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Introduction

When A. V. Dicey declared in 1885 that 'England is a country governed, as is scarcely any other part of Europe, under the rule of law', he was expressing sentiments long shared by many of his compatriots.[1] For liberal public intellectuals of Dicey's generation, the constitution was pervaded by a unique spirit of legalism which was embedded in English constitutional culture.[2] It ensured that all powers exercised by government were given by the law and exercised in conformity with it and that all were equally answerable to the law. It also meant that no Englishman could be deprived of his liberty save for a breach of the law as determined by a court.[3] This principle, famously articulated in Magna Carta, was not simply an abstract right: it was practically secured by the great writ of liberty, habeas corpus, which gave the common law judges a power to free anyone imprisoned without cause. By the time that Dicey was writing, the imprisonment without trial of British political dissenters, or

[1] A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 5th ed. (London, MacMillan, 1897), p. 175. Cf. Francis Palgrave, *The Rise and Progress of the English Commonwealth* (London, John Murray, 1832), vol. 1, p. 281.
[2] See also Edward A. Freeman, *The Growth of the English Constitution from the Earliest Times* (London, MacMillan, 1872); and W. E. Hearn, *The Government of England: Its Structure and Development* (London, Longman, Green Reader and Dyer, 1867).
[3] Dicey, *Law of the Constitution*, pp. 179–195.

even their prosecution for such crimes as seditious libel or conspiracy, seemed to be a thing of the past.[4]

At the same time that this liberal view of political opposition took root at the metropolis, the number of people defined and held as 'political prisoners' in Britain's African empire increased sharply. The presence of large numbers of political prisoners here raised important questions about whether enemies of the state in the wider empire would enjoy the same protections offered by the rule of law as those in the metropolis. Those who celebrated the English conception of the rule of law did not consider it to be confined to domestic shores: rather, it also had a central place in British imperial thought. Part of the moral justification of empire was that it would bring the rule of law to 'backward' peoples, and free them from 'oriental despotism'.[5] As Lord Carnarvon put it in 1874, it was Britain's imperial duty to give 'our native fellow-subjects [...] struggling to emerge into civilisation' a system of wise laws, 'where the humblest may enjoy freedom from oppression and wrong equally with the greatest'.[6] This did not mean introducing English forms of government into all her possessions. Even that most impeccable liberal John Stuart Mill thought that '[d]espotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement',[7] and there was often much handwringing over when and whether particular communities could

[4] T. E. May, *The Constitutional History of England since the Accession of George III, 1760–1860*, 2nd ed., 2 vols. (London, Longman, Green, Longman, Roberts and Green, 1863), vol. 2, chs. 9 and 11.

[5] See Keally McBride, *Mr. Mothercountry: The Man Who Made the Rule of Law* (New York, Oxford University Press, 2016), pp. 22–23; and Thomas R. Metcalfe, *Ideologies of the Raj* (Cambridge, Cambridge University Press, 1995), pp. 37–39.

[6] Quoted in C. C. Eldridge, 'Sinews of Empire: Changing Perspectives', in C. C. Eldridge (ed.), *British Imperialism in the Nineteenth Century* (London, MacMillan, 1984), p. 185; and (partially) in Peter J. Cain, 'Character, "Ordered Liberty", and the Mission to Civilise: British Moral Justification of Empire, 1870–1914', *Journal of Imperial and Commonwealth History*, vol. 40:4 (2012), pp. 557–578 at p. 563.

[7] J. S. Mill, 'On Liberty', in *Collected Works*, vol. 18, ed. J. M. Robson (Toronto, University of Toronto Press, 1977), p. 224. Cf. J. F. Stephen, 'Foundations of the Government of India', *The Nineteenth Century*, vol. 14 (1883), pp. 541–568 at pp. 556–557. Historians have recently drawn attention to the contradictions for liberalism which empire entailed: see Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago, University of Chicago Press, 1999); and Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton, Princeton University Press, 2005).

