

Law and Colonial Cultures

Legal Regimes in World History, 1400–1900

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ONE

Legal Regimes and Colonial Cultures

In the late fifteenth century, as Christians were extending their rule over the remaining pockets of Moorish dominion in the Iberian peninsula, a North African legal scholar named Al-Wansharishi issued a legal finding (*fatwa*) to address the situation of an influential Muslim advocate in Marbella. The man in Marbella wished to obey the edict directing good Muslims to abandon Christian jurisdictions in Spain, but he felt compelled to stay and continue to work as an advocate for Moors whose property and livelihood were being threatened under Christian rule. His appearances before Christian judges to represent Muslims seemed a worthy cause, one that he apparently thought would warrant an exception to the edict. The *mufti* disagreed. He ruled that it was the man's duty to flee Spain. Contact with Christians – particularly the close dealings with Christian judges that the advocate's role would require – was a form of contamination. The Moors staying behind were, in any case, hardly entitled to such care since they were already breaking with Muslim authority by staying in a Christian jurisdiction, the *mufti* explained. They should be left to their own devices.¹

Al-Wansharishi made it clear that it was Christian authority, not Christians themselves, that made contamination inevitable. Christians with subject status posed no particular threat. But to live under Christian rule was “not allowable, not for so much as one hour a day, because of all the dirt and filth involved, and the religious and secular corruption which continues all the time.”² The central rituals of Muslim religious

¹ L.P. Harvey, *Islamic Spain, 1250–1500*, pp. 56–58.

² Harvey, *Islamic Spain*, pp. 58–59.

life would be threatened – the collection of alms, the celebration of Ramadan, the daily prayers. Just as troubling to al-Wansharishi was the inevitable disappearance of distinctive forms of expression of Muslims: “their way of life, their language, their dress, their . . . habits.”³

We do not know whether the Marbella advocate obeyed the fatwa. We know that some influential Moors chose to stay and fill the role of advocates for the conquered Moors. We also know that their actions, as agents seeking to reinforce one legal authority by representing cases before another, were remarkably common in territories of imperial or colonial conquest. We know, too, that al-Wansharishi’s interpretation of the stakes of this decision was repeated throughout Muslim Spain and in other settings of conquest and colonization. Colonizing authorities understood just as readily that the structure of legal authority and the creation of cultural hierarchies were inextricably intertwined. Jurisdictional lines dividing legal authorities were the focus of struggle precisely because they signified other boundaries marking religious and cultural difference. As al-Wansharishi observed, the structural relation of one legal authority to another had the power to change both the location of boundaries and the very definition of difference.

Turning this statement around, we see that contests over cultural and religious boundaries and their representations in law become struggles over the nature and structure of political authority. Ways of defining and ordering difference are not just the cultural materials from which political institutions construct legitimacy and shape hegemony. They are institutional elements on their own, simultaneously focusing cultural practice and constituting structural representations of authority. Fine distinctions among groups attain an importance that appears exaggerated to observers outside a particular time and place but reflects participants’ certain knowledge that they are struggling not just over symbolic markers but over the very structure of rule.

Colonialism shaped a framework for the politics of legal pluralism, though particular patterns and outcomes varied. Wherever a group imposed law on newly acquired territories and subordinate peoples, strategic decisions were made about the extent and nature of legal control. The strategies of rule included aggressive attempts to impose legal systems intact. More common, though, were conscious efforts to retain elements of existing institutions and limit legal change as a way of sustaining social order. Conquered and colonized groups sought, in turn,

³ Harvey, *Islamic Spain*, p. 58.

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to respond to the imposition of law in ways that included accommodation, advocacy within the system, subtle delegitimation, and outright rebellion. The legal conflicts of colonized and colonizers were further shaped by the tensions that divided the two sides. Jurisdictional jockeying by competing colonial authorities was a universal feature of the colonial order. It called up and altered cultural distinctions, as competing colonial authorities tied their jurisdictional claims to representations of their (special or superior) relationship to indigenous groups or sought to delegitimize other legal authorities by depicting them as tainted by indigenous cultures. Factions within colonized populations, too, entered into conflicts with one another because of different interests in and perceptions of the legal order.

These multisided legal contests were simultaneously central to the construction of colonial rule and key to the formation of larger patterns of global structuring. Precisely because imperial and colonial polities contained multiple legal systems, the location of political authority was not uniform across the international system. Yet international order depended upon the ability of different political authorities to recognize each other, even if that recognition fell short of formal diplomacy or treaty making. The law worked both to tie disparate parts of empires and to lay the basis for exchanges of all sorts between politically and culturally separate imperial or colonial powers.⁴ Global legal regimes – defined for our purposes as *patterns of structuring multiple legal authorities* – provided a global institutional order even in the absence of cross-national authorities and before the formal recognition of international law. Their study reveals a global order that was far more complex and institutionally less stable than many approaches to world history, and to global economic change in particular, have suggested. Studying legal regimes leads along paths in two directions: toward an enhanced

⁴ Given the importance of law in this regard, it is frustrating and surprising that its study has remained so resolutely within the boundaries of national political histories. Even some comparative legal scholars have exacerbated the problem by overemphasizing legal sources in categorizing legal systems. See, for example, Alan Watson, who argues forcefully that rulers and elites were mainly “indifferent to the nature of the legal rules in operation” and that this indifference gave legal sources their strength and resilience in diverse colonial settings (Alan Watson, *Slave Law in the Americas*). Regional historians are sometimes even criticized for placing their subject in a wider context; for example, Hoffer is taken to task for including a valuable chapter on European-Indian legal relations in his history of North American colonial law because attention to French and Spanish law is “misplaced in a volume that concentrates on British North America” (Gaspere Saladino, “Review of Peter Charles Hoffer, *Law and Peoples in Colonial America*”).

