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Chapter 6. Solving the Spanish creole puzzle: The legal hypothesis of creole genesis

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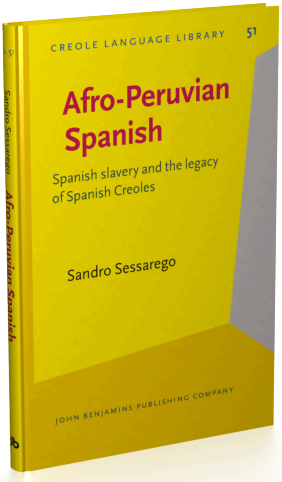

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CHAPTER 6

Solving the Spanish creole puzzle

The legal hypothesis of creole genesis

6.1 Introduction

As we have seen in this study, the Spanish creole debate is still much alive and certain Afro-Hispanic varieties such as APS may well be described as "Missing Spanish creoles" or "Decreolized Spanish creoles" depending on the hypothesis we adopt (Afrogenesis vs. Decreolization).

The socio-historical information provided in this book has shown that APS probably does not fit any of these models, but that it might be better described as and *advanced conventionalized second language*. This definition, I have argued, could probably be used to account for several other Afro-Hispanic contact varieties that present strikingly similar features. Indeed, recent studies on Barlovento Spanish (Venezuela) (Díaz-Campos & Clements 2005, 2008), Afro-Yungueño Spanish (Bolivia) (Sessarego 2011a, b, 2013d, in press) and Chota Valley Spanish (Ecuador) (Sessarego 2013c) appear to lead to the same conclusion.

As far as the Venezuelan case is concerned, Díaz-Campos and Clements (2005, 2008) have shown that the linguistic features mentioned by Álvarez and Obediente (1998) in relation to a potential creole origin for Barlovento Spanish can also be found in a number of rural dialects, thus indicating that they should not necessarily be seen as creole indicators. Moreover, the authors have shown that, in contrast to McWhorter's (2000) predictions, colonial Barlovento was not the perfect place for creole formation. In particular, since the Spanish Crown's monopoly of the slave trade kept the blacks/whites ratio relatively low until the end of the 18th century, a plantation society did not develop in the colony. For this reason, the majority of the population classified by McWhorter as "Africans" were actually mixed-race people, who were born in the Americas and spoke Spanish natively.

In regards to Bolivia, Lipski claimed that "in absence of any other viable scenario, Afro-Yungueño Spanish must be viewed as the descendant of a colonial Afro-Hispanic pidgin" (2008: 186), while Pérez-Inofuentes (in press) and Schwegler (2014) would link this dialect to a previous Portuguese creole stage. Nevertheless, a closer look at the linguistic features proposed as potential indicators of prior creolization indicates that the grammatical elements found in

this Afro-Bolivian vernacular can be encountered in advanced second languages or non-standard Spanish dialects for which a creole hypothesis is not feasible. Moreover, the sociohistorical data analyzed do not suggest a creole origin either. Several factors have affected the dimension of African slavery in Bolivia and consequently the presence of black population in the territory from the 16th century through the middle of the 20th century. In fact, the Spanish Crown's monopoly of slave trading, the geographic location of Bolivia and the availability of native workforce affected the cost of Africans, raising their price and, as a result, reducing the number and the dimension of slave transactions. The non-massive introduction of black workforce into the territory favored the acquisition of a closer approximation to Spanish by the slaves (Sessarego 2011a, b, 2013d, in press).

Chota Valley Spanish (Ecuador) presents yet another case pointing to an *advanced conventionalized second language* as the most likely scenario (Sessarego 2013a, c, 2014b). On one hand, McWhorter (2000), proposes that colonial Chota would be one of the Latin American regions that supports his Afrogenesis Hypothesis since it was characterized by low whites/blacks ratio, harsh working conditions in labor intensive Jesuit sugarcane plantations, massive introduction of African-born workers, and minimal contact with the outside Spanish speaking world. On the other hand, Schwegler (1999) claims that also this dialect should be analyzed as the result of the decreolization of a previous Portuguese creole, since it would have retained the Portuguese pronoun *ele* 'he/she'. However, also in this case, African-born slaves have never been a majority group at any point in the history of the region (Coronel Feijóo 1991). In addition, sociohistorical reports from the Jesuit period (1680–1767) highlight a certain degree of social flexibility: the formation of nuclear families was favored, slave reproduction was high, each family was given a piece of land, and slaves could purchase their manumission (Bouisson 1997). Also, the claim that *bozales* were used massively to work these plantations is a bit problematic, since a concomitance of logistic and financial constraints strongly limited the introduction of Africans in the colony (Colmenares 1997). Contact with the outside world may not have been intense, however, Coronel Feijóo (1991) indicates that blacks could rent small land parcels to white people and sell agricultural goods in local markets. Finally, the Portuguese hypothesis appears to be contradicted by the fact that when the Jesuits started importing African workers to work in Chota Valley, Spanish colonies were no longer receiving slaves from the Portuguese; rather, they were acquiring them from French, Dutch and English traders (Colmenares 1997; Sessarego 2013a). From a linguistic perspective, the morphosyntactic features encountered in this dialect align with those reported for other Afro-Hispanic dialects in Chapter 5, thus they should not be taken as strong evidence in support of a creole hypothesis. As far as *ele* is concerned, data appear to suggest that we are dealing with at least

two different elements: (a) a topic and (potentially) focus marker, which has been also described as an interjection to express emphasis, alarm, and surprise in a number of Highland (non-black) communities (cf. Córdova Álvarez 1995; Lipski 2010); (b) a pronoun, which seems to be the result of a sporadic paragogic process of [e] insertion, since this phenomenon is also found in several other Chota Valley Spanish lexical items (*ayer* → *ayere* 'yesterday', *ser* → *sere* 'to be', etc.).

Faced with this evidence from a variety of Latin American colonies, we are left wondering if it is possible to find a common thread among all these colonial realities. We will address such an issue in this chapter. This chapter is in no way meant to provide a detailed analysis of all the complex factors that may have participated in shaping the Afro-European contact varieties currently spoken in the Americas; nevertheless, by relying on a comparative examination of American slave law, the current study aims to point out to the linguistic community some key elements that have been overlooked by previous theories attempting to account for the paucity of Spanish creoles in the Americas. Here I wish to offer a new perspective on the long-lasting Spanish creole debate.

A comparative analysis of slavery in the Americas will show that Spain not only diverged from other European powers in that it lacked slave forts in West Africa, as pointed out by McWhorter (2000); rather, one of the most prominent differences between Spain and the other countries involved in the colonization of the Americas had to do with the legal regulation of black captivity and, in particular, with the fact that Spanish slaves were the only ones who were granted legal personality. I call this hypothesis "The Legal Hypothesis of Creole Genesis". This hypothesis argues that the relative paucity of creole languages in Spanish Americas may be seen – in part – as the byproduct of differences in the European legal tradition; in particular, it has to do with differences in the reception of Roman law. In other words, my thesis claims that if England, the Netherlands, France and Portugal had adopted Roman slave laws[35] to the extent that Spain did, then we would

35. It should be pointed out that in Roman law there did not exist any word similar to 'slave'. The Latin word was and is "servus", which became "serf" in English and in French and "servo" and "siervo" in Portuguese and Spanish. "Slave", in fact, is an adoption of the "tribal" name for Slavs. Slavs suffered attacks from neighboring peoples who used to sell them as serfs in markets around the Dead Sea, and so their ethnic name became a synonym of "serf". "Slave" is documented in Arabic in the 9th century and in Latin in 10th century (*slavus, eslavus, esclavus*…); so it is a late designation. Also, it must be acknowledged that the *Siete Partidas* never mention "esclavo" (slave in Spanish), but "siervo" (serf, from the Latin "servus"). Nevertheless, in the current study we will not focus on the historical evolution of these two terms (which ended up being used as synonyms in the Americas); rather, we will follow Watson's (1989) work and thus refer to "Roman slave law", "Spanish slave law", etc. We will do this for the sake of clarity, even

probably not observe these disproportions between former Spanish colonies and other European colonies in the number of creoles spoken across the Americas.

The aspects of slave law most pertinent to this study are those that provide more insights into the nature of slaves' social conditions, their chances of climbing the social ladder as well as the access and incentives they might have had to learn the colonial language to improve their social status: the chances of becoming free people and the degree of acceptance of ex-captives into the free society; limitations on the masters' freedom to punish their slaves; the possibility for slaves to own property and accumulate capital; the right to have a family; and the extent to which the colonial administration regulated the public sphere of slavery.

6.2 The Legal Hypothesis of Creole Genesis, a synopsis

The Legal Hypothesis of Creole Genesis stresses the importance played by the different colonial legal regulations of slavery in the evolution of Afro-European contact varieties in the Americas. This work shows that one of the most prominent differences between Spain and the other countries involved in the colonization of the 'New World' had to do with the legal treatment of slaves. In fact, the legal figure of the slave was adopted by the Spanish system in ancient times, from the Roman *Corpus Juris Civilis*; it had been gradually changed into the medieval Spanish code, called *Siete Partidas,* and then further modified in the *Leyes de India*. On the contrary, such a legal figure followed a significantly different evolution in the other European legal systems, resulting in remarkably different socioeconomic and sociolinguistic outcomes in the European colonies overseas (Watson 1989; Andrés-Gallego 2005).

This section consists of a comparative analysis of slave law in the Americas. Findings indicate that black slavery in the 'New World' colonies was highly heterogeneous and that the Spanish system was the one providing slaves with the most rights. In particular, unlike the other legislations, the Spanish system was the only one that acknowledged legal personality for slaves.[36] This element, as we will see, is key to understanding a series of rights enjoyed by Spanish slaves, which were completely absent in the slave regulations dictated by other colonial powers. This fact, I claim, is probably the most important factor to shed light on the

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though it is understood that, from an etymological perspective, it would be more appropriate to talk about "Roman serf law", "Spanish serf law", etc.

36. The fact that slavery cannot be treated as a homogeneous phenomenon across space and time is particularly evident when we compare the Western colonial concept of it to the servitude system implemented in colonial times across Southeast Asia (cf. Ansaldo 2009: Ch. 2).

Spanish creole debate and thus to understand the reasons behind such a "mysteriously absent creoles cluster under a single power" (McWhorter 2000: 39).

The analysis presented in the current chapter is not concerned with all of the possible socio-economic and demographic factors that might have had an effect on shaping the Afro-Hispanic contact varieties that developed in the Americas (e.g. the effects of the Spanish Crown's monopoly on slave trading, logistic constraints on the introduction of African-born slaves, the economic structure of certain colonies, etc.; see Lipski 1993, 2005; Díaz-Campos & Clements 2005, 2008; Clements 2009; Sessarego 2011b, 2013d, 2014a, b, c). Nevertheless, since a legal tradition is effective only if life conforms to it, in Section 6.3 I will try to bridge the gap between the idealized legal status of Spanish slaves and their social reality, while in Section 6.4 I will apply the hypothesis to three concrete case studies that represent challenging testing grounds for the model proposed: post-sugar-boom Cuba; seventeenth century South Carolina and Barbados; and eighteenth century Chocó (Colombia).

This proposal provides reasons to believe that the European legal tradition of slavery played a major role in American creole genesis and evolution. It also raises questions as to why the only two existing Spanish creoles in the Americas (Papiamentu and Palenquero) actually developed where no Spanish law ever applied: in The Dutch Antilles, and in San Basilio de Palenque, a formerly isolated maroon community in Colombia.[37] Before describing slavery in the American colonies, I will provide an overview of Roman slave law, the legal system which, in one way or another, influenced the slave law of all the European powers involved in the colonization of the Americas.

