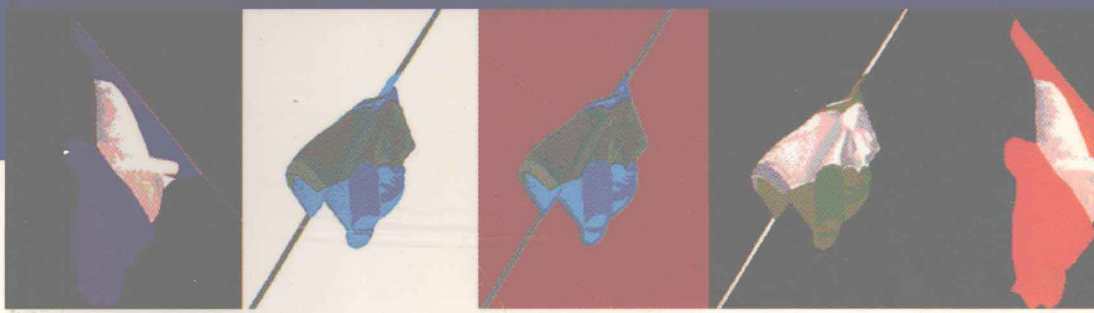
Contested States



Law, Hegemony and Resistance

Edited by Mindie Lazarus-Black
and Susan F. Hirsch

Foreword by John L. Comaroff

AFTER THE LAW

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ROUTLEDGE NEW YORK LONDON

Published in 1994 by

Routledge
29 West 35th Street
New York, NY 10001

Published in Great Britain by

Routledge
11 New Fetter Lane
London EC4P 4EE

Printed in the United States of America on acid-free paper.

Library of Congress Cataloging-in-Publication Data

Lazarus-Black, Mindie.
Contested states : law, hegemony, and resistance / Mindie Lazarus
-Black and Susan F. Hirsch (eds.).
p. cm. — (After the law)
Includes bibliographical references.
ISBN 0-415-90779-9 (HB) — ISBN 0-415-90780-2 (PB)
1. Sociological jurisprudence. 2. Ethnological jurisprudence.
3. Customary law. I. Hirsch, Susan. II. Title. III. Series.
K376.L393 1994
340'.115—dc20 93-47569
CIP

British Library Cataloguing-in-Publication Data also available.

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ACKNOWLEDGMENTS

In *Contested States* we seek to demonstrate that new scholarship in legal history and the anthropology of law contributes to theoretical understanding of power, hegemony, and resistance. We began with this goal, and it is the thread that binds together eleven papers written from different perspectives about diverse parts of the world and moments separated in time.

Like flags in the wind, the ideas in the volume have shifted, changed, and unfurled through our separate ruminations, conversations, and contestations with each other, our contributors, and other colleagues. We developed this collection in several intellectual forums. Our interest in the project first emerged in conversations we had at the American Bar Foundation in Chicago, a place that brought us together and provided each of us with intellectual stimulation, new colleagues, and personal friendships. We invited our contributors to a panel at the joint meetings of the Law and Society Association and the research Committee on the Sociology of Law of the International Sociology Association held in Amsterdam, the Netherlands, June 26–28, 1991. Excited by the obvious connections between the issues we were investigating in different times and places, most of us met again at the American Anthropological Association Annual Meeting in Chicago in November of the same year. Michael Musheno and Dirk Hartog commented astutely on the papers in Amsterdam and we benefited from Don Brenneis's insights and support in Chicago. Our thanks to them.

As *Contested States* began to take shape, we talked at great length on the telephone and by fax, and twice camped out in each other's homes. We would like to thank our separate institutions, Wesleyan University and the University of Illinois at Chicago, for support. We are also grateful to colleagues and students who listened to us and stimulated our thinking through their questions and comments. We want to acknowledge the family members and close friends who have

supported us in this project, for all the things that sometimes get taken for granted and for respecting our time together.

