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Transpositions of Empire

Edited by
Shaunnagh Dorsett and Ian Hunter

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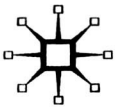

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Contents

Introduction

Ian Hunter and Shaunnagh Dorsett

The chapters in this volume were generated from a gathering of scholars working on the role of law in colonial societies. All participants in a series of discussions that were held in Prato, Italy, in April 2009 were asked to reflect on the forms in which metropolitan legal doctrines and practices were transposed in colonial settings as part of processes of appropriating territory, subduing indigenous populations, and establishing European governance. Thus discussions concentrated on the relation between law and politics in transpositions of empire or rule in colonial enterprises. In order to sharpen the focus, concrete examples were drawn principally from British colonies. In keeping with the "historical turn" in studies of imperialism and international law, and in an effort to combine legal history and the history of political thought, scholars representing this array of expertise were asked to join forces.[1] As a result, legal historians of empire, social historians of colonization, historians and philosophers of political thought, all found themselves in the same space sharing their research and arguments. The chapters in this book thus have as their substantive focus the relations between law and politics in British colonial settings, and they find their methodological convergence in the (sometimes difficult) nexus between legal history, social history, and the history and philosophy of political thought.

In the event, discussion of the substantive relation between law and politics turns out to be multiplex and contested. This is as a result of the fact that it is overdetermined by the superimposition of two quite different approaches to the relationship. In accordance with the first approach—formed by the nexus of legal history and contextualist history of political thought—relations between law and politics are shaped by the interaction of two counterpoised historical moments: the historical role of judicial systems in ordering the exercise of government in accordance with the "rule of law"; and the historical fact of the governmental use of law as an instrument of rule or empire. This sometimes fraught interaction is

typically managed via the instrumentality of public law, which includes inter alia fundamental laws for the establishment of colonies; imperial acts and local ordinances establishing basic institutions; statutes legitimating the appropriation and distribution of land; and treaties between colonizing sovereigns and indigenous "nations." *Jus gentium* doctrines and common law determinations also feed into this process. Public law manages this interaction immanently rather than transcendentally and thus itself manifests the unstable interaction between the role of law as a normative means of ordering government (where it is known as constitutional law) and as the instrumental means of exercising it (where it is known as public law).

In British colonial thought and practice the public law management of the interaction between law and politics was epitomized by the juridical construct of the "Crown." As a public law construction, and depending on concrete historical circumstances, the Crown could function as both the juridically constrained legal personality of the British sovereign and as the legal cipher through which an unconstrained British sovereignty was exercised through the imposed rule of its law. As the principal colonies discussed in the following chapters were British "Crown colonies," they present us with a series of examples in which attempts to transpose the formal legal personality of the British sovereign in colonial jurisdictions had to be undertaken in circumstances where British sovereignty and the rule of its law had yet to be established as a political or governmental fact. In such frontier circumstances—where advocates of settler liberties sought to re-contest the prerogative rights of the Crown; where state authority lacked the disciplinary instruments to control both them and its own soldiery; and where the rule of law was to be imposed on indigenous peoples whose political and cultural amenability to it was radically contested—it was impossible for the settled judicial attributes of the metropolitan Crown to be simply imposed in the colonies, for better or worse. Rather, as several of the following chapters show in detail, what we find is that the juridical attributes of the Crown were subject to a whole series of political improvisations and innovations, as this highly contextual public law construct was continuously adapted to the governance of settlers whose British subjecthood had blurred at the frontier, and of indigenous peoples whose British subjecthood was a matter of governmental aspiration rather than legal proclamation.

