10

LO EXTRAJUDICIAL

Between court and community in the Spanish empire[1]

Bianca Premo

Introduction

In 1775, the *promotor fiscal*, or Church's attorney – a key figure in the judiciary of the Spanish viceregal capital of Mexico City – argued that women's formal cases against husbands over abuse or other marital matters were not *really* lawsuits. He conceded that, yes, the suits procedurally aligned with codified law that permitted women to file criminal charges for men's excessive physical punishment. And, certainly, women often submitted the proper written documentation to the right authorities. Still, these legal actions were different from lawsuits since women often went to judges not as magistrates but rather as 'paternal resources', and could – and often did – drop their suits.

The *promotor fiscal* referred here to a popular use of the law in the eighteenth-century Spanish empire: sometimes litigants, especially subordinates such as women, slaves and commoner natives, engaged Spanish courts in a semi-formal manner, entering a sphere of legal interaction they called *lo extrajudicial*. Their cases were intended to provoke summary verbal decisions, out-of-court settlements, face-to-face encounters or public declarations. But their initiators did not always intend for them to lead to formal trials and sentences.

The archives of the Spanish empire hold evidence of just how ample a legal space *lo extrajudicial* was: many, perhaps most, lawsuits or complaints in the civil archives of various repositories of the empire are little more than opening petitions or preliminary steps to a lawsuit that trail off with no resolution. Indeed, in one Spanish high court in Castile, 'forgotten suits' comprised the majority – 57.7 per cent – of all civil cases on record.[2] In a more ordinary colonial court such the ecclesiastical tribunal of Trujillo, on the north coast of Peru, 16 of the 21 divorce petitions that remain in the archive for the eighteenth century end with no explanation.[3]

That these suits were 'forgotten', 'dropped', or 'abandoned' make them no less worthy of historical consideration than formal, sentenced cases. Indeed, such legal fragments reveal perhaps more of ordinary people's legal practices than do full lawsuits, which tended to feature litigants who had the time, commitment and money to see cases through. On a more theoretical plane, reading half-finished suits of the Spanish empire alongside fully formed cases for what they can reveal about the actions of historical subjects outside of court forces us to abandon our own assumptions of what constitutes the legal archive.[4] While we might privilege the sentence and the disciplinary regimes of states, early modern people in the Spanish empire approached the bench more instrumentally, looking for intervention but not necessarily resolution to conflict.

Legal action in *lo extrajudicial* was frequently, though not exclusively, verbal. Yet the documents that capture it were written. This binds us to the petitions that Spanish imperial litigants did end up placing before judges. Bridging the gaps in the way justice was approached and how it was recorded – in other words, bridging the gaps in the archive – requires careful attention particularly to the early parts of the suits brought before authorities in the 1700s, a period of expanded legal activity, particularly among ordinary litigants in Mexico and Peru.[5] Early petitions in many suits, whether heard on the peninsula or in the American colonies, were submitted to court officials before procurators and attorneys were named, and petitioners often had these documents drawn up in the streets and homes of towns and cities rather than the courts themselves. It was not unusual for these petitions to be penned without any indication of who had done the legal writing, and they were written in the first person. There were a multitude of freelance writers throughout the Spanish empire, particularly cities, called '*agentes*', who knew how to follow the format of petitions laid out in legal manuals, but litigants had educated patrons, priests, friends or family members pen the early documents of the suits, or, in some rare cases, they wrote them themselves (Premo, 2017b).

The earlier writings in the suits are the most likely to reveal the world of *lo extrajudicial* not only because they sprang from the community but also because they recount the steps already taken in a conflict – other authorities to whom parties appealed, attempts at verbal reconciliation, even prior visits to the judges. The petitions in the chapters come from ecclesiastical and civil courts at three jurisdictional levels: first-instance courts, called *justicia ordinaria*; the courts of district magistrates, called *alcaldes mayores* or *corregidores*, which often presided over primarily rural inhabitants; and high courts, or *audiencias*, in larger cities. The regions examined range from the heavily indigenous districts of Oaxaca, in Southern Mexico, to the multi-ethnic coastal region surrounding the city of Trujillo, Peru, as well as viceregal capital cities including Mexico City and Lima, and rural areas of Castile, Spain.

If references to *lo extrajudicial* in the written archive demand methodological and theoretical attention to the life of law beyond the courts, they also challenge us to rethink our approach to stark divisions between the functioning of law in colonial settings such as Spanish America and those of Europe, and not only in the eighteenth century but also today. In this sense, the chapter's comparative regional frame, which

includes Spain as well as Spanish America, seeks to disturb neat divisions between Western and non-Western legal cultures. Certainly, the prevalence of certain features of colonial domination – such as native servitude and African slavery – impacted the practices and application of law and recording of lives.[6] But this chapter also seeks to reveal *lo extrajudicial* as a common field that drew practices of law together, making the imperial legal system cohere.

What is more, the chapter's temporal frame, encompassing the eighteenth century, bridges the divide between the modern and early modern. This permits us to scrutinize an assumption made patent in the *promotor fiscal*'s commentary above: that formal, written action aimed at concrete legal outcomes, or sentences, is 'real' law, and that there is another kind of legal practice among marginal groups that is somehow outside or beyond it. This assumption is itself a product of hegemonic global encounters around law, and it functions to elevate the actions of privileged, often male, subjects as authentic legal history. While legal anthropologists certainly have forced us to contend with a wide range of verbal legal activities and normative orders aimed at justice among non-Western peoples, exploring *lo extrajudicial* in the eighteenth-century Spanish empire allows us to do even more.[7] It tells us that the realm of justice negotiated beyond formal procedures was not a non-Western alternative or parallel world to that of the formal courts of Spain but was instead integral to the functioning of law in a more global sense.[8]