Christine Harrington and John Brigham introduced us to Routledge and asked us to be part of their exciting series. They worked with us to further enhance the manuscript for publication, and we have appreciated their support, editorial advice, and early assurances that this collection deserved publication. Cecelia Cancellero and her staff at Routledge were helpful and efficient throughout the publication process. We especially thank John Comaroff for writing the foreword and for comments on a prior version of the introduction.

Early in this project we learned that collaboration can be an invaluable and very special experience. We found the quality of our thinking enhanced through the creative exercise of talking and writing together. We are grateful to each other for working hard and in good faith and for all that we have learned together through this process. We want our readers to know that we flipped a coin to determine whose name should be placed first on the title page, agreeing beforehand that the other would then be named first author of the introductory chapter.

We owe a special debt of gratitude to our contributors whose scholarship inspired us to take on the project. We want them to know that when we began this manuscript we were warned that editing a long volume with many authors would be hard work—it was—and that it might turn into an unpleasant ordeal—it didn't. Ours was an apparently unusual editing experience; each author responded to our letters and telephone queries, suggestions for revisions, and requests for advice with intelligence, good will, and prompt attention. Thank you all for your scholarly contributions to this volume, your comments on our introduction, and your support and professionalism. We value deeply what we have learned with and from you.

Susan F. Hirsch and Mindie Lazarus-Black

FOREWORD

John L. Comaroff

You are better off not knowing how sausages and laws are made.
Chinese Fortune Cookie
Amherst, Massachusetts; September 9, 1993

Every god, it seems, has its day. In the academy, our current deity du jour is unquestionably Janus. It is almost impossible to read anything at present on, say, nationalism without being told, after Hugh Seton-Watson, that the beast is "Janus-faced." It is said to have both a light and a dark side, to prompt people both to heroic freedom struggles and to horrific ethnocidal excesses.

As with nationalism, so with many other things in our imploding, explosive world. The body. The self. Social identity. Modernity. Power. Language. Time. Technology. Travel. Representation. Reality. Space. Virtual reality. Almost everything which engages our attention is held, by someone or another, to have a double visage, to produce a double consciousness in us, to constrain and enable, to promise freedom and potentiate bondage. Janus turns out not just to be the god-of-two-faces, but also the god of paradox and contradiction.

And now The Law. In this excellent collection of essays, we are taken on an intriguing tour through the labyrinthine ways of legality, power and hegemony, contestation and resistance. And through the conceptual minefields that enclose them. Much recent writing—especially on colonialism and the political sociology of race, class, and gender—has emphasized the dark side of the law. From this vantage, legal institutions and processes appear as tools of domination and disempowerment; blunt instruments wielded by states, ruling classes, reigning regimes. By contrast, liberal theory, always long on optimism, has it that law holds the key, actual or potential, to liberation and

empowerment, to civil rights and equality of opportunity. *Contested States* succeeds splendidly in showing that each of these representations captures, or rather caricatures, just one face of the beast. And it does so by interrogating legal processes, precepts, and practices precisely where they should be interrogated: in historically constituted, socially situated fields of power and resistance; the force fields within which human beings live out their lives—however ordinary, however epic.

Lazarus-Black and Hirsch, along with their contributors, demonstrate how the law may serve those who contest authority as well as those who wield it; that legal structures and sensibilities are everywhere polymorphous, everywhere politicized; how efforts intended to subvert the state by recourse to illegalities may reinforce the received state of the world; that the mysterious workings of power may implicate the law quite unpredictably in its means and ends. But they also do more. They show us *how* and *why* legality enters into the making of modern history—past and present, at home and abroad—in inherently ambivalent, contradictory ways. In so doing, they compel us to rethink both the scope and the substance of the anthropology (taken in its most general sense) of law in culture and society.

I am reminded, in saying this, of three things, three texts that, although far removed from each other, together underscore the lessons to be learned from this book. And speak for its importance.

