Law and Colonial Cultures
Legal Regimes in World History, 1400–1900

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rules guiding the functioning of extraterritoriality could not contain the production of legal cases and strategies challenging those rules. Ongoing tensions and patterns of litigation continued to thrust the (re)definition of foreigners’ legal status into prominent view. At the same time, arguments used to support extraterritoriality in all its forms involved rhetoric about the shortcomings of local states and urged both legal reform and claims about territorial sovereignty in response. We need not deny that extraterritoriality was imposed by force in order to see that it was also used strategically by local elite factions in representing and shaping state institutions. At times, the history of extraterritoriality as a concession made by strong host communities to subordinate part-polities provided a way to turn apparent weakness into a symbol of political authority. Treaty making itself (and even consular diplomacy) implied, after all, the existence of an interstate order that all sides were coming to recognize as an important objective of legal reformulations.

Seen in this light, the politics of extraterritoriality forms part of a wide array of prominent debates shaping the nineteenth-century legal order. Past chapters have explored two sets of contests: struggles over the definition of the legal status of culturally different part-subjects and conflicts over the relation of imposed and indigenous forums and legal personnel. The construction of sovereignty formed part of this wide and varied political field. To isolate the study of extraterritoriality from these parallel processes would prevent us from understanding its formative influence on state making and lead us instead to relegate its analysis to the more narrowly defined field of diplomatic relations. But as the case studies of this chapter show, external images of the state and its internal representations were inextricably tied. Foreigners by definition crossed borders, defining those boundaries in the process. Territorial and hegemonic state legal authority in this sense was made out of the politics of defining exceptions to sovereignty.

This book has argued that the colonial state was in no small part the product of the politics of legal ordering. Early, multicentric legal orders promoted a pattern of jurisdictional complexity whose continuity across regions itself formed an element of international order. Colonial rule magnified jurisdictional tensions and gave greater urgency and symbolic importance to the task of defining the interactions of various legal forums, sources, and personnel. As we saw in the cases of Spanish America, the Ottoman Empire, and British India, territorial colonial expansion prompted a turn to legal pluralism as a colonial project—the formal mapping of interrelations of imposed and indigenous law. This project, aimed at the creation of order, introduced new rules as objects of conflict.

The new hybrid orders struggled especially with the challenge posed by cultural others and intermediaries whose legal roles were difficult to fix and who themselves exploited and attacked ambiguities in the law. The political and symbolic importance of defining the legal status of indigenous subjects stretched across the colonial world. In the cases we examined in the Cape Colony and New South Wales, the legal status of seemingly marginal actors in the legal order became symbolically central to multisided struggles over the structure and scope of new colonial bureaucracies. Throughout the colonial and postcolonial world, as the case study of jurisdictional politics in Uruguay illustrates, the ambiguous status of foreigners in local courts unified external and internal political and legal maneuvering, simultaneously urging a more explicit state claim to territorial sovereignty.
These historical findings depend upon and support a particular approach to the politics of legal pluralism. The architecture of the plural legal order had simultaneously a discursive importance—it was, we have shown, the object of continual struggle over definitions and markers of cultural difference—and a structural dimension that acted to shape and constrain political and economic interactions. Further, this double-sided quality of conflicts over the relation of multiple legal authorities reproduced knowledge about power that carried across both internal and external borders. The knowledge that permitted the mutual recognition of one polity by another in part derived from, and in turn reinforced, the political engagement of legal authorities, forums, and sources of law within emerging polities. This echoing effect both linked internal and external politics and fused international ordering to cultural conflicts. Such connections show that the classic image of stacked levels of law within the plural legal order was itself a cultural representation and a product of conflict.

Both these findings and the conceptual framework they support comment on prominent debates about the rule of law and the divergent character of the colonial state. Interventions in these debates tend to circle and return to E.P. Thompson’s deservedly famous epilogue to Whigs and Hunters. In this essay, Thompson seeks to explain the rise of the rule of law in England. He ruminates on the paradox of plebeian loyalty to a legal order that was most of the time blatantly tipped in favor of the interests of the ruling class and all too willing to bring immediate force to bear in controlling commons. Much of the body of the book tells a familiar Thompson narrative: it is a story of the “grid” of capitalist relations and state’s law descending with a crash upon the “grid” of customary law. Here, as in his other works, Thompson wants to convince us of the logic of plebeian responses to capitalist incursions, even those rituals that seem either unplanned and chaotic—the ubiquitous food riots—or acts that appear peculiar, like blackening faces and ceremoniously poaching game in royal forests.