be considered ready for representative institutions. In many parts of the empire, imperial subjects were meant to be treated in the way that the metropolitan disfranchised were treated: denied a political voice, but subject to a rational, modern and equal system of laws.[8] Nor did it mean exporting the common law to all parts of the empire. Although settlers were said to carry the common law with them to new territories,[9] in conquered or ceded lands, such as Quebec or the Cape of Good Hope, existing legal regimes created by other European imperial powers were not replaced.[10] Within the empire, multiple forms of legal order might co-exist,[11] with different sets of rules applying to different peoples, as with the different regimes of 'personal law' for Hindus and Muslims in India which sat alongside codified versions of English law,[12] or the use of customary law in Africa alongside systems based on European jurisprudence.[13] It was thus not the details of English law which imperialists sought to export but rather its animating spirit,[14] at the heart of which was a commitment to 'the rudiments of procedural fairness', secured by a jurisdictional hierarchy with Westminster and

[8] For such a view, advocating a clear code of law, but administered by 'an enlightened and paternal despotism', see T. B. Macaulay's speech in *Parl. Debs.*, 3rd ser., vol. 19, col. 533 (10 July 1833).

[9] *Blankard* v. *Galdy* (1694) 2 Salk. 411; *Dutton* v. *Howell* (1694) Show. PC 24; *Anonymous* (1722) 2 P. Wms. 75. Only so much as was suitable to local conditions was so carried. See Mary S. Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Harvard University Press, 2004), pp. 1–4; and Daniel J. Hulsebosch, 'The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence', *Law and History Review*, vol. 21 (2003), pp. 439–482.

[10] See Christian R. Burset, 'Why Didn't the Common Law Follow the Flag?', *Virginia Law Review*, vol. 105 (2019), pp. 483–542; and Hannah Weiss Muller, 'Bonds of Belonging: Subjecthood and the British Empire', *Journal of British Studies*, vol. 53 (2014), pp. 29–58.

[11] See Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge, Cambridge University Press, 2002).

[12] See D. A. Washbrook, 'Law, State and Agrarian Society in Colonial India', *Modern Asian Studies*, vol. 15:3 (1981), pp. 649–721; and Eric Stokes, *The English Utilitarians and India* (Oxford, Oxford University Press, 1959).

[13] See Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge, Cambridge University Press, 1985); and Thomas Spear, 'Neo-traditionalism and the Limits of Invention in British Colonial Africa', *Journal of African History*, vol. 44:1 (2003), pp. 3–27.

[14] Metcalfe, *Ideologies of the Raj*, p. 39.

Whitehall at the top.[15] One of the principal benefits of being under this imperial jurisdiction was that, like their disfranchised counterparts in the metropolis, all those who became British subjects could claim the right to a writ of habeas corpus to be freed from unlawful imprisonment, or the right to sue any official at common law for invading their private rights.[16] In the eyes of its defenders, the common law constitution provided the tools to ensure that liberties could be secure throughout the empire.

Habeas Corpus and the Rule of Law

For jurists like Dicey, the most important legal tool to defend liberty was the writ of habeas corpus, which secured the release of anyone whose gaoler could not show the court a lawful reason for his detention.[17] Seventeenth-century legislation settled that no prisoner could be detained simply for reason of state or deported to evade the reach of the writ.[18] In 1861, the court of Queen's Bench confirmed that the writ had imperial reach, when the British and Foreign Anti-Slavery Society sought to prevent the extradition to the United States of a fugitive slave, John Anderson, who had killed a cotton planter while escaping from Missouri. After an application for a habeas corpus on his behalf had been rejected by the Queen's Bench in Toronto (on the ground that murder was an extraditable offence

[15] Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Cambridge, Harvard University Press, 2016), p. 17.

[16] *Mostyn* v. *Fabregas* (1774) 1 Cowp. 161, *Campbell* v. *Hall* (1774) 1 Cowp. 204. Colonial governors were also liable to criminal proceedings in London, though only in very exceptional cases were they held accountable, even for murders. Joseph Wall, who had been Governor of Goree, was executed in London in 1802, after a trial for the murder twenty years earlier of a sergeant at the garrison. *The Times*, 21 January 1802, p. 2; 29 January 1802, p. 3. Attempts to prosecute Governor Picton of Trinidad and Governor Eyre of Jamaica did not succeed: see (for Picton) Lauren Benton and Lisa Ford, 'Island Despotism: Trinidad, the British Imperial Constitution and Global Legal Order', *Journal of Imperial and Commonwealth History*, vol. 46:1 (2018), pp. 21–46 and (for Eyre) R. W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford, Oxford University Press, 2005).