6.2.1 Roman slave law

From a legal point of view, slaves in Rome were property; they had no rights, since they did not have legal status. In fact, to have legal status within a certain legal system implies acquiring a series of legal rights and duties, such as taking part in civil lawsuits, getting married, entering into contracts, etc. Slaves, however, were property of a special kind since, for certain purposes, they were treated as human beings. For example, they could be educated and could perform highly skilled jobs for the benefit of their masters. Moreover, they could be set free and, in that way, they automatically acquired Roman citizenship, which implied acquiring

37. In a forthcoming paper, Schwegler (Forthcoming) claims that Palenquero did not actually form in the village of San Basilio de Palenque. Rather, he suggests that this creole formed in a different maroon community and then, eventually, was taken to Palenque. In any case, this language would have formed in a context far away from the Spanish colonial rule.

legal personality as well as all the privileges that Romans enjoyed over other nations within the Roman Empire. Manumission was common; restrictions on it were few, mainly limited to protect creditors from fraud (Marrone 2001: 119).[38]

Slavery was not based on race. Rather, anybody could become a slave, independently of his or her ethnic or national background. According to Roman law, human beings could be reduced to slavery if they belonged to any of these three categories: (1) prisoners of war; (2) offspring of enslaved mothers; (3) anybody who sold themselves into slavery (often to repay a debt). There was also the possibility for a father to sell his children as slaves; however, this practice was highly uncommon (Marrone 2001: 111).

The lack of legal personality for slaves also implied that they could not own property. However, they were usually provided with a fund called *peculium*, which legally belonged to their master but which they were allowed to use within the restrictions set by their owner (Marrone 2001). The *peculium* was frequently designed as a percentage of the revenues provided by the slave to the master. It was cumulative and slaves could eventually use it to purchase their own freedom, at a price set by their masters. It worked as an incentive to work harder; it was meant to create additional profits for owners, since setting a slave free in exchange for the *peculium* did not represent any economic loss for the slaveholder, who could use the money to acquire a new slave.

Another consequence of slaves lacking legal personality was the inability of captives to take part in civil lawsuits. Their use as witnesses in civil cases was highly restricted and they could not give evidence against their owners. Emperor Constantine (320–23 A.D.) decreed that if slaves tried to accuse their owners, they would not be heard and would be crucified (Watson 1989: 30). Finally, since slaves were property, they could not marry, either among slaves or with free people. They could have sexual partners but the institution of marriage, as well as the rights and duties that it implied, were denied to slaves. As a consequence, for example, they could not carry out an action against someone who committed adultery with their partner. Their offspring belonged to the owner. Slave couples, as well as their children, could be divided and sold to different masters. Overall, slave law in Rome mainly concerned private issues; it did not deal much with the

38. The fact that manumitted slaves would not only automatically become free people, but also Roman citizens, generated no little concern among the Roman population. Two laws were promulgated at different points in time to constrain such a phenomenon: the *Lex Fufia Caninia* (2 B.C.) and the *Lex Aelia Sentia* (4 B.C.). The *Lex Fufia Caninia* imposed an upper limit on the percentage of slaves that could be manumitted by last will; while the *Lex Aelia Sentia* provided a set of stricter constraints regulating manumissions, such as the impossibility of manumitting misbehaving slaves (Marrone 2001: 119).

public sphere of society. For this reason, a slave owner was free to do whatever he wanted with his slaves; there were no government instructions on how to punish, educate, employ, etc. a slave (Watson 1989: Ch. 2).

The best-known and most influential legal text collecting Roman laws is the *Corpus Juris Civilis* (CJC). It was created from 529 to 534 under the administration of emperor Justinian. This text had a deep impact on the legal history of Europe. In particular, it shaped the legal systems that developed in the regions that had been more deeply colonized by the Romans (Hespanha 2003). In the following sections we will explore the extent to which the CJC and its slavery regulations were received by the European legal systems that subsequently would be transplanted and implemented in the Americas. This will help us achieve a better understanding of the legal systems that regulated living and working conditions of black captives in the different European colonies across the 'New World'.

6.2.2 Spanish slave law

Slavery had been established in Spain since the Roman colonization of the Iberian Peninsula. Spain, along with Portugal, was among the few European countries that possessed a long tradition of slavery regulation by the time the 'New World' was discovered. In the Spanish case, a good part of the Roman legal heritage had been codified in the thirteenth century under the direction of King Alfonso el Sabio in the *Siete Partidas* code, which had inherited – with few modifications – the Roman legislation on slavery proceeding from the Justinian *Corpus Juris Civilis*. The *Siete Partidas* provided the legal bases for the further development of the Spanish legal system in the Americas, which gradually was adapted to the new colonial needs through the progressive promulgation of the *Leyes de Indias* 'Laws of the Indies' (Burns 2000). This represented a legal tradition that was absent from the majority of the other European colonial powers. As we will see, this fact was key in shaping the dynamics of the slave-master relation overseas and consequently, I claim, the nature of the languages that developed in the different colonies across the Americas.

The Spanish legal system was deeply rooted in the principles contained in the CJC. Along with slavery, the Spanish system inherited the concept of property and the different ways in which property could be acquired. One of such ways was the *accessio*. It consisted of the incorporation of one thing into another. The person who owned the main thing became the owner of the combined thing. Thus, for example, the owner of a certain field automatically became the owner of the plants and crops which would grow on it (Marrone 2001). During the Middle Ages, this ancient property concept was re-elaborated and applied to the validity

of legal systems. As a consequence, a given legal system, adopted in a certain territory, would automatically become valid for the regions incorporated by such a territory. Therefore, after the discovery of the 'New World', the regions granted by the Papal bull *Inter Caetera* to Spain became part of Castile (see Section 5.2). As a result of *accessio*, the Castilian law automatically applied to those territories. This implied that in the Spanish colonies there was "law regulating slavery before there were slaves to be regulated" (Watson 1989: 47).

Such a slave law, which in Spain was already centuries old when the 'New World' was discovered, was designed not according to socio-economic needs that would develop in the Spanish colonies but rather in line with the demands of society in 13th century Spain. Much of it, moreover, had derived in large measure from the rules of Roman law as they were set out in the CJC. In fact, according to the *Siete Partidas* the main reasons to reduce somebody to slavery were exactly those indicated by the CJC: (1) war prisoners; (2) children of an enslaved mother; (3) people who decided to sell themselves into slavery. One relevant difference, which developed in the Spanish code due to the influence of the Catholic Church, had to do with point (1): war prisoners could be enslaved only if they were non-Christian (Andrés-Gallego 2005).[39]

One key factor differentiated Spanish slavery from Roman slavery: slaves under Spanish rule were legal persons. Granting legal personality to slaves was the result of a radical departure of the Spanish system from the Roman legislation (Andrés-Gallego 2005). The presence of legal personality implied a variety of rights and duties ascribed to the Spanish captives, which were unknown to Roman slaves. Slaves, therefore, could take part in legal lawsuits both as plaintiffs and defendants. According to the *Siete Partidas*, a slave could not be punished too harshly and had the right to be clothed and fed. In case the master did not meet such requirements, the slave could take his owner to trial and ask the judge to be sold to a different master. In order to be able to adequately defend themselves during trials, a royal law of 1528 assigned a special lawyer to any slave in need of legal assistance, called *protector de esclavos* 'slave protector' (Andrés-Gallego 2005: 65). Slaves could get married and they could accumulate financial resources to purchase their manumission.

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39. The systematic enslavement of Africans during the following centuries raised some moral concern since Spain and Portugal did not really wage wars in Africa to obtain their black slaves. These were almost without exception obtained via African slave traders, who had either captured them individually, or through larger raids and/or wars. For this reason many people questioned the legitimacy of such cases of enslavement. Navarrete (2005) provides an overview of the debates concerning this sad chapter of the transatlantic history.

In the original *Siete Partidas*, as in the CJC, slaves could not own property, but they could receive the *peculium* if their master agreed to provide them with it. The *peculium*, therefore, in the *Siete Partidas,* was not compulsory; rather, it was just common practice. However, the *Ley de Indias* promulgated in 1541 made it required in Spanish America. This compulsory *peculium* had to be paid to slaves either in cash, or with material goods, or by providing them with time off and production means (e.g. a piece of land on which to grow their own crops) (Andrés-Gallego 2005: 60). Moreover, an additional and more sophisticated legal instrument to achieve manumission was developed in the Spanish Indies. It was called *coartación*. It was a contract that consisted of a sort of 'manumission mortgage' where slaves could acquire their freedom by providing the master with periodic payments: the more they paid, the more they could enjoy their freedom, thus the more chances they had to accumulate capital to pay off their debt (Andrés-Gallego 2005: 63).

Therefore, Spanish slavery regulation significantly evolved from the CJC to the *Siete Partidas* and, subsequently, to the *Leyes de Indias*. The reception of Roman slave law in ancient times provided Spain with several centuries to adapt and gradually modify such regulations to better meet the natural evolution of Spanish society and of its institutions. This was somewhat unique to Spain. It did not happen in the other European countries which would be subsequently involved in the colonization of the Americas. The concept of legal personality benefitted slaves not only on the legal and economic levels – with the possibility of taking part in legal lawsuits, the possibility of relying on the *protector de esclavos*, the capacity of accumulating capital to pay off their debt and become free people, etc. – but also on the familiar level their life changed radically from what was originally established in the CJC. The Catholic Church played a key role in this. Indeed, the Church insisted that slaves had souls. In caring for souls, the Church managed to take away some of the power that masters had over their captives. For example, to avoid the sin of fornication, the institution of marriage had to be conceded to slaves. This provided slaves with some additional element of personality. Moreover, slave marriages had to be preserved, thus a slave husband and wife could not be separated (Watson 1989). As a result, two married slaves belonging to two different masters could not be divided by the owners against their will. For example, in the case that an owner from say Lima (Peru) decided to move to a different location, say Quito (Ecuador), and his male slave was married to an enslaved woman residing in Lima, then the owner would have to either purchase his wife and take her to Quito, or sell his slave to a Limeño resident. Interracial marriages were common and even more common were interracial sexual relations. Owners often freed the children they had from their enslaved lovers. These Spanish customs led to a growing free mulatto sector in all Spanish colonies.

6.2.3 English slave law

Watson (1989) indicates that slavery in the English colonies was remarkably different from the institution found in Spanish America. The reasons for this had to be sought in the fact that Roman law had not been received in England so that the institution of slavery did not exist in this country at the time of the American colonization. Watson states that in order to overcome this legislative gap "a law of slavery had to be made from scratch" (Watson 1989: 63).

Apparently, the non-reception of Roman law also implied the lack of the notion of *accessio* in the English medieval legal system, as Blackstone (1765) indicated and Watson (1989: 65) highlighted. As a result, a key difference between the territories colonized by the Spaniards and those conquered by the English emerged in the regulation of many aspects of social life. Watson states (1989: 65):

> The difference in Spanish and English law here is fundamental. The law of the Spanish colonies was the law of Castile as it was and as it would become. Law could only be made in the colonies by governors, viceroys, or others to the extent that power to do so had been expressly granted by the ruler of Castile. The lawmaking power remained in Spain. In the English colonies, the basic laws were those made by the colonists in the colonies.

Watson (1989: Ch. 4) explains that English colonies did not have a law of slavery when the first slaves were introduced in the territories overseas; rather, the legislation started being created step by step, mainly by judicial court precedent and by statute. In both cases, the decisions made to shape such systems were not imposed from England. On the other hand, they were the result of local processes, involving local judges and local colonial authorities.

Judges therefore had to create laws on slavery, in a context in which a previous code on such an institution was lacking; a common practice to accomplish such a task was to recur to Roman law and therefore to fragments of a system that was comparatively harsher on slaves than the system developed by the Spaniards over time and formalized in the *Siete Partidas*. As for the law created outside of judicial courts, the local legislatures passed a variety of statutes that oftentimes dictated even stricter regulations on captives and manumitted blacks.