Community justice

Historians of early modern legal culture in various regions have rightly placed a great deal of emphasis on the importance of community justice, as opposed to formal justice in tribunals, as the theatre in which most people in the past interacted with the law. For example, Tommaso Astarita, examining a rural village in Calabria, Italy, reflects on the way that trials there involved interplay between more erudite jurisprudence coming from the counter-Reformation state and community values focused on 'individual honour and reputation', and channelled along 'a network of links between local women, the respective position of insiders and outsiders in village society, the expectations placed on men and women within the family and the community, and the fluidity, vibrancy and relatively egalitarian character of community life' (Astarita, 1999, p. 3).[9] Laura Edwards's description of 'local law' in the pre-Revolutionary US south paints a similarly lively portrait of impromptu town gatherings or conflagrations. There, doubts about the causes of a villager's death or a dispute over a sale would escalate until a circuit judge might be called to the scene. Critically, that judge was not some impartial purveyor of laws but more akin to a distinguished 'neighbour' (Edwards, 2008, pp. 69–71).

These descriptions of village justice from places as far apart as southern Italy and South Carolina echo, almost verbatim, scholarly depictions of rural areas of the Spanish empire, from Cantabria to Castile to Southern Mexico, in the seventeenth and eighteenth century (Mantecón Movellán, 1997; Taylor, W.B., 1979). While rural regions far from the corridors of high courts were particularly alive with customary,

semi-formal legal practices, it is important to recall that neighbourhoods and familial networks functioned as kinds of courts of first resort in cities as well (Garnot, 2009). In fact, the concept of 'infrajustice', elaborated by European historians of crime, was derived from observations not about rural villages but Paris.

Benoît Garnot warns us not to stretch the concept of 'infrajustice' out of shape by using it to encompass divergent legal actions. He distinguishes acts such as a refusal to go to court at all from binding practices of justice adjudicated by a superior entity, be it community or individual, in which the goal was to achieve agreement between parties rather than to impose sentences (Garnot, 2000; Mantecón Movellán, 2002, pp. 43–75. Also see Herzog, 2004; Stern, 1995).

Only the latter, in Garnot's estimation, qualifies as an alternative mode of justice that should be called 'infrajustice'. I would maintain that *lo extrajudicial*, as an ambit of law that contemporaries in the Spanish imperial world specifically discussed by name, qualified as such a mode of justice. It is important to recognize that the way that subjects defined it, *lo extrajudicial* was not always set in opposition to formal law in the tribunals. It was, rather, interactive with formal law. In 1732, the *Diccionario de Autoridades* defined 'extrajudicial' as 'that which is treated, convened and adjusted outside of a suit, without following the formalities of law [*derecho*]'.[10] Notably, the definition went on to discuss the process by which unwritten legal actions became notarized and formalized.

While the long process of centralization of the Iberian realms meant that the tendency over time was toward formalization and the channelling of conflict into royal courts and official ledgers – with a 1567 Castilian law expressly attempting to limit the legitimacy of contracts and accords made in writing without royal sanction – in truth, the realities of running a large empire meant that an array of semi-formal activities, including oral statements and agreements, were considered valid.[11] For example, in the native pueblo of San Vicente Lachixío in Oaxaca in the 1790s, a dying community member's last will and testament would be uttered before 'the republic', meaning the gathered members of the village council, who held local jurisdiction over civil and criminal affairs. Such testimony was considered as binding as any written document, despite the fact that, in this region as in others in Mexico, each major village had native notaries well versed in written Spanish legal genres and able to record them in native languages.[12] Even during the sweeping absolutist administrative reforms of the late 1700s, when the Spanish Bourbon monarchy left little of the legal system untouched, the crown not only continued to tolerate but even encouraged dispute settlement outside the formal processes of law to facilitate the 'friendly rectification of parties, excusing them from [formal] procedure whenever [cases] are not serious'.[13]

Although justice took place within more community-embedded, semi-formal relationships and processes than in the courts of our modern imagination, it was no less fractious. A testy villager in the Montes de Toledo named Juan Gómez Gordo, who quarrelled frequently with his wife, ran afoul of village officials one hot summer evening. The entire affair would have been settled verbally and informally had Juan not lost his temper at their intervention and stabbed the *alcalde*.

As they hauled him off to the town jail, he reminded them loudly, 'Your homes do not lack for disagreements, either'.[14] Juan's saucy response reminded the legal officials that their private lives were no less subject to scrutiny than was his, and that the community, in the end, was the true judge in the village.

Honour and reputation

Indeed, one central aspect of community justice, as it was enacted beyond the courtrooms, involved the adjudication of honour. Scholars have long been attracted to the workings of this key cultural institution in determining the course of justice – as a legitimate excuse for violence, for example, or as a feature impacting debt relations (Stern, 1995; Taylor, S., 2003). While honour certainly left its imprimatur on formal trials and litigation in the Spanish empire, it had a particularly colourful extrajudicial legal life. It was often negotiated verbally and through cultural signs, such as tipped hats and forms of address, including the use of the title 'don' or 'doña' (Taylor, S.K., 2008; Johnson and Lipsett-Rivera, 1998). Women played key roles enforcing and negotiating these norms of honour through gossip and shaming (Taylor, 2008, p. 179; Stern, 1995, pp. 142–148; Poska, 2005, pp. 105–108).

