conceptual construction by the learned law of the *ius commune* as a reflection of the autonomy of law,[34] I am inclined to argue that we can only

26 Hespanha (2013) 180 ff.
27 Morelli (2007) 126.
28 Agüero (2016).
29 Morelli (1997).
30 Morelli (2014) 105.
31 Among others: Coing (1986); Tau Anzoátegui (1992).
32 See e. g. Wehler (1975).
33 Lorente (2015) 202.
34 Grossi (1995) 68; Meccarelli (2015).

speak of the more restricted notion of jurisdictional autonomy. The lack of differentiation between the declaration and application of law and its ontological underpinning indicates the absence of an autonomous locus of legal norm production different from natural and social reality itself. Normative activity was by definition interpretative, and there was therefore no substantive difference in the *interpretatio* of the prince, of the community through custom, of the judge in the administration of justice, or in the conceptual construction of the jurist.[35] Grossi has argued that the interpreter, insofar as he mediated between the realms of concepts and facts, had a creative function; however, it was creative in the sense that it modified the technical-juridical language of Roman law to make it reflect existing (and new) states of affairs.[36] For Hespanha, similarly, the *ius commune* of the jurists was the elegant and rational disposition of »raw legal norms«, local usages and practices, and as such was an elaborate composition of norms that were already rooted in communitarian relations.[37] Law was thus a reflection of society itself, and consequently could change as society changed, but it could also simultaneously conceal this dynamic operation through the semantic reference to *aequitas* as a unitary and stable order of things.

Modern law, in Luhmann's characterization, organized as an autonomous system, implies a complete rearrangement of these relations.[38] Thinking of law as a system highlights the fact that law provides society with a highly specialized form of observation, which reconstructs reality according to its own specific, self-referential meanings. The system produces and reproduces this meaning specific to law (*rechtsspezifischen Sinn*) through the system's operations (*legal* actions, observations, and decisions) and, in time, builds up the structures (*legal* rules, norms, and texts) that are required for selectively limiting the information from the environment in order to continue the system's operations. Insofar as the system recursively draws on its own operations, Luhmann speaks of autopoiesis.

The legal system, however, is not isolated but presupposes and establishes relations of interdependency with its environment (i. e. *everything* that is not defined by the system as part of the system). From the perspective of the system, the system is always one side of the distinction between system and environment. The idea of self-reference implies external reference, and vice versa. Being embedded in society, law has to construct its own autonomy by differentiating itself from, and neutralizing, preexisting social structures through the construction of distinctions specific to law: »Die Rechtspflege muß [...] gesellschaftlich desolidarisiert werden.«[39] This means that legal operations have to be clearly distinguished from other kinds of communication, thus constructing a fracture in the way reality is observed inside and outside the system. And this process occurs not only within the legal system, but also simultaneously in every functional system of society, meaning that functional differentiation is the fragmentation of the unitary worldview of the *ancien régime* into artificial communicative arrangements that reorganize reality according to their own functional imperatives.

While legal theorists have attempted to grasp the differentiation of law through notions such as ›relative autonomy‹,[40] the economic system has a long tradition of being observed as a kind of automatic subject.[41] This was the idea, for example, behind Karl Polanyi's discussion of global market society in which human society becomes subordinated to the imperatives of the economic system.[42] Luhmann expands this line of argument to represent modern society as a being internally organized into functionally specialized and autonomous communicative networks. Systems are thus not organizations, nor institutions, nor things, but rather manifest themselves in their operations: the economic system presents itself in economic operations, the legal system in legal operations, and so on.