Then Thompson’s account takes a turn that has infuriated some of his most enthusiastic followers. He writes that the rise of the rule of law was a “universal good,” a historic move that must be recognized as generally positive in its outcome, even if in so many individual cases the courts’ work was repression. The fury that has greeted this single remark is not surprising, but its intensity perhaps is. Writing about the formation of the colonial state, Guha goes out of his way to criticize E.P. Thompson for his complicity in an ultra-Orientalist vision of “other” histories as pale approximations of a Western model. Conceding that there was a definable moment of establishment of state hegemony in the West and that the rule of law was central to this shift, Guha denies the notion that the rule of law ever came to exist in colonial settings. Here, instead, the state developed “dominance without hegemony,” a form of power that relied much more heavily on coercion than persuasion.

More broadly still, in a critique of not just Thompson but of social history in general, Guha attacks revisionist attempts to respond to the earlier tendency of colonial history to chronicle empire’s “administrative career.” This revisionist strategy portrayed colonial institutions as emerging out of the interaction of “imperial stimulus and native response.” Guha firmly rejects even the possibility of choice for subjugated peoples and denies their influence on shaping the colonial state in India: “The colonial state in India did not originate from the activity of Indian society itself. No moment of that society’s internal dynamics was involved in the imposition of the alien authority structure which provided the process of state formation both with its primary impulse and the means of its actualization.”

Since I have argued throughout this book that the colonial state emerged in part out of a legal politics engaging both colonizers and the colonized, I must defend what Guha rejects as a revisionist half measure, the replacement of an elite colonial history with an interactional one. I can do so best, I think, by returning to E.P. Thompson’s discussion of the rule of law. Of particular interest are parts of the epilogue to Whigs and Hunters that Guha tosses out together with, or because of, Thompson’s provocative remarks about the universal value of the rule of law. In particular, the approach that Thompson uses to explain plebeians’ willingness to appeal to the courts at all, given their notorious reputation for bias and excessive force, is directly relevant to an understanding of the production of state legal hegemony in colonial settings.

1 Ranajit Guha, Dominance Without Hegemony: History and Power in Colonial India, p. 85. And for his critique of E.P. Thompson, see pp. 66–67.
2 Guha, , Dominance Without Hegemony, p. 64.
3 I do not plan to enter this part of the debate, but it is worth noting that Thompson qualifies this statement more than Guha allows us to see. He chides Thompson for calling the rule of law “a cultural achievement of universal significance” (Guha, Dominance Without Hegemony, p. 67). But Thompson goes on in the very next sentences to state, “I do not lay any claim as to the abstract, extra-historical impartiality of these rules,” and he suggests that in conditions of even greater inequality, the law was more nearly (though never, still, completely) an instrument of repression. Thompson, Whigs and Hunters, p. 266.
Thompson’s argument about the rule of law in eighteenth-century England turns on his assertion that the law’s legitimacy depended on the ways in which it distinguished itself from arbitrary force. The appearance of impartiality was essential, and creating that appearance meant crafting a kind of formalism that in turn generated occasional just outcomes, results that either frustrated ruling class objectives or protected commoners’ interests in particular cases. These exceptions made the law “a great deal more than sham.”4 Most criminal defendants and litigants with meager resources understood perfectly that the system was effectively stacked against them. But the possibility of justice, however remote, had great force. Even powerful Whigs, in rare instances, suffered defeats in the courts or had to alter their behavior in anticipation that they might do so. Thompson’s problem as a historian is to try to explain why the leap from this glimmer of hope to a generalized acceptance of the rule of law was the product neither of false consciousness nor of simple miscalculation.

Thompson has some difficulty in explaining this central paradox. Part of his answer is to rely on an explication of the qualities of custom. Translated into the terms employed in this book, Thompson’s vision is one of a weak legal pluralism. The plebeian world had its own, separate “law” situated in custom and enforced by social pressures and the actions of the crowd. Thus the foresters Thompson describes in Whigs and Hunters reacted to the incursions of improving gentry on the commons with a form of poaching that was at times purely punitive: They killed protected deer and, instead of carrying off the venison, left the bodies in prominent view on the estates. Ironically, it is this strong, but separate, vision of justice that Thompson suggests explains the significance given to the perception of the law’s ability to produce occasional justice. In the terms we have been using in this book, the plural legal order contained within it the power of mutual recognition. State power, and state law, may have been new historical forces, but as forms of power and sanctioned violence, they were neither new nor foreign to legal actors situated in different spheres of the legal order.

