

INTERPRETIVE ESSAY ON THE LEGAL HISTORY OF THE RECOPIACION DE LAS LEYES DE INDIAS IN REGARD TO RIGHTS IN WATERS, FORESTS, AND PASTURES

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I.- GENERAL PRINCIPLES OF THE RECOPIACION DE LEYES DE INDIAS

1. A Short History.

The Recopilacion de las Leves de Indias is an imposing code consisting of nine books, two hundred eighteen titles, and six thousand, one hundred seventy-seven laws. The Recopilacion required almost a century to reach its final form, that of 1680, and it consists of royal decrees and orders, royal ordinances, provisions, judicial decrees, and resolutions from the early years of the six-

teenth century. When the discovery of America made necessary the creation of a juridical system applicable to the colonization of the New World, where by reason of the existence of human beings possessed of their own customs, social institutions, and rights, it was inevitable that there would first be produced the collision and then the amalgamation of those with peninsular customs, institutions and laws.

Several drafts of Recopilaciones preceded the definitive one which was finished in 1680 and published in 1681. The distinguished historian Jose Bravo Ugarte, in his work Instituciones Politicas de la Nueva Espana, presents a survey of the various drafts which at the end of the sixteenth century were completed to form the great Code of the Indies:

"The first, emanating from the Council of the Indies, was the work of its visitador and President, the legal advisor Don Juan de Ovando, who examined the books of the said Council and extracted the orders, laws and ordinances with an indication of their source and date, forming with them a catalogue according to subject matter The second

was commissioned to the ranking official Secretary of the Chamber of Justice, Diego de Encinas, a work which is known as the Ordenanzas de Encinas, which was highly defective and was printed in 1596 The third was entrusted to the lawyer Diego de Zorrilla, who compiled nine books in two years, suspending the work in 1608 upon being nominated Oidor of Quito. The lawyer Rodrigo de Aguiar y Acuña continued the work of Zorrilla, and after sixteen years published Sumarios de la Recopilacion General de Leyes de Indias. (1629) The fourth, and almost definitive, edition had as its principal author the lawyer Antonio de Leon Pinelo, who said he had begun in 1624 "from the first letter, because he had found nothing which satisfied him." Leon Pinelo finished his work in 1635, and its examination was given to Dr. Juan de Solorzano Pereyra, the famous jurist, who found that Leon Pinelo had satisfactorily complied with his obligation, "having recognized all the books of royal orders [cedulas] of the Secretary of the Council, having selected from them the substance, arranging all by books and titles, with great distinction and propriety."

There nevertheless passed forty-four years before King Carlos II approved the publication of the Recopilacion, in 1680, the delay in part owing to the chronic lack of resources of the Council of

the Indies, and in part also to the new and unnecessary revision to which the work of Leon Pinelo was subjected after his death in 1660. Thus came about the final version of the Recopilacion de Leyes de Indias, a work printed six times, always in Madrid: in 1681, in 1756, in 1791, in 1841, and in 1890, this last coinciding with the final collapse of the Spanish Empire.

The sixth book of the Recopilacion is fundamental to a knowledge of the treatment given by the Spanish crown to the indigenous people of America, its unexpected vassals. A study of the 19 titles and 560 laws which comprise Book VI of the Recopilacion reveals the fundamental design of the crown in respect to the native population of the Indies, which consists of the attainment of three important objectives, which could be expressed as follows:

- a).- To save the Indians from the destruction which, from the experience in the Antilles, seemed to be their destiny upon establishing contact with the Conquistadores of the New World.
- b).- To incorporate them into the Christian faith by means of preaching and persuasion.

c).- To respect their customs, institutions and laws, insofar as
these were not incompatible with the hispano-Christian
customs, institutions and laws.

Note Refer back from page 2)

The purpose of the laws contained in Book VI of the Recopilacion could not be more exalted, particularly considered from the ethical-religious point of view, and it was only to be regretted, as Padre Bravo Ugarte, S. J., says,

"that the previous legislators did not go farther and give new and more progressive laws which would have taken the Indian from the juridical wardship in which they, by favoring him, left him." (Op. cit., loc. cit.)