understanding of world history and toward a more nuanced view of cultural interactions in particular colonial encounters.⁵

INSTITUTIONAL WORLD HISTORY

Global institutions broadly defined include widely recurring, patterned interactions (not limited to exchange relations or formal organizations) that emerge from cultural practice. This inclusive definition helps us to tackle persisting conceptual problems of global theory. Where gaps between local process and global structure, between agency and structure, and between culture and economy have been bridged by focusing on such objects of analysis as cultural intermediaries, transnational processes, and the discourse of colonialism, these analytical strategies can be expanded and combined, moving the analysis simultaneously out toward global (and structural) and in toward local (and cultural) phenomena. Rather than offering a technique for bridging these gaps (and thus salvaging established ways of representing the global order) this approach urges us to reimagine global structure as the institutional matrix constructed out of practice and shaped by conflict. These patterned sets of behavior do not exist at, or merely bridge, separate “levels,” but themselves constitute elements of global order.⁶

⁵ This project is designed to address several conceptual problems of world history, and in global theory more generally: capturing connections between local conflict and global structure; describing institutional change; and characterizing “culture,” especially the relation between culture and economy. These problems have been addressed differently, but not successfully, in world systems theory, in institutional economic history, and in colonial cultural studies. I do not intend to review these approaches and their shortcomings here but will outline instead an approach to studying law as a global institution in an example of an alternative I call institutional world history. The approach, which I believe offers useful tools in response to the central problems of global theory, can potentially frame research on topics other than the law. See note 6 below and Lauren Benton, “From the World Systems Perspective to Institutional World History: Culture and Economy in Global Theory.”

⁶ As the reliance on work done on middle-ground phenomena, agents, and analytical categories suggests, institutional world history builds upon recent work across a range of disciplines. Economic institutionalists propose viewing global markets as culturally embedded; a particularly successful scholarly project has been the investigation of the links between political culture and postwar monetary regimes (e.g., John Odell, *U.S. International Monetary Policy*). But less obvious global structures and processes deserve attention and recall a somewhat expanded notion of Thomas’s “colonial projects” – globally organized routines (or institutions) that form both through metropolitan policy and local colonial conflict (Nicholas Thomas, *Colonialism’s Culture*). McNeill points to the structuring of communications as a source of global ordering (William McNeill, “Preface,” in Andre Gunder Frank and Barry Gills, eds., *The World System: Five Hundred*

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The example of international institutional ordering this book explores is the emergence, under varying historical conditions, of legal regimes in which actors immersed in different legal systems nevertheless constructed a shared understanding of legal power as a basis for exchanges of goods and information, even in the absence of an overlapping authority or a formal regulatory structure.⁷ It is possible to speak of “order without law” as emerging at the international level just as it has been shown to do in small communities or in business agreements not based on contracts.⁸ Legal regimes extended beyond the borders of particular legal systems and established repeatable routines for incorporating groups with separate legal identities in production and trade and for accommodating (or changing) culturally diverse ways of viewing the regulation and exchange of property.

Elements of such an international order can be found from the fourteenth to the seventeenth centuries in the replication of fluid,

Years or Five Thousand). Frank interprets this comment as an endorsement for his perspective, but I view it more as a challenge to push beyond the obvious ordering function of trade (Andre Gunder Frank, *ReOrient: Global Economy in the Asian Age*). Finally, the project I propose has a good deal in common with the “constructivist” perspective in international relations theory, which views international norms as emerging out of the social practice of states and other social actors. See, e.g., Frederick V. Kratochwil, *Rules, Norms, and Decisions*; and Vendulka Kubálková, Nicholas Onuf, and Paul Kowert (eds.), *International Relations in a Constructed World*.

⁷ It should by now be clear that my use of the term *regime* to describe an institutional field linking polities that were constituted in politically and culturally very different ways departs somewhat from the use of the term to describe areas for cooperation among states (see Stephen Krasner, “Structural Causes and Regime Consequences: Regimes As International Variables”). While explorations of the conditions under which state actors will enter into agreements is analytically relevant to my project, such an approach limits our focus to negotiations that are the outcome of international order rather than its building blocks. It is the *replication* of forms of political authority that after all makes interstate agreements possible. My interest, then, is not in the way interstate norms and agreements are shaped but in the ways that widely replicated “domestic” political processes and conflicts produce a framework for international norms. For another argument in favor of the conflation of “internal” and “external” processes, see James N. Rosenau, *Along the Domestic-Foreign Frontier*.