The definition of what belongs to the system, and what does not, is made by the system itself through the system's binary code. Operations that

35 Grossi (1995) 168 ff.
36 Grossi (1995) 174.
37 Hespanha (2013) 183.
38 Here I will not discuss the broader aspects of Luhmann's theory and will avoid, as much as possible, some of the more technical language of the theory. It may, however, be worth reminding the reader that this is not a theory of law, but of society.
39 Luhmann (1995) 59.
40 Lempert (1988); Baxter (1987).
41 Bachur (2013) 77.
42 Polanyi (2001) 74 ff.

are relevant for the legal system are any communication that assigns one value of the binary code law/non-law. The idea of autonomy implies that there can be no legal communications outside the legal system, i. e. »es [gibt] keine andere Instanz in der Gesellschaft, die sagen könnte: Dies ist Recht und dies ist Unrecht.«[43] As a societal process, the operative closure of functional systems through the binary code produces a fragmentation of knowledge and rationality, making total representations of the world only possible as a partial totality – as a totality that is reconstructed within each partial subsystem of society.[44] The idea of system autonomy, therefore, does not imply autarchy but rather suggests that there is a distinction between internal and external reference, and the connection of the system to its environment is always, and only, realized through the internal operations of the system.

This may be a good place to resume the relation between law and political power, understood now as the relation between the legal and the political system. Luhmann begins by trying to rearticulate the long tradition in modern thought, which tends to collapse law and politics into the concept of the state. For Luhmann, the state represents actually two different, operatively closed, and autonomous systems, which have been viewed in unitary terms due to particular historical circumstances in which the legal system required the political system to achieve its differentiation, and vice versa. In order to rely on their own operations and increase their own internal complexity, each system requires the other to relieve them of their specific functions. The political system lets the legal system deal with legal questions, while the legal system leaves the political system to deal with political questions.[45] Despite this mutual interdependence, the legal system does not presuppose a state and can operate independently of a sovereign,[46] making systems theory particularly attractive for contemporary research on transnational law, societal constitutionalism, and other global approaches to law.[47]

The state is thus presented as the unity of two contrary perspectives. From the perspective of the legal system, the state is the consequence of the universal societal relevance of law. For the legal system it is not possible to accept the existence of spheres or behaviors that are not regulated by law; even the introduction of indeterminacy has to be qualified by law as freedom. The legal system thus frames itself in relation to the political system as limiting arbitrariness and violence, thus guaranteeing political decisions as binding decisions only insofar as they are lawful. From the perspective of the political system, law is seen as an instrument for the fulfillment and realization of political objectives. In this sense, even though it is autonomous, alongside money from the economic system, law is an important condition for politics, i. e. the power to politically decide what law should be in force. For law the reference to the state indicates that it can only develop in contexts where unhindered violence can be contained; for the political system, itself identified as the state, the reference to law is a condition for increasing complexity.[48] The scheme *Rechtsstaat* thus reconstructs the premises of the jurisdictional vision of power, albeit in modern form: law is seen as limiting political power, while the exercise of political power has to be achieved by lawful means.

Autonomy not only implies different ways of observing and describing reality, but it also implies the constitution of particular temporalities intrinsic to the system. The time frames that have to be anticipated, the time of connection between communications, and the expected reaction times vary from system to system. Even though everything that happens in society in any given moment happens simultaneously, systems can hasten or delay their responses to events, thereby introducing temporal differences in the way events are processed by different systems. While the political system is under significant time constraints to decide, and is thus considered a mechanism for introducing change, the legal system is slow by comparison, acting as a residual source of stability. Legislation thus acts as a mechanism of societal time compensation, which introduces changes in both the political and the legal system. However,

43 Luhmann (1995) 69.
44 Bachur (2013) 37.
45 Holmes (2013) 95 ff.
46 Luhmann (1995) 417.
47 As can be seen in the work of, among others, Hauke Brunkhorst, Andreas Fischer-Lescano, Marcelo Neves, Gunther Teubner, and Chris Thornhill.
48 Luhmann (1995) chap. 9.

the effects of new laws are not the same for each system, and the political system can anticipate, but not *know*, what will happen with the law when applied by the legal system.[49]