[17] On the writ, see Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge: Belknap Press, 2010); and Amanda L. Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (New York: Oxford University Press, 2017).

[18] Star Chamber Act 1641, 16 Car. I c. 10; Habeas Corpus Act 1679, 31 Car. II, c. 2.

under the Webster–Ashburton treaty with the United States),[19] a writ from the English court was directed to the sheriff of York County in Canada, confirming the power of the Queen's judges in London to supervise the actions of her officials throughout the empire.[20] Although legislation in the following year qualified this power – denying courts in England the right to issue the writ to any colony or dominion with a court which could do so itself[21] – it confirmed that the writ would be available, one way or another, throughout the empire.

The power of the writ to supervise imperial detentions without trial was demonstrated early in Victoria's reign, when an attempt was made to move political prisoners from one part of the empire to another. In 1837, popular rebellions in both Lower Canada and Upper Canada were suppressed after martial law was declared.[22] With order restored, an ordinance was passed in Lower Canada to empower the executive to transport the leaders of the rebellion to Bermuda and to punish them with death should they return without permission.[23] This ordinance was disallowed by the imperial government, after the Whig opposition pointed out that the detainees would be freed on a writ of habeas corpus as soon as they arrived in Bermuda, 'as the proceeding was obviously and notoriously illegal'.[24] In Upper Canada, where those considered most morally guilty were to be tried for treason, legislation was passed to

[19] *In the matter of John Anderson* (1860) in C. Robinson (ed.), *Reports of Cases Decided in the Court of Queen's Bench*, vol. 20 (Toronto, Henry Rowsell, 1861), p. 124.

[20] The Court of Common Pleas in Toronto later freed Anderson on a technicality (*The Times*, 19 February 1861, p. 7; 27 February 1861, p. 12), rendering the intervention of the Westminster court unnecessary. By then, the English Law Officers had given an opinion that he could not be extradited under the Webster–Ashburton treaty, since it could not be murder for a person to kill someone attempting to enslave them: William Forsyth, *Cases and Opinions on Constitutional Law* (London, Stevens and Haynes, 1869), p. 373, Opinion dated 28 March 1861.

[21] Habeas Corpus Act 1862, 25 & 26 Vic. c. 20.

[22] See Colin Read and Ronald J. Stagg (eds.), *The Rebellion of 1837 in Upper Canada: A Collection of Documents* (Montreal, McGill-Queen's University Press, 1985); and F. Murray Greenwood and Barry Wright (eds.), *Canadian State Trials*, vol. II (Toronto, Osgoode Society, 2002).

[23] See Jean-Marie Fecteau, '"This Ultimate Resource": Martial Law and State Repression in Lower Canada, 1837–8'; and Steven Watt, 'State Trial by Legislature: The Special Council of Lower Canada, 1838–41', in F. Murray Greenwood and Barry Wright (eds.), *Canadian State Trials*, vol. II (Toronto, Osgoode Society, 2002), pp. 207–247 and 248–278.

[24] *Parl. Debs.*, 3rd ser., vol. 44, col. 1084 (9 August 1838, Lord Lyndhurst); PP 1839 (2) XXXII. 1, No. 53, p. 58.

empower the Lieutenant-Governor to grant conditional pardons to a second rank of rebels without such trials, if they petitioned for a pardon after being charged with treason. Under this procedure, nine men were given pardons conditional on their being transported to the penal colony of Van Diemen's Land for periods varying between seven years and life.[25] When the men were transported, opposition MPs in London again invoked habeas corpus to secure their liberty.