2. Character of the Recopilacion.

Perhaps the feature most attributed to the Recopilacion is its profound religious sentiment. In defense of moral and religious values, the Christians ignored the exigencies which reality imposed when European cultural forms came in contact with the new American circumstances, which gave rise to the formulation of legislative norms which provoked, with exaggerated frequency, the most absolute

divorce between fact and law. In the compilation of the more important laws of the Recopilacion, the theologians and moralists exercised a very powerful influence, interested more in the defense of the Indians as children of the same God, in their incorporation into the Christian religion, and in their final salvation, than in the resolution and satisfactory regulation of the very concrete problems which the violent facts of the colonization of the New World caused.

are you saying that laws are not made for the Book of 11 titles
(cause no injury to Ind. Law)
would Indian courts be approved
prop. w/ approval of court

Aside from the laws which govern the ethico-religious aspect of the presence of Spain in the Indies, which were rigorous and of general character, the Recopilacion suffers from a very accentuated casuistry. Its authors lacked the facility necessary to formulate a juridical construction in the Roman sense, and still less in the modern, it being for this reason difficult to reduce the Indian Law Derecho Indiano to a coherent structure of norms or general principles without contradictions. The Indian Law had its origin, at least in good part, in the necessity of legislating for isolated

Bad about question next page

individual situations, as were, for example, the Capitulaciones

*Do Capitulation
change laws
in particular
area*

which were entered into with the discoverers, a very clear example

of which was that entered into with Onate for his expedition to

New Mexico. The investigator J. N. Ots Capdequi, in his book

*DoB
Capitulation
change*

El Estado Espanol en las Indias, explains that in the case of the

*water rights
rights
will*

discovery expeditions the personal interest predominated over the

official authority of the State, which was the situation resulting

in the Capitulacion, which was a contract entered into between the

crown or its representatives and the chief of a discovery expedi-

tion. With a basis in the Capitulaciones, the Indian Law had in

its origins a particularist character, so that each Capitulacion

was the fundamental code or primary law in the territory which was

discovered and settled under its sanction. "It legislated over

each concrete situation," points out the same Ots Capdequi, and

it attempted to generalize, as far as possible, the solution

adopted for every situation (op.cit., Chapter I, p. 12; Mexico,

1942). From all this, there resulted the over-specific and petty

character of the Laws of the Indies. The Kings of Spain wished to
in their hands all threads of the government in a world so
vast, so complex and distant. Likewise, they wished to intervene
in the great political and economic problems which affected all
the Indies, or the entire territorial demarcation of an audiencia
or a viceroyalty, as well as small questions which affected only
a single city or a reduced rural district (Ots.Capdequi: Op. cit.,
supra; loc. cit.).

From either the particularist character or from the casuistry
of the juridical norms which make up the Recopilacion results the
gravest defect of this famous code, that is to say, the lack of
an organic plan for the legislative material which it contains.
In a single book, and even in a single title, it legislates over
heterogeneous subjects; insignificant questions are repeated with
tedious prolixity, and, on the other hand, very limited attention
is paid to the fundamental aspect of all law, in the Roman sense,
which must be its general character. The impassioned defense of

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explain - no harm
to wider
protection
of interest
to property

the rights of the Indians always confused the correct estimate of the rights in conflict to the point of making of the Recopilacion, above all, a moral code, and for this reason, difficult to carry into practice. In his Politica para Corregidores (Madrid, 1775), Bovadilla said that the laws which were enacted contrary to right and to the prejudice of some "are not worthy, and should be obeyed and not complied with" (cited by Carlos Levene in his Introduccion a la Historia del Derecho Indiano, Buenos Aires, 1924). This, that the law be obeyed and not complied with, will have been converted into a lamentable inheritance for the Hispano-American juridical life.

II.- THE PROBLEM OF THE INDIGENOUS ACQUIRED RIGHTS

1.- The Bull and the Will.

The fourth of May, 1493, Pope Alexander VI produced his famous Bull Inter Caetera, the basic title of the sovereignty of the Kings of Spain over the Indies, as Law I of Title I, Book III of the

recopilacion establishes:

"By donation of the Holy Apostolic See and other just and legitimate titles, we are Lord of the West Indies, islands, and lands of the ocean sea, discovered and to be discovered, and they are incorporated in our Royal Crown of Castile."