In fact, Spanish colonial inhabitants could consider courts of law as merely an extension of the community theatre of reputation. When the native woman María Oloya Pérez, from a district seat called Yanhuitlan in southern Mexico, appeared before the Spanish magistrate, her petition began not with the standard statement that she was 'complaining civil and criminally' against her husband, as a civil or criminal case might. Rather, she was 'availing myself of the laudable Justice that You distribute'. Her husband, the statement reads, 'whom I justly love and venerate, and give not the least reason to abuse my conduct and honour, has given himself over to the disgrace that is rightly named drunkenness'. When later pressed on what exactly she wanted from the judge, she stated that she wished for her husband 'to proclaim under oath whether or not she was a woman of good habits and complied with the marital bonds of matrimony to raise, feed and care for their offspring'.[15]

In this respect, María considered the Spanish colonial tribunal she approached as simply another venue, if a more public one, for seeking reputational justice. Perhaps she was inclined to envision it in this way because the court was located in the same native town where she lived, making the Spanish district magistrate a true member of the community. When women departed their homes and sought to formally use the courts to police husbands rather than to seek reputational rectification, they might have a harder time obtaining the outcome they wanted. Or, perhaps, complaining to a judge was part of the everyday negotiation of daily life in marriages and communities. Bartola Bayona, from the pueblo of Guadalupe on Peru's north coast, approached the rural district judge (*juez territorial*) several times in her conflicts with her unfaithful husband in the 1780s, to no effect. Finally, in a fit of drunken rage, her husband cut off her braids – a gendered social punishment that marked a woman as dishonourable. This symbolic violence, rather than beatings and unfaithfulness to

their vows of monogamy, finally prompted Spanish colonial authorities to imprison Bartola's husband.[16]

There are some cases that indicate that the very act of formally suing or levelling charges rather than waiting until a violent act made going to court inevitable was seen as dishonourable, or at least undesirable. '*Cabiloso*', a negative term tantamount to 'litigious' that was frequently thrown around in late-eighteenth-century cases, was exclusively reserved for men.[17] The term could be used against a wide variety of figures, including native elites, Spaniards living in native regions, husbands, and anyone else who was considered a 'friend of discord', or '*pleitista*' ('a suer'). But even if men were expected to refrain from entering court in a rash manner, appealing to a judge formally could be seen as particularly indecorous for women, particularly those from rural areas.

As women's petitions recounted extensive prehistories of enlisting families, neighbours and priests into their disputes with husbands, they indicated that turning to law proper was not their first choice since it exposed them publicly. Indeed, silent suffering over a long period of an unhappy marriage could strengthen a woman's side of a marital dispute. Doña María Casela's petition to an ecclesiastical judge for divorce narrated a ten-year history of trying to hide her troubled marriage from her parents until her husband physically abused her, at which point it was no longer possible 'to silence this act'. She then turned to her godfather and, in succession, other relatives who intervened on her behalf. 'Many were the extrajudicial reprimands undertaken by my relatives and his', as well as by an unnamed 'person of respect'. In the end, her petition narrates, none of this quasi-judicial castigation worked. Meanwhile, she gave him repeated notice that divorce was on the table. 'I had to admonish him multiple times that if he did not act in a different manner, I would appear before this Tribunal.'[18]

Certainly, a well-worn archetype of the long-suffering wife scripted the stories of extrajudicial appeals in such petitions (García, 2006; Delgado, 2009, pp. 101–103). But if insisting on a lawsuit proper could be construed as a masculine act, one Doña Melchora Oyos decided to embrace it. She left her children in a pueblo close to Chota, Peru, traveling to the city of Trujillo to bring a civil suit against her husband, borrowing 200 pesos from a priest in order to do so. Her husband, Pedro Alvarez, complained that, in suing him, she had abandoned their five children, including one aged only four, and he nakedly argued that her civil suit was of 'little legality because of her sex'. She, for her part, turned the gendered contradiction of suing him to her advantage: 'In sixteen years of marriage, he has not given me a single thing', her argument reads, and 'I have been Wife and Husband. At the cost of my work, today he wears the cape and clothes that serve to make him decent. . . In the mountains, the woman is the man for the work I have done, and the man is the woman in living an ostentatious life'.[19] If her husband had intended to argue that her official lawsuit before the city judge was inappropriate for a woman, she cleverly used that very fact as evidence of his neglect.

Few were as bold as the masculinized mountain-woman Melchora, but she, along with Doña María Casela, reveal that threats of going to court were useful weapons in the negotiation of reputation, and that honour had a decidedly legal edge.

Likewise, honour was frequently implicated in law. Which is to say that individuals who were fighting with their neighbours understood their exchanges as 'judicial' even when no judge or even mediating authority had been roped in. Consider the conflict that occurred in 1781 between two renters of a house and garden in Lima. Don José Taramona had signed a contract renting the house, but the current occupant refused to leave.

> Although various times I have extrajudicially summoned [*requerido*] the renter who is occupying the [house] against the owners' will and my own, not only did he excuse himself to me from moving, but did so lacking the boundaries of good upbringing, so that it was necessary for me to avail myself of judicial means.[20]

It is telling that Don José chose such legally loaded language to describe his interactions with the renter, positioning himself as the executor of a binding contract, and blaming the intransigent occupant's 'lack of good upbringing' for the fact they had ended up in court. But ending up in court was not only a failure for Don José and his extrajudicial efforts to police the dispute. It also dragged the defendant down. This made the threat of having a dispute aired before a judge – rather than the suit itself or its sentence – enough to make an opponent preemptively buckle. In eighteenth-century Spanish America, the petitions enslaved men and women of African descent increasingly brought during the century against their masters for excessive physical punishment (*sevicia*) seemed intended in many cases not to prompt a formal ruling but to force the owner to consider selling the slave to another owner, perhaps one more amenable to permitting self-purchase arrangements.[21]