One is the remarkable opening sentence of Montesquieu's *The Spirit of the Laws*: "Laws, in their most general significance," it says, "are the necessary relations arising from the nature of things." A less acute, more mechanistic mind—of the kind, for example that later gave us sociological functionalism—might have written instead that "laws are necessary things that arise from the nature of relations." However, in his more compelling formulation, Montesquieu anticipated the first principle, the founding syllogism, of a postfunctionalist, poststructuralist, post-Marxist, postcolonial legal anthropology: that, inasmuch as relations always entail multiple representations, multiple subjectivities, multiple realities, they are, by their very nature, the perpetual object of construction and contention; and inasmuch as "laws . . . are . . . relations," it follows that they, too, are perennial sites of struggle—as are the social institutions, the economic practices, the cultural forms that rest upon them. Such processes of construction and contestation may be strident or silent. They may move with dramatic speed or seem hardly to be moving at all. But they are always there, always happening. As Hirsch and Lazarus-Black insist, the contestation and (re)construction of relations, by means legal or illegal, do not occur only when history takes a detour from its expected pathways. Or only when

something ruptures the accepted order of things. They *are* the means by which histories are made, both histories of the momentous and histories of the mundane: the means, that is, by which states—nation-states and states of everyday being in the world—are formed, informed, deformed, transformed. Here, then, is the first lesson to be learned from *Contested States*.

The second comes from a memorable moment in Carlos Fuentes's recent novel *The Campaign*, a narrative of the liberation struggle in nineteenth-century South America. One of its recurring themes is a discourse on the role of lawyers and legalities in building a new, unfettered society. From the frontier, the irrepressible Rousseauian revolutionary Baltasar Bustos writes a letter to his friends. In it he asks, "Isn't law reality itself?" The answer—here as everywhere, at all times—is no. Of course not. What is significant, though, is not the answer. It is the fact that the question was thinkable; the fact that, in Baltasar's world at the edges of a European empire in the early eighteen hundreds, law might plausibly *appear* to be reality itself. For it bespeaks a dawning awareness of the centrality of a culture of legality in the scaffolding of the modernist nation-state; of the significance, in its architecture, of the right-bearing subject, of constitutionality and citizenship, of private property and an imagined social contract. Baltasar's practical lessons in elementary Eurocivics bring to the surfaces of our analytic consciousness many things which we often take for granted: among them, the unspoken axioms, ideologies, and aesthetics on which rests not merely the idea of "civil(ized)" society, but the anatomy of our (ever more global) political world.

So, too, do the essays in *Contested States*. And, as they do, they force us to confront the most basic questions of all: What, exactly, *are* the invisible components of the cultures of legality that underpin modernist political sensibilities in the West and elsewhere? How exactly are they constructed and connected to one another? How and when do they come to be taken for granted? When and why do they become objects of struggle? A great deal, patently, rests on our answers to these Big Questions. In insisting that we address them, Lazarus-Black and Hirsch read us a profound lesson about the present and future of legal anthropology. If we are to elucidate the place of law in the making of economy and society, itself an exercise in perpetual motion, we have always to situate (even) our (most local) analyses in larger-scale processes. In the large-scale processes, that is, which give cultures of legality their specific historical character.

But Baltasar was to learn another lesson, one which colonized peoples all over the world—in South America, South Africa, South Asia,

the south side of some American cities—have also had to learn. It is that power, too, is less a thing than a relation; that it lies in the relative capacity—of human beings and habitual processes, of social institutions and cultural practices—to construct reality, to shape lived worlds, to give form to perceptions and conceptions, to beat out the polyrhythms of everyday life. Here is where my third text becomes salient. It is from the South African interior in the second half of the nineteenth century, the ground on which Tswana "tribes" encountered European colonizers.