Watson highlights that a visible difference between the English system, which emerged in the colonies, and the Roman one had to do with the fact that the former was much more regulated than the latter in its public sphere. In fact, Roman slave law was mainly a system of private law, which did not publicly regulate the relations between slaves and masters. In Rome, it was the master who decided how a slave should be punished, what he should wear, where he should live, how he should be educated or trained and so forth. The Roman state did not have a

say on these issues. Conversely, in English America, all these aspects of slave life were regulated by law; oftentimes the slaveholder was not even allowed to treat his slave better than what was established by the local legislatures.

Watson even claims that while a slave in Spanish America could be considered to belong to his owner, in English America it appeared to belong to "every citizen – at least he was subordinate to every white" (Watson 1989: 66). In fact, any white citizen had the right to stop a black outside of a plantation and question him about what he was doing. The local government established the type of clothes that slaves should wear; it would organize patrols of white people to catch runaway captives and would give the masters a certain frame of time to inflict a pre-established punishment on them. The local authorities also forbade formal education for blacks. Slaves could not buy and sell any sort of products since they could not own anything. For this reason, the master could not even decide to donate animals or other goods to them. They had to live with their master and were not allowed to live in another area, even if the owner agreed.

Watson illustrates some passages of the slave law implemented in South Carolina. In particular, he reports extracts from the first South Carolina statute on slavery called the "Act for the Better Ordering of Slaves" from 1690. This document states (Watson 1989: 68–69):

> And if any negro or Indian slave shall offer any violence, by striking or the like, to any white person, he shall for the first offense be severely whipped by the constable, by order of any justice of peace; and for the second offense, by like order, shall be severely whipped, his or her nose slit, and face burnt in some place; and for the third offense, to be left to two justices and three sufficient freeholders, to inflict death, or any other punishment, according to discretion; provided such striking or conflict be not by command of or in lawful defense of their owner's persons.

Watson highlights the fact that this Act, which in itself had borrowed much from the Statute of Barbados of 1688, served as a model for several other US states. He provides many other samples of regulations that highly restricted the freedom of blacks as well as the freedom of slaveholders, who had to inflict the punishment established by the law on their captives, and could not provide them with benefits that were not contemplated by the statute.

The author indicates that many US codes strictly forbade the masters to allow slaves to rent out their work for money, or to gain a *peculium*, or work a parcel of land for their own benefit. Slaves in the English colonies, as in ancient Rome, had no legal personality; they were classified as movable property. Because of this condition, slaves could not sue their masters or any other people. Moreover, in civil actions, they could not act as plaintiffs or defendants. Nevertheless, they could be defendants in criminal actions and there existed a specific legal system

that regulated criminal law specifically for slaves. Watson (1989) indicated that "Procedure for slaves' crimes was more summary, penalties were more severe when the offender was a slave, and there were crimes that in effect could only be committed by slaves" (1989: 72).

As for manumission law, Watson (1989) points out that achieving the state of 'free black' was not as common and easy as in the Spanish colonies. He shows that in the original South Carolina statute there was no reference to manumission. The first clear reference to manumission is from the statute of 1712. In this document, section 1 indicated that slaves could be manumitted by their masters or by a governor of provincial council given a good reason. The statute of 1735 clarified that manumitted slaves had six months to leave the province. If they did not do so, they could be re-enslaved by local authorities. The reason behind this law had to do with what was probably a common practice: slaveholders tended to free captives who were not productive enough or of bad character, in order to not have to feed them and pay property taxes on them. To solve this issue, Section 7 of the act of 1800 indicated that manumission was contingent upon local government approval to make sure that the captive was able to earn a living and did not have bad habits. Progressively, the legislation became stricter on this issue. In 1820 the statute declared "that no slaves could be freed except by an act of the legislature" (1989: 75).

Another act from 1740 also forbade teaching how to read and write to blacks. Similar regulations were also present in legal codes from North Carolina, Georgia, Alabama, and other states. Watson classifies as "striking" the interest of the government in regulating the public dimension of slaves' lives, while not much was usually said about private law (1989: 72). For example, nothing is mentioned about slave marriages, which were not considered as being legally valid. Slaves could not get married in the majority of the British American territories; enslaved couples could be separated and sold to different buyers without any limitation; interracial relations were highly prohibited. As we can see, the lack of legal personality automatically implied the lack of a variety of related rights. This limited slaves' initiatives on both the private and public spheres of their lives. In particular, we can observe that the legal, financial and family-related freedoms of slaves were systematically more limited than their respective Spanish counterparts. This situation inevitably had a negative effect on the opportunities for English slaves to climb the social ladder and thus automatically reduced their chances of social integration. Such segregation probably favored the formation and preservation of contact varieties in the English colonies that diverged more radically from their lexifiers than the dialects that developed in the territories under Spanish control.

6.2.4 French slave law

France, unlike England, had received the Roman CJC. However, the reception of Roman law was not as intense as in the Spanish case. In fact, scholars working on the legal history of France traditionally describe this region as a land in which two main private legal traditions coexisted until the advent of a progressive and systematic homogenization, started in 1454 by Charles VII and subsequently implemented by the central governments in the following centuries (Hespanha 2003). One legal tradition was based on customary law, rooted in local customs and generally not written. It was applied in the northern territories (*pays de droit coutumier*). Conversely, in the southern territories[40] the law was written (*pays de droit écrit*) and had been influenced more significantly by the Roman CJC.

In certain regions, serfdom was in place up to 1798. It consisted of services that rural peons had to perform freely for their landlord; this system, however, differed significantly from the Roman one. Moreover, it did not belong to the Paris legal system (*Coutume de Paris*), the one which was introduced to French America. Therefore, unlike Spain, medieval France did not have a collection of laws on slavery. For this reason, while slavery evolved in the Spanish system and gradually provided more rights to the slaves, in the French system such a process could not possibly take place.

At the time of the American colonization, the French did not have the accumulated centuries of slave legal tradition as the Spaniards did. Like the English, they had to create new rules, designed on an *ad hoc* basis to address differing local situations. To do that, they borrowed massively from the ancient CJC. This legal effort eventually resulted in the *Code noir*, originally passed by King Louis XIV in 1685, which differed significantly from the Spanish slavery regulations, developed through the centuries and crystallized in the *Siete Partidas.* This code also differed from the slavery law developed by the English. Watson (1989: 85) points out two key differences: first, the French law was not created in the colonies where slaves and masters lived and the legislator might have designed a system to address their needs; rather, it was created in Paris, where the circumstances were completely different from those found in the colonies. Second, these regulations were put together by lawyers trained in Roman Law and the socioeconomic situation encountered in ancient Rome differed radically from what happened in colonial French America during the 17th century.

As we will see in the following paragraphs, given the direct borrowing from the CJC, French slaves did not have legal personality. Slaves were movable

40. These territories roughly corresponded to the areas occupied by the Visigoths and the Burgundians (Watson 1989: 83).

property, as chattel. For this reason, they could not own any material goods. However, in line with Roman law, they could be provided a *peculium* by their master, who could take it away from them at any time.

Overall, French regulations on manumission appeared to be more flexible than English rules. Watson (1989: 86) takes Article 55 of the edict of March 1685 for the French American islands to exemplify the state of manumission in the majority of the colonies where the *Code noir* was in place: "Owners who are twenty years old can free their slaves by any act *inter vivos* or *mortis causa* without being bound to give a reason for the manumission". Nevertheless, manumission over time became more difficult. In fact, after a royal ordinance of 24 October 1713, it was not enough for a master to agree to his slave's manumission. Rather, an application for manumission had to be submitted to the local authorities and the governor or an administrative commissary had to sign it to give the master the permission to free his slave (Andrés-Gallego 2005: 248; Watson 1989: 90).

Similar to the English slave law, the *Code noir* paid more attention than Roman law to the public sphere of slavery. For example, for certain slaves' behaviors against their masters there were fixed punishments decided by the state, which could not be modified according to the owner's will. For instance, in the case that a slave struck "his master, his mistress, her husband, or their children on the face so as to bruise or cause bleeding" (Watson 1989: 85) the fixed punishment by law had to be death; it did not matter if the master forgave his slave. Such an act of revolt was not perceived as a private issue between an owner and his captive; rather, it was considered as a public security issue, and therefore, it would have to be addressed by public regulations.[41]

The punishments inflicted on slaves were harsher in the French system than in the Spanish one. Slaves could not be tortured, but if found guilty of a crime, the punishment could involve amputations, iron branding and the death penalty. Since slaves had no legal personality, they could not take their masters to court if their rights were not respected.

Slavery was based on race, and the law strongly discouraged race mixing. A free person could not marry a slave; moreover, if masters had children by their slaves, such slaves and their offspring would be confiscated by the government authorities; they would become property of the closest hospital, and would never

41. Schwegler (p.c.) points out that also in the Spanish system certain issues were treated as cases of public offense, and consequently punished according to precise state regulations. This is certainly true; for example, there were pre-established punishments that had to be inflicted to the slaves that tried to escape. Nevertheless, it is a well-documented fact that the domain or crimes corresponding to the public sphere was much more extended across the English and French colonies than the Spanish ones (cf. Watson 1989).

have a chance of becoming free people. In addition, masters would be forced to pay a high fine (Watson 1989: 88). Due to the influence of Christianity, the *Code noir* acknowledged slaves' humanity. It considered slave marriage as valid and forbade the separation of family members to sell them as individual tokens. Marriage among slaves was, therefore, recognized by the authorities; however, slaves could not get married without their owners' permission.

As we can see, when we compare French regulations with the Spanish ones, we can immediately see how in the French colonies blacks' freedom and their chances of being accepted into free society were considerably more limited.

6.2.5 Dutch slave law

The United Provinces of the Netherlands received Roman law, but not uniformly. Some regions like Friesland and Holland were more influenced, while other provinces, like Groningen, Gelderland, Overijssel and Drente were never significantly affected by it. Even though the legislations regulating these provinces differed, an aspect that unified all of them was the lack of the institution of slavery. Moreover, the Dutch colonies in the Americas (Dutch Antilles and Suriname) were not technically controlled by the Dutch government; rather, they belonged to a private trading company (with a local governor and council), the Dutch West India Company.

Since neither the United Provinces nor the Dutch West India Company had a legal code regulating slavery, at first, when slaves were introduced into the Dutch territories, there was no slave law capable of regulating black captives' living and working conditions (Watson 1989: 103). In order to fill such a legal gap, the Dutch had to rapidly adopt some regulation, as the English and the French did. The Dutch also borrowed material from the CJC; however, the emanation of such regulations did not proceed from the local state legislation nor from judges, as in the British colonies overseas; nor did it proceed from their homeland back in Europe, as in the French and Spanish cases; rather, they were directly dictated by the Dutch West India Company.

Watson (1989) points out that the Dutch borrowed the bulk of slave law from the Romans and implemented systematic changes through the *placaaten* 'ordinances' only to address issues of public administration. He states (1989: 110):

> The problem is that the rules of the Roman law, as they were set out in the Corpus Juris Civilis and as understood by later scholars, were so taken for granted that they were not restated. And little of this law was changed. The *placaaten* basically added only local police law.

For this reason, as in ancient Rome, slaves had no legal personality; thus they could not appear in court nor sue their masters, nor get married, nor own property. As in Rome, they could be provided a *peculium*, which the master could take away at any moment.

Watson (1989: 106) reminds us that the *placaaten* were not uniform; rather they changed from colony to colony. He provides several examples from Curaçao and Suriname and decides to group these ordinances into three main categories. In the first group he places the "*placaaten* which particularly bring out the public law dimension" (1989: 106). This would include ordinances instructing masters to provide a certain number of slaves to perform a job of public interest (e.g. construction of streets, bridges, etc.), restrictions on slaves' free time activities (dancing, singing, going out at night), limitations on fishing, regulations for fugitive slaves (setting up funds to catch runaways, penalties for the escaped captives, etc.), regulations of the minimal proportion of whites to blacks on plantations, etc.

