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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

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[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. Jurisdic-
tional 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 cul-
tural practice and constituting structural representations of authority.
Fine distinctions among groups attain an importance that appears ex-
aggerated 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 im-
posed law on newly acquired territories and subordinate peoples, strate-
gic decisions were made about the extent and nature of legal control.
The strategies of rule included aggressive attempts to impose legal sys-
tems intact. More common, though, were conscious efforts to retain
elements of existing institutions and limit legal change as a way of sus-
taining social order. Conquered and colonized groups sought, in turn,

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[3] Harvey, *Islamic Spain*, p. 58.

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

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[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" (Gaspare 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]

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[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., Frederich 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 pri-
macy 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 interna-
tional regimes in periods before the rise of an interstate system and as the
products of both globalizing pressures *and* the internal dynamics of pol-
itics 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 "ad-
vanced" 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 prop-
erty 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

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[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 schol-
arly 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 ex-
ample, 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.

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[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*.

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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

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[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