*what about
Papal Bull of
1537 by
Pope Paul III
long before
occupation
of New
Mexico*

The Bull of Alexander VI did not leave room for doubt either on the point of the limits and extensions of the donation, or even in regard to the objective of the same, consisting in the Christianization of the natives. The Bull, as says the famous jurist and historian Don Toribio Esquivel Obregon, "was a form of encomienda for the Christianization of the Indians" (Apuntes para la Historia del Derecho en Mexico, Vol. I, p. 401; Mexico, 1937).

In the Alexandrian Bull, there was still no disquieting question raised, as was the question of the destiny of the property and rights possessed by the Indians of the New World and which necessarily would have to enter into the conflict with the Spanish

conquest and colonization. But this problem, which was and continues to be the object of controversy, arose a few years later with sufficient force to deserve specific mention in the will of Queen Isabel the Catholic. In this document, after alluding to the islands and lands discovered and to be discovered, "which were given to us" by the Holy Apostolic See with the objective "of inducing and bringing their peoples and converting them to our Holy Catholic Faith", Queen Isabel adds:

"I very affectionately beg my Lord the King and charge and command my daughter the princess, and the prince, her husband, that thus this be done and fulfilled, and that this be their principal goal, and that they not consent nor allow that the Indians, settlers and inhabitants in the said islands and lands, won and to be won, receive any harm in their persons and property."

This principle, a true limitation on the concept of the royal patrimony, which is established in the will of the Catholic queen, will thereafter serve the theologians and jurists as a point of departure in the formulation of the doctrine of acquired rights

(pre-existent rights) of the original inhabitants of the Indies.

Perhaps no one better treated the problem of acquired rights with

greater acuteness than Father Francisco de Vitoria, the most

famous jurist of his time and the founder of modern international

law. Vitoria establishes as a general proposition that the Indians

were in quiet and peaceful possession of their lands, public as

well as private, at the arrival of the Spaniards. And from this

proposition, historically false in the majority of cases, he con-

cluded that the Indians were veri domini, that is, the true lords

of their lands (Vitoria: Primera Releccion de Indios, No. 4. ^{Also}

in this regard: Antonio Gomez Robledo: Politica de Vitoria, Mexico,

1943, and Alois Dempf: Die Christliche Staatsphilosophie in Spanien;

Salzburg, 1937). That Queen Isabel's will and the ideas of jurists

and theologians like Vitoria powerfully influenced the authors of

the Recopilacion is beyond doubt, and, to prove it, it will be

sufficient to cite a few important texts from the famous code:

*Does this influence
make laws less valid?*

"Having made the discovery by sea or land in conformity with the laws and orders which pertain to it, and the province and territory being selected which are to be settled as well as the sites for the places where new settlements are to be made, and taking control over it, those who accomplish it will maintain the following procedure: Select the site from amongst those which may be vacant and by our leave may be occupied, without injury to the Indians and natives, or with their free consent."

(Book IV, Title 7, Law 1).

*mention of these
in Esp. trans.*

And, further:

". . . the settlers shall make their settlement without taking that which may belong to the Indians, and without doing them more damage than that which may be unavoidable for the defense of the settlers, provided that this not be a hindrance upon the settlement."

*could
the
land -
crops -
houses
How about
water*

(Book IV, Title 7, Law 23).

Two additional texts will still better illustrate the influence of the will of the Catholic queen upon the legislation of the Indies:

- does this affect availability of laws?

"We order that the distributions of lands, both in new settlements and in places and districts which are already settled, shall be made with complete equity, without preference, personal exception, or injury to the Indians."

(Book IV, Title 12, Law 7).

"We command that the estates and lands which are given to Spaniards shall be without prejudice to the Indians, and that those given to their prejudice and injury shall be returned to whomever they rightfully belong."

(Book IV, Title 12, Law 9).

The lawful dispositions of the Recopilacion in this area distinguish with complete clarity the case of lands possessed by Indians previously, i.e., before the conquest and Spanish colonization, from the case of those lands which, in compliance with the same law, they were entitled to have assigned to them. In one of the most important laws of the Recopilacion, which is the 14th, Title 12 of Book IV, there are clearly distinguished the three mentioned situ-

ations: The first is that of the vacant lands, res nullius, constituting the royal patrimony; in the second place, that of the lands which belonged to the Indians by reason of having been occupied by them previous to the Spanish conquest and colonization; and lastly that of the lands which could be adjudicated to the Indians following the provisions established by the same law.

