

## THE [MANY] FACETS OF LAW

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### Abstract

Does Law lead always to Justice? Are there more facets of justice? Law is reflecting each human community's values, is trying to resolve the particular issues that might arise – different issues, different mentalities, different solutions. Is it always so clear? Law protects and Law forbids. Each community's Law is supposed to defend community's members' interests. Is that accurate? And who would be those members? Law is reflecting Culture, Law is [Legal] Culture. Law was and is created by each community's members, Law was imposed by conquerors, Law is imposed by international lenders, Law is often the product of many and various influences. Justice should prevail, it is said, it was always said. What sort of justice was sought, when European colonizers had imposed Black Codes to the peoples in the lands that they had conquered? What sort of justice is sought, when countries demand that other countries copy, transplant their laws? In the name of which justice, decisions are taken about attacking countries and their people? Is there a good and a bad Law? And who would be the judge of it? Should one Law prevail over all the other Laws? Legal hegemonism is at the threshold, if not already in the house...

### Indice Contributo

THE [MANY] FACETS OF LAW.....	129
Abstract.....	129
Keywords.....	130
1. Facts – Reasons – Excuses .....	130
2. Colonial Past.....	130

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3. Variations on a theme.....	133
4. Colonial Present .....	135
5. [The real] Cause of legal transplants: Is it prestige or is it [covered] imposition? .....	137
6. Law protects dignity.....	138
7. Legal validity of laws.....	139

## **Keywords**

Colonialism - Code Noir - Justice - Legal Culture - Legal Transplants - Dignity

### **1. Facts – Reasons – Excuses**

Communities of people, in all times, made law, used law, exploited law. There is no community of people without some kind of law, as it has been pointed out.

Countries, especially when willing to become empires, try to legitimize their acts by laws and legal concepts especially created to that aim. Economic powers of today, follow the same path. Law is/should be reflecting the mentality and the specific characteristics of each human community, of each State, we, comparativists, point out. Probably (or obviously) this is of no concern for the power holders.

Is law just? Can law be cruel? Who will be the judge of it? Can rulers of one country intervene in the affairs (and the law) of another country? How did they do it in the past, how do they do it today? May they claim legal concepts in the name of which they could order another country to change its law, presumably “unjust”?

### **2. Colonial Past**

How did conquerors use the law in their favor? Law which was far from what could have been meant as justice. It is not feasible to speak about all the colonizers and all

the facts that would answer to that question, so it is unavoidable to focus on a few, very clear, examples.

How did the British behave towards people in conquered [or “acquired”, to use an euphemism] lands? Let’s see some details concerning the use of law in Ireland and India. *Divide et impera*, a politics of difference and subordination, was always the way.

In 1541, the Irish Parliament passed a statute declaring Henry VIII to be king of all Ireland and the Irish his legal subjects<sup>1</sup>. Intermarriage was forbidden – as was learning the Irish language or adopting Irish modes of dress. End of 16<sup>th</sup> – beginning of 17<sup>th</sup> century English Protestants founded large “plantations” in Ireland. Settlers from England, Wales, or Scotland became tenants on these large plantations. The government and the Protestant Elite claimed that these plantations would enhance agricultural production and would civilize(!) the Irish as Roman colonization had civilized the Britons.

Their aim, at putting English or Scottish settlers on the land was that Ireland’s Catholics would not anymore have rights or attachment to land<sup>2</sup>. During all time of Elizabeth’s reign, native Irish landlords resisted to those plans about their lands and to the introduction of judicial officers as representatives of the legal order. That resistance, as it is pointed out, revealed an operative gap between theory and practice and between two legal concepts: *dominium*, in the sense of “possession” and *imperium*, or “sovereignty”.

According to the English Crown’s theory, it [the English Crown] had a claim to *dominium* through conquest. It had no *imperium*, though, in most parts of the island. The process of colonization chose a harsh solution, in order to diminish the gap between the two: it adjusted *dominium*, through a process of confiscation and redistribution. Ownership of the land was reinvested in the Crown and afterwards

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<sup>1</sup> B. Cormack, *A Power to Do Justice. Jurisdiction, English Literature, and the Rise of Common Law, 1509-1625* (The University of Chicago Press 2007) 136.

<sup>2</sup> J. Burbank/F. Cooper, *Empires in World History. Power and the Politics of Difference* (Princeton University Press 2010) 171.

“by charter grant in New English settlers, who would carry English justice and sovereignty with them as part and parcel of their tenures”.<sup>3</sup>

English common law intended to replace Gaelic, Brehon law. *Convenience* was the critical term, a term borrowed from the sphere of judicial interpretation<sup>4</sup>, a term (and its connotations – and misunderstandings) that would be steadily used, directly or indirectly, by the judiciary in all colonies of England, in order to not be convinced about the existence of a local rule and to fill the “void” with a common law rule. This was very clearly represented in the work *The Faerie Queene*, of Edmund Spenser, himself too an undertaker in the first Munster plantation (1585-98) and a minor official in the Irish colonial government.