On, off and in between the court record

Spouses, too, tentatively filed suits, never intending for them to be sentenced. We have already encountered this in the case of the native woman María Oloya, who envisioned the court as a public theatre for her husband to proclaim her good honour. But even suits with ostensibly clearer aims were geared toward extrajudicial solutions. One husband, Don Pedro Crosco, openly admitted that he filed for divorce to shock his wife into reconciling with him, an intention the ecclesiastical judge supported.[22] But this kind of instrumental use of the courts was riskier for unmarried couples. When court cases would reveal sinful or criminal behaviour, such as in the case of a gentleman from Lima who was sued by his lover over child support for his illegitimate child, privacy became paramount. The don agreed to a quiet monthly payment of 6 pesos in order to avoid her 'stripping my reputation with legal appeals'.[23]

Indeed, although civil and Church courts served as theatres for negotiating honour, not every inhabitant, or even every community, in the Spanish empire was keen to put their reputation on the stage. Or on the page. In Church courts, there was an established tendency to leave the names of women accused

of sexual impropriety off the papers of proceedings, where they were abstractly morally chastised but not necessarily formally prosecuted. Such was the case of a woman involved in an eight-year love affair with Don Manuel Fernández Gago, city magistrate of Colmenar de Arroyo, a village of only a couple hundred inhabitants in central Spain. The unnamed women and the judge had been living together unmarried for years. The parish priest reported having repeatedly attempted to rectify this scandalous union '*en lo extrajudicial*', but with no success. The Church's attorney for the archbishopric of Toledo became involved after his court notary had run into Fernández at a religious festival in a nearby town, where Fernández confided in him 'as a friend' and asked if he knew how to obtain medicine to produce an abortion, since his lover was pregnant. The news led the notary first to his own confessor then finally to his boss, who initiated a case against the couple. Villagers' testimony indicated that the matter set a bad example that could circulate through the village and spread beyond it. But they were cleverly vague, insinuating that the written prosecution, not the extra-sacramental pairing itself, was the dangerous part of the affair.[24]

The admission of gossip and extrajudicial information that underlay this case was not at all unusual. Community judges often reported initiating criminal suits '*de oficio*' because 'it had become notorious' in the village or town that a moral infraction was occurring.[25] Other times, even appeals-level judges would settle cases based on information that they expressly stated they gathered off the record. The magistrate known as the Fiel del Juzgado in the city of Toledo, who held civil and criminal jurisdiction over eleven pueblos in the mountainous region south east of the city known as the Montes de Toledo, often legally traded in such information. When a 21-year-old maiden named Josefa Morena, who had long been rumoured to be having an affair with a married man in the town of Sonseca, fled her village with him on a stolen horse, she was arrested and brought to the imperial city of Toledo. There, the Fiel del Juzgado gathered information '*estrajudicialmente*' to prove that the black horse used in her escape had been stolen from a poor man in a neighbouring village, as well as to amass information indicating that Josefa's parents had been too quick to believe the rumours. He arranged her return to her pueblo, admonishing her parents to treat her 'with more tenderness and refrain from mistreatment'.[26]

Just as verbal and written information flowed back and forth in *lo extrajudicial*, legal interactions with judges easily slipped the shackles of strict jurisdictional categorization. Magistrates like the Fiel del Juzgado often engaged in what we might understand as counselling or spiritual advising rather than ruling. In turn, priests often filled the role of judge from the confessional, as did elders and native village officials, all of whom held quasi-familial intimacy with community members. All of these authority figures counselled irritable villagers or spatting spouses, often seeking to make peace without formal proceedings. Church authorities' movement into *lo extrajudicial* was to be expected in marital disputes, since ecclesiastical courts held jurisdiction over sacramental affairs. But it also pertained, often by custom, to priests' often-muscular intervention in civil legal affairs among villagers.

This was particularly true in more remote villages, including the native pueblos of Spanish America.

Of course, indigenous peoples had their own judges in the pueblos, and those judges often operated on the margins of formal Spanish law because of their tendency to conduct business in verbal transactions or in native languages and legal cultures only partially legible to Spanish authorities. But one priest who administered to a parish in San Pedro de Virú in Peru diminished native jurisdiction in order to elevate his own authority. He tried to convince the *corregidor* in the city of Trujillo that he rightly exercised actual civil jurisdiction in the community:

> Your Mercy does not live here as it is not possible (if only it were), [and] the priest is not just a bale of hay [sitting out in the countryside]. T]here being no other rational person to govern the Indians in the civil sphere, the priest offers himself to the Indians, and the [native judges] follow the parish priest in everything; and the [Indians] should not have to go to Trujillo every day, troubling Your Mercy with ridiculous things, when there are notable things that do not involve Indians [for you to oversee.] Your Mercy sometimes does hear suits, and I see to this so your orders are promptly executed, and I even let them appeal to you for ridiculous things, when they want, such as when they get drunk and fight. . .[27]

The priest obviously got himself a bit tangled in his own assertion of civil authority, having to acknowledge that indigenous peoples did make use of formal, secular jurisdiction presided over by colonial authorities, as well as having to concede that a sphere of native judicial authority also existed in the pueblo. This entanglement is telling. Despite his colonial fantasy of absolute dominion over the legal life of his parishioners, as well as reference to his role as gatekeeper for community members wishing to approach the bench of secular magistrates, distinct jurisdictional spheres blurred and overlapped in *lo extrajudicial*.