Because of its importance, we believe it appropriate to transcribe the most important part of the mentioned Law 14:

"Because we [the King] have succeeded totally in the domain of the Indies, and because vacant territory, soils and lands that have not been granted by the Kings our predecessors, or by us, or in our name, belong to our patrimony, it is convenient that all the land that is possessed without just and true titles, be returned to us, as it belongs to us, so that reserving above all things what we, or the Viceroy, Audiencias and Goernors deem necessary at the present and for the future for public squares (plazas), commons (ejidos), public revenue lands (proprios), pastures and common waste lands of the towns (lugares) and districts which are settled, and distributing to the Indians whatever they

*gives
right for
future
needs of
towns & Indians*

*is lugares properly translated
as towns*

may need for their planting and stock raising, and confirming said Indians in what they already have, and giving them anew what they might need; let the rest of the land remain and be unappropriated so that it may be granted and distributed according to Our Will"

A careful study of this law allows us to distinguish the three mentioned situations, given that, if, on the one hand, the royal patrimony over the "vacant territory, soils and lands that have not been granted by the Kings our predecessors, or by us, or in our name" is declared, on the other hand it confirms the acquired right of the Indians "in that which they already have", ordering, lastly, that there be allocated to them "whatever they may need for their planting and stock raising".

2.- The Extension of the So-Called Acquired Rights.

There is no doubt that, under the influence of the will of Queen Isabel and of the doctrines of jurists and theologians of the University of Salamanca, the principle of acquired or pre-existent rights of the American Indians was very definitely established,

but it is also certain that various orders and royal decrees compiled in the legislation came later to delimit and define the existence and extent of these rights.

The Will spoke of protecting the persons and property of the Indians, but certainly such wide concepts lent themselves to multiple controversies. Thus, in relation to the protection of persons, there were later established distinctions which dealt with the civilized or uncivilized Indians, the latter being susceptible of slavery by making themselves into prisoners of war, and in relation to the property which was to be protected, the distinctions were even more wide-spread. In my opinion, and with the support of the same texts of the Recopilacion which I have cited and which I will cite further, the characterization of acquired or pre-existing rights can only be given to those rights which are established by the law with this condition, and these are, in almost absolute terms, rights of property or possession in land.

*Is water right a
property right?
What in Spain?*

Law 1 of Title 7, Book IV, requires that once the discovery is made and the site or province of the settlement selected, there will be chosen the vacant sites which "by our disposition may be occupied, without injury to the Indians"; in other words, there is made express reference to the lands and individual plots [solares] on which the new settlements are to be made, a concept which is repeated in almost identical terms in Law 23, Title 7 of the same Book, where the settlers are commanded "to make their settlements without taking that which may belong to the Indians". Finally, Law 7, Title 12 of the same Book requires that "the distributions of lands will be made without exception of (any) persons nor damage to the Indians", a principle which is reiterated in Law 9 of the same Title and Book, where it is commanded "that the estancias and lands which are given to Spaniards shall be without prejudice to the Indians"

From the above citations, the result is that when the legislative norm requires that no offense be committed against the

acquired or pre-existing rights of the Indians, the allusion is basically to those rights which the said Indians possessed over their own lands, a concept which can be enlarged so as to cover other property susceptible of individual appropriation, excluding another class of rights in property which, by the direction of the same Indian Law, must be property common to all inhabitants of the Indies.

To my way of thinking, there is no doubt that, if the cited laws expressly protect the acquired or pre-existent rights of the Indians to their lands without any mention of waters, forests and pastures, it is because the right in these latter natural properties remained subject to a very express and diverse juridical regulation, which is that of being property in the

public domain. *are you referring to the law of public domain?* *words of art for woodlands, pasture waters of a town site*

Isnt it true P 15 of Spanish, P 23 of English
Los Montes, Pastos y aguas de los lugares y montes contenidos en las mercedes que estuvieron hechas, o hicieremos de señoríos en las Indias, deben ser comunes a españoles e indios; y así mandamos a los Virreyes y Audiencias que lo hagan guardar y cumplir. R. de Indias. P. 17-21

todas las
the into title of this law refers to town site
law p 15 translates lugares as town

do you have case have you checked practice
 ← P1
1/10/1921

III.--THE JURIDICAL REGULATION OF WATERS, FORESTS AND PASTURES IN ACCORDANCE WITH THE LAWS OF THE INDIES.