From this perspective, the statist paradigm, like descriptions of law as an instrument of political power,[50] are partial representations that are necessarily incomplete. It is, of course, possible to write history from this perspective and posit the state as the center of historical agency, as has been done by some of the best historical sociology in recent decades.[51] But the relevant question here is whether this manner of framing the problem is adequate for legal-historical research. Charles Tilly famously wrote the history of state-building in the Western world without once stopping to provide even a brief account about the role of law in this process.[52] Garriga correctly observed that this is a consequence of the tautology through which the statist paradigm makes the state the starting point and the conclusion of research. And this has consequences for how law is observed: »si no me equivoco, la categoría ›Estado moderno‹ implica de suyo todo un programa investigador precisamente en relación con el derecho, que determina los temas a tratar e impone la perspectiva a adoptar, condicionando así muy fuertemente los (posibles) resultados a alcanzar«.[53] By subordinating law to the state, it is inevitable that one finds the state's law.

The autonomy of law thus complements the jurisdictional critique of the statist paradigm by indicating the structural limitations of political power in a functionally differentiated society. The hypothesis of the primacy of functional differentiation implies at least three complementary ideas: (i) functional specialization leads to a functionally differentiated society in which there is no hierarchical ordering of social systems; (ii) all social functions are equally important insofar as they cannot be replaced by any other; and finally, (iii) the primacy of functional differentiation means that there is no partial system that can represent the whole of society.[54] Thus, no subsystem has privileged access to the observation of society in its entirety, and this holds true for social evolution as well as for historical reconstruction. The fracture in observation produced by functional differentiation means that the reconstruction of causal relations can no longer be assumed to arise from an objective point of view: »They differ, depending upon observing systems, that attribute effects to causes and causes to effects, and this destroys the ontological and logical assumptions of central guidance.«[55] Understood in this manner, the idea of functional differentiation forces the historian to assume a constructivist perspective. If systems theory is not occupied with objects that exist in an independent reality, but with distinctions – i. e. how communicative systems make distinctions – then it must be held that no historical moment can be described in a unitary manner.

If we accept this characterization of the transformations occurring in the modern world, and thus represent the 19th century as the moment in which the process of functional differentiation acquires primacy, then the representation of the continuity of law between the *ancien régime* and modern society requires specification. If the ontological continuum between *aequitas*, norm formation, and the application of law is disrupted, can we speak of the continuity of the jurisdictional culture in a broad sense? Or must we rather subsume the persistence of certain figures and categories of the *ius commune* culture into the broader reorganization of societal meaning systems in modern society? The following section will attempt to illustrate why the perspective of discontinuity should be taken as the primary form of interpretation. Drawing on recent research, I will try to show how studying the repetition of a single legal operation, the sale of a plot of land between 1790 and 1850, reveals the manner in which law began to monopolize legal observations. To observe this transformation, however, it is necessary to mobilize both the jurisdictional and the functional perspectives of autonomy in the analysis.

49 Luhmann (1995) esp. 422 ff.
50 See e. g. Grimm (2000); Mommsen Moor (1992).
51 Important for establishing this research agenda were two collaborative tomes: Tilly (1975); Evans et al. (1985).
52 Tilly (1992).
53 Garriga (2004) 21.
54 Bachur (2013) 90.
55 Luhmann (1997).

## IV. Law and Frontier: Legal System in 19th-century Latin America

My interest in reconciling the two approaches to autonomy outlined above is related to studying the functioning of law in frontier regions in the transition from the 18th to the 19th century. In this regard the critique of the statist paradigm is relevant not only for the study of the *ancien régime* but also for the contemporary world. The limits of political power during the colonial period have a correlate in the contemporary world, albeit in a different manner. While the *ancien régime* culture was structurally organized to allow a decentralization of political and juridical power, the fragmented character of the contemporary world limits its political power's capacity to observe, and therefore unilaterally determine, reality. In order to operate, political power has to organize its own operation while becoming blind to its environment, i. e. everything that is simultaneously occurring in other social systems.