The overlap built into the early modern Spanish imperial legal system – between moral and civil, between verbal and written, between community and court – could work to the disadvantage of some potential litigants. The enslaved María Moncada, a woman identified as being from the Chala caste of West Africa, found a new owner in 1765 who would allow her to purchase her own freedom on instalment at the rate of 4 pesos a month. The new owner and María seemed to have made this arrangement before a judge but did so 'extrajudicially'. Later, her original owner died, leaving María free by testament. The extrajudicial purchase arrangement might have provided freedom for María in the short term but jeopardized her liberty in the long term.[28]

Enslaved litigants did, however, find ways to work the semi-formality of the system of self-purchase to their advantage. An enslaved *pardo* from the indigenous Mixtec town of Teposcolula named Manuel de la Trinidad approached the district magistrate in 1748, using *lo extrajudicial* to try to level the playing field with his owner. His owner and he had verbally arranged [*pactado*] that Manuel

would pay him a total of 240 pesos for his freedom. That amount would be worked off with his own labour as well as that of his wife, children and some of his brothers, who pitched in to help Manuel achieve his liberty faster. In the meantime, the owner seems to have engaged in various crimes including stealing mules and kidnapping an old indigenous man. In an altercation with Manuel, the owner threatened him to 'shut up; the value of the mule is that of your entire liberty'. So Manuel decided to keep quiet, at least until the owner refused to reimburse Manuel's brothers for their work. At this point, Manuel gathered an 'extrajudicial' statement [*declaración extrajudicial*] from a local man of elite status that attested to Manuel's owner's misdeeds. The case became complicated as the judge sorted the criminal accusations from Manuel's claims to freedom but, in the end, Manuel's legal savvy in collecting his own evidence in the form of testimony was successful, and he was declared free.[29]

Manuel was lucky to find a magistrate willing to formalize his extrajudicial arrangement and accept the testimony he gathered outside of the institutions of the court. Other judges were less reliable allies for subordinates seeking formal litigation. Families or individuals could appeal multiple times only to be told that their disputes should be solved *en lo extrajudicial* – making it a space that could constrain ordinary people, prolonging their disputes. This was especially true of marriages, where ecclesiastical authorities tended to drag their feet in permitting formal divorce, seeing their primary responsibility as keeping partners married.[30] But civil officials also could turn their backs on formal cases. The criminal judge of first instance in Mexico City ignored a family's multiple reports of spousal abuse against Don Antonio Moreno, including locking his wife for days on end in a mule shed and threatening her with scissors.[31] Such official evasion devolved responsibility for settling domestic and local conflict onto individuals and the community. Particularly resourceful individuals who could or would not settle matters on their own were often left to continually seek out other authority figures besides judges, be they local priests, relatives or magistrates in other jurisdictions, to mediate their disputes.

But even these other authority figures could put off fulfilling their duties by attempting to move disputes into a more informal sphere. When a new renter objected to the amount of time it was taking to get a former occupant out of her new home, the landlord ignored the written eviction order that the new renter had had drawn up by a court official, promising to pass an 'extrajudicial message to evacuate' to the occupant.[32] Thus, in some ways, *lo extrajudicial* functioned not only to maintain the family, neighbourhood and community as the central loci of negotiating legal conflict; it also worked to preserve the status quo of imperial hierarchies by keeping people out of court and reinforcing the authority of those who already held power.

Conclusion

When the Mexico City *promotor fiscal* distinguished between real lawsuits and women's paternalistic appeals to judges, he constructed a conceptual division between law and society that privileged men as more authentic legal actors than women. When

the priest of the parish in San Pedro de Virú in Peru attempted to argue that any troubles the native communities might bring to the district magistrates would be 'ridiculous things', he likewise attempted to diminish them as trivial in comparison to the legal activities of other inhabitants, namely Spaniards. In some ways, it was this conceptual division that served as a harbinger for modern legal systems, where the law was presented as a realm of state action distinct from its social milieu. In the words of Italian legal historian Paolo Grossi, in the eighteenth century, law began to be conceived as having 'its own ontological reality, to pertain to an objective order'. While in modern systems, 'justice continues to be the aim of the juridical order', he continues, 'it is an external end', separated from the ordinary person and imaged to exist at a plane accessible to a privileged few (Grossi, 2003, pp. 27, 22).

Legal historians have participated in keeping what Grossi calls this 'juridical myth of modernity' alive through our disciplinary distinctions between 'law and society', as if the law could or should be decontextualized and approached as a timeless object apart from the historical place in which it was made. As legal historians now take up the challenge of reimagining our subject not as a world apart from society but rather constitutive of it – as we turn from a 'law and. . .' to a 'law as. . .' approach – reckoning with *lo extrajudicial* might prove particularly instructive (UC Irvine Law Review, 2013, 2014, 2015.) In part this is because it reminds us that inhabitants of the early modern world approached the law as part of society, at times envisioning themselves as able to execute a 'summons' to a neighbour or to call on a judge as a father.

But this is not all it teaches us. *Lo extrajudicial* was no romantic domain of justice that was necessarily better or more egalitarian when compared to more formal systems because it was more socially embedded and communally administered. Rather, examining the space between community and court reveals that formal legal systems formed dynamically as a way to distinguish themselves from the operation of justice outside the tribunals of an expanding West. The promotor's statement speaks to a way of thinking that separates women's complaints from lawsuits, native conflicts from serious politics, unwritten from written law. Modern courts, in other words, were built not as bricks-and-mortar institutions that sealed judges off from society but rather as textual spaces that made a mythic distinction between real law and real legal subjects, and the rest.

Notes

1 The author wishes to thank the organizers and participants of three lively gatherings where this work was vetted: Karen Graubart and readers at Notre Dame History Department, and Mitra Sharafi and the scholars assembled at the 2017 Hurst Institute at the University of Wisconsin-Madison; and Damián González Escudero and the Jornada de Historiadores del Derecho at the Pontificia Universidad Católica del Perú.

2 For example, the Archivo de la Real Chancellería de Valladolid, Spain, holds 212067 abandoned cases compared to 20884 suits heard from the sixteenth to the nineteenth century.

3 This is based on my analysis of all eighteenth-century divorce and annulment suits in the Archivo Arzobispal de Trujillo (AAL), Peru.