On their arrival at Liverpool, en route to Van Diemen's Land, their case was taken up by the radical MP J. A. Roebuck, who applied for a writ of habeas corpus on the ground that they had been brought to England as 'State Prisoners' without having 'been legally accused of any crime'.[26] The prisoners' first habeas corpus application – to the Queen's Bench – failed, after Lord Denman ruled that the Canadian statute was valid and that 'transports from the colonies on commuted sentences had been habitually received in England in their passage to the penal settlements'.[27] However, doubts remained over whether they could be removed from England to Van Diemen's Land,[28] and a second habeas corpus application was lodged in the court of Exchequer. On this occasion, Lord Abinger held that their imprisonment was lawful, since even if the pardon was void – or the men had renounced it – they were to be regarded as lawfully in custody on a charge of treason. Crucially, however, he left open the question of whether such men, who were not 'convicts', could be removed from England under the 1824 Transportation Act.[29] If they could not, then it

[25] See Rainer Baehre, 'Trying the Rebels: Emergency Legislation and the Colonial Executive's Overall Legal Strategy in the Upper Canadian Rebellion', in F. Murray Greenwood and Barry Wright (eds.), *Canadian State Trials*, vol. II (Toronto, Osgoode Society, 2002), pp. 41–61; Paul Romney and Barry Wright, 'The Toronto Treason Trials, March–May 1838', in ibid., pp. 62–99; and Colin Reid, 'The Treason Trials of 1838 in Western Upper Canada', in ibid., pp. 100–29. See also PP 1837–8 (524) XXXIX. 833, pp. 11–12; PP 1839 (54) XXXIV 197.

[26] The National Archives (UK) TS 11/679. Affidavit of J. A. Roebuck, 28 December 1838. Unless otherwise stated, all archival materials henceforth cited are held at the National Archives. A list of classes is to be found in the Abbreviations of Archival Sources.

[27] Alfred A. Fry, *Report of the Case of the Canadian Prisoners with an Introduction of the Writ of Habeas Corpus* (London, A. Maxwell, 1839), p. 82. See also *The Canadian Prisoners' Case* (1839) 3 *State Trials* new ser., 963.

[28] See 'Case Respecting Certain Canadian Prisoners: Opinion of the Attorney General and Solicitor General, 24 January 1839', TS 11/679.

[29] 5 Geo. IV c. 84, s. 17. *In the Matter of Parker and Others (the Case of the Canadian Prisoners)* (1839) 5 M. & W. 32 at 50.

was clear that they would have to be tried for treason in England, or released. It was this dilemma that eventually forced the government in July to pardon them.[30] Although both the government and the judiciary in this case were content to see the men remain in prison, the logic of the decision dictated that the men had to be freed or tried. This seemed to suggest that once the law was put into operation – in this case by the Whigs and Radicals – it would be self-operating, to ensure the principles of Magna Carta were upheld even in an imperial dispute.

At the same time, however, the level of protection offered by the writ was limited by the ability of the legislature to suspend its operation, or to create legal regimes permitting detention without trial. Although this was not done on the mainland after 1818, it was done routinely in Ireland as well as in the wider empire in the nineteenth century. In addition to suspensions of habeas corpus, Ireland also saw a number of Insurrection Acts and Coercion Acts between 1807 and 1833, which gave authorities the power to use emergency powers in proclaimed areas.[31] Further legislation passed between 1848 and 1871 authorised the detention without trial of those suspected of plotting rebellion against the government in Ireland. [32] For a jurist like Dicey, coercive legislation in Ireland presented a challenge:[33] how could such legislation be reconciled with his vision of the rule of law? At first glance, his comment that where 'acts of state assume the form of regular legislation, … this fact of itself maintains in no small degree the real no less than the apparent supremacy of law'[34] seemed to indicate that in the end, he was prepared to endorse a formal view of rule *by* law, according to which anything done under the authority of a valid act of parliament was legitimate. Such a position would abandon the common lawyers' view that the rule *of* law required

[30] On the government's doubts regarding the issue of transportation, see PP 1840 [221] XXXI. 219 at p. 21, No. 23. See also Cassandra Pybus, 'Patriot Exiles in Van Diemen's Land', in F. Murray Greenwood and Barry Wright (eds.), *Canadian State Trials*, vol. II (Toronto, Osgoode Society, 2002), at pp. 190–192.