My research focuses on the jurisdiction of Valdivia, which was a particular space both in the Spanish-American world and within the Chilean context. Briefly, Valdivia was located in what was known as the Chilean frontier, a space that effectively resisted Spanish occupation and was known until the nineteenth century as the »country of Indians«.[56] While the larger Chilean frontier, the so-called *Araucanía*, persisted well into the 19th century, the territory of Valdivia was integrated into the Spanish Crown in 1792 and into the Republic of Chile in 1820. At the time of Spanish expansion into the indigenous territories in 1792, most of the land and population belonged to one of the several *Che* ethnic groups that inhabited the region. Here, however, I am concentrating primarily on the *Huilliche*, who occupied the central plains of Los Llanos and Osorno – fertile lands situated in the midst of dense rainforests and most coveted by the Spaniards. By the 1850s, the territory had suffered profound shifts, as the land changed hands from indigenous populations to German immigrants, on many occasions against the territorial objectives of the nascent nation-state. The history of private property formation in this territory is, thus, a history of dispossession of indigenous land, of demographic and ecologic shifts, as well as of the shortcomings of state power in the process of state-building.

Traditionally, the historiography of the 19th century, particularly when it focuses on the relations between European and indigenous populations, tends to observe continuities. The history of dispossession of indigenous land is presented as a continuum from the colonial to the republican period. And this is, to a certain extent, true because it is evident that there is an ongoing process of land moving from the hands of indigenous peoples into the hands of white populations. But how this occurs, what concrete mechanisms intervene, and how much this represents a political objective of the state for the territory is less straightforward. The analysis I propose, focused – in this phase of research – strictly on the operation of law, highlights discontinuities in at least two, more or less, accepted descriptions of the period between 1790 and 1850. The first is the idea that sales of indigenous land were always commodity transactions managed by private law. While the indexes of the volumes of legal records in the archive construct this continuity by labeling these sales indifferently as *compraventa*, historical research has to an extent reproduced this notion by treating land sales indifferently between the colonial and the republican period.[57] The second is the continuity of the normative framework of the *Siete Partidas* and the *ius commune* until the enactment of the Civil Code in 1855.[58] If one follows a strictly legalist approach, the transfer of land ownership in republican Chile continued Spanish doctrine and privileged traditional over consensual mechanisms of conveyance.[59]

The following discussion of how land sales shifted between the colonial and the republican period will attempt to illustrate two arguments. First, in order for land to be understood as a com-

56 Molina (1788) 9.
57 Most notably Illanes (2014); Vergara (2005).
58 Bravo Lira (1984); Bravo Lira (1985).
59 Barrientos Grandón (2003); Guzmán Brito (2015).

modity, the legal system had to monopolize as many observations as possible – and thus exclude all other possible societal observations – from what was considered a legally valid conveyance of ownership. This shift occurred around 1830, in relation to indigenous land, when community knowledge and authority relations were removed from land sales. Second, while tradition was still the predominant form of understanding ownership transfers until the 1840s, consensual mechanisms of conveyance began to acquire increasing importance in land sales throughout the territory of Valdivia. This manner of transfer became widespread with the increasing demand for land through the expected demographic pressure created by immigration and state planning, and it was recognized as a legal mechanism for conveyance by court rulings in the 1850s. These transformations are not easily observable from other vantage points – laws, decrees, policy objectives – and they are not easily explained if the legal experience is not taken seriously and is instead seen as a mere reflection of economic or political interests.

Between 1790 and 1830, the process of buying and selling one piece of indigenous land required numerous interactions and bundled diverse institutions beyond the strictly economic and legal. Authority relations, for example, were central to the process. Buyers had to send a written supplication to the governor asking for his authorization to ›verify the purchase‹ and ›give possession‹ of the land. At this point, the governor had the opportunity to condition sales by either requiring the buyer to take residence in the place or by authorizing the sale on the condition that enough lands to sustain their families remained in possession of the indigenous sellers. During the process of verification, the preconditions of tradition were determined. Consent, for example, was not only required from the indigenous seller but, standing in relations of dependency, also from the head of the lineage, the *cacique principal*. Additionally, the community was important in land sales, becoming the source for proving the identity and the ownership of the plots of land to be sold. The owners, and the dimensions of the 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.[60] Tradition, thus, had a high social and political burden that transcended the will of the parties of the sale.