4 Now-classic theoretical meditations on the way that the mere cataloguing of historical documents shapes our understanding of history and time include Derrida and Prenowitz (1995); Foucault (1994), and several of the contributions to Hamilton et al. (2002), especially Mbembe (2002) and Stoler (2002).

5 While beyond the scope of this chapter, it is worth noting that the number of civil disputes on file for various regions of Spanish America increases over the course of the eighteenth century while in Spain the number stabilizes or declines from earlier centuries. The trends for Spain are consonant with what has been dubbed 'the Great Litigation Decline' for eighteenth-century Europe more broadly. See Vermeesch (2015), Premo (2011b, 2017b).

6 The silences that this creates are particularly notable in the case of slave women, as explored by Fuentes (2016). However, in the case of *lo extrajudicial* in the Spanish empire, the result is often not silence but excess in the archives – an excess of materials that refer to actions outside the courts that seem fragmentary, irrelevant or unfinished, and thus that have escaped legal historians' consideration as law proper.

7 Key among these works are the classics by Nader (1997); and Merry (1999). For recent work on Latin America, see Rappaport and Cummins (2012). On the inherent 'hybridity' of early modern law, see Donlan and Heirbaut (2015). For the centrality of Spanish colonial law to understanding the global development of law, see Duve and Pihlajamäki (2015.)

8 Edwards makes the same argument for understanding 'local' legal culture in post-Revolutionary US: 'local legal practice was not some quaint, folksy exception to a formalized, rational body of state law, as is commonly assumed' (Edwards, 2008, p. 5).

9 'Peace' as a discourse and approbation of litigious or fractious neighbours can be found from Coyoacán to Cantabria to Calabria, though the terminology used to express it could be 'peace', 'order' or 'friendship'. See Astarita (1999, pp 133–136; 144), Owensby (2008, pp. 236–238) and Mantecón Movellán (1997, pp. 124–126).

10 *Diccionario de Autoridades*, tomo III (1732):

> EXTRAJUDICIAL. adj. de una term. Lo que se trata, conviene y ajusta fuera de juício, y sin arreglarse a las formalidades del derecho. Es compuesto de la preposición Extra, y del adjetivo Judicial. Latín. *Extrajudicialis.* RECOP. lib. 2. tit. 8. l. 28. Otrosi de las escritúras extrajudiciales y contratos que ante los dichos Escribanos passaren, lleven por el registro y lo que dieren signado, lo que se manda por el Arancel hecho por sus Altezas para todos los Escribanos del Reino.
>
> EXTRAJUDICIAL. adj. of a term. That which treats, conforms and fits outside of a suit, and without following the formalities of law. It is composed of the preposition Extra and the adjective Judicial. . . Furthermore, extrajudicial writings and contracts should be before Scribes, be carried in their registers and marked off by them, as mandated in the official price list of your Highnesses for all Scribes of the Kingdom.

11 *Novísima Recopilación de Castilla*, Libro X, Título, XIII, Ley VIII : 'D. Felipe II en Madrid, año 1566. Con arreglo á la ley precedente, no pueda dar fe de contrato alguno, ni acto judicial ó extrajudicial Escribano que no sea de los contenidos en ella', *Novísima Recopilación de las leyes de España*, 6 vols. (Madrid: Boletín Oficial del Estado, 1805–7).

12 'Madalena María, natural del pueblo de San Vicente Lachixío deja sus derechos a Luciano Antonio Melia, natural del mismo pueblo, de los bienes del difunto Juan Molina', Archivo del Poder Ejecuctivo del Estado de Oaxaca (APEGEO), Intendencia, Villa Alta, Leg. 1, exp. 25, 1792. For a study of such writings, see Restall, Sousa, and Terraciano (2008).

13 Instrucción a Corregidores, 15 de mayo, 1788 cáp. 2 y 3, in *Recopilación de Castilla*, Ley X, cited in *Los Códigos españoles. Concordatos y anotados*, vol. 9 (Madrid: Publicidad a carta de DM Rivadeneyra, 1850), p. 173.

14 Causa de malos tratos por oficio contra Juan Gómez Gordo, acusado de maltratar a María López su esposa, a quien escuchan llorar los alcaldes en su casa una noche, AMT (Archivo Municipal de Toledo), Navalmoral, Criminal, caja 6324, no. 3643, 1736, 1v.

15 Maria Oloya Pérez natural y vecina de Yanhuitlan. . . dice que Juan Montesinos, su marido, a dado en embriagarse, resultando de esto que la maltrata. Archivo Histórico Judicial de Oaxaca (AHJO), Teposcolula, Criminal, Legajo (Leg.) 42, expediente (exp.) 43, 1797, 1–1v.

16 Autos que sigue Bartola Bayona contra su marido Cipriano Dias por malos tratamientos y amancebamiento, Archivo Regional de la Libertad (ARL), Intendente, Criminal, Leg. 35, cuaderno (c.) 1347, 1788. On braids, see Socolow (1980, p. 49).

17 Da. María Josefa De Arizaga, vecina de Tehuacan contra su marido Don Fernando Monteagudo sobre malos tratamientos, Archivo General de la Nación-México (AGN-M), Civil volumen (vol.) 1500 exp. 2, 1793, 3; Traslado de los autos que D. Mateo y Martínez como apoderado del cabildo de naturales de la ciudad de Los Reyes, promovió en la corte de Madrid, sobre que se separase del cargo de procurador de los naturales a Toribio Ramos, por no ser indio entero, sino sambaigo: y sobre se le acordase a los naturales, Archivo General de la Nación del Peru (AGN-P) Derecho Indiano (DI), Leg. 23, C. 402, 1782, 29 v; Carta alegando la nulidad de elecciones de justicias en dos pueblos del partido de Comaltepec, APEGEO, Intendencia, Villa Alta, Leg. 1, exp. 3, 17, 1791, 1; Cuaderno de los autos promovidos por el subdelgado del partido de Zaña. . . por el cabildo de Lambayque, sobre que se remobiese y separase del cargo de protector sustituto de los naturales a D. Manuel Sararredo no obstante de que el fiscal protector general D. Jose Pareja le había prorrogado el ejercicio de dicho cargo, AGN-P DI, Leg. 25, C. 459, 1795, 22 v.