The second group of *placaaten* presented by Watson concerns the restrictions on "trading by or with slaves". Several of these ordinances were promulgated with the goal of reducing the sale of stolen goods (1989: 106). Slaves were often prohibited from selling anything other than vegetables, fruits and other crops. Limitations were also imposed on whites who wanted to rent their houses or other properties to blacks since, apparently, it could happen quite often that slaves rented houses without having enough resources to pay for them. Other common *placaaten* forbade whites from purchasing gold, silver, alcohol, and other products from slaves, unless the captives could provide a letter from the owner or sheriff's deputy indicating that they had permission to sell such goods.

The third group of *placaaten* analyzed are those that "provided regulations for slaves and free blacks together" (1989: 107). Watson mentions ordinances prohibiting blacks to go out after a certain time without written permission from their masters; rules forbidding assemblies of blacks and mulattoes (e.g. a burial could not be attended by more than 6 people); regulations stating that blacks could not carry weapons of any sort, not even sticks; rules indicating that free blacks had to register for taxation, could not live with white women, nor buy alcohol, etc. Moreover, Watson points out that a master willing to manumit a captive had to obtain permission from the Edele Hove van Politie, the local Police Department. This bureaucratic step was introduced to make sure that the former slaves would be able to earn a living by themselves, without having to recur to theft to survive after manumission.

In summary, the direct legal borrowing from the CJC and the consequent lack of legal personality for slaves had a direct effect on limiting blacks' integration into the Dutch colonial society.

6.2.6 Portuguese slave law

In the case of Portugal, the situation was again different. The Portuguese had received the Visigoth Code, which inherited the institution of slavery from the Romans. However, with exception of some Moorish captives, not many slaves were present in the territory after the *Reconquista* (Watson 1989: 91).

Andrés Gallego (2005: 246–247) highlights that the Portuguese legislation was the closest to the Spanish one (see also Tannenbaum 1946). He indicates that this was partially due to the fact that the law that was promulgated for the establishment and organization of the Portuguese colonies in the Americas (*Ordenações filipinas*) had been promulgated by Philip II, a Spanish king, who in the sixteenth century ruled both Portugal and Spain.

In line with the Spanish colonies, the Portuguese territories overseas received the homeland law via *accessio*. In this specific case, the law consisted of the *Ordenações filipinas*. This code, as well as the *Siete Partidas,* was rooted in the Roman *Corpus Juris Civilis*. The *Ordenações filipinas* indicated that "the owner could only punish a slave, as a father a son, or as master a servant" (Watson 1989: 100). However, this supposedly 'kind' treatment imposed on slaveholders by the code in some parts of the legislation was, at the same time, explicitly contradicted in others. In fact, "owners were permitted to mutilate slaves until 1824. A regulation of 1830 prohibited administering more than fifty lashes of the whip at any one time. (As a result, punishment might be spread over a long period)" (Watson 1989: 100).

In theory, slaves could not be treated cruelly; however, they did not have legal personality and therefore they could not complain in front of a judge in case of mistreatment. The only case in which they could act in a legal court had to do with issues related to religion, such as marriage. In fact, while in Roman Law slaves could not marry, due to the influence of Christianity on the Portuguese legislation, marriage between slaves was considered valid in Brazil and slave family members could not be separated, so that husband, wife and children could not be sold individually.

The legislation concerning slaves' ability to file lawsuits was a bit opaque. In fact, a slave could not take his master to court; nevertheless, if for some reason it was made clear to a judge that the master was vicious, the slave could request to be sold to a different owner (Watson 1989: 100).

Manumission was not as strictly regulated as in the French and English colonies; it only required the will of the master to free his slaves. As in Roman Law, some restrictions could apply to prevent fraud in case the masters had debts. The amount of money needed by a slave to buy his/her own freedom had to be established in line with a fair market price. Watson (1989: 99–100) and Andrés-Gallego

(2005: 247) also point out the peculiar situation in which a slave would be manumitted by the royal house if he found a diamond of twenty or more karats, or if he denounced his master to the justice in case of illegal traffic (especially concerning products such as diamonds, gold, and precious wood).

Similar to the Spanish system, the *peculium* was contemplated by the Portuguese legislation; nevertheless, it was implemented in a different way, which highly limited the slaves' chances of saving money to achieve manumission. In fact, we saw that since 1541 some sort of compulsory *peculium* had to be provided to slaves in the Spanish Indies; on the other hand, in the Portuguese colonies it was not obligatory, so that only some slave owners would agree to concede it to their captives.

When we compare the Portuguese scenario with the Spanish one, certain similarities emerge. The early reception of the CJC by the Portuguese system, the presence of slave marriage, the possibility of obtaining the *peculium* and of being manumitted, as well as the pressure exercised by the Catholic Church had an effect on the lives of slaves, who were treated – to a certain extent – as human beings. These common patterns may have had a key influence on shaping the nature of the Afro-Portuguese varieties spoken in Brazil. Indeed, a detailed sociohistorical and legal investigation on the nature of Brazilian slavery may be able to cast new light on the debates concening the (non)creolization of Portuguese in a Latin American country, which, in line with Jamaica and Haiti, experienced massive introduction of enslaved labor force during the colonial period (cf. Guy 1981, 2004; Holm 1992, 2004; Naro & Sherre 2000, 2007; Lipski 2006; Lucchesi, Baxter & Riberio 2009). Nevertheless, the lack of legal personality for Portuguese slaves set a crucial difference between the legal status of Portuguese and Spanish captives; as a result, Brazilian slaves faced harsher social and economic barriers than the captives living in the territories under Spanish control.

6.3 How did legal personality affect Spanish slaves' living conditions?

So far this chapter has focused exclusively on the documentation concerning the formal aspect of slavery, as it was stated in the legal rules, "law in books", rather than the practical application of such rules to a specific social context, "law in action" (Pound 1910). In the present section, I will try to bridge the gap for the Spanish colonies overseas. This attempt, however, will always be – at best – an approximation of the reality, since it is materially impossible to provide a perfect picture of the past. As historian Crespo (1995: 7) pointed out in his book *Esclavos negros en Bolivia* (Black slaves in Bolivia), '*La historia es siempre una aproximación*' (History is always an approximation). I believe that this statement is

particularly true when one is exploring a delicate topic as the Atlantic slave trade and is faced with only partial and scattered pieces of information (see Sessarego 2013d: 363–364). This section attempts to put together some of these pieces to show that Spanish slave law, and in particular, the singularity of the legal personality of Spanish slaves, may have set apart these captives from the rest of the enslaved Africans living in other European colonies. This attempt, however, does not pretend to provide *the* answer to all the questions that gravitate around the Spanish creole debate; rather, what the Legal Hypothesis of Creole Genesis means to do is to highlight that a concomitance of factors conspired against the formation of Spanish creoles in the Americas, and that the Spanish legal regulation of slavery played a *major* role in this scenario.

This section consists of four parts. In the first one, I will provide a list of comments from a variety of colonial diplomats, clerics, and travelers who – at their time – compared Spanish slavery and its colonial regulations to the conditions to which slaves were subjects in other European colonies. Such a list of statements may provide a general and impressionistic account of how the Spanish 'law in books' might actually have been reflected in the social reality, or at the very least, of how such a reality might have been perceived by these observers in colonial times. The second part will try to show how the slaves' rights deriving from the presence of legal personality (in particular: property, family, the right not to be abused, and access to juridical means) are actually reflected in the available historical evidence we have for colonial Spanish America. These two different sources of information will provide us with a more precise picture of how "law in books" translated into "law in action". This will not provide a perfect reconstruction of colonial reality, but should, at least, help us get a closer look into it. The third section takes us back to Peru, to see how the general patterns illustrated in the preceding two parts apply to this specific Andean country. The forth section zooms into three particular colonial contexts, which have caused much debate in the field of creole studies: Cuba, Chocó (Colombia), South Carolina and Barbados. Such regions, where "law in books" may have deviated quite significantly from "law in practice," can be used as a powerful testing ground for the Legal Hypothesis of Creole Genesis; thus they will help us understand to what extent this hypothesis may make valid predictions.

6.3.1 Historical remarks on Spanish slavery in the Americas

It is not an easy task to understand to what extent the "law in books" has an effect on the "law in action" and therefore on the social reality at any point in time; however, if we look at the overall literature on Latin American history, we can

find numerous remarks made by observers of the time who highlight how Spanish slave law was supposedly less harsh than slave regulations in other European colonies. Andrés-Gallego (2005: Ch. 6) provides a variety of examples that suggest that Spanish slave rules were less harsh than those of other European powers and that this clearly benefitted Spanish slaves' living conditions. He (2005: 242) quotes a statement by the scientist Don Felix de Azara, who in the 18th century indicated that Paraguayan slaves were not treated as harshly as in other European colonies:

> No se conocen esas leyes y esos castigos atroces que se quieren disculpar como necesarios para mantener a los esclavos dentro de los límites de sus deberes.
> (Those laws and those cruel punishments that some people want to justify as needed to keep the slaves under control are unknown in this region).

Another case mentioned is the one by Alexander de Humboldt, who commented on the slaves of Mexico during his trip across the Americas (1799–1805) with the following words (2005: 242):

> Se hallan como en todas las posesiones españolas, algo más protegidos por las leyes que los negros que habitan las colonias de las demás naciones europeas. Estas leyes se interpretan siempre a favor de la libertad, pues el gobierno desea que se aumente el número de negros libres.
> (As in all Spanish colonies slaves are more protected by the law than in other European territories. These laws are always interpreted in favor of freedom, the government wants the number of free blacks to increase).

Andrés-Gallego (2005: 242) also reports a remark made by Jeronimo José Salguero, consultant of the Audiencia de Buenos Aires in 1807. Mr. Salguero commented on a case of poor slave treatment that took place under his jurisdiction; he reflects on the evolution of slave law in the Latin American territories and compares it to the *Corpus Juris Civilis*:

> Tanto más acreedor es un esclavo entre nosotros a un tratamiento suave y piadoso, cuanta es la diferencia de servidumbre, y sus motivos, entre los que conoce nuestro derecho y la que usaron los romanos.
> (A slave is entitled to receive a softer and more sympathetic treatment among us than among the Romans; this is a reflection of the difference between our law on serfdom, and its reasons, and the Roman one).

Similar remarks on the less harsh treatment applied to Spanish slaves in Venezuela also come from an anonymous observer at the beginning of the 19th century (2005: 243):

> El negro esclavo en Venezuela no es un ente aislado en medio del género humano, sin recursos, sin protección, sin bienes, sin esperanzas: no es en nuestra consideración un ser condenado perpetuamente a la fatiga y a las privaciones. Si en otros países los esclavos pueden existir en tan duras situaciones, en Venezuela las leyes, los magistrados y los intereses personales y comunes de los amos, más sabiamente calculados, les proporcionan para su conservación descanso en la fatiga, vínculos en la sociedad y contento en su condición.
> (The black slave in Venezuela is not an isolated individual, without resources, without protection, without goods, without hope: from our point of view, he is not a being perpetually condemned to hardship. If in some countries slaves are subject to such harsh conditions, in Venezuela the laws, the judges, and the smartly calculated individual and community interests provide slaves with rest from hardship and better chances of becoming part of society so that they are happy in their condition).