This was law. Was that justice? Or just a “coercive violence of interpretation that erase[d] the force of alternative jurisdictions”<sup>5</sup>?

Legal concepts were used – then and always – to give a foundation to the conquerors’ aims. Interpretations were adapted to the conquerors’ interests. In the above case – as in other cases too – theory was in the service of the Crown.

India is perhaps the saddest example of how colonialism contributed to the presentation of cultures and legal cultures of colonized people, in a distorted way – or in a simplistic, far from the truth, narrative. An example of this, was that the British magnified the problem of caste hierarchy in India, following various methods/ways. When Governor-General was Warren Hastings, he hired eleven pandits (Brahmin scholars) to create what became known as the Code of Gentoo Laws or the Ordinations of the Pandits. The British could not read or interpret the ancient Sanskrit texts, thus they could not check the accuracy of the work of their Brahmin advisers. The result, as it is pointed out, was an ‘Anglo-Brahminical’ text that was rather imprecise in regard to the originals, and that gave the possibility to the pandits

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<sup>3</sup> B. Cormack, ob.cit., 137.

<sup>4</sup> B. Cormack, ob.cit., 174.

<sup>5</sup> B. Cormack, ob.cit., 176.

to favour their own caste, “by interpreting and even creating sacrosanct ‘customs’ that in fact had no shastric authority”.<sup>6</sup>

Theory was also in the service of the European (and later American too) expansion, as Mattei and Nader have pointed out, in their book *“Plunder: When the Rule of Law is Illegal”*. John Locke in England (1698) and Emerich de Vattel in Switzerland (1797) articulated plunder by means of law: “As much land as man tills, plants, improves, cultivates and can use” and the idea of “terra nullius”,<sup>7</sup> lands which presumably belong to no one and thus can be allocated to the powers that be.<sup>8</sup>

### 3. Variations on a theme

Were all [European] colonizers’ attitudes the same, towards the conquered people and their laws? No, several scholars answer. For example, it is stated by certain scholars that there was a strong legal presence of indigenous peoples in Spanish America, while in British America there was a relative legal absence of them. Still, when one reads, for example, that in 1558, Jesuit Manuel da Nóbrega had written in a letter that in Brazil people (obviously, the colonizers) thought “that the Indians did not have full rights before the law because, lacking a soul, they were not fully human”<sup>9</sup>, one is not really convinced about the truth of the above statement.

It is also claimed that the French followed a policy of cultural assimilation, so that, for example, children in Senegal or Vietnam learned to recite “nos ancêtres les Gaulois”.

Still, the following example does not really verify the above claim: when Algeria was occupied by the French, on July 5, 1830, there was an intense administrative activity,

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<sup>6</sup> S. Tharoor, *Inglorious Empire. What the British Did in India* (Hurst & Company 2017) 106.

<sup>7</sup> U. Mattei and L. Nader, *Plunder: When the Rule of Law is Illegal* (Blackwell 2008) 67.

<sup>8</sup> L. Nader, *Culture and Dignity. Dialogues Between the Middle East and the West* (Wiley-Blackwell 2013) 220.

<sup>9</sup> B.P. Owensby and R.J. Ross, ‘Making Law Intelligible in Comparative Context’ in: B.P. Owensby and R.J. Ross (eds) *Justice in a New World. Negotiating Legal Intelligibility in British, Iberian, and Indigenous America* (New York University Press 2018) 1, 6.

which culminated in a massive dispossession of property rights of the city habitants. The colonial jurists who wrote about that, insisted on the hypothetical need of the French authorities of that time, to diminish the big difference between the two legal regimes. However, documents not fully explored about this perspective, show that the real reason were the conflicts about the property and the conditions for its access, following the conquest.<sup>10</sup>

On the other hand, the British had a particular talent for ... drawing ethnically-based administrative lines in all their colonies. People in colonized countries were always subjects, never citizens. Law can form and transform.

But there were also the slaves – mostly people from Africa, transferred to the American Continent by the respective colonizers. And there were codes... created for the slaves, who were considered less than persons...

In Barbados, an English colony, in 1643, there were 18,600 white colonists and 6,400 African slaves. In 1680, of the total population on the island of around 60,000, almost 39,000 were African slaves. Those slaves were mostly the property of the largest 175 sugar planters, who also owned most of the land. The powerful - and owners of the slaves – planters could do whatever they wanted (obviously and sadly, buy and sell slaves) since of the forty judges and justices of the peace on the island, twenty-nine of them were large planters.<sup>11</sup>

In 1661, the Barbadian Assembly passed the first comprehensive slave code in the English Americas, to 'better manage its profitable but unruly slave society'. The title of the Act was 'An Act for the better ordering and governing of Negroes'. Among its rules, was one that stipulated (clause 2) that if a slave ran away or misbehaved, he was to be 'severely whipped, his nose slit and bee burned in the face'.<sup>12</sup>

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<sup>10</sup> I. Grangaud, 'Le droit colonial au service des spoliations à Alger dans les années 1830' in : A. Bouchène/ J.P. Peyroulou/O. Siari Tengour/S. Thénault (eds) *Histoire de l'Algérie à la période coloniale (1830-1962)* (Editions La Découverte, Paris and Editions Barzakh, Alger 2012) 70.