18 No me fue pocible silenciar esta acción. Fueron muchos las recombenciones extrajudiciales que se le hicieron a si por mis parientes como por los suyos, y otras personas. . . huve de amonestarle varias ocasciones que si no se portara de otra manera ocurririría a este Tribunal'

> Doña Ana María Casela, vecina de esta ciudad, casada con Don Vicente López de Frías, oficial de libros de los almacenes de la Dirección del Tabaco de este reino solicitando el divorcio por malos tratamientos de palabras y de hechos, AGN-M, Inquisition, vol. 1242, exp. 9, 1783, 49–73.

19 Autos seguidos Por Doña Melchora Oyos, mujer De Pedro Francisco albarez, residente en rio de Maygosbmamba jurisdicción de Chota, contra Don Pedro, sobre demanda de pensión de alimentos." In ARL Intendente, Causas Ordinarias (CO), Leg. 447, C. 316, 1796.

20 Autos Seguidos por D. José De Taramona contra Doña Francisca De Lara sobre que desocupe una vivienda." In AGN-P, Cabildo Civil (Civ.) Leg. 46, C. 831, 1781.

21 See, for example, Tomasa Rayo, negra libre con Doña Inés de la barrera sobre que se le ortogue carta de libertad, AGN-P, Real Audiencia (RA), Civ., Leg. 108, C. 914. s/f. For more on self-purchase, see de la Fuente (2007) and Premo (2011a).

22 Autos de demanda de divorcio interpuesta por don Pedro Crosco contra su eposa doña Gregoria Daza, AAT, Divorcios, 1761.

23 Autos Seguidos por Doña Juana de Luna contra Don Antonio Moreno, sobre alimentos de una hija, AGN-P RA Civ, Leg 343, C. 3100 1795, 3v.

24 De oficio contra el Alcade de Comenar dl Arroyo, Don Manuel Fernández Gago, Archivo Diocesano de Toledo, 1757.

25 See, for example, n/t, AMT, Yébenes, Criminal, caja 545, no. 20, 1722, f. 1 v.

26 Criminal Contra Pedro Venitto Vez de Sonseca sobre haverse llebado de d[ic]ha villa a una muger soltera, In AMT, Criminal, Marjaliza, caja 511, no. 18, 1728.

27 no viviendo a que VMd ni siendo posible que ojalá lo fuera y no siendo el cura bulto de paja ni aviendo otra persona rasional que govierne a los indios en lo sivil que se ofrece de indios quienes occuren a su cura de que los alcaldes la hagan en todo lo que en el curato se ofrece; que no han de ir a truxo todos los dias a quebrar la cabesa de VMd para cosas ridículas; que las cosas notables y que no son de indios a VMd se ozcura y yo cuido de esso, y de que sus ordenes tengan prompta execusión y aún en cosas de yndios y ridículas como en sus peleas que tienen quando se emborachan, dejo que occuran algunas veces y quando ellos quieren a VMd como dro.

> Expediente seguido por Juan Lorenzo Rizo, protector de los naturales del corregimiento de Truxillo, por lo tocante al común de ellos del pueblo de San Pedro De Virú, contra los alcaldes y mandones del dicho pueblo para que no apremien a los indios de su comunidad a pagar derrames gravosas, ARL, Corregimiento, CO, Leg. 224, C. 1898, 1748.

28 Autos seguidos por María Moncada, de casta chala, esclava que fue del Licenciado Don Alonso Moncada, sobre se le declare persona libre y no sujeta a servidumbre dando cumplimiento a la última voluntad de su amo como consta en una cláusula de su testamento. ARL Cab. CO, Leg. 51, C. 893, 1765.
29 Manuel de la Trinidad, pardo esclavo, sobre su libertad, AHJO Teposcolula, Criminal, Leg. 31, no. 22, 1748.
30 Among many examples, see the recounting of how the ecclesiastical judge repeatedly ignored a woman's report of abuse and forced reunion in Delito: Recurso de fuerza que interpuso Fco. De Villavendas, sobre el divorcio que entabló Don Joseph Vicente con su mujer Maria Ana Rosel; Lugar: Sta. Ma. Tlamimilolpa, AGN-M Criminal, vol. 221 exp. 6. fojas: 179–208, 1768.
31 Mariano Rodríguez, sobre el matrimonio que contrajo su hijo Manuel con María del Carmen, y malos tratamientos. Mexico, AGN- M, Bienes Nacionales, vol. 25, exp. 6, 1774.
32 Autos ejecutivos seguidos por Doña Cayetana Marín contra Doña Melchora Laines, sobre desalojo de la casa en que habita. In AGN-P, RA, Civil, 1774.

References

Astarita, T. (1999). *Village Justice: Community, Family, and Popular Culture in Early Modern Italy*. Baltimore, MD: The Johns Hopkins University Press.

Burns, K. (2010). *Into the Archive: Writing and Power in Colonial Peru*. Durham: Duke University.

de la Fuente, A. (2007). Slaves and the creation of legal rights in Cuba: *Coartación* and *Papel*. *Hispanic American Historical Review*, 87(4), pp. 659–692.

Delgado, J. (2009). 'Sin temor de Dios': women and ecclesiastical justice in eighteenth-century Toluca. *Colonial Latin American Review*, 18(1), pp. 99–121.