One century later, in 1911, still in Venezuela, Núñez Ponte, in his work *Estudio histórico acerca de la esclavitud y de su abolición en Venezuela* (Historical study on slavery and abolition in Venezuela), comments on the laws that would punish slave owners who did not respect slaves' rights and on the possibility for captives to rely on the legal assistance of a state lawyer, who would provide them with his services for free (*procurador de pobres*, also known as *procurador de negros*) (2005: 243):

> Ni tampoco usaron los españoles con sus esclavos de demasiada sevicia; […] Había leyes altamente filantrópicas que […] en algo suavizaban el rigoroso destino de los negros, y señalaban penas a los señores que en demasía les torturaban; y un procurador de pobres ejercía gratuitamente la función de defenderles cuando se hubiese menester.
> (The Spaniards did not abuse their slaves too much; […] there were highly philanthropic laws that softened blacks' living conditions, and indicated punishments for the masters who mistreated them; and a *procurador the pobres* defended them freely whenever it was needed).

Andrés-Gallego (2005: 244) also quotes historian Fernando Ortiz (1916), who in the same century highlights how British and French captives underwent much harsher treatments than Spanish slaves:

> Muchos suplicios descriptos por viajeros de las colonias francesas e inglesas […] demuestran o que su celo antiesclavista o narrativo les hizo presentar como frecuentes, hecho del todo desusados, o que la esclavitud en aquellas pequeñas colonias antillanas era mucho más cruel que entre los españoles, circunstancia esta muy verosímil y creíble dada la gran abundancia de documentos justificativos de la refinada crueldad de los plantadores de las otras colonias de las indias.

> (Much of the tortures described by travelers who visited the French and English colonies […] show that either they were common there, and not here, or that slavery in those little Antillean colonies was much more cruel than among the Spaniards; this is quite realistic and believable given the abundance of documents showing the sophisticated cruelty of those Caribbean planters).

All these quotes suggesting that Spanish laws were less brutal than other European regulations and that such a legal difference was clearly reflected on the real living conditions of colonial slaves are not isolated remarks systematically selected by historian Andrés-Gallego. The literature on the legal history of Latin America is replete with such comments (see for example Mac-Lean y Estenos 1948; Genovese 1967; Finley 1980; Berlin 1997; Bryant 2005; etc.).

Lucera Salmoral is arguably one of the most knowledgeable historians with an expertise in colonial Latin America and black slavery (see for example Lucena Salmoral 1994, 1999, 2000a, b, 2002). To exemplify how the differences in the legal and social structure of the Spanish territories overseas would be reflected in the actual reality of such a colonial scenario, Lucena Salmoral (1994: 63) quotes a letter dated March 31, 1794, from the *Consejo de Indias* describing the fundamental differences between Spanish, English and French colonies in the Americas. The *Consejo*'s director of several departments (La Habana, Santo Domingo, Louisiana, Caracas) indicated that the French and the English imported on average 50,000 *bozales* yearly (25,000 each). This was done to maintain a constant number of workers, many of whom died from the harsh living conditions. On the other hand, Spanish colonies had relatively high birth rates and a longer life expectancy; this reduced the need for new *bozales*. The reduction in the number of slaves in Hispanic America was due to the relatively high manumission rate. Moreover, interethnic marriages were allowed, giving birth to mixed-race individuals (*castas*), some of whom were free:

> Entre los españoles se disminuye el número de esclavos por la facilidad con que se libertan, pero no porque parecen entre los rigores de un trato inhumano, pues en el fondo las varias castas, llamadas gentes de color, que deben su origen a la esclavitud.
> (Amongst the Spaniards the number of slaves tends to decrease because it was easier to achieve manumission, but not because slaves would die due to inhumane working conditions, this gave birth to a variety of mixed races, called colored people, who originated from slavery).

As we can see, a variety of colonial observers, from different Spanish territories across the Americas, agreed that the Spanish slave law was less brutal than the one designed by other European colonial powers in the Americas and that such legal differences had a clear impact on the living conditions of slaves: less harsh

treatments (because harsh treatments were punishable by law), more opportunities to integrate in society, the possibility of recurring to legal means (*protector de pobres/esclavos*) when their rights were not respected, higher rates of manumission, the possibility of interracial marriages (which also implies the recognition of marriage for slaves), etc.

These quotes may provide a general impression of how dissimilar legal systems might have influenced the lives of slaves in different European territories. The following section will try to corroborate these statements with actual instances of "law in practice" to show to what extent the singularity of the legal personality ascribed to Spanish slaves may have affected their living conditions in relation to three main spheres of their life: owing property, right to a family, and right to not be punished too harshly.

6.3.2 The legal practice of Spanish slavery

A crucial aspect of African slavery in Spanish America was the importance given by the Crown to the fact that slaves were human beings with souls (Watson 1989). As Bowser (1974) correctly pointed out, masters had to baptize their slaves and provide them with Christian education. By law, slaves could not work on Sundays and during religious festivities. Many religious groups, in particular the Company of Jesus (the biggest Latin American slaveholder), put a lot of emphasis on the Christianizing mission of the Spanish Empire. Language teaching was often seen as a key means to achieve the correct reception of the Christian faith. In fact, it was compulsory for all slaveholders in Spanish America to provide their slaves with Christian education and to teach them the Spanish language. If a master was caught violating such a requirement, he would have been forced to pay high fees (Watson 1989).

To exemplify how slaves had to be treated and educated in the Americas according to the Spanish Crown, it may be insightful to look at the following three extracts, taken form a King's ordinance of 1545 (cf. Konetzke 1953: 237–238). Extract one shows clearly that the masters had to treat slaves in a human way, and even when punishing them, the castigation could not be unreasonably harsh.

> Primeramente se […] ordena que todos los señores de negros tengan cuidado de hacer buen tratamiento a sus esclavos, teniendo consideración que son próximos y cristianos, dándoles de comer y vestir conforme a razón, y no castigalles con crueldades, ni ponelles las manos, sin evidente razón, y que no puedan cortalles miembro ni lisiallos, pues por ley divina y humana, es prohibido, a pena que pierdan el tal esclavo para S.M. y veinte pesos para el denunciador.

> (First of all, we order […] that all the slaveholders take good care of their black slaves because they are related to us as Christians; masters should feed them and clothe them, they should not punish them cruelly, not even hurt them without a good reason; they are not allowed to amputate any parts of their bodies not causing them any permanent damage, since it is forbidden by both the divine and the human laws. If they do it, the slave will be taken away from them, and they will have to pay a fee of twenty pesos, which will be given to the denouncer).

The second paragraph stresses the importance of providing slaves with Christian education during the days off and to make hacienda workers pray on a regular basis:

> Item que todos los señores de haciendas […] tengan en ella un hombre blanco como mayordomo o mandador, el cual tenga cuidado que en dicha hacienda esté una casa o bohío como iglesia con su altar, con la señal de la cruz e imagines, y allí cada día por la mañana, antes que vayan los tales negros e indios a trabajar al campo, vengan a hacer oración […], y todos los domingos y fiestas, después de comer, habiendo aquella mañana tenido misa con el santísimo sacramento de la eucaristías, se junten en la dicha iglesia o casa de oración y allí les enseñen la doctrina Cristiana, de manera que estén instruidos en la fe; […] a los tales amos y señores de los dichos negros e indios, demás de que se les pone de treinta pesos, por cada vez que dicho señor Gobernador fuere a visitar la gobernación y no hallare que se cumple esta orden y que está en su costumbre cotidiana.
> (In every plantation […] there must be a white supervisor, who has to make sure that in the plantation there is a house or a hut functioning as a church with an altar, a cross and holy images, and in that place every morning, before going to work, blacks and natives must pray […], and every Sunday and celebration day, after lunch and after having attented the mass and having received the holy sacraments, workers have to get together and pray, they have to receive Christian education, so that they will be able to understand the faith; […] if the governor while visiting the plantation should realize that this regulation is not systematically respected, the owners will have to pay a fee of thirty pesos).

The third extract is of great importance from a linguistic standpoint. Spanish language teaching was in fact mandatory; the masters had to teach Spanish to their slaves within six months from the time of purchase. This was considered fundamental by the Crown to allow for a better understanding of the Christian faith:

> Item […] se les manda a cualquier señor de negro o negros, que como compren un negro esclavo, dentro de seis meses tengan cuidado como entrare en su poder, de hacelles aprender nuestra lengua vulgar y dalles a entender el sacramento del agua del santo bautismo y hacerlos bautizar y cristianar; pues todos los negros de su inclinación son amigos de los cristianos y fáciles de convertir a ello y lo tienen por presunción y valor ser cristianos como nosotros […] y si se le probare haber

> tenido descuido en esto y que se le ha pasado el dicho término y no ha procurado hacer lo que ansi arriba se declara, incurra en pena del valor de la cuarta parte del negro la primera vez, y por el Gobernador que fuere, le sea puesto otro término, cual le pareciere, para que lo haga; y si la segunda vez fuera remiso, pierda la mitad del valor del negro; y por la tercera todo el negro […] y si alguno que ansi comprare o hubiere en su poder el tal negro bozal y lo quisiere vender o trocar o enajenar antes de cumplidos los dichos seis meses, y no lo hubiere fecho cristianar, no lo pueda enajenar, sino fuere con el aditamento susodicho, y que el tal cargo tome sobre sí el que ansi después lo hubiere, so la dicha pena al uno y otro, vendedor y comprador.
>
> (It is mandatory for all slave owners to teach our common language to the slave within six months from the time of purchase; they also have to explain the meaning of the sacrament of baptism, they have to baptize them and teach them into the Christian Faith; indeed all the blacks are friends with the Christians, they are easy to convert and happy to become Christian […] and if there were evidence that after such a period of time the slave owner did not meet the aforementioned requirements, then he would lose one fourth of the slave value the first time; for the second time, he would lose half of the value; and for the third time, the whole value […] and nobody in possession of a black *bozal* can sell him, or exchange him, or cede him after those six months without having taught him into the Christian faith; if this were to happen both the giver and the receiver would be guilty and would have to pay the consequences for their actions).

From the early times of the Spanish colonization of the Americas, the Spanish Crown, pressured by the Catholic Church, stressed the importance of not punishing slaves too harshly and of Christianizing them, thus teaching them the Spanish language. The Spanish Crown was highly committed to achieving such goals and promulgated a great number of laws to address such issues in all the Spanish colonies overseas (see Konetzke 1953; Lucena Salmoral 2005). However, the question here is to understand to what extent such rules were actually enforced. Were these regulations just depicting "in books" a highly idealized slave status that was completely disconnected from "law in practice"? Or did such regulations really affect slaves' lives?

As we saw, a variety of observers from that time appeared to indicate that Spanish regulations significantly influenced slaves' living conditions and made them overall much better than the conditions in which black captives had to live in other European colonies. The historical data that emerge from colonial legal court reports also appear to support such a view. Nevertheless, arguing that all Spanish masters were always kind to their slaves would definitely provide a misleading picture of colonial black captivity. In fact, there is clear evidence that in many circumstances slaves were abused and treated cruelly by their Spanish owners (see Andrés-Gallego 2005: 176–185). However, it has to be said that both the

Church and the Crown managed to take away some of the power that masters had over their slaves. As Bryant (2004: 4) states "laws and royal edicts emanating from the metropolis [Madrid] encroached upon the master's domain while the clergy's determination to have exclusive authority in the administration of sacraments like marriage further eroded masters' authority over human chattel".

Historians working on Spanish colonial slavery were able to provide a variety of data clearly showing how captives' legal personality played a key role in providing blacks with better standards of living as well as more chances of climbing the social ladder (Watson 1989). Studies in the field are replete with documentation showing how slaves relied on the legal means available to them to fight for their own rights (Bryant 2004, 2005). In particular, they fought for the very basic rights stipulated in the *Leyes de Indias* such as: not suffering from unjustified punishment, the right to have a family, and the right to own property – especially in connection with the possibility of purchasing their own freedom. Indeed, many are the trials involving slaves suing their own masters for poor treatments. One of such trials is the case of Claudio and Bonifacio, two slaves who in 1798 appeared before the high court of Quito (Ecuador) to complain about the harsh treatments they received by their overseer in a mining camp near Barbacoa (current Colombia). After analyzing the case and realizing that the overseer was guilty of ill-treatment (*sevicia*), the judges transferred the case to the officials of Barbacoa to further explore how to provide Claudio and Bonifacio with protection for them and for their families (Bryant 2004: 33–34). Another case of mistreatment is the one of Ignacio, who belonged to Dr. Marcos Infante, and denounced his master in 1764 to the Governor of Córdoba (Argentina) because he punished him too harshly and without a proper reason. After an investigation, Ignacio succeeded in having Marcos Infante put in jail. In order to be set free, the master had to agree to sell Ignacio to a different owner (Andrés-Gallego 2005: 194).