⁸ The classic works on these two phenomena are, respectively, Robert Ellickson, *Order Without Law*; and Stuart MacCaulay, “Non-Contractual Relations in Business.” See also Lauren Benton, “Beyond Legal Pluralism.” And, on the construction of rules in the international order, see Kratochwil, *Rules, Norms, and Decisions*. The study of customary international law also has some relevance here, though its focus on the emergence of law out of custom in the international arena is different from my approach to international order as a function of widespread patterns of organizing multiple legal authorities. See Michael Beyers, *Custom, Power, and the Power of Rules*; and Anthony D’Amato, *The Concept of Culture in International Law*.

multijurisdictional legal orders. We perceive this clearly in territories of colonial and imperial expansion, where culturally and religiously different peoples employed legal strategies that exploited (and further complicated) unresolved jurisdictional tensions, particularly those between secular and religious authorities. Such tensions provided the context for law in diaspora; where ethnically distinctive groups expanded without conquering significant territory, they exercised legal control over their own communities while fitting into preexisting plural legal orders. While the formation of legal institutions was thus open-ended (and determined neither the special dynamism of the West nor the cultural character of the East), the process itself also created a common institutional framework that extended from the Americas to the Indian Ocean and beyond.

From the late eighteenth century on, routines for subordinating the law of ethnic and religious communities to state law replaced more fluid forms of legal pluralism and began also to be widely replicated. By the mid-nineteenth century, state-centered legal pluralism was being promoted as a model of governance by European administrators. Just as important, though, was its emergence, simultaneously, as an institutional “fix” for the fluid jurisdictional politics of colonial settings. Diverse polities displayed similar processes urging this transition. Jurisdictional politics became symbolically important and politically charged. Attention focused in particular on debates about the legal status of indigenous peoples and, especially, the definition of roles for cultural and legal intermediaries. Legal actors played upon these tensions in crafting legal strategies that often involved appeals to state law, even before the colonial state had articulated claims to sovereignty. Paradoxically, such processes often meant sharpening artificial divisions between “modern” and “traditional” realms, and between state and nonstate legal authorities. And as political contests shaped a structure of state-centered legal pluralism and reproduced it (in some places as a fiction of governance rather than a political reality), this shift helped to form, in turn, the interstate order.

This account, and the approach favored here, suggests an important reorientation of world historical narratives. The perspective clearly challenges Eurocentric world histories that emphasize the unique, progressive character of European institutions or that view global change as emanating exclusively from the dynamics of Western development. Particularly for the early period, the approach challenges “world systems” frameworks that link the Americas to Europe but downplay

connections to Asia and Africa in the early modern period. Even those world systems accounts that oppose Eurocentrism by claiming the primacy of an Islamic “world system” before the thirteenth century, or the centrality of Asian economies, miss institutional interconnections between East and West.⁹ The reorientation allows us to identify international regimes in periods before the rise of an interstate system and as the products of both globalizing pressures *and* the internal dynamics of politics in particular places. The approach replaces searching for the roots of state formation and of a more connected globalism in Westernizing projects or in nationalist and anticolonial responses. At the same time, unlike critiques of Eurocentric world history that engage in a checklist of comparisons to establish that other world regions were as or more “advanced” than Europe, this perspective moves such measuring exercises to the margins of analysis.¹⁰ Certainly social actors asserted claims about the more “civilized” or “modern” nature of “their” institutions. But the institutional order we are examining was not an exclusive cultural property but the product of an ordered and contested multiculturalism.

LEGAL PLURALISM

We do not begin the study of legal regimes without tools, but the tools need some refashioning. In legal studies, and in the anthropology of law in particular, the study of legal pluralism provides one starting place.¹¹ Throughout the book I use the term *legal pluralism*, and also some closely related terms, while also seeking to move beyond some

⁹ Examples are Janet Abu-Lughod, *Before European Hegemony*; and, arguing that Islam constituted a cultural world system, John Voll, “Islam As a Special World-System.”

¹⁰ The claim by Frank (*ReOrient*) that the global economy was Asian-centered until around 1800 in this way reproduces the sorts of analytical biases that lead him to reject Eurocentered global history in the first place. See the last section of this chapter.

¹¹ Shaping a conceptual framework must take us outside colonial history. Though the multiplicity of law in colonial settings has long been recognized, comprehensive scholarly treatments are few. The works of M.B. Hooker are an exception, though it is fair to say that they had only marginal impact on colonial studies more generally (for example, his *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*). There are many case studies and monographs on law in colonial and postcolonial settings that frame their analysis in terms of *legal pluralism* (see note 14 below), but the dearth of comparative works has made it difficult to place such works in a larger context. In the study of law more narrowly defined, the fields of conflict of laws, and of comity of nations, also intersect with the approach to colonial law here. In contrast to these fields, though, I focus on formal legal issues as one part of a larger set of cultural and political tensions crystallized in jurisdictional disputes.

common assumptions about the relation of multiple systems of law and, in particular, the role of state law.

Plural legal orders have more often than not been represented as comprising sets of “stacked” legal systems or spheres. In part, this approach is implicit in prominent social theoretical takes on law. Unger, for example, describes customary law as patterns of interactions to which moral obligations attach. The law becomes more formal as layers of greater complexity adhere to this foundation. At the pinnacle of the legal order sits state law, a system with distinctive features, including the presence of specialized legal personnel.¹² The image of stacked or nested legal systems within or below an enveloping state law extends even to theoretical approaches to law that seek to place nonstate and state law in the same comparative context. The search to define universal features of legal systems, for example, has tended to render the plural legal order as a Hobbesian world: Each legal system coheres around a single coercive authority, and more powerful authorities subsume those that are weaker. State law caps the plural legal order through its ability to establish a monopoly on violence.¹³

Among the problems of these, or alternative, representations of the legal order as a set of stacked legal systems, two critiques have special relevance to the study of colonial law. One consists in the observation of rampant boundary crossing. Legal ideas and practices, legal protections of material interests, and the roles of legal personnel (specialized or not) fail to obey the lines separating one legal system or sphere from another. Legal actors, too, appeal regularly to multiple legal authorities and perceive themselves as members of more than one legal community. The image of ordered, nested legal systems clashes with wide-ranging legal practices and perceptions.¹⁴ Mapping the plural legal order thus takes on the feel of early astronomy, with its attempts to plot heliocentric orbits on an imagined geocentric solar system – what is required, ultimately, is a return to faith to account for the inconsistencies.