Thompson’s failure to go no further in his critique of “structural reductionism,” the idea that law can be reduced merely to an instrument of oppression, is to my mind much larger as a shortcoming than his quip about the universal goodness of the rule of law. Thompson expends so much effort, in this work and in many others, establishing the existence of a separate moral economy for the plebeian class, that he is left oversimplifying the process by which the two “grids” become one. In this sense, it is ironic that Guha, a founding voice of subaltern studies and someone who has insisted on the autonomy of colonial subjects, repudiates Thompson, whose narrative is organized so clearly around an implicit schema of a separate customary realm. Guha holds fast to the autonomy of the subaltern; for him, the intricacies of colonial administration and indigenous bourgeois conciliation are reduced to historical epiphenomena, a pair of “failed” agendas, precisely because the subaltern stands outside this relation, a not-very-attentive bystander to all the fuss. Thompson does not go this far, surely; his foresters poach, after all, in reaction to Whig policies. But one gets little sense that the two realms, the two grids, are truly interpenetrating. The foresters are as monolithic in this sense as their counterparts, each side’s interests homogeneous, rarely overlapping, even at the margins. The parallels result instead from the reproduction of the logic of the law across essentially separate levels. The gentry built on legal traditions emerging out of the struggle against royal absolutism, and petty property holders found that the ideology of law as a defense for property could extend to their own customary use-rights.

Unlike Guha, though, I am reluctant to abandon Thompson’s reflections on the law as a helpful guide to colonial legal politics, even if substituting a more sympathetic critique. Since Whigs and Hunters was published, several turns in social theory have appeared to urge Thompson’s insights further. Given his insistence, with some qualifications, on the structural relation of spheres of law, the most helpful contribution in this regard is Bourdieu’s critique of structuralism.5 The influence of Foucault in the study of the modalities of colonial control is another important aid, though we must prevent “discourse” from merely floating above unexamined structures of power.6

Bourdieu would tell us that the conceptual leap from recognizing the mere possibility of justice in state’s law to the consent implied in becoming legal actors in state’s courts is not a leap at all. It is commonplace, he argues, for social actors to participate in routines about which they simultaneously hold contrasting understandings. These interpretive differences do not easily fall into categories that are objective (for example, the understanding that legal outcomes mainly favor elites)

4 Thompson, Whigs and Hunters, p. 265.
5 Philippe Bourdieu, Outline of a Theory of Practice.
6 See Cohn, Colonialism and Its Forms of Knowledge, on colonial modalities.
of persuasion and coercion (inevitably, colonial states will be heavy on coercion) and collaboration and resistance (much of both) particular colonial histories then produce. Guha entirely misses, however, a second discursive shift, the one this book is concerned with. Colonial states did not in an important sense exist as states in the early centuries of colonialism. They did not claim or produce a monopoly on legal authority or on the assignment of political and legal identity. Indeed, colonial conditions often intensified the fluidity of the legal order and enhanced the strategic importance of personal law by multiplying claims made by, and on behalf of, cultural and religious communities to their own legal authorities. There was dominance, undeniably, but both colonizing factions and colonized groups were not irrational or deluded when they sought advantage in the fractured qualities of rule.

In the later discursive shift that Guha misses, his ideas about the colonial state become more relevant, but not in the way that he predicts. This shift, as the chapters on mid-nineteenth-century legal politics show, involved the halting emergence of representations of the state as legally dominant. Recognizing the existence of this shift is not the same, however, as arguing that colonial politics produced “the rule of law” or that the institutional change was the product of its universal appeal. Rather, the very politics that emerged out of the fractured international legal regime of the earlier period had the tendency to generate a juridical space for the state that was historically novel. Debates about the ordering of plural legal orders reinforced the notion of state oversight of this ordering, a role that itself signaled state legal hegemony. The close association of cultural and legal boundaries meant, too, that representations of group characteristics had implications (some intended, some not) for legal ordering, and vice versa. To take an example not from this study, Lorcin shows that the French representation of Kabyles as culturally superior to Arabs in colonial Algeria emerged partly out of perceived differences in legal practices and, in turn, generated significantly different legal policies toward these groups. The French preoccupation with such distinctions then itself became a defining rationale for French colonial rule; here as elsewhere, a substantive shift in the middle to late nineteenth century collapsed these distinctions as the colonial state became a state.7

Guha is no doubt right to emphasize that nineteenth-century state making was not the product of consensus (in fairness, he should note