There are also many records of colonial court cases concerning the right of slaves to have a family. Andrés-Gallego (2005: 214–215) mentions the case of a peculiar trial in San Miguel, Tucumán (Argentina) in 1764, where the local tribunal, in order to preserve a slave marriage, forced a master to pay a fifteen pesos fine and to sell his lover, an enslaved woman, who was already married to another slave. Another trial related to marriage was started by slave Pedro Pablo Moreno in 1770 in Lima (Peru). Pedro Pablo denounced his owner because he did not allow him to spend Saturdays and Sundays with his wife, who belonged to a different master. Eventually, after it was discovered that the master had also punished the slave for no real reason, the tribunal decided to take the captive away from such a violent owner and assigned him to a notary working for the same tribunal (Andrés-Gallego 2005: 194).

Also common were the trials related to property and manumission. One is reported by Andrés-Gallego (2005: 197) and concerns the appeal to the court of San Miguel, Tucumán (Argentina) made by slave Juana María Artaza, who sued her master, father of her kid, for not giving freedom to her and their offspring. In fact, Juana María accused the owner of promising her manumission if she agreed to have an affair with him. The court provided her with a *defensor de negros* who was able to find two reliable witnesses and won the case. The court decided that Juana María could achieve manumission if she managed to put together the relatively modest sum of two hundred pesos. Moreover, in order to protect her for her master, she was momentarily put under the control of a new owner, Fray Pedro de Artasar. Another case related to slaves' accumulation of property is the one of Joaquín, who in 1768 in Guadalajara (Mexico) was accused by his former owner, Don Carrete, of having accumulated one hundred sixteen pesos by means of stealing, so that Carrete felt justified to take such a sum away from Joaquín. On the other hand, Joaquín claimed that "los había ido juntando de premios que le daban los que hacían empleos" (he put the pesos together by receiving over time the right compensations for his work). After a trial that lasted exactly one year, the court decided that Joaquín was right and that Carrete had to refund the money he took from him (Andrés-Gallego 2005: 199–200).

As we indicated in Chapter 5, Andrés-Gallego (2005: 208) suggests that urban slaves could recur quite easily to the *protector de negros* to sue their masters. He even suggests that in some cases they would do it to gain time off from work (2005: 210). This author also highlights that of all the legal cases he examined during the decade 1760–1770, the vast majority was favorable to the slaves' requests (2005: 218–219). Obviously, it would be naïve to think that all black captives in Spanish America could easily recur to the *protector de esclavos*. In fact, it is true that not all slaves could enjoy the same degree of legal protection. Those who lived closer to the capitals or to big cities had more access to legal means to sue their masters than those who lived further away (Andrés-Gallego 2005: 202, 221–223). Nevertheless, even assuming that some owners would manage to violate slaves' rights and prevent their captives from taking them to court, the number of blacks who succeeded in obtaining justice was amazingly high, especially if compared to the rest of the other European colonies, where slaves – deprived from legal personality – did not even have a chance to do so. Andrés-Gallego (2005: 217) rephrases Meiklejohn's (1981: 192) words to illustrate this concept:

> Aun suponiendo que – como es verosímil – hubiera amos que maltrataran a sus esclavos y consiguieran impedirles que los denunciasen, y procuradores que no se quisieran malquistar con aquellos, el número de esclavos a quienes se hizo

> justicia y el número de procuradores que cumplieron con su deber defendiéndolos, concretamente en Santa Fe de Bogotá durante el siglo XVIII, es simplemente *impressive*.
> (Even if we suppose that – as it was probably the case – there were slave owners who mistreated their captives and managed to prevent them from filing a lawsuit, and lawyers who did not want to help them, the number of slaves who received justice and the number of lawyers who did their job in Santa Fe de Bogotá during the 18th century is just *impressive*).

It is true that slaves working in remote areas, far away from cities, would have had far fewer chances of enforcing their legal rights than urban captives. However, it should also be pointed out that a great percentage of the slaves used in rural areas belonged to the Company of Jesus, which in some colonies owned more than one fourth of the total number of slaves (see Andrés-Gallego 2005: 188). The Jesuits, as is well-known, implemented a working system that strove to maximize slaves' productivity and loyalty while minimizing the risks of revolts. To do so, they respected captives' rights and adopted a managerial strategy with blacks that has been repeatedly identified as less brutal and more humane than the one of other masters in the Americas (see Macera 1966; Andrés-Gallego 2005: Ch. 5). They facilitated language acquisition through systematic Christian indoctrination, supported slave marriage to incentivize and preserve the creation of slave families, provided each family with a house and a piece of land to work for its own benefit, thus favoring the accumulation of property and a certain degree of social flexibility. These tactics had the final goal of developing stronger bonds between the slaves and the *haciendas* (Bouisson 1997; Bryant 2005; Sessarego 2014b).

Even though we have seen how a variety of observers' remarks and court reports show that the Spanish slave "law in books" had a clear effect on the "law in practice", we must also accept that sometimes such regulations might not have been systematically applied, so that – in some cases – a fair *peculium* might not have been paid to a captive, some slaves might have been mistreated without a reason, a married couple might have been separated against the law, etc. Nevertheless, besides those infractions, which may happen in all societies and are quite difficult to quantify at this point, it must be *stressed* that the aforementioned actions were considered illegal in Spanish America (and therefore punishable by law), while in the remaining European territories they were not seen as infractions at all; rather, they were perfectly in line with the legislation. This simple fact must have played a key role in the way black-white social relations developed in the Americas. Believing that in practice no real difference existed among all these European colonies with such heterogeneous slave laws would be a big historical mistake.

The way slave law was set in Spanish America provided black captives with more chances of improving their social conditions than any other legal system

did. This, inevitably, had an effect on the slaves' integration into colonial society.[42] Unlike other European slaves, Spanish captives were legal persons. Thus, they had a precise set of rights and duties. Latin American Spanish slaves could own property, as they could accumulate financial recourses. They were entitled to a *peculium* and could enter contracts such as *coartación* to better achieve manumission. They had the right to a family. They could not be mistreated without a reason and could take other people to trial (even their masters) if their rights were not respected.

Conversely, in the remaining European colonies, black slaves did not have legal personality; thus, all the aforementioned rights were either absent or highly restricted. Moreover, we observed that in some legal systems the public sphere of slavery was much more emphasized and regulated than in the Spanish and Roman traditions, so that limitations were also imposed on slave owners, who, in some cases, were forbidden from treating their slaves better than what the law had established. The Spanish colonial administration, on the other hand, was not generally interested in the public aspect of slavery. Overall, the Spanish Crown was not much concerned with segregating the blacks or forbidding black/white racial mixing. The lower the level of public regulations on this aspect of interracial relations, the more open and (consequently) the more socially tolerable would be sexual relationships, not necessarily excluding marriage, between blacks and whites. And the more tolerable such mixed families became, the more socially acceptable the offspring of mixed race would be. All these elements (in one way or another deriving from the notion of legal personality) undoubtedly had a significant effect on influencing the essence of Afro-European relations in the Americas and (ultimately) on shaping the nature of the languages that developed from such contact.

6.3.3 Back to Peru

The same kind of observers' comments and court cases reported in Sections 6.3.1 and 6.3.2 to testify to the effects of legal personality on the living conditions of Spanish slaves across the Americas can easily be encountered for Peru as well. For example, the British traveler Stevenson (1828: 42–43; cf. Andres-Gallego 2005: 273), who spent some twenty years in the Americas during the first decades

42. Schwegler (p.c.) does not agree with this claim. He thinks that this does not explain why slaves would escape, if it is true that they had inalienable rights. At this point I wish to punctualize that the sociohistorical evidence we have indicates that, overall, the Spanish system provided slaves with more rights and chances for integrations than any other European system. This is not to say that Spanish slaves had a great life, thus it is understandable that they might have tried to run away.

of the 19th century, indicated that the way slaves were treated in Peru was much better than in any other country he had ever visited. He even stated that Peruvian slaves lived better than many European farmers in the Old World. He used the following words to describe the condition of black slaves on Peruvian plantations:

> Si les esclaves de tous les pays pouvaient être traîtés de la même manière que ceux que j'ai été a portee de voir au Pérou, pendant le séjour que j'y ai fait, leur sort serait, sans contredit, plus heureux que celui de beaucoup de paysans de l'ancient monde.
> (If the slaves in all the countries could be treated the way I saw people treat them in Peru, they would be, without any doubt, better off than many farmers working in the Old World).

Obviously, these remarks should be taken with a grain of salt. In fact, given the cases we know of mistreatment (cf. Andres-Gallego 2005: 176–185), it is hard to believe that Peruvian slaves working on plantations had such a great life. Nevertheless, if we analyze these words considering the perspective of a European man who traveled for several years across English, French and Spanish colonies in the Americas at the beginning of the 19th century, we may infer that overall the Peruvian slave had a much better life than black captives working on either English or French plantations.

In addition, if we examine the court cases concerning slavery for colonial Peru, we can easily find all the typologies of legal actions related to the presence of slaves' legal personality, as we found for the other Spanish colonies. Peru, in fact, was one of the Spanish Viceroyalties in the Americas, it was an important colony and administrative hub in the Spanish Empire; for this reason, colonial archives are replete with legal documentation and slavery-related trials have been brought to light and studied by several historians focusing on colonial Latin America (cf. Lockhart 1968; Bowser 1974; Lucena Salmoral 2000a; Andrés-Gallego 2005; etc.). Indeed, the socioeconomic and legal dynamics that emerged in Chapter 5 of this book, when we described the slaves' living conditions in colonial Peru, appear to parallel perfectly the overall scenario encountered in the rest of the Spanish colonies, as testified by the cases reported in Section 6.3.2. Therefore, the same kind of situations picturing slaves involved in legal actions over property rights, manumissions, marriages, mistreatments, etc. can be easily encountered. For example, we mentioned the case of Juan de Fregenal, a black man who purchased his freedom and then became a successful business man (cf. Lockhart 1968: 194–195); the group of black freedmen who managed to acquire lands in Carabaya and became hacienda owners (cf. Lockhart 1968: 192); the trial started by José de la Trinidad, who sued his master because of the excessively harsh working conditions he imposed on him (cf. Andres-Gallego 2005: 208); or the example of

Domingo Barrueta, who forced his owner to sell him so that he could live close to his wife (cf. Andres-Gallego 2005: 211). These are only some among the many cases that could be cited (for a more detailed account cf. Lockhart 1968; Bowser 1974; Lucena Salmoral 2000a, b; Andrés-Gallego 2005).

These data show that in Peru the socioeconomic and legal dynamics of slavery did not diverge much from the general patterns found in other Spanish colonies overseas. Nevertheless, this system – quite homogeneous within the Spanish Empire – significantly differed from the legislations found in other European colonies. This marked contrast, which eventually boils down to the presence/absence of slaves' legal personality, represents a crucial factor to explain the reasons behind the genesis and evolution of Afro-European contact varieties in the Americas.