¹² Roberto Mangabeira Unger, *Knowledge and Politics*.

¹³ See, for example, Leopold Pospisil, *Anthropology of Law*, for an emphasis on coercive authority as the centerpiece of all legal systems.

¹⁴ The anthropological literature on legal pluralism in particular highlights the fluidity and contingency of the relation of multiple legal authorities. See especially Sally Merry, “Legal Pluralism” and also the more recent *Colonizing Hawai’i*; June Starr and Jane F. Collier (eds.), *History and Power in the Study of Law*; Sandra B. Burman and Barbara E. Harrell-Bond (eds.), *Imposition of Law*.

A second problem is one of narrative. As in Unger's sociological framework, there is a common underlying assumption about the direction of legal change. State law descends – an imposition – though borrowing from and building upon existing custom. Even in accounts more attuned to the complexities of this process there is a sense of inevitability about the dominance of state law and about its independent origins.¹⁵ But imagining the state as a fully formed entity with a coherent view of law and of its own place in the legal order may lead toward one of two, very different, mistakes, each producing a different flawed chronology in colonial history. The first is to take states' claims to legal sovereignty at face value. Early colonial authorities then appear as comprehensive political powers rather than internally fragmented entities that tended to insert themselves within local power structures even in places where there was a sharp imbalance of power. It is equally possible to err in a second, opposite direction, making statehood dependent upon specific institutional formations. In this view, the enactment of codification and other state-directed legal reforms in the late nineteenth century established the colonial state's claim to paramount legal authority, and nationalist movements everywhere came to identify the law as a crucial arena for the struggle for political control in the twentieth century. These narratives cannot, of course, both be right – that is, the interstate order cannot have appeared in the early colonial centuries and then again, *de novo*, in the twentieth.

A close analysis and comparison of legal politics in particular places allow us to identify transformative moments with greater precision. Subtle but important shifts in the definition of colonial state law and its relation to other law, it turns out, occurred at various moments in the long nineteenth century, in patterns replicated across a wide array of colonial and postcolonial settings. Colonies were not distinctive because they contained plural legal orders but because struggles within them made the structure of the plural legal order more explicit. The cultural significance of legal boundaries was central to colonial legal

¹⁵ Sally Falk Moore, for example, in a careful study designed explicitly to understand "traditional" law as the product of colonial politics, repeatedly refers to local customary law in a colonial setting as the "residue" left over after the imposition of state law (Sally Falk Moore, *Social Facts and Fabrications*). In Chapter 7, I analyze E.P. Thompson's views of custom, and the descent of state law, as another variant of this tradition of legal pluralism. Like Moore's approach, Thompson's views move us beyond the constraints of a plural legal order conceptualized as stacked and separate legal systems, but significant problems remain.

politics. Designing, announcing, and fighting about rules ordering the interaction of various legal authorities fashioned a place for the state as an instrument and forum for the production of such rules. In short, what some approaches would represent as a natural condition of plural legal orders – the ascendance of state law – appears as the product of history, and of widely reproduced conflicts.

The comparative and interpretive study of these processes is at one level synonymous with the study of *jurisdictional politics*, a term that I define broadly to mean conflicts over the preservation, creation, nature, and extent of different legal forums and authorities. The opposition of “ruler” and “ruled” universally generated charged debates about jurisdictional politics. These debates were never two-sided, though, because multiple legal authorities on each side also asserted different sets of claims about the structure of legal authority (think of the divide between the North African mufti and peninsular Moors). The ways in which the politics of jurisdictional disputes played out were crucial to changing notions of cultural boundaries, in part because “jurisdiction” itself implied a certain sharing of identities and values among subjects. This association was not lost on social actors, who struggled purposefully to draw jurisdictional lines in ways that were consistent with their own images of group distinctions.

Many forces could bring jurisdictional disputes into sharper relief, but two stand out. One was the challenge posed by cultural intermediaries and the attendant conflicts about the place of such groups within the legal order. In jurisdictional politics, cultural intermediaries – and a particular group of them, indigenous legal personnel – aligned themselves in surprising ways, sometimes seeking to broaden jurisdictional claims of the colonizers in order to push for cultural inclusiveness, sometimes defending and reinventing “traditional” authorities as a way of protecting or creating special status. Their very presence tended to pose a challenge to colonizers’ representations of cultural and legal boundaries. Intermediaries’ place was redefined, further, in relation to shifting definitions of acts and groups placed outside the law – the illegalities of banditry, piracy, and criminality, and the presumed lawlessness of “savages.”

A second force propelling jurisdictional politics into the foreground comprised contests over property. Conflicts over cultural difference in the law were intertwined with disputes focusing on the control of property and its legal definition. Culture and economy were not separate entities – one prior to, or determinant of, the other. Rather than developing

as a “framework” for the spread of capitalism in the period we are studying, legal institutions emerged *with* capitalist relations of production through repetitive assertions of power and responses to power. Indeed, transformations in the law of property (including definitions of rights to land and labor) were sometimes perceived by social actors as primarily about changes in the ordering of legal authorities, rather than about property rights per se.