Frontiers—the spaces in which people of different cultures seek to make sense of, and encompass, the world of others—are always fascinating. And revealing. This case is no exception. Black South Africans at the height of the imperial epoch, wrote the missionary John Mackenzie, were alike engrossed and affrighted by the British obsession with legal papers, processes, contracts, and courts. Such, said one of his "native" interlocutors, were "the English mode of warfare," the mysterious means by which Tswana autonomy was brought to an end, their land expropriated, and their labor extracted. All without a sword drawn or a drop of blood shed. Colonial law, it seemed to these colonized people, was a nonviolent means of committing great violence. And this in spite of the curious fact that the language of legality was also the lingua franca most widely spoken (if not as widely understood) on the terrain where Europeans and Africans met to speak of peace and to negotiate the terms of their relations.

Like Baltasar, in short, the Tswana came to see law as an enchanted key to the altogether disenchanting realities of colonial politics. This, then, is the point, and the final lesson of *Contested States*. If power lies in the relative capacity to construct reality, and law appears as "reality itself," it is obvious why the connection between the two, between law and power, should feature so prominently and problematically in the historical consciousness of those who feel disempowered; of those who would alter the existing order of things, be it in the name of constitutional rights, private self-interest, or identity politics. To the degree that law *appears* to be imbricated in the empowered construction of reality, it also presents itself as the ground on which to unravel the workings of power, to disable and reconstruct received realities. Which is why, when they begin to find a voice, people who see themselves as disadvantaged often do so either by speaking back in the language of the law or by disrupting its means and ends. The crucial challenge we face—and it is raised by *Contested States* with particular acuity—is to establish when and why some seek legal remedies for their sense of dispossession and disempowerment; when and

why others resort to illegalities, to techniques of silent subversion or to carnivals of violence.

In a memorable essay on Hallam's *Constitutional History of England* in the *Edinburgh Review* of 1828, Lord Macaulay differentiates the cartographer's map from the painter's landscape. Each is likened to a form of history—which, he says, should be "a compound of poetry and philosophy" that "impresses general truths by a vivid representation of particular characters and incidents." To this Renaissance realist, the map was meant to serve as a reliable guide, a means of accurately establishing our bearings. The landscape, on the other hand, was meant to serve the imagination by challenging our senses to see beneath the surfaces of the scenic. In teaching us its lessons, *Contested States* is at once map and landscape. Hirsch and Lazarus-Black and their co-contributors achieve the difficult objective of mapping a conceptual landscape sufficient to the task of elucidating the place of law in the making of history. And they do so with real imagination. Before you, to be sure, lies the future of legal anthropology.

CONTENTS

INTRODUCTION

PERFORMANCE AND PARADOX: EXPLORING LAW'S ROLE IN HEGEMONY AND RESISTANCE

Susan F. Hirsch and Mindie Lazarus-Black

This volume investigates law as a struggle revealing contested states of governance, mind, and being. The dual meaning of "state" as "institutionalized political order" and "condition of being" (cf. Comaroff and Comaroff 1991:5) encourages new ways of thinking about law and power. We argue that theories of law and power identifying states as institutionalized polities must also consider the strategies through which people reshape oppressive states of being. As the case studies in this volume demonstrate, people who are otherwise politically marginal go to court regularly to resist domination. From Philadelphia to Tonga, they skillfully manipulate legal rhetoric in courts and in a variety of other sites of oppositional practice. Their contestations in and around law shape, and are shaped by, hierarchies of gender, class, race, ethnicity, religion, age, and caste. The volume's examples illustrate that, although governments wield tremendous power to encode and enforce law, a crucial part of the power of law is its very contestability.

The volume shares and extends a growing concern with law, power, and social process in anthropology, history, and legal studies.[1] These works describe law as manifesting power of various sorts, including the authority to legitimate certain visions of the social order, to determine relations between persons and groups, and to manipulate cultural understandings and discourses. In *Contested States*, analyses of law and power begin with a conceptualization of power as fluid and dynamic, constitutive of social interactions, and embedded materially and sym-

bolically in legal processes. Accordingly, we include studies of slaves invoking law to charge masters with illegal behavior, women asking courts to help them defy or escape their husbands, colonized peoples preserving cultural practices in legal contexts, and one homeless American using law to get himself a shower and a shave.