While tradition in this period was a physical act tied to the verification of the facts of the sale, after 1830 sales of indigenous land became tied to the deeds of purchase (*escrituras de compraventa*). Very briefly stated, tradition no longer required a physical act, the responsibility for the identity of the instrument was displaced from the agent charged with its creation to the seller, and the legal prerequisites were presumed to be true by virtue of the deed. This basically removed the social and political mechanisms of control over the territory, reducing land sales to an interaction between sellers, buyers, and scribes. The social and political mechanisms of land sales were a manner of guaranteeing the peace of the local spaces through the administration of changes in local social relations produced through the sales *before* conveyance was completed. The shifts in the procedures, therefore, were socially disruptive by allowing the introduction of grievances to any sale only *after* the fact through litigation. This, of course, shifted the temporal and spatial references of everyday life on the land to the spaces and times of the judicial process, in lawsuits that could take years to resolve in courts located almost 800 kilometers away.

Finally, the abstraction of local forms of life from the definition of property relations was accelerated through the use of contracts for the buying and selling of land. Unlike the deeds of purchase, these contracts were highly informal documents that did not indicate the precise locations or limits, were not signed by reliable witnesses, and lacked most of the formalities of the deeds, such as the official seal, the cost and year of the paper, and the formal legal clauses provided by the scribe. While the former shifts affected local social relations, the movement towards contracts hindered state control over the territory. As the Chilean state began planning to colonize fiscal lands in the province of Valdivia with German immigrants, the state agent charged with taking possession of public lands found that the state had »but very few properties« due to the number of individuals claiming private

60 For a detailed reconstruction see: Bastias Saavedra (2018) 14 ff.

property through »perverse and monstrously informal« titles.[61] The lawsuits that ensued to clarify the legality of these purchases of public lands were decided against the state, thus recognizing contracts as legitimate instruments for transferring ownership rights. The consensual mechanism for transferring ownership of land, however, was short-lived in Chile. By 1855, the Civil Code reintroduced the idea of tradition through the registration of property before the *Conservador de Bienes Raíces*.[62]

This brief overview of the changes produced in land sales in the territory of Valdivia may allow us to bring together some of the central issues discussed so far. The collapse of the Iberian Empire certainly led to important transformations in the legal regime of the territory of Valdivia. The regime of land sales between 1790 and 1830 certainly fits with the characterization of imperial law provided by Hespanha, where local conditions and contexts shaped the manner in which law was administered and how decisions were reached. Customary practices, communitarian and authority relations, and the normative framework of the *ius commune* were central to the application of law in this historical space. Thus rather than a commodity exchange, the normative and institutional framework that structured sales of indigenous land suggests that, beyond their economic function, land transfers were fundamentally acts of government. They also reveal a fundamental lack of differentiation between the economic, political, legal, and communitarian functions of land. The attribution of relevant facts for the legal validity of tradition is not yet exclusively managed by legal institutions, making legally relevant facts analogous to the shared knowledge of those living on the spot.