Together, these areas of conflict shaped a body of “rules of engagement” in the law, or a set of shifting procedural and legal rules about the relations among cultural (or religious) groups. We find these rules distributed across the law and its institutions rather than residing in one body, or one function, of the law. Colonial law had, in this sense, a peculiar subtext of rules about rule – a regulating of the regulating system. Such rules had symbolic force, but they were not merely symbolic; they constrained legal strategies and influenced perceptions of the law and thus had an impact on choices of legal sources, their interpretation, and legal practice in general. In short, the law’s structuring of cultural boundaries directly shaped its wider institutional profile.

In studying conflicts about the structure of the legal order, I rely on a simple, broad typology. Multicentric legal orders – those in which the state is one among many legal authorities – contrast with state-centered legal orders in which the state has at least made, if not sustained, a claim to dominance over other legal authorities. Rather than elaborating upon these models or arguing the degree to which various historical examples constitute faithful representations, I use the typology to explore patterns in the historical shift from one legal regime to another, the timing of this shift, and its intricacies. Other terms I employ heuristically are *strong* and *weak* legal pluralism. The first denotes legal orders in which politically prominent attempts have been made to fix rules about the relation of various legal authorities and forums. Weak legal pluralism occurs where there is an implicit (mutual) recognition of “other” law but no formal model for the structure of the legal order, or where the model is in formation. Colonial settings offer examples of both strong and weak legal pluralism, as well as cases that fall between these types.

The remainder of this introduction discusses in turn the three points of entry I have chosen for studying global legal regimes – jurisdictional politics, cultural and legal intermediaries, and changes in the law of property. The choice of these entry points does not lead me to develop a typology of plural legal orders based on patterned variations, in the

way that sociological theory building might proceed. Rather, the rubrics serve to illuminate processes shared across diverse colonial settings and to investigate the interrelation in particular historical contexts of cultural conflicts and institutional change.

JURISDICTIONAL AND CULTURAL BOUNDARIES

In his book *Marvelous Possessions*, Stephen Greenblatt explores the consequences of claims of legal authority in American colonial society. The mere act of extending a claim of possession over American Indians, he argues, changed Spaniards' representation of Indians' nature. The signs of civility and of shared humanity marveled at by Spaniards in their first encounters faded to insignificance after the formal act of possession – the extension of legal jurisdiction – turned the Indians into “outlaws and bandits . . . [living] outside of all just order, apart from the settled human community and hence from the very condition of the virtuous life.”¹⁶ The formal extension of legal jurisdiction in and of itself created a clear cultural boundary between the colonizers and the colonized by casting only one as the possessor of law, and of civility.

Greenblatt is examining a historical moment: the taking of possession. But, to corrupt a worn phrase, possession was not the law, or even nine-tenths of it. No sooner did the extension of jurisdiction formalize difference than the law also had to take up the task of structuring difference, that is, of making rules about cultural interactions within the law. For jurisdiction did not just mark new boundaries. It raised the possibility of shared identity as the colonizers and the colonized occupied the status of subjects before the law, and it opened the way for the colonizers and the colonized to act in similar functions within the law – as litigants, advocates, witnesses, judges. Not surprisingly, then, the act of extending formal jurisdiction was rarely simple. Colonizing groups in fact wished at times to restrict jurisdiction and thus to reinforce cultural divides (while at the same time limiting administrative costs of rule). Some indigenous groups struggled to be included on equal terms; others fought to maintain the legitimacy of alternative legal forums; still others pursued both strategies simultaneously. Odd coalitions formed across the divide between colonizer and colonized. In restricting his analysis to first contact, Greenblatt implicitly recognizes that in less than a generation after the formal ceremonies of possession marked

¹⁶ Stephen Greenblatt, *Marvelous Possessions*, pp. 67–68.

stark boundaries between conquerors and subjects in the Americas, a much more complex map of differences emerged both in discourse and in institutional structures.¹⁷

Claims of legal jurisdiction uniformly set in motion a process of cultural distancing, but the process itself varied substantially. On the one side, the meaning of jurisdiction was conditioned by the nature and rhetoric of law in the colonizing society. Imperial powers possessed legal systems that were already formally plural. This background influenced the ways in which colonial jurisdictional claims were extended. The relation to subordinate, conquered peoples was crafted in the familiar terms of structured legal pluralism that the colonizers knew. Colonized subjects perceived the possibility of using these tensions to their advantage and devised legal strategies that explicitly exploited them. The tensions of jurisdictional politics at home thus extended, with new complications, to colonial settings. In the case that Greenblatt analyzed, this dynamic was very important. Though the rhetoric of conquest established possession by the Spanish crown, the ambiguities of jurisdiction were immediately present. A second legal authority, that of the church, was recognized by both conquistadors and the crown itself, and the resulting jurisdictional tensions came to influence profoundly the functioning of colonial law in Spanish America and, in particular, the legal status of American Indians.