1.- The Point of Departure.

Law 5, Title 17, of Book IV of the Recopilacion establishes with all clarity the rule to which the waters, forests and pastures of the Indies remain subject:

"We have ordered that the pastures, forests and waters be common in the Indies, and some persons without right from us have occupied a great part of these lands in which they refuse to allow others to place their corrals, their huts, nor bring their cattle: We order that the use of all the pastures, forests and waters of the provinces of the Indies be common to all the inhabitants of them who are now and later may be, so that they may be freely enjoyed, and anyone may keep his flocks next to any hut."

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This law has a very clear antecedent in the Partidas of King Alfonso the Wise, which is, by the terms of the Recopilacion itself, a supplementary source of Indian Law. Law 6 of the Siete Partidas establishes:

"The rivers and the ports and the public roads belong to all men communally, so that they may be used by foreigners as well as by those that occupy and live in the land where they are born."

*point of the
off on local
water laws:
in Spain*

It cannot be denied that this law of the Partidas is the historical and juridical antecedent of Law 5, Title 12, Book IV of the Recopilacion, which was reproduced above, a wise law for a different reason, for it legislates not only with regard to actual problems, but also with an eye to resolving future situations. Upon establishing the communal nature of forests, pastures and waters, the legislator the Indies turned its attention to the problems which necessarily would be overcome in increasing the population of the New World, and for that reason it speaks of usufructuaries in these communal properties "who are there now," distinguishing them from those others, those who "later may be," who may freely enjoy the said communal goods. It deals with a valid norm for equal treatment for Indians and Spaniards, not discriminating against one or another as do many other laws of the Indian Law.

*As you see
at the point
of population
doctors
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back to
p 5 purpose
of laws
customs
& rights of
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settlers
to pits
in Spain
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certain
provinces*

To attribute to the waters, forests and pastures the character of property common to all inhabitants in the Indies does not mean that they cease to form a part of the royal patrimony, and for this reason the King of Spain in the exercise of his patrimony could give to certain persons a right or privilege broader than that which belonged to all in common. The King could, without prejudice to the common use of waters which belonged to all inhabitants of the Indies, make grants mercedes or privileges so that individuals could appropriate the water for agricultural or industrial purposes, and this right of appropriation derived, not from the fact that an individual owner of land owns the land through which the river or flood flows, but from the royal grant, by virtue of which one exercised an individual right for the appropriation of the same.

exception
for grants
how about
Indians

in
law
of appropriation
in West

The circumstance of giving a grant for the establishment of a seigneurie in the Indies did not relieve the usufruct of water, forests and pastures of its communal character, and this is very

clearly established by Law 7, Title 17, Book IV:

"The forests, pastures and waters of the places and forests included in the grants mercedes which we have conceded or might give of seigneuries in the Indies, should be common to Spaniards and Indians. And thus we order to the Viceroy and Audiencias, that they see that this is followed and executed."

*covered
on p 15*

The distinguished jurist Don Manuel de la Pena, in an article published in Volume II of the work Documentos Relacionados con la Legislacion Petrolera (Mexico 1922, page 255), establishes that:

"The Spanish law made wide use of the concessionary right over waters from the beginning of the conquest, establishing concessions for its use at the same time as over the land, or even separately."

This coincides with the principle already established by us in the sense that, from the absence of a grant or specific title, the use of the waters, forests and pastures in the Indies had to be common to all the inhabitants of them, and not only to those which "are there now", but to those "who later may be", so that "they may freely enjoy it", following the mandate of Law 5, Title 17 of Book IV.

2.- The Acquired Right in Relation to Waters.

In a careful review of all the legal provisions which comprise the Recopilacion, we have found only one norm which governs the case of acquired rights in relation to the appropriation of waters by the Indians gathered in Pueblos, and who irrigated their lands from before the coming of the conquest and Spanish colonization of the New World. The law in question says: •

IV-12-18

"We order that the sale, grant and adjustment composicion of lands be done with such consideration that there are left to the Indians, with an excess, all those lands which belong to them, individually as well as communally, and the waters and irrigation systems; and the lands on which they ^{may} have constructed acequias, or any other improvement through which by their personal effort they have rendered fertile. . . ."