<sup>11</sup> D. Acemoglu/J.A. Robinson, *Why Nations Fail. The Origins of Power, Prosperity and Poverty* (Profile Books 2012) 75.

<sup>12</sup> J. Collins, 'English Societal Laws as the Origins of the Comprehensive Slave Laws of the British West Indies' in: W. Eves/J. Hudson/I. Ivarsen/S.B. White (eds) *Common Law, Civil Law, and*

And there was the infamous French *Code Noir*, first promulgated by Louis XIV for his possessions in the Antilles. It was “one of the most infamous and important codes in the history of French codes”, says Vernon Palmer, who accurately points out that the *Code* “should be regarded as a sociological portrait, for no legislation better revealed the belief system of European society including its fears, values and moral blindspots”.<sup>13</sup>

Facts and law[s] were interpreted in ways that could and would “legitimize” the unjust behaviour of the colonizers or/and would award with more power, more lands, the winners of wars, presenting them as saviors.

That is what happened in Paris Conference of 1919 too, following the end of the WW1. The mandates and the League of Nations “injected new subtleties into notions of sovereignty and expanded ideas of the responsibility of “civilized” powers developed at earlier conferences”. Later, and in retrospect, they spoke about those changes as steps toward the dissolution of empires. At that time, though, those changes helped make the territories of some empires much bigger (the British empire alone acquired a million square miles), “enforced the legitimacy of administering “dependent” peoples and reaffirmed that not all polities were equivalent in international law and practice”<sup>14</sup>.

#### **4. Colonial Present**

Are systems of colonial rule and economic exploitation, a thing of the past?

Nietzsche, in *The Genealogy of Morals*, sought to demonstrate how modern moral values are based on truth claims that in reality obscure the truth, “distort the relationships between causes and effects”.

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Colonial Law. Essays in Comparative Legal History from the Twelfth to the Twentieth Centuries (Cambridge University Press 2021) 305, 307, 319.

<sup>13</sup> V.V. Palmer, *Through the Codes Darkly. Slave Law and Civil Law in Louisiana* (The Law Exchange, Ltd. 2012) 3.

<sup>14</sup> J. Burbank and F. Cooper, *Empires in World History. Power and the Politics of Difference* (Princeton University Press 2010) 386.

In an about similar way, Gregory, in *The Colonial Present*, argues that the dominant discourse of counter-terrorism is founded on a narrative according to which the terrorist was the cause of violent counter-insurgency. Following this discourse, and mostly because of this, “the complex and overlapping histories of imperial interests that produced such acts of violence are effaced”.<sup>15</sup>

Law can be used by rulers, be it States, be it Empires, as a means to expand, to weaken rivals, to liberate, to subjugate, to fortify itself, to fortify its economy, to fortify its citizens. Law can be mobilized in various causes. It can be mobilized by multiple actors, in their own, often opposed to each other, interests. Institutionalization of law has offered in the past – and it can always offer – opportunities both to rule makers and to rule users. Legal pluralism in the former empires, often meant something more complicated (even darker) than recognition of more sources of law. More than one legal fora were connected to local practices and legitimated by a superior authority. As it is mentioned, “[c]oexistence of multiple sources of law (customary, religious, of a prior polity, devolved authorities, the emperor, etc.) combined with a multiplicity of instances for obtaining legal decisions meant that justice was not just a moving target but a many-centered one in any empire.”<sup>16</sup>

The same could be observed today. Law can be mobilized by multiple actors, in various causes. Different legal systems, all created and formed on the bases of various influences, either desired or imposed, mobilize law according to the aimed results. Comparativists can easier than other scholars understand why and how that happens. They can – or should be able to – see the obvious and the less obvious, in legal system, having in mind the respective sources of law and the permitted modes of law’s interpretation.

The administration of justice must serve the interests of society, it is said. This was always said, though. But the interests of society were and are considered differently, in various times and various places. Is there a unique way to interpret the law? Comparativists would obviously say no, since there are many and different laws in the

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<sup>15</sup> S. Morton, ‘Violence, Law, and Justice in the Colonial Present’ in: G. Huggan (ed) *The Oxford Handbook of Postcolonial Studies* (Oxford University Press 2013) 179.

<sup>16</sup> J. Burbank and F. Cooper, ‘Rules of Law, Politics of Empire’ in: L. Benton and R.J. Ross (eds) *Legal Pluralism and Empires, 1500-1850* (New York University Press 2013) 279, 281.



world, and for a reason – or reasons. Law is not only the written one, so for a comparativist the exclamation of Napoleon, when confronted with commentaries on his civil code, “Mon code est perdu”,<sup>17</sup> would only be an element to study in order to understand the legal mentality of France, at the beginning of the 19<sup>th</sup> century; in order also to understand the reasons for the French civil code’s “expansion”, influence on other civil codes of the world