The transformations observed after 1830, however, require a way of organizing and interpreting what is happening. The autonomy of law, understood in systems theoretical terms, is one possibility. This entails – which is worth repeating – a reorganization of the relation established within the system between facts and norms. The legal system increasingly uses rules that allow the application of the binary code through a deductive use of facts. In this manner, the facts relevant to the legal system no longer correspond with facts in other social systems (e. g. the state, the local community, etc.).[63] The shifts seen in the way land sales were conducted after 1830 indicate that some form of this process is occurring. Particularly important is the reduction in communications that were accepted as valid for transferring ownership of land – as seen in the extrication of authority relationships, the local community, and the state. Of course, it is obvious that these elements do not lose their objective relevance or disappear from society altogether; rather, the process of functional differentiation simply means that these elements of reality do not constitute information for the system and become part of the *noise* of the environment. In this manner, issues that are relevant for other observers such as the state, the families involved in the sales, the historian, or the anthropologist can only be introduced retroactively, but will not influence the outcomes of the operation. And as historians, for example, we can observe both that the system begins to ignore the indigenous condition in transactions regulated by private law *and* that this produces consequences – such as the dispossession of indigenous land – that, though not immediately relevant for the legal system, are relevant for society more generally.

Taking a systems-theoretical approach, furthermore, attributes the transformations of the 19th century less to the collapse of the Spanish Empire than to a societal reorganization occurring *everywhere*. This is why Luhmann's concepts of modern society and functional differentiation are connected to the idea of *Weltgesellschaft*, as the hypothesis of the existence of one – and only one – global system of society.[64] Nation-state-centered or center-periphery representations will thus be subordinated to global characterizations of local iterations, again forcing a specification of research questions and explicative theories. Did the collapse of the Spanish Empire entail the continuity of the legal regime in the imperial metropolis and change in its periphery? Did the institutional responses to the collapse of the Spanish Empire lead to the multiplication of incommensurable regional/national normative orders? And, perhaps most interestingly from a comparative perspective, did imperial law

61 Quoted in: Donoso Velasco (1928) 98.
62 Bastias Saavedra (2017) 203 ff.
63 Luhmann (1992).
64 Luhmann (1971), (1982). Also Stichweh (2000).

remain unaltered – as jurisdictional government – in the colonies which remained under Spanish control after the early 1800s? The premise of a world society organized by the primacy of functional differentiation does not provide answers to these questions. The outcomes of this process and the historical paths it takes in different spaces can only be reconstructed empirically: in order to know how this unfolds – as Luhmann often repeats – we need to observe observers.

## V. Conclusion

This paper has argued that any answer to the question about the relation between law and empire has to be subordinated to the framework used to understand the broader relation between law and political power. Understanding the transformations of legal regimes that occurred after the collapse of the Spanish Empire requires understanding how the form of law shifted more generally between the *ancien régime* and the contemporary world in the context of the 19th century. The critique of the state-centered paradigm of the historiography of the jurisdictional culture, though valuable for reconstructing the experience of the Spanish Empire in America, has to be complemented by a theoretical framework that can grasp the relations between law and political power in the contemporary world. In this sense, I argue that the theory of functional differentiation and the autonomy of law are ways of signaling the structural limits of political power and the specificity of law in modern society. Through the complement of jurisdictional autonomy with the autonomy of law it is possible to understand the transformations in legal regimes at the moment of the collapse of the Spanish Empire as part of broader societal transformations.

The case presented here serves as an example of how the end of the Spanish Empire reveals certain fractures in the legal regime. However, the case also highlights how causal attribution is not as straightforward as tying these transformations to political developments. Our analysis has revealed that there is a clear shift from a jurisdictional model of government to a formalistic use of legal instruments in the sales of indigenous land in the territory of Valdivia. Through the inductive process of reconstructing the rules that governed the conveyance of land, it is possible to observe shifts that, though operating and transforming the everyday experience, are not accounted for in the body of laws, in the indexing of the archives, or in historical reconstruction. The rules and procedures that intervene in the discrete application of law have to be inductively reconstructed and can thus not be deduced from the planning or decision-making of the state. As such, relations of cause and effect are more difficult to observe and require different vantage points. Thinking about legal autonomy is one possible way of refocusing on the specificity of the legal experience. Instead of focusing on the codes and laws created by central decision-making instances, such a perspective opens the possibility of reconstructing the vague ubiquity of law from the lived everyday experiences of actors and their relation to the broader normative context.

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