6.3.4 Three case studies to test the Legal Hypothesis of Creole Genesis

This section provides an analysis of some case studies that may be used as a powerful testing ground for the Legal Hypothesis of Creole Genesis: post-sugar-boom Cuba, seventeenth century South Carolina and Barbados, and seventeenth century Chocó (Colombia). Before proceeding to the analysis of these scenarios, I must stress one more time that this hypothesis is not claiming that slaves' legal personality is the *only* reason why Spanish creoles did not develop in Spanish America; the Legal Hypothesis of Creole Genesis, in fact, does not deny the fact that demographic, economic and logistic factors played a major role in shaping colonial societies and their languages. What this hypothesis is actually claiming is that an additional factor that should be added to the aforementioned list is the legal one. Indeed, this factor set Spain apart from the other European colonies involved in the colonization of the Americas and had obvious effects on the evolution of colonial social and linguistic dynamics.

6.3.4.1 *Cuba*

As observed in Section 2.3, Clements (2009: 68–101) has recently provided a linguistic perspective on the evolution of Cuba's colonial economy and demographic figures during the colonial period. He showed – in line with Mintz (1971), Laurence (1974), and Lipski (1993) – that until the 1810 the country's production system was primarily based on small haciendas, which did not rely massively on enslaved labor force. Nevertheless, after the sugar boom of the nineteenth century, a shift in the terms of production took place, so that a plantation system requiring a high number of African slaves was implemented. Additionally, given the reported cases of widespread violence (cf. Blackburn 1997), it has been suggested that "the brutal exigencies of sugar cultivation obliterated any significant affection

or clemency towards black slaves" (McWhorter 2000: 36). So, if the sugar boom of the nineteenth century had turned Cuba into a plantation society similar to those found in Haiti and Jamaica, why is it that we do not find a Spanish creole in Cuba, but we do find creoles in the former French and English colonies? And how can the Legal Hypothesis help us understand this situation?

To answer these questions, it is important to analyze the socio-historical scenario that preceded the sugar boom. In fact, it has been shown that besides an exception for a short period around 1532, blacks never outnumbered whites in Cuba until 1811 (Masó 1976: 115; Clements 2009: 77). Clements (2009: 81) indicates that the restrictions on slave trading imposed by the Spanish crown highly constrained the introduction of African slaves into the island for several centuries so that the local economy had to rely primarily on the sectors that did not need much workforce, such as tobacco and cattle raising. Moreover, besides the demographic factor, Clements points out a few other elements that may have reduced the likelihood of creole formation on the island; in particular he stresses the presence of a higher numbers of manumissions and the emphasis placed by the Spanish authorities on Catholic education, which indirectly implied language teaching.

Therefore, a prior stage of *société d'habitation* would have favored language acquisition among the black workers (Chaudenson 2001); when the sugar boom imposed a large-scale plantation system, the recently arrived masses of African slaves did not creolize the Spanish spoken in Cuba; rather, the new *bozales*, who were numerically inferior to the local population, just learned the language spoken by the slaves who were already working on the islands (Lipski 1993, 1998). In line with what shown by Mintz (1971) and Laurence (1974), these socio-economic data may account for the non-creolization of Cuban Spanish. But how can we gain any additional insights by focusing on the different European slave laws at a time when Cuban law in books may have differed from Cuban law in action?

It must be said that an economic shift in the manner of production (from a system of small farms to one of big plantations) did not necessarily imply a complete change in the social and cultural habits of the people living on the island. To be sure, neither did it completely dismiss all the rights related to slaves having legal personality, nor did it remove the acceptability of mixed-race people in society (Watson 1989; Andrés-Gallego 2005). Indeed, even after the sugar boom, the Spanish Caribbean differed quite significantly from the English and French Caribbean societies.

Self-purchased manumission, *coartación,* was still in place in colonial Cuba, even after the sugar boom (Lucera Samoral 2005; Andrés-Gallego 2005). It must be stressed that the practice of manumission did not necessarily have much to do with a "kinder, gentler" attitude; it had been designed in Roman times as an incentive to work harder. When a slave was manumitted, his Spanish master did not

lose any money since the amount paid would be enough to buy another captive. What is more; the incentives generated by this legal instrument in the workforce were definitively beneficial to the owner; the reasons why such a practice was so restricted by the English and French legislations had more to do with the fact that those systems were more concerned with regulating the public sphere of slavery than the Spanish one, they were much more segregated and strictly forbade interracial mixing. On the other hand, even after the sugar boom, it was common for white men and black women to have intimate relations and mixed-race marriages were not exceptional, such that a free mulatto group, capable of speaking Spanish, kept growing.

Even though Christianizing all the recently arrived *bozales* was not an easy task, and in certain cases proved impossible (cf. Andrés-Gallego 2005: 117), certain legal and social practices promoted by the Catholic Church (i.e. slave marriage; family preservation; etc.) were so deeply rooted in society that attempting to break such social conventions would have caused major turmoil. This is not only true of the Cuban sugar boom; it can be observed in a variety of other Afro-Hispanic contexts. When the Company of Jesus in 1767 was expelled from the Spanish colonies, it had to leave behind its haciendas and its slaves. Those properties were subsequently dismantled and sold to individuals. It is well known that the riots that took place in Chota Valley (Ecuador) and Chincha (Peru) in those years were the result of the irresponsible actions of certain government administrators who tried to sell individual slaves to the highest bidders without taking into account the family rights that had been bestowed upon those communities for centuries (Sessarego 2013a, 2014c). The sudden attempt to remove a right taken for granted by society inevitably led to social unrest.

As a result of this Hispanic legal and cultural heritage, even after the sugar boom, the hierarchical structure of society in Cuba was much more flexible than that found in the French and English territories and, for this reason, Spanish slaves could more easily climb the social ladder. Even though the Cuban economic system eventually became more similar to the one in place in French Haiti and English Jamaica, its Spanish social conventions and cultural habits – rooted and reflected in the Spanish law – did not converge with the English and French ones.

In summary, the evolution of slavery and its legal codification within the Spanish system had a deep effect on the development of Spanish society for centuries. A rapid change in the means of economic production in the nineteenth-century Spanish Caribbean did not wipe away such a cultural background. It definitely imposed stricter constraints on the practical fruition of some rights (i.e. manumission might have been more difficult to achieve), but it could not remove certain customs that belonged to society (i.e. slave marriages, family preservation, *coartación*, etc.) and the legal principles on which they had been based (i.e. slaves'

legal personality). This legal and cultural heritage, combined with the fact that the Cuban economy had been based for centuries on a system of small farms, did not lead to the development of a Spanish creole on the island during the sugar-boom phase of the nineteenth century.

6.3.4.2 *Barbados and South Carolina*

McWhorter (p.c.) claims that the Legal Hypothesis of Creole Genesis makes a scientific prediction: that *in colonies where criollos were common, no creole occurred.* He indicates that such a prediction cannot be accepted unless it is first tested. He proposes South Carolina as a testing ground since it is well known that a large proportion of the founding slaves brought to Charleston were from Barbados – that is, many of them had been born in the New World. Yet there is a creole there, Gullah – why did those *criollos* from Barbados speak a creole?

These are interesting points, which I would like to address in order to clarify potential doubts that the proposed hypothesis may generate. First of all, I wish to highlight that the Legal Hypothesis of Creole Genesis does not make any prediction on the *criollo* vs. *bozal* issue. As I have already indicated in this chapter, this hypothesis stresses the importance that the different legal systems had in shaping colonial societies and their languages; it does not address demographic issues such as whether slaves were born in Africa or in the Americas. This being said, I personally believe that demographic issues such as the *criollo* vs. *bozal* distinction are key to understanding the genesis and evolution of Afro-European languages in the Americas. Thus, in line with the Founder Principle (Mufwene 1996), I do think that a large proportion of the structure of today's contact languages was determined by the make-up of the founder populations. This does not mean that *criollo*s equals Spanish dialect, while *bozales* equals Spanish creole; it just means that if the founder population speaks a creole or speaks African languages and has little access to the European language, than a creoloid vernacular is more likely to be adopted by the community; while if the founder population already speaks a good approximation to the superstrate language or a minority speaks African languages and has good access to the European lexifier, then a creole language is less likely to develop and to be adopted by the enslaved group. In a society like pre-sugar-boom Cuba, where *bozales* supposedly had good access to Spanish, black captives could learn a good approximation to Spanish and a creole did not emerge; their offspring, which technically were *criollos*, acquired Spanish as their L1. Conversely, in other colonial settings (i.e. Jamaica or Haiti), even locally-born plantation slaves may have had little access to the European language, thus they acquired a creole as their native language.

Even though the *criollo* vs. *bozal* distinction is not directly related to the Legal Hypothesis predictions, the presence of a creole language supposedly proceeding

from Barbados in South Carolina may serve as a good testing ground for this model. McWhorter (2000: 107–108) claims that "plantations were small in Barbados as well until 1665"; thus, this would indicate – in his view – that the living and working conditions of slaves in Barbados were comparable to those of slaves in pre-sugar-boom Cuba. Consequently, if a creole did not develop in Cuba, then it should not have developed in Barbados either. According to McWhorter, such a creole must have arrived to Barbados from somewhere else: West Africa.

It is here where the Legal Hypothesis of Creole Genesis clashes with the Afrogenesis Hypothesis. The Legal Hypothesis of Creole Genesis predicts that, even in similar demographic settings, the life of a slave in Spanish America differed quite significantly from the life of a slave in English America. The South Carolina and Barbados examples are particularly well-suited for this test. Indeed, as I have indicated in Section 6.2.3, the South Carolina statute on slavery from 1690, called the "Act for the Better Ordering of Slaves", was in great part borrowed from the statute of Barbados of 1688 (Watson 1989: 68–69). All the rights that legal personality provided to slaves in the Spanish colonies were strictly forbidden in these two English-controlled regions: slaves could own no property, no *peculium* was allowed, they could not marry, family members could be sold as individual tokens, slaves could not sue their masters, no racial mixing was allowed, etc. Moreover, in the original statutes of Barbados and South Carolina manumission was not even an option. Additionally, the states strongly intervened in the regulation of the public life of slaves: slaveholders could not provide their slaves with extra benefits beside those allowed by the law, pre-established punishments had to be inflicted in case of disobedience, etc. If it is correct to say that the Spaniards were not any kinder or gentler to their slaves, it is also right to state that the intervention of the English legislators was definitely crueler and rougher.

Given the radically different social dynamics entailed by these divergent slave laws, it is no surprise that the Barbadian and South Carolinian societies may have been more conducive to creolization and/or preservation of creoles than the Cuban one. While I have some serious doubts about the possibility that virtually all English-based creoles and French-based creoles would have developed from one French and one English pidgin (from the Île the Bieurt, Senegal, and Cormantin Castle, Ghana, respectively) (McWhorter 2000: 111, 173), I do not deny that certain contact vernaculars may have spread from one region to another and that certain plantations did not necessarily *create* creoles but *preserved* them (McWhorter 2000: 205). On this specific issue, I think, some points of convergence may be encountered between the Afrogenesis Hypothesis and the Legal Hypothesis. Indeed, the Legal Hypothesis may help explain why certain colonial settings might have been more likely to preserve creoles than others (i.e. providing incentives/motivations to learn the European language and/or the creole). What I find limiting

about the Afrogenesis Hypothesis is the assumption that only African-born pidgins may have seeded the American land to grow into fully-developed creoles, and that virtually no qualitative difference among colonies would play a role in the creolization process, thus basically implying that no significant dissimilarities existed among slaves' living conditions across the different European territories in the Americas.

6.3.4.3 *Chocó*

Chocó Spanish is spoken by the descendants of the slaves taken to the Colombian Pacific lowlands during colonial times to work the rich gold mines of the area. The socio-historical scenario that characterized colonial Chocó seems to have been ideal for a full-fledged creole language to develop: a low whites to blacks ratio, harsh working conditions in labor intensive mines, massive introduction of African-born workers, and minimal access to the outside Spanish speaking world (McWhorter 2000: Ch. 2). For this reason, McWhorter claims that this is the prototypical "missing Spanish creole", which would prove that creoles were not created on American plantations/mines due to the lack of access to the European lexifier; since, "if they were, Chocoanos would speak a creole" (McWhorter 2000: 205).