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7 Patricia Lorcin, *Imperial Identities: Stereotyping, Prejudice, and Race in Colonial Algeria*. 7
that neither Thompson nor Hay, in uncovering the function of theater in establishing legitimacy for the courts, confuses this potent technique with “persuasion”\(^8\). But the forms of dominance taken, and the timing of this second institutional shift, were fashioned out of an interactive politics and not simply the logical extension of conquest. In many places, the decisive shift toward a state monopoly of law provided an interesting twist to E.P. Thompson’s formulation. In establishing supremacy over a plural legal order, the improbability of justice could actually serve as a support for legitimacy for emerging states. The state-centered quality of the legal order was itself new, and the state asserted its centrality by demonstrating its authority to administer law with any degree of consistency or standards of justice. Thus in Uruguay the state could assert power by institutionalizing the ruthlessness of caudillos, or by imitating the indifference of larger, more powerful states. Legitimacy through impartiality was less important than the mere assertion of dominance over “other” types of law in the plural legal hierarchy. Yet there was more to this shift than the mere assertion of power. The distinctiveness of state’s law resided partially in its control of violence but also in special relationship to rule setting. Procedure trumped justice; institutions outlived bandits.

In a narrow sense, the colonial state was not, in fact, built on hegemony, if the term is narrowly defined to imply either persuasion or consent. But if we define hegemony instead, with the Comaroffs, as “constructs and conventions that have come to be shared and naturalized throughout a political community,” then the shift we have identified in legal politics as occurring over the span of the long nineteenth century is indeed one that establishes the hegemony of state law.\(^9\) Just as, across the early modern world, coterminous and fluid legal jurisdictions were naturalized features of the political landscape, by the end of the nineteenth century the subordinate status of nonstate law to state law no longer required a formal ideological defense. It became possible to fight over the control of the state rather than over its location. The process that moved politics from one legal regime to another involved not persuasion and consent (or even starkly divided collaboration and resistance) but a series of contests over the structure of the legal order that shaped a juridical space for the state and brought participants into a single discourse about the law.

There is something so striking about the synchronicity of this shift that one is tempted to look further for pressures shared across these cases. One obvious contender — the shared influence of European legal sources and ideas — cannot completely account for the patterns we observe. Certainly legal policies crossed geographically disparate parts of empire, and legal ideas traveled with law-trained administrators and even, as in New South Wales, with felons. But in general, colonial governors, settlers, and even political leaders in the metropole treated European legal traditions as a useful collection from which they might draw selectively in crafting colonial legal systems.

More compelling than the influence of shared sources of law is the unifying function of structural frameworks for defining “other” legal authorities. In this sense, the familiar fluidity of legal orders in the early modern world provided institutional continuity that itself gave legal politics a certain similarity across widely disparate legal systems. The territories for which this condition of jurisdictional fluidity was true are so vast and diverse that they can be described as encompassing a global legal regime.\(^10\) The structural similarities — in particular, the treatment of minority legal communities that is illustrated by the comparative analysis of the law of the “other” in Iberian and Islamic empires — provided a baseline for legal politics. They formed, too, a basis for analogy building among litigants who were therefore able to adjust quickly to the particular demands of legal strategy under colonial rule.

Another unifying force was the pressure to frame new types of property holding and transactions. As the cases we have examined suggest, jurisdictional disputes accumulated and intensified at critical junctures, often marking a shift to new property regimes: the imposition of a market in land in India; the demarcation of landholdings and the recruitment of labor in pastoral economies from South Africa, Australia, and South America; and the eclipse of ethnic trade diasporas by merchants and their agents in global trade generally. These shifts in productive

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\(^9\) For this quote and for what is in general a more nuanced discussion of hegemony in colonial settings than the one provided by Guha, see Comaroff and Comaroff, *Of Revelation and Revolution*, p. 24.

\(^10\) I have not concentrated in this study on determining the extent or borders of this legal regime. Surely, though, if Wallerstein can dub interlinking areas of production and trade spanning the Americas and Europe but excluding Africa and Asia as a “world system,” I am justified in calling the vast area of institutional continuity from the Americas to Africa, Europe, and the Indian Ocean (and perhaps beyond) a “global legal regime.”
relations had a necessary legal dimension. As E.P. Thompson notes, they were in part “only meaningful in terms of their definitions at law.” Yet, the cases I have examined caution against turning this observation into a simple formulation about the unifying forces of global capitalism. Such forces—and they did exist—became immediately translated into local idioms of order, exchange, and legal sanction. Institutional developments did not simply “respond” to economic pressure; the two processes were blended into one matrix and subject to a host of conflicts that might objectively be seen as marginal to either kind of change. When fights about definitions of property seemed to blend into struggles over cultural boundaries, it was not because the participants could not “see” the underlying material interests, or were attempting purposefully to disguise them. Legal norms encoded both culture and property, and neither could change without the other.