Indeed, jurisdictional jockeying and disputes were pervasive, and they existed within state law itself. Administrative, civil, criminal, commercial law – there was no imperial handbook about which forms of the law were best to institute first in a colonial setting. Nor, for that matter, was it predictable which mattered most to colonizers (or to political factions among them) or which potentially created most political

¹⁷ Seed improves upon Greenblatt's approach by giving more careful consideration to the differences among five "national" legal cultures and their ceremonies of possession (Patricia Seed, *Ceremonies of Possession*). Like Greenblatt, though, her book focuses narrowly on first contact and not the complexities of legal rule that follow. There is a danger that Seed's conclusion that different European powers could not "read" each other's symbolic statements of possession might be understood to mean that they could not read each other's legal orders. As I will argue in this book, I do not think this was at all the case, not only across European polities but also between many European and non-European polities. "Possession" and its manifestations might be an exception, but I tend to think that Seed has overstated her case, a result mainly of comparing symbolically different fields (for example, signs of legal possession in English colonies to astronomical markers of the Portuguese "known" world). I nevertheless consider the book a very valuable step in the direction of building a broader understanding of colonialism out of comparative study.

turmoil. While we find in practice that cultural boundary marking took place across the legal order, particular sorts of law emerged as focal points of tensions in particular historical circumstances. In eighteenth-century England, for example, the criminal law became an arena for public redefinitions of class boundaries. There are analogous cases in colonial settings where shifting definitions of criminality were also central to political strategies of domination by colonial powers. But mere administrative regulations – changing requirements to sit for civil service examinations, for example – could also emerge as focal points of controversy and in turn drive legal reforms in other areas. When we analyze colonial law, we must not restrict our view to particular kinds of law but must allow wide flexibility in order to identify critical moments. The danger of comparing apples to oranges is less troubling than the possibility of concluding that legal contests that were politically marginal in one place or time were marginal everywhere.

Conquered peoples showed themselves to be quite adept and sophisticated at interpreting the significance of claims to jurisdiction and strategically taking positions to undermine those claims. As in the case of the Muslim advocate in Marbella and the mufti ruling on his obligations, groups that appeared to be politically allied often adopted quite different approaches to jurisdictional issues. Undermining claims to jurisdiction might be approached by insisting on the legitimacy of alternative legal authorities, as the mufti was doing, or they might involve entering actively into an imposed legal system, as the Marbella man wanted, to protect particular interests and, in the process, preserve community status. Either approach – and also the dialogue about which was morally superior and tactically more promising – had an impact on changes in the ordering of legal authorities. In striking either of these positions (or in combining them in some way), groups used their knowledge of jurisdictional tensions present in the imposed legal order. For example, American Indians at times showed considerable sophistication in their appeals to religious as well as state legal authorities. Or, in a very different setting, Indian Ocean merchants carefully chose among religious, administrative, or customary forums when pursuing claims in the regions where they traded.

In different historical moments, the discourse of jurisdictional disputes focused on different divisions. One striking commonality of the Iberian overseas empires and the great Islamic empires was the focus of jurisdictional politics on the relationship between religious and state law, and the boundaries separating religious communities. In the

extension of these empires, political jurisdiction did not necessarily produce religious jurisdiction, and vice versa. This relationship was a volatile one acted upon by local political contests, many of which focused explicitly on questions of religious identity and the limits of imperial authority.

Contrast this focus to debates in the late nineteenth century about the nature of citizenship in colonial contexts. The discourse of jurisdictional politics shifted decisively away from religion and toward membership in particular political communities. Groups seeking to undermine colonial law often found themselves arguing for broadening, rather than restricting, state jurisdictional claims so that rights recognized under state authority could be extended more widely. At the same time, those who wished to enhance state legal authority often sought to do so by drawing jurisdictional boundaries more sharply and closely. In nineteenth-century India, whole ethnic communities found themselves defined as being outside the law – as “criminal tribes” – while in many parts of Africa colonial administrators embraced efforts to shore up, and even re-create in quite distorted forms, “traditional” law.

We should not be surprised to find that people often perceived very clearly the close connections between jurisdictional claims and messages about cultural difference. Fights broke out about seemingly arcane changes in the extension or restriction of court authority. Even if his view was narrowly focused on the discourse of possession, Greenblatt was right to point to the utterances describing jurisdictional claims as being central to cultural self-definition, and to the discourse of colonialism (and to its institutions) more generally. We need to add to this dimension the impact of these debates on actual institutional structures, some of which endured and extended beyond the particular historical conditions that gave rise to them. Jurisdictional politics in this way shaped an institutional framework linking local cultural divisions to structures of governance and, in turn, to global ordering.

CULTURAL AND LEGAL INTERMEDIARIES

In Achebe’s acclaimed novel of colonialism, *Things Fall Apart*, the protagonist, Okonkwo, is taken before a judge and jury, and convicted, without realizing what is happening. He is not awed by the event because he does not know it is a trial. He does not know that the presiding British official is a judge; he does not know that the twelve men brought in to listen to the exchanges in the room comprise a jury. Okonkwo’s obliviousness

may reflect Achebe's overstatement of Ibo isolation.¹⁸ Still, the point is worth considering. Colonial powers sent some messages through legal institutions that were simply not received. Conquered peoples may also have ignored messages because they doubted the legitimacy of courts, or simply because they found the medium remote. Staging loud and impressive theatrical events was relatively easy for colonizers; making these displays mean what they were intended to mean was much more difficult.¹⁹