[31] 47 Geo. III (sess. 2), c. 13; 3 Geo. IV, c. 1; 3 & 4 Wm. IV, c. 4.

[32] 11 & 12 Vic. c. 35; 12 & 13 Vic. c. 2; 29 & 30 Vic. c. 1; 29 & 30 Vic. c. 119; 30 & 31 Vic. c. 1; 30 & 31 Vic. c. 25; 31 Vic. c. 7; 34 & 35 Vic. c. 25.

[33] Yet another coercion act – the Protection of Person and Property (Ireland) Act 1881, 44 & 45 Vict. c. 4 – was passed shortly before he composed his famous treatise.

[34] Dicey, *Law of the Constitution*, p. 227. For a recent reading of this passage, see Mark D. Walters, *A. V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge, Cambridge University Press, 2020), pp. 279–285.

fidelity to a deeper set of substantive principles which had been developed by the courts over centuries.[35] It would suggest that, for Dicey, the principle of parliamentary sovereignty could trump the rule of law. In fact, his position was more complex.

Both Dicey and his contemporaries assumed that English constitutional practice was suffused by a culture committed to protecting the substantive values found in the common law tradition. According to this view, the same 'spirit' or 'habit' of legality which pervaded the decisions of courts adjudicating contests about the rights of individuals also pervaded wider constitutional practice. It was animated by 'a whole system of political morality, a whole code of precepts for the guidance of public men, which will not be found in any page of either the Statute or the Common Law', and which had evolved over time.[36] At the heart of this political morality was a notion of accountability. Although parliament was legally sovereign, it was practically constrained by the need to conform to the will of the political nation which it represented, which was politically sovereign. Ministers were not only answerable to the common law courts for any breaches of the law, but they were also accountable to parliament, 'the constitutional representatives of the public', for the way they exercised those powers which lay in their discretion.[37] In these areas, they were – as Dicey famously expounded – expected to follow settled constitutional conventions, which also ensured that the will of the political nation was observed.[38] In Dicey's mid-Victorian view, the will of the nation was animated by the spirit of the rule of law, and could act as a check against the potential tyranny of the rulers.[39]

[35] For the distinction, see the discussions in Paul P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law* (1997), pp. 467–487; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, Cambridge University Press, 2004), chs. 7–8; Jeremy Waldron, 'The Concept and the Rule of Law', *Georgia Law Review*, 43:1 (2008), pp. 1–62; and Jeremy Waldron, 'The Rule of Law and the Importance of Procedure', in James Fleming (ed.), *Getting to the Rule of Law* (New York, NYU Press, 2011), pp. 3–32.

[36] Freeman, *The Growth of the English Constitution*, p. 109.

[37] Hearn, *The Government of England*, p. 99.

[38] See also Adam Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (Ann Arbor, University of Michigan Press, 2013), pp. 60–61, 66.

[39] In the eighth (1915) edition, Dicey bemoaned the demise of this spirit, and the rise of party spirit, which he argued could not be associated with the authority of the nation. A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th ed. (London, MacMillan and Co, 1915), p. xii.

With this perspective, Dicey regarded parliament not as a potential instrument of tyranny, but as an institution which worked to complement the common law. This meant that he, and his Whig and Liberal contemporaries, did not feel that the rule of law was undermined if parliament on occasion felt the need to confer extraordinary powers on the executive: for such powers could be conferred only by 'formal and deliberate legislation',[40] and the legislature might be trusted to do so only when the rule of law was itself under threat. Although Irish Coercion Acts made Liberals uncomfortable, they thought such legislation could be justified, since they felt that in the context of the Land Wars of the early 1880s, the very preconditions for the existence of a rule of law did not exist in rural Ireland.[41] Those who saw the unrest as being driven by a small number of dangerous agitators felt (in Sir Charles Dilke's words) that 'by locking up a small number of the chiefs the rule of law might be restored'.[42] For Dicey, legislation such as the 1881 Act could be 'tolerated as a necessary evil' when used to deal with offences 'condemned by the human conscience'. At the same time, he argued that coercion had to be accompanied by reforms to remove grievances. Coercion had to be accompanied by 'just legislation, [to] remove the source of Irish opposition to the law'.[43] According to this view, emergency legislation depriving people of their liberty was justified if it was implemented by a legislature which was committed to the broader culture of the rule of law. In an imperial context, this was to assume that emergency legislation would be used only when it was clearly necessary, and would be justifiable in a common law idiom.