Derrida, J. and Prenowitz, E. (1995). Archive fever: a Freudian impression. *Diacritics*, 25(2), pp. 9–63.

Donlan, S.P. and Heirbaut, D., eds. (2015). *The law's many bodes: studies in legal hybridity and jurisdictional complexity, c. 1600–1900*. Berlin: Duncker and Humblot.

Duve, T. and Pihlajamäki, H., eds. (2015). *New Horizons in Spanish Colonial Law: Contributions to Transnational Early Modern History*. Frankfurt: Max Planck Center for European Legal History.

Edwards, L.F. (2008). *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South*. Chapel Hill: University of North Carolina Press.

Foucault, M. (1994 [1966]). The order of things, a preface. In: *An Archaeology of the Human Sciences*. New York: Vintage Books, pp. xv–xxiv.

Fuentes, M.J. (2016). *Dispossessed Lives: Enslaved Women, Violence and the Archive*, Philadelphia: University of Pennsylvania Press.

García, A.L. (2006). *El fracaso del amor: Género e individualidad en México del siglo XIX*. México DF: Colegio de México/UNAM.

Garnot, B. (2000). Justice, infrajustice, parajustice, et extra justice dans la France d'Ancien Régime. *Crime, Histoire, et Sociétés*, 4(1), pp. 103–140.

Grossi, P. (2003). *Mitología juridical de la modernidad*. Madrid: Editorial Trotta.

Hamilton, C. et al., eds. (2002). *Refiguring the Archive*. Dordrecht: Kluwer Academic Publishers.

Herzog, T. (2004). *Upholding Justice: Society, State and the Penal System in Quito (1650–1750)*. Ann Arbor: University of Michigan Press.

Johnson, L. and Lipsett-Rivera, S., eds. (1998). *The Faces of Honor: Sex, Shame and Violence in Colonial Latin America*. Albuquerque: University of New Mexico Press.

Mantecón Movellán, T.A. (1997). *Conflictividad y disciplinamiento social en la Cantabria rural del antiguo regimen*. Santander: Universidad de Cantabria/Fundación Marcelino Botín.

Mantecón Movellán, T.A. (2002). El peso de la infrajusticialidad en el control del crimen durante la Edad Moderna. *Estudis*, 28, pp. 43–75.

Mbembe, A. (2002). The power of the archive and its limits. In: C. Hamilton et al., eds. *Refiguring the Archive*. Dordrecht: Kluwer Academic Publishers, pp. 19–27.

Merry, S.E. (1999). *Colonizing Hawai'i: the Cultural Power of Law*. Princeton: Princeton University Press.

Nader, L., ed. (1997 [1969]). *Law in Culture and Society*. Los Angeles: University of California Press.

Owensby, B. (2008). *Empire of Law and Indian Justice in Colonial Mexico*. Stanford: Stanford University Press.

Poska, A.M. (2005). *Women and Authority in Early Modern Spain: the Peasants of Galicia*. New York: Oxford University Press.

Premo, B. (2011a). An equity against the law: slave rights and Creole jurisprudence in Spanish America. *Slavery & Abolition*, 32(4), pp. 495–517.

Premo, B. (2011b). Quejas ilustradas. Litigios en la historia de España e Hispanoamérica (siglo XVIII). *Memoria y Civilización: Anuario de Historia* (Navarra, Spain), 14, pp. 155–173.

Premo, B. (2017a). *The Enlightenment on Trial: Ordinary Litigants and Colonialism in the Spanish Empire*. New York: Oxford University Press.

Premo, B. (2017b). Legal writing, civil litigation, and agents in the 18th-century Spanish imperial world. *Oxford Research Encyclopedia of Latin American History*, 6 August 2017. http://latinamericanhistory.oxfordre.com/view/10.1093/acrefore/9780199366439.001.0001/acrefore-9780199366439-e-247. (Accessed 16 October 2018.)

Rappaport, J. and Cummins, T. (2012). *Beyond the Lettered City: Indigenous Literacies in the Andes*. Durham: Duke University Press.

Restall, M., Sousa, L. and Terraciano, K., eds. ([2005] 2008). *Mesoamerican Voices: Native-Language Writings from Colonial Mexico, Oaxaca, Yucatan and Guatemala*. New York: Cambridge University Press.

Stern, S.J. (1995). *The Secret History of Gender: Men, Women and Power in Colonial Mexico*. Chapel Hill: University of North Carolina Press.

Stoler, L.A. (2002). The colonial archives and arts of governance: on the content in the form. In: C. Hamilton, et al., eds. *Refiguring the Archive*. Dordrecht: Kluwer Academic Publishers, pp. 19–27.

Taylor, S. (2003). Credit, debt and honor in Castile, 1600–1650. *Journal of Early Modern History*, 7(1–2), pp. 7–27.

Taylor, S.K. (2008). *Honor and Violence in Golden Age Spain*. New Haven: Yale University Press.

Taylor, W.B. (1979). *Drinking, Homicide and Rebellion in Colonial Mexican Villages*. Stanford: Stanford University Press.

UC Irvine Law Review (2013). 'Law As. . .' Theory and method in legal history, *UC Irvine Law Review*, 1(3), pp. 239–512.

UC Irvine Law Review (2014). 'Law As . . .' II, History as interface for the interdisciplinary study of law. *UC Irvine Law Review*, 4(1), pp. 1–493.

UC Irvine Law Review (2015). 'Law As . . .' III, Glossolalia: toward a minor (historical) jurisprudence. *UC Irvine Law Review*, 5(2), pp. 519–1079.

Vermeesch, Griet (2015). The social composition of plaintiffs and defendants in the Peacemaker Court, Leiden, 1750–4. *Social History*, 40(2), pp. 208–229.