The naturalizing, noncoercive, and mostly invisible power that Gramsci termed hegemony and the methods and means that constitute resistance are of central concern in this volume. Recent scholarship on hegemony and resistance captures how power frames, shapes, and pervades social processes in subtle and "everyday" ways (see, e.g., Abu-Lughod 1990; Comaroff and Comaroff 1991; Scott 1985, 1990). Our specific interest in law leads us to explore how the political, social, and economic mandates of states operate in courts and other law-related arenas. We analyze how people respond to and reinterpret these directives. For example, what does it mean to be a Hawaiian man compelled by a white judge from the mainland to attend a school for rehabilitating wife beaters (Merry this volume)? As they protect Central American refugees from the "deporting gaze" of the INS, do U.S. sanctuary workers subject refugees to other gazes that are sympathetic though intrusive (Coutin this volume)? In failing to attend to what Muslim women do in courts, how did traditional scholarship on sixteenth-century Islamic communities contribute to stereotypes of Muslim women as lacking political acumen (Seng this volume)? The chapters in this volume examine how these and other behaviors address simultaneously legal and other hierarchical structures.

We begin this introduction with a brief review of recent developments in scholarship on law and power. We then introduce the concepts of hegemony and resistance, and explore their dynamic relationship. The third section applies the analysis of hegemony and resistance to a range of legalities and across diverse contexts. Introducing the chapters in the fourth section, we focus on two themes that reveal the character of legal power: the contested performances and the paradoxes that characterize law and legal practice. Other themes emerge as we discuss the scholarly projects in each chapter, including discourse and law, gender and identity, and legal continuity and change.

POWER AND LAW

The past two decades of intellectual development in social theory have changed radically how scholars think about the concept of power, and how power is understood in relation to law. The current explosion of

ideas about power has roots in Gramsci's exploration of how civil institutions, such as the church, the media, and schools, are implicated in domination. Gramsci's work encouraged scholars to rethink the long-standing assumption that power is primarily exercised through the force of the state in concert with the ruling classes. More recently, Foucault has been a prominent proponent of radical redefinitions of power (see, e.g., Lukes 1974; Wrong 1979). At one level, Foucault's "analytics of power" entails simple inversions of commonplace assumptions: power is exercised, not possessed; power is productive, not primarily repressive; power should be analyzed from the bottom up, not the top down (Sawicki 1991:21). These concise reframings are Foucault's basis for examining power's role in the production and circulation of knowledge. As he has shown, power operates through disciplinary practices that constitute the specific categories and procedures regulating social life in sometimes determinative and often intimate ways (see also Bourdieu 1977; de Certeau 1984). In this view power is central to the formation of discourses—both dominant and subjugated—which set the parameters of what can be said, thought, challenged, struggled over, and achieved in a given historical moment.[2]

Asserting that "the personal is political," feminists have also reconceptualized power to show how power dynamics play out in the home and the bedroom, the factory line and the lunchroom, the legislature and the courtroom (see, e.g., Hartsock 1983; Janeway 1980; Segal 1990). Through the analysis of power in different local contexts, feminists developed significant understandings of how power operates at the microlevel of interaction to construct gender roles and hierarchies. This work also illuminates the discursive constitution of gendered subjectivity in and through the body, clothing, and language. Bordo (1988), for example, analyzes anorexia nervosa as the "crystallization" of pathological discourses about gender, consumption, and success in contemporary Western society. Anorexics are ". . . surely the most startling and stark illustration of how cavalier power relations are with respect to the motivations and goals of individuals, yet how deeply they are etched on our bodies, and how well our bodies serve them" (109). Although, like Bordo, many feminists draw on Foucauldian approaches to discourse and the microlevel of power dynamics, most also offer the critique that theorizing power primarily in multiple local contexts tends to elide more systematic domination, particularly the oppressive effects of patriarchal institutions on women (see, e.g., Diamond and Quinby 1988; Hartsock 1990; McNay 1992; Sawicki 1991). Accordingly, these scholars emphasize that power operates discursively *and* materially in many contexts, *including* state institu-