Martial Law

If jurists were concerned to explain and justify the use of legislated coercive powers in Ireland, they also sought to explain martial law powers in a way consistent with their substantive view of the rule of

[40] Dicey, *Law of the Constitution*, pp. 336–337.
[41] 'In Munster and Connaught the ordinary law is set aside. True freedom has ceased. . . . We do not refuse to put out a fire until we have ascertained where and how it originated.' *The Times*, 14 December 1880, p. 9.
[42] Dilke Memoirs, B[ritish] L[ibrary] Add. MS. 43935, f. 12.
[43] A. V. Dicey, *England's Case against Home Rule* (London, John Murray, 1886), pp. 115, 120.

law. Although not used on the mainland, martial law was widely used in the nineteenth-century empire. It was used to crush slave rebellions in Barbados in 1816 and again in Demerara in 1823.[44] It was used to suppress rebellions in Upper and Lower Canada in 1837–1838, and to crush the Kandy rebellion in Ceylon in 1848.[45] In the following year, martial law was also proclaimed in Cephalonia, where Britain acted as a 'protecting sovereign' by treaty.[46] It was used on five occasions in New Zealand in the 1860s, and again in 1882. Martial law was also regularly used at the frontiers of empire, as colonial settlers came into conflict with indigenous communities,[47] particularly – as shall be seen in what follows – in Africa. The nature of martial law was debated in London on numerous occasions in the nineteenth century after its use in parts of the empire, most heatedly in the 'Jamaica controversy' which followed the proclamation of martial law by Governor Edward Eyre in Jamaica in 1865.[48] These debates raised questions about whether and when the military had the right to punish or imprison civilians without the due process of an ordinary trial.

By the middle of the nineteenth century, it was a settled principle in international law that when an army occupied foreign territory in wartime, it would apply martial law.[49] According to the Duke of Wellington, this was 'neither more nor less than the will of the general

[44] See Richard Gott, *Britain's Empire: Resistance, Repression and Revolt* (London, Verso, 2011), pp. 208, 213; Emilia Viotti da Costa, *Crowns of Glory, Tears of Blood: The Demerara Slave Rebellion of 1823* (New York, Oxford University Press, 1994).

[45] See R. W. Kostal, 'A Jurisprudence of Power: Martial Law and the Ceylon Controversy of 1848–51', *Journal of Imperial and Commonwealth History*, vol. 28 (2000), pp. 1–34 at pp. 6–7. Martial law was also used in Ceylon in 1818 after a previous rebellion against British rule.

[46] On its status, see Benton and Ford, *Rage for Order*, pp. 102–112. The Lord High Commissioner of the Ionian Islands exercised a 'High Police Power' under the Constitution of 1817 which gave him the power to proclaim martial law, institute courts martial and order the removal of Ionian citizens from one island to another. See PP 1852 (567) XXXII. 323, No. 21, pp. 56ff.

[47] See e.g. the use of martial law against indigenous Australian subjects in 1840, in Robert Foster, Rick Hosking and Amanda Nettelbeck, *Fatal Collisions: The South Australian Frontier and the Violence of Memory* (Kent Town, Wakefield Press, 2001), pp. 13–28.

[48] Kostal, *A Jurisprudence of Power*; Priyamvada Gopal, *Insurgent Empire: Anticolonial Resistance and British Dissent* (London, Verso, 2019), pp. 83–126.

[49] As Francis Lieber put it in an unpublished work, 'The Martial Law of hostile occupation – *occupatio bellica* – is recognized by the Law of nations as a necessary element of the *jus belli*': Francis Lieber and G. Norman Lieber, *To Save the Country:*