*was word
may left
all of
translation
Does this
not change
meaning*

This deals with a law legalizing an accomplished fact, which is the appropriation of waters by means of ditches in lands belonging to Indians established in pueblos pre-dating the arrival of the Spaniards. Please note that the pre-existent situation is

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legalized with more /con sobra/, in other words with a margin favoring a division of the waters for purposes of irrigation of Indian-occupied lands, but keep equally strongly in mind a fundamental circumstance, which is that the rule in question makes legal an existing situation at the moment of the contact between the Spanish colonizers and the indigenous communities, but in no manner does this refer to future situations. The law requires that there be left to the Indians the waters, irrigation works and lands "in which they may have built ditches", but it does not say where they may later make them. This is a situation similar to that which is regulated by international law by its clause rebus sic stantibus, that is, maintaining things in the status quo for purposes of juridical effects, but without concluding from such a situation a judicial standard applicable to the future. The almost unique rule in question among the thousands which form the Indian Law cannot destroy the general principle of the community of usufruct in the waters, forests and pastures to which the laws

how does this reconcile w/ law quoted p 15 (whatever they may need)

(were not community use after by towns as community as in Valencia in Spain Did not Pueblos hold property as community ownership)

of the Recopilacion refer repeatedly, and which we have cited and to which we will refer hereafter, in order to analyse the exercise of the royal patrimony in the said common property.

3.- The Exercise of the Royal Patrimony in Waters, Forests and Pastures.

Upon the basis that the waters, forests and pastures were properties in the public domain, without thereby ceasing to form a part of the royal patrimony, the same King of Spain in the exercise of his royal patrimony conceded the property of the said waters, forests and pastures - as he had done also with vacant land - to various persons with the object of populating the territories of the Indies. These concessions, which took the name of mercedes, were in some cases simple gifts to reward the effort of conquistadores and colonizers, and in others constituted true operations of sale. It is from this point that all private property in lands and waters in the Indies proceeded in direct or indirect form from a royal grant. The conclusion from a situation such as this was very

clear, and can be reduced to a few words: The waters which had
not been the object of some grant continued to be of the public
domain, without ceasing to form a part of the royal patrimony.

*one concept
why not and!*

*except
waters
already
owned*

In the exercise of his royal patrimony, the King of Spain
established the means for regulation of the common usufruct in
water, as he did for the individual appropriation of the same,
and there are many laws in the Recopilacion intended to fix the
administrative proceedings which regulated that matter:

*as in case
of lands*

"We ordain that the Audiencias assembled designate
judges, if it be not the custom that they be named
by the Viceroy or the President of the Audiencia,
or the villages and town governments, so that these
judges may divide the waters amongst the Indians, so
that they may irrigate their ranches, orchards and
plantings, and give water to their cattle, and may
such partitions be such that they may not harm the
Indians, and allot the Indians the water that they
need, and once the judges divide the waters they
shall submit to the Viceroy or President a report
stating the terms under which they have proceeded."
(Book III, Title 2, Law 63).

*Baronies
will
cover*

From the above law, it follows that the Indians' title to the appropriation of waters for irrigation arises from a true judicial resolution, and not from acquired rights antedating the conquest and colonization of the Indies. Even further, the mention that they shall be given the waters "which they may need" makes clear that this attempts to regulate an actual situation, conditioned also to the actual necessities of the Indians gathered in pueblos, without giving them any pre-eminent right in regard to the usufruct in the said waters.

*speaks in futuro or
ambiguous
could
cases help
determine*

In the Recopilacion there exists an even more clear norm, if one is desired, which deals with the same problem:

woodlands pastures & waters
"The forests, pastures and waters of the places and forests included in the grants [mercedes] which we have conceded or might give of siegneuries in the Indies, should be common to Spaniards and Indians. And thus we order to the Viceroy and Audiencias, that they see that this is followed and executed."
(Book IV, Title 17, Law 7).

*was word translated
requires same law
as on 23
same
speaking
of town*

And, further:

"The Viceroys and Audiencias shall observe that which may be needed for the good government of pastures, waters and public buildings, and issue the orders that are convenient for the colonization and perpetuity of the land, and send us a report of what they ordain, which they shall execute until they receive notice of what we decide. And we ordain that between parties they shall do justice to whomever requests it" (Book IV, Title 17, Law 9).