This region offers another valuable testing ground for the Legal Hypothesis; in fact, Chocó Spanish developed in an area described by many as 'remote' and 'on the frontier' (cf. Whitten 1974; Sharp 1976), thus far away from legal courts and where law was not likely to be properly enforced. So, why do we not find a Spanish creole in Chocó? Did the Spanish legal tradition play any significant role?

Again, as in the Cuban case, the Legal Hypothesis does not deny the importance of other economic, logistic, and demographic factors. Thus, to understand why Chocoanos speak a dialect of Spanish rather than a Spanish creole, a brief socio-historical analysis is due.

The colonial and post-colonial history of Chocó is strongly connected to the socio-political development of its surrounding regions. In fact, the powerful colonial miners residing in Antioquia, Cali and Popayán were those who pushed the Spanish colonial enterprise toward this remote frontier – conquering and exploiting the region, which was one of the richest mineral areas of the Americas. In particular, the principal actors in this conquering enterprise were the mining families from Popayán, who, after several attempts to penetrate the region, finally managed to defeat and pacify the native populations by the end of the seventeenth century. From that point until the abolition of slavery in 1821, several white and mestizo entrepreneurs entered the region with their gangs of black slaves (*cuadrillas*) to exploit the rich gold mines of the province (Sharp 1976).

McWhorter (2000: 7–10) maintains that, if we believe the limited access model, Colombian Chocó would have been the perfect place for a Spanish creole to

develop. He supports this claim by reporting demographic data that indicate that by 1778 the ratio of blacks to whites was 5,828 : 175; thus the whites represented just 3 percent of the entire population (West 1957: 100, 108). This piece of information – at first glance – may appear to suggest that access to Spanish must have been very limited; however, a closer look at the available socio-historical evidence indicates the exact opposite. In fact, the ratio blacks to whites does not tell us much about the languages spoken by those two ethnic groups. For example, it would be a mistake to assume that the blacks in Chocó were all *bozales* who spoke African languages. On the contrary, from the very beginning of the mineral exploitation of the region, the Spaniards brought with them the slaves they had used in previous mining enterprises (Colmenares 1997; Bryant 2005). Mining was not an easy job, and a certain number of experienced slaves, capable of understanding Spanish, was always required. Such a practice was not only found in the mining sector, indeed, as we saw for the Peruvian case, in the plantation business, skilled *criollo*s were also commonly transferred from hacienda to hacienda (Flores Galindo 1984: 28; Sessarego 2014c: 102), in line with the logic behind the supposed relocation of Barbadian slaves to Suriname and South Carolina (McWhorter 2000: 107). In addition, if we pay attention to slave transactions in Popayán, the biggest slave market of the Andes (Bryant 2005), we immediately discover that during the peak of the Chocó mineral exploitation (1690–1780), almost 60% of all the captives sold in Popayán were *criollos*, thus they did not proceed directly from Africa and were probably speaking good approximations of Spanish (Colmenares 1997). The sales of *criollos* and *mulattos*, in fact, were far more common in Popayán and in Chocó than in Cartagena (the biggest slave market in Spanish Americas receiving captives directly from Africa), especially when the supply of *bozales* was low: for example between 1690 and 1701, during the Succession War (1705–1710) and when there were interruptions with the supply of licenses (1715–1720, 1740–1745 and 1753–1759) (Colmenares 1997: 57).

As a result of this brief historical inquiry, I think we have enough evidence to cast some serious doubts on the analyses that depict Chocó as the perfect breeding ground for a Spanish creole to develop, at least if we consider the demographic factor. At this point, however, I would also like to show how the legal factor may have played an important role in shaping certain social, and – consequently – linguistic, dynamics in this remote region.

The historian William Sharp (1976) wrote an entire book on Chocó slavery: *Slavery on the Spanish Frontier: The Colombian Chocó 1680–1810*. One of the main goals of this manuscript is to test Frank Tannenbaum's (1946) claim that "slavery, as it existed in Latin America, was generally a milder institution than the systems practiced by other European colonial powers in the New World" (Sharp 1976: 5). One of the weaknesses of this proposal, as pointed out by some scholars working

Table 6.1 Slaves sold in Popayán 1690–1789 (% according to their age) (Colmenares 1997: 36)

Ages	Criollos (1,074 cases)	Bozales (749 cases)
0–5	7.0	0.2
6–11	13.5	2.8
11–15	22.3	25.5
16–20	27.9	39.9
21–25	14.8	16.7
26–30	10.0	9.2
31–35	1.8	2.9
36–40	2.6	2.7
Total	100	100
%	58.9	41.1

in the field of slavery in the Americas (i.e. Elkins 1959), was that Tannenbaum's analysis was primarily based on a legalistic approach, which completely lacked empirical archival investigation to understand to what extent "law in books" was reflected by "law in action". Therefore, to test such a claim, Sharp selected Chocó, one of the most remote regions of Latin America, where law enforcement was probably minimal. Sharp (1976: 127–145) dedicates an entire chapter to this issue: *Slavery in Chocó: Law and Reality*. He begins this chapter by stating that Tannenbaum's proposal was based on two main claims: (1) the Spanish legal system had in place a variety of regulations concerning manumission, marriage, family issues, punishments, law suits against the masters, etc. that would protect slaves against potential abuses; (2) the Catholic Church actively intervened in the relationships between masters and slaves, thus improving the captives' living conditions since "masters were admonished to protect the moral welfare of their slaves and see to their spiritual instruction" (Sharp 1976: 130).

Sharp strongly affirms that both conditions were missing in Chocó. On the one hand, slaves in Chocó could not receive much legal protection against abuses since the population in the area was too small to justify the expenses of sending government administrators into the region to systematically enforce regulations (Sharp 1976: 128, cf. McWhorter 2000: 37) while, on the other hand, there were very few clerics (only eighteen priests in a total population of 17,898 in 1789), to effectively have any significant effect on improving captives' living conditions (Sharp 1976: 131, cf. McWhorter 2000: 37). Nevertheless, a close analysis of the archival documentation available from the mining enterprises, including the local registers for manumission, marriages, etc., as well as the slave codes provided by the owners to the administrators to maintain order in the *cuadrillas,* indicates that all the basic slave rights derived by the notion of legal personality were

fundamentally preserved in Chocó. In fact, slaves worked in average 260 days a year, since during the remaining time they were off (a sort of *peculium*) to provide for themselves and their families (1976: 134); they could accumulate goods, gold and other properties to pay for their manumission (1976: 135), abuse of slaves was remarkably rare (1976: 136), they were instructed in the precepts of the Catholic religion (1976: 139), marriage was encouraged and family units preserved (1976: 140). Sharp stresses that these cultural habits, stated in the local slave codes and implemented by the administrators in their *cuadrillas* should not make us believe that the Spanish miners were gentler or kinder. On the contrary, "far from exhibiting human, legal, or religious values, the Chocó slave codes were very pragmatic" (1976: 140). Indeed, religion was seen as a tool to stress obedience as a Christian value; marriage and family preservation was a way of binding the slave to the mine, since escaping was much more difficult with a wife and children; providing captives with the means to feed themselves was a basic prerequisite if the owner wanted the slaves to be healthy and productive. All in all, better treatments also reduced the likelihood of black rebellions, which such a small white minority had to prevent as much as possible (1976: 141). These social dynamics, combined with the wealthy Chocó gold resources, provided black captives with incentives and opportunities to achieve manumission and thus become free people. Sharp (1976: 141–142) clearly states that:

> Manumission in Chocó was not only possible but occurred. In 1778, 35.44 per cent of the black population was free (3,160 of 8,916) […]. During the next thirty years the free black population increased by a remarkable 5.7 per cent a year. By 1808, 75.34 per cent of the black population in the Chocó was free.

Once again, we may observe that certain legal rights were so rooted in the Spanish colonial society that, even if no legal enforcement was effective in Chocó, those rules were for the most part respected as they belonged to social praxis. Indeed, what would have been the incentives for any rational slave-owner not to respect the aforementioned practices reported in the local slave codes and belonging to the local customs?

Sharp (1976: 142, 147) concludes his analysis by saying:

> It may be argued that the treatment designed for slaves in Chocó followed the pattern described by Tannenbaum […], even though the Spanish legal system and the church were not directly involved […].
>
> Slaveholders in Chocó understood the formula that better physical treatment resulted in healthier workers and greater productivity. Mistreatment led to dissatisfaction and possible rebellion. Profit motives helped determine slave treatment but ironically, behavior was in general accord with the Spanish conduct Tannenbaum […] described.

If we look at colonial Chocó through the lenses provided by the Legal Hypothesis of Creole Genesis, and we combine the resulting image with the available demographic evidence we have for this region, we may now better understand why Chocoanos speak a Spanish dialect rather than a Spanish creole.

6.4 The Legal Hypothesis of Creole Genesis in the context of Afro-European contact varieties in the Americas

This chapter has brought attention to the nature of slavery in colonial Americas to cast some light on the Spanish creole debate. In order to approximate this goal, I decided to focus on the legal systems that regulated black captivity overseas. Findings indicate that the reasons for such a heterogeneous legislation must be sought back in Europe, where the bases of slave law were originally laid down – by the Romans. In fact, this study shows that the juridical figure of the 'serf/slave' had been received by the Spanish legal system in ancient times, from the Roman *Corpus Juris Civilis*; it had been gradually modified and progressively softened into the medieval Spanish code, called *Siete Partidas,* and then further smoothed in the *Leyes de Indias* 'colonial laws'. In particular, the Spanish slave, unlike the Roman one, was granted legal personality and a series of legal rights that derived from it. On the contrary, the juridical concept of 'serf'/'slave' followed a significantly dissimilar evolutionary path in the other European codifications, which did not receive it in ancient Roman times. Thus, by the time the Americas were "discovered", the English, the French and the Dutch found themselves borrowing directly from the *Corpus Juris Civilis* to fill such a legal gap and introduced slaves into their overseas plantations. As a consequence, English, French and Dutch slaves did not have legal personality and the living conditions set by these legal systems for black captives were much more brutal than the ones dictated by the Spanish Crown (Watson 1989; Andrés-Gallego 2005). The Portuguese, on the other hand, had received Roman slave law in ancient times but over time did not modify it to the extent the Spaniards did. As a result, Brazilian slaves were not considered legal persons, and had many more restrictions constraining their freedom than Spanish slaves did.

The Legal Hypothesis of Creole Genesis does not pretend to be the answer to all the questions that gravitate around the Spanish creole debate. As I have indicated, a variety of demographic, economic, political, religious and social factors played a role in the evolution of the Afro-European contact varieties that developed in the Americas, and they should not be dismissed for the sake of a simpler/more elegant creole equation (i.e. no slave castles in Africa = no creole languages

in the Americas). Nevertheless, this proposal clearly identifies an important common feature that Peru and all the remaining Spanish colonies overseas shared, in contrast to the other European territories (presence vs. absence of slaves' legal personality); thus it provides a reasonable generalization that addresses the puzzle concerning such a "mysteriously absent creoles cluster under a single power" (McWhorter 2000: 39).

The Legal Hypothesis of Creole Genesis highlights the impact that these legal differences had on the development of black-white relations and therefore on the evolution of contact varieties in the Americas. In particular, it stresses the importance of the reception of Roman slave law in Europe as a significant factor for understanding the evolution of Afro-European languages in the New World. The point that is here conveyed might be summarized as follows: if certain colonial societies in the Americas were more or less conducive to creolization than others, it is in great part due to the degree of legal Romanization their homeland countries went through in ancient times.