This brings us again to culture. In this account of colonial legal politics, culture becomes a globalizing force itself, though in a way that is rarely recognized in discussions of the coming “global culture.” I do not mean that culture was in this process a homogenizing force. Rather, routines for organizing cultural difference took institutional forms, and these structures, in replication, became themselves an element of international continuity. Such a view moves beyond tentative efforts to seek the origins of international law in custom. It was not the content of custom that stretched across boundaries (though sometimes this was also the case) but rather the legal and political space for custom that reproduced itself and, in the process, created new possibilities for colonial governance and cross-regional capitalist economies. The globalizing imaginaire, in other words, was quintessentially cultural in its emphasis on difference, but profoundly legal and political, and had an enduring, if changeable, institutional dimension.

11 Thompson, Whigs and Hunters, p. 267.
12 In this regard, my argument does not belong to the project of international legal theorists analyzing the customary sources of international law. See Beyers, Custom, Power, and the Power of Rules; and D’Amato, The Concept of Culture in International Law.
13 In all the settings I have written about in this book, contemporary legal actors would not have used the term “culture” to categorize themselves or others. Whether describing themselves or others according to religious affiliation, by degree of civilization or barbarism, or in reference to other social categories, their discourse was, however, uniformly about difference. My view of culture thus meshes with that of Appadurai, who defines culture as “a pervasive dimension of human discourse that exploits difference to generate diverse conceptions of group identity” (Arjun Appadurai, Modernity at Large: Cultural Dimensions of Globalization, p. 13). Yet my approach differs in two ways, first by identifying “cultural dimensions of globalization” further back in time and second by emphasizing the homology between cultural and institutional dimensions of globalization.
14 Christopher Bayly traces other multicentric global processes through a similar chronology, in which “archaic globalisation” of the seventeenth and early eighteenth centuries created spaces for a hybrid globalism of the period from 1760 to 1830 and then continued to shape the emerging international order of the nineteenth century. Bayly, “From Archaic Globalisation to International Networks, c. 1600–2000.”
15 Benedict Anderson concedes that he initially misrepresented colonial nationalism as having been modeled on European nationalism and argues that its origins instead must lie in “the imaginings of the colonial state” (Anderson, Imagined Communities,
The picture of the politics of legal pluralism that emerges from this view differs in important respects from Thompson’s image of the descent of the grid of capitalist relations and its legal matrix on the grid of custom, with indigenous legal culture standing in for the plebeian moral economy of eighteenth-century England. In colonial settings and also within Europe, familiarity with a complex legal order involving multiple legal authorities and the borrowing of procedures, legal rules, sources, and rhetoric conditioned (and helped to propel) the shift toward state and capitalist hegemony. This constant referencing of other legal authorities and forums intensified in colonial settings, and this intensification itself helped to produce a shift toward a hierarchical understanding of the plural legal order and a recognition of the dominance of state law. The imagery of separate legal levels was itself partly a product of this shift, rather than an accurate representation of the architecture of the legal order. This picture could not have been drawn by colonizers alone, an observation that pretends no apology for the brutality of colonial rule but places indigenous institutions and cultural practice on an equal footing with the institutions and discourse of colonizers by recognizing their internal logic, inventiveness, and ability to change. In this sense, we should label legal transformations in the long nineteenth century not as the rise of the rule of law but as an iterative cultural politics centering on rules about law.

I began this book by commenting on the possibility of drawing connections to the legal politics of the colonial past and the political conflicts of the postcolonial world. Many of the legal issues discussed in these pages are still with us: debates about the legal status of Aborigines, indigenous Canadians, American Indians, Mexican Indians, South African Zulus, Indonesian Chinese, Egyptian Copts, and many other groups call forth competing theories about legal pluralism and the relative authority of the state. Added to such cases are the challenges of governance of new forms of transnational association. The shift toward state legal hegemony has not foreclosed possibilities for the emergence of alternative legal authorities centered in ethnic subpolities or cross-border communities. Nor does the institutional continuity provided by jurisdictional fluidity in the early modern period offer a model for a future of diminished states. If anything, the knowledge that pluralist visions of the law

contributed to state making should suggest that state unmaking (or remaking) would involve another historical shift matching widespread legal and cultural reordering. Struggles surrounding such a shift would invoke many of the old routines for organizing difference, with some groups claiming that these patterns are immutable products of one or another legal tradition. We should beware of such claims. And we should look to seemingly small struggles over cultural boundaries in the law as having a potentially profound impact on new structures of power everywhere.