Lastly:

"Having to allot the lands, waters, water holes and pastures between those who may settle, the Viceroys or Governors who have the jurisdiction from us shall make the allotment with the advice of the cabildos of the cities or villas, taking into consideration that the regidores be preferred, if they have no land and plots of equal value; and to the Indians there will be left their cultivated and pasture lands, in such form that they do not lack the necessities, and that they may have all the comfort and ease possible for the maintenance of their homes and families" (Book IV, Title 12, Law 5).

*not water
for needs*

Don Andres Molina Enriques, without doubt the most highly reputed

Historian by reason of his studies concerning rural property in Mexico since the Colonial epoch, dedicated special attention to the problem of water rights in his famous book, Los Grandes Problemas Nacionales:

"We can be sure that in the Colonial period there existed:

- a).- Concessions of waters and lands in which waters are not mentioned except in very vague and general terms, such as 'and the waters contained in these lands'.
- b).- Concessions of lands and waters in which the last are mentioned in less vague terms, such as, for example, 'the waters necessary to irrigate the granted lands'.
- c).- Concessions of land without mention of waters, with subsequent grants which included the waters.
- d).- Concessions of waters and lands or solely of waters for mills, factories, etc.
- e).- Concessions of waters to satisfy the necessities of towns; and
- f).- Concessions of waters exclusively for irrigation."

(Los Grandes Problemas Nacionales, p. 171; Mexico, 1909.)

All of this is independent of the waters which, through not having been the object of a concession or royal grant, continued to form a part of the royal patrimony.

Regarding the regulation of waters, forests and pastures, the Laws of the Indies continued in force in Mexico for many years after the independence of this country. In the first Mexican Constitution, that of 1824, the question of waters was left under the jurisdiction of the states that comprised the Mexican Federation, but the states did not enact legislation over waters, with the exception being made in isolated cases of laws of colonization, in which, as a general rule, the principles of the Colonial legislation were followed. But it is the actual Federal Constitution of the Republic of Mexico which with greater rigor adopts the principles of the Laws of the Indies in relation to waters, as is seen in its Article 27:

"Property in land and waters found within the territorial limits of the nation belong originally to the nation, which has had and has the right to convey the ownership of them, constituting private property."

If you eliminate the concept of the royal patrimony exercised by the Kings of Spain, and substitute in its place the concept of the Mexican nation, you will have the most transparent example

of how the institutions of the past breed and give birth to those of the present with one same spirit.

From the study which precedes, and in good logic, we can arrive at the following:

C O N C L U S I O N S

1.- The Recopilacion de las Leyes de Indias is a markedly casuistic legislation, in which there nevertheless exist certain norms of a general character.

could other conclusions be logically drawn from these same laws & from other laws

in the Recopilacion

*- how many total laws?
how many have you used?*

2.- One of these norms of a general character is that which establishes the commonality in the usufruct of waters, forests and pastures for the benefit of all inhabitants of the Indies, be they Indians or Spaniards.

3.- In order to exercise an exclusive right - in other words, for the individual appropriation of waters - it was necessary to obtain a concession or grant. The history of Spanish colonization in America is filled with grants executed in favor of individuals for the private appropriation of waters for agricultural or industrial purposes.

4.- Neither Indians nor Spaniards needed the grant for the usufruct in the common waters. Without the existence of a grant, the waters of the Indies continued to form a part of the royal patrimony, and were susceptible of appropriation in common.

5.- Except in Law 18, Title 12, Book IV of the Recopilacion, in no other is there recognized in the Indians any acquired or pre-existent rights in irrigation waters, and in that unique case the legislator of the Indies limited the right to the actual situation without making it extend into the future.

6.- Many laws of the Recopilacion establish the common right of Indians and Spaniards to the waters of the Indies, but none establishes eminent rights in favor of one or the other, except in the case of the making of grants for the individual appropriation of the same, this being the same system which, in accord with modern juridical techniques, was adopted in the Federal Constitution of the United States of Mexico.

What do cases show??

Chihuahua, March of 1969

s/
Lic. Jose Fuentes Mares, Ph.D.