The burden of translating was present in the first moments of colonial encounter. Individuals and groups were identified right away to act as interlocutors or intermediaries. While culture change reverberated through interacting societies, it was concentrated in the cultural transformation of these individuals. Within a historically short space of time – certainly less than a generation – we observe cultural practices that are products of neither “dominant” nor “subordinate” culture, but of the interaction. Further, the interpretation of these new cultural forms is not easy and cannot be deduced from a simple algebra of domination and subordination. The variety of cultural representations on the two sides is the cause of some of this complexity. So, too, is the sophistication of cultural adaptation. As an example of this complexity, Bhabba points out that mimicry of colonial rulers (or colonial elites) may signal a recognition of cultural inferiority but may also reflect the hunger to usurp power, a capacity for parody, and a sense of security that external changes will leave one's own cultural core untainted.²⁰

¹⁸ Achebe's novel exaggerates the isolation of Ibo villagers, who lived in a region long incorporated in long-distance trade routes – including the slave trade – and exposed to cultural difference. Also, as Achebe shows us in another section of the novel, the Ibo had a court system of their own, and one wonders if Achebe is right to deprive Okonkwo of the power to form analogies. I do not mean to endorse Obeyesekere's presumption of universal practical rationalism (Gananath Obeyesekere, *The Apotheosis of Captain Cook*; and the response by Marshall Sahlins, *How "Natives" Think*), but instead to point out that Achebe's portrayal of Okonkwo's perceptions of British ceremony are a literary device.

¹⁹ In *Ceremonies of Possession*, Seed emphasizes the disconnect between messages sent and received in legal rituals and suggests, too, that this failure sometimes favored European interpretations of Indian acceptance of their rule. Clendinnen, in her study of the colonial encounter on the Yucatan peninsula, suggests that miscommunication was perhaps inevitable and in fact exacerbated by factional politics on the part of the colonizers (Inga Clendinnen, *Ambivalent Conquests: Maya and Spaniard in Yucatan, 1517–1570*).

²⁰ This is a charitable reading of Bhabba, who stresses the less interesting point that Westernizing cultural change was not always functional to colonial rule. Homi Bhabba, “Of Mimicry and Man.” For a critique of Bhabba that pushes further, see Nicholas Thomas, *Colonialism's Culture*.

Legal Regimes and Colonial Cultures

In colonial law, similarly, it is tempting but wrong to view any participation in an imposed legal system as collaboration, on the one hand, and to represent any form of rejection of the law's authority as resistance. Groups emerged almost everywhere that simultaneously "collaborated" with an imposed legal order and "resisted" its effects. The Moorish "collaborator" discussed at the beginning of this introduction is a case in point. He is also, though, atypical in some ways. Whereas he made explicit his goal of protecting the Muslim community, many intermediary groups did not pursue a clear political agenda but crafted their strategies in terms of fairly narrow individual, family, or small-group interests. If they found the law a useful forum for forwarding those interests, they also maneuvered to strengthen legal mechanisms that improved their standing in the legal system. A most interesting tension emerged when intermediaries perceived that prevailing ways of marking cultural difference would continue the conditions that made their work as intermediaries indispensable but would also inhibit changes in the law that would benefit them in other ways.

As already noted, the mere act of claiming legal jurisdiction prompted a demand for rules about the sorts of people who would be permitted to serve as witnesses, advocates, and judges, and whether they would be treated the same way or differently from others in these roles. Cultural intermediaries who took part in legal proceedings – as litigants or legal practitioners – had an immediate and apparent interest in altering these rules. At times, they were aided by popular perceptions that cultural divisions within the law were symbolic and permissive of other inequalities; at times, their maneuvering favored narrower group interests. In either case, their actions influenced the standing of indigenous courts, procedures, and sources in the legal order and changed perceptions of the legitimacy of colonial rule.

The intermediaries' role was also both important and complex from the point of view of colonial or imperial administrators. Intermediaries were often viewed as essential to rule but at the same time dangerous and an affront to cultural divisions that ruling groups were struggling to uphold. Not surprisingly, questions about how to respond to challenges raised by these groups became the focus of political debates in many places. Debates about whether such intermediaries should be regarded as "foreign" subordinates with the power to undermine state authority or as colonial officials deserving of protection intersected with representations of cultural difference as a rationale for colonial rule.

As with jurisdictional issues, colonial agents faced with these problems relied in part on the blueprint of metropolitan law for distinguishing among categories of legal actors, and they looked for analogous distinctions in indigenous law. For example, the value of oath taking in both imposed and indigenous law depended on a witness's social standing and category. Colonial legal agents tried to create rough tables of equivalence of socially subordinate groups, which were in turn challenged in various ways in the courts. Roles and titles for legal advocates emerged out of a combined process of imposed order, established practice, and strategic responses of both colonial agents and indigenous litigants to opportunities for improvisation.

Perhaps most interesting about the shifting role of legal intermediaries is that their ambiguous status – as participants in the legal order who were not fully subjects of the law – prompted serious debate about the essential nature of law itself. What were the qualities that made imposed law supposedly out of reach for colonized practitioners? Answers to this question called forth generalizations about the nature of indigenous culture and sharpened colonial officials' claims about metropolitan law. In fact, the debates focused attention on the virtue of legal rules themselves, so that for nineteenth-century Europeans the defense of the colonial order became closely intertwined with representations of the rationality of the colonizers and their institutions. As with jurisdictional debates, such attention to the intricacies of the plural legal order ultimately reinforced the growing recognition that the colonial state *was* a state – an entity with the mission and authority to order and regulate all of society.