Despite the fact that they are typically found together, the second approach to the relation between law and politics differs fundamentally from this first one. Rather than focusing on public law as the historical nexus for the legal ordering of politics and the political utilization of law, the second approach treats law itself as only a proxy for a higher normative principle—variously justice, right, or the good—whose actualization

in history is commanded by reason or nature. Methodologically, this approach is grounded in the nexus between legal history and philosophy or philosophical history, and, in treating law as the exponent of justice, right, or the good, it establishes a normative rather than historical relation between law and politics. In the peculiar mytho-history of the English common law, this normative relation is carried in the story of timeless common law tradition whose "time immemorial" rights and liberties lie beyond the reach of any merely historical sovereign powers and function as a permanent check on the latter.[2] Of more importance for our current concerns, however, is the normative relation between law and politics established by certain constructions of natural law: first, the Thomistic Catholic construction, according to which justice is the preeminent virtue derived from the imperative that man must complete or perfect his nascent ("rational and sociable") nature or essence; and second, the Kantian Protestant construction, according to which law is grounded in a higher "principle of right," understood in terms of the harmonization of potentially conflicting wills in a community of rational beings.[3] On either construal, law as the exponent of a higher justice or right obtains normative preeminence over politics, which in exercising power on grounds other than those of justice or right (typically in exercising "Hobbesian" sovereignty on the grounds of territorial security) is regarded as contravening the justice embedded in man's nature or the right embedded in his reason, and so too the merely "positive" or historical law that allows itself to function as a mere instrument of such politics.

When this philosophico-legal or philosophico-historical approach to the relation between law and politics is applied to the deployment of law in colonial settings, it constitutes a means of formulating retrospective normative regret for the historical existence of colonialism and imperialism. From this viewpoint, the European exercise of sovereignty and governance over indigenous peoples in a manner that contravenes justice or right—to whose norms it is presumed such peoples have subscribed through their nature or reason—represents a regrettable deviation from the true historical unfolding of these norms, brought about by an unjust politics and the law it has suborned. This view contrasts starkly with the public law view of the law-politics relation, which, since the seventeenth century, has treated the exercise of sovereignty—including its exercise over conquered nations—as an untranscendable historical-political fact: something that public law seeks to order in accordance with fundamental enactments or treaties, but to which it remains immanent as the exponent not of a higher justice or right but only of these historical enactments and treaties.[4] The philosophico-historical approach has commended itself to postcolonial scholars in particular. They have been drawn to the recovery of natural

law in order to effect the normative condemnation of a "positive" law rendered complicit in colonialism and imperialism through its political corruption. Although they continue to maintain a historical view of this process, theirs is a history oriented to what should have happened rather than what happened to happen.

In current research these two approaches to the relation between law and politics in colonial settings do not function as strict alternatives. They operate rather as the opposed poles of a single research field, their counterpoised forces establishing a wide spectrum of positions, characterized not by sharp demarcations but by gradual transitions. All of the contributions to the present volume find their place in this spectrum between the public law historiography of colonial legal governance as a historical fact, and the philosophical history of it as a normative political deviation; most of the chapters contain both perspectives, often shaping their perspectives in the torsion between the two.

It is appropriate then that Part I should contain two chapters that come as close as possible to the two poles that define the field. In his contribution Ian Hunter makes an uncompromising case for an immanent public law historiography of the colonial uses of the law of nature and nations. Explicitly targeting the "critical" philosophical historiography of postcolonial studies, Hunter argues that the natural law perspectives underlying this historiography—neo-Thomist, neo-Kantian, and deconstructionist—constitute "regional" European metaphysical subcultures. Rather than supplying a global normative justice capable of registering the normative deviation of colonialist uses of European law, Hunter argues that such perspectives are themselves ineluctably Eurocentric, indicating that colonial encounters could not be mediated by philosophical reason, only managed in a fumbling manner through law and politics. Rejecting the kind of case made by Hunter, Duncan Ivison argues that philosophical rationality can still bring colonialism and imperialism before the normative bench of a universal justice, albeit a justice that is itself mediated by history and practice. Drawing on a version of natural law that he argues escapes the problems of Eurocentrism—namely, Kant's conception of right or justice as the harmonized willing of a community of rational beings—Ivison nonetheless qualifies Kant's moral cosmopolitanism by insisting on the role of historical institutions (such as the state) in mediating justice, and by arguing for the bottom-up generation of a non-imperialist and non-cosmopolitan justice that is still global.

In the four chapters that comprise Part II of the collection, both approaches to the colonial uses of law—as a public law fact and as normative deviation induced by politics—are strongly present, although it is perhaps the latter approach that provides these chapters with their underlying orientation. Christopher Tomlins searches for the sources of British colonialist thought