LAW AND PROPERTY, LAW AS PROPERTY

In Joseph Conrad's novel about the fictitious republic of Costaguana – a place that has much in common with the República Oriental del Uruguay visited by Conrad in his travels – the English-descended head of the local mining concession relies on familiar logic in explaining the benefits of reviving the mine. Charles Gould tells his wife:

What is wanted here is law, good faith, order, security. Any one can declaim about these things, but I pin my faith to material interests. Only let the material interests once get a firm footing, and they are bound to impose the conditions on which alone they can continue to exist. That's how your money-making is justified here in the face of lawlessness and disorder. It is justified because the security which it

demands must be shared with an oppressed people. A better justice will come afterwards. That's your ray of hope.²¹

Gould's views would not seem strange to those historians who view state institutions in general, and the rule of law in particular, as instruments of informal empire and dependent capitalist development. Exchange and profit required stability, and a certain predictability for interactions; law followed investment to provide these conditions. Access to justice for Conrad's "oppressed peoples" was a rare and accidental byproduct of hard-to-come-by order.

For the period we are studying, there has been a marked tendency to describe global interconnectedness in terms of an increasing spread of capitalism outward from Europe and encompassing, by the end of the nineteenth century, all the regions of the world. What permitted this spread? In one version of the story, it is the diffusion of Western institutions – specifically, Western mechanisms for defining and establishing rights to property in ways that permit and stimulate the growth of markets. The rule of law emerged as part of a solution to the problem of high and volatile transaction costs. These transaction costs – the costs of “defining, protecting, and enforcing the property rights to the goods (the right to use, the right to derive income from the use of, the right to exclude, and the right to exchange)” – were minimized through institutional stability, in particular the ability of the state to enforce contracts.²² In another version of the story, capitalist relations of production surged ahead, bringing supportive institutions in their wake, much in the way that Gould was predicting for the hapless Costaguana.

This narrative has been loudly criticized for, among other faults, its Eurocentrism.²³ It represents Western institutions as uniquely capable of facilitating economic growth. But the alternatives offered are saddled with their own problems. One possibility is to elaborate Marx's concept

²¹ Joseph Conrad, *Nostromo*, p. 65.

²² Douglass North, *Institutions, Institutional Change, and Economic Performance*, p. 91.

²³ Although this is surely the more usual complaint, I think that a deeper (and related) flaw of the approach is its inadequate treatment of culture, which is represented as either a sort of mystical substratum that occasionally and for inexplicable reasons acts to impede institutional transformations, or as an aftereffect, a mere dependent variable. These contradictory representations are never resolved. The odd result is that a perspective designed to center analysis around universal, rational-choice models, resides firmly on notions of deep cultural differences that are impervious to reason. For a wider discussion of this problem in the institutionalist literature, see Benton, “From the World Systems Perspective to Institutional World History.”

of the mode of production. By defining a multiplicity of noncapitalist modes of production, one can, proponents argue, represent the complexity of regions that become in some senses (or sectors) capitalist while remaining noncapitalist in other senses (or sectors). This approach, articulated most clearly in world history by Eric Wolf, transcends the pure linearity of assumptions about the necessary link between Western institutions and capitalist growth.²⁴ But the end of the story – the “conquest” by capitalism of the global economy over the long nineteenth century – is surprisingly familiar. Further, the real puzzle in this perspective has proved to be the elaboration of “articulation,” that is, the ways in which different modes of production are linked. They are linked – they *must* be linked – by patterned behaviors that have the regularity and standing of institutions, yet each mode of production is associated with a set of institutions that, in effect, constitutes and defines the mode of production. Are there specific institutional arrangements that then do the work of linking these other institutional practices? No one, to my knowledge, has succeeded in building a very convincing model of this nested institutional order, to say nothing of describing its changes.²⁵

A different and in some senses opposite solution is simply to disregard institutions as secondary to economic forces and patterns – especially, in global narratives, to long-distance trade. Frank, for example, takes this view in arguing against a Western-centered account of capitalist institutions and their spread. Institutions, he argues, simply do not matter. They bend to economic forces.²⁶ This view accomplishes its goal of debunking Eurocentrism. Western institutions were hardly “needed” for a global economy to develop; that economy emerged well

²⁴ Eric Wolf, *Europe and the People Without History*.

²⁵ Indeed, the limitations of this perspective led Eric Wolf away from a focus on articulation and toward an effort to conceptualize power and conflicts over power more broadly. See Eric Wolf, *Envisioning Power: Ideologies of Dominance and Crisis*.

²⁶ Unfortunately, this point, which Frank describes as “a major thesis” of his book *ReOrient* (p. 206), is more an assertion supported by strings of quotes from other scholars than a developed argument in the book. It does appear, though, that in his eagerness to debunk the Eurocentrism of the institutionalists, Frank throws out the baby with the bathwater. He rejects any notion of “the social embedment of the economic process” (p. 206), based narrowly, it seems, on his rejection of Polanyi. This simply returns Frank to universal rationalism (p. 223). But for a strident reminder of the Western biases inherent in *this* assumption, see the introduction in Marshall Sahlins, *How “Natives” Think*; and J.M. Blaut, *The Colonizer’s Model of the World: Geographical Diffusionism and Eurocentric History*. For a subtler discussion of economic social embeddedness, see Mark Granovetter, “Economic Action and Social Structure: The Problem of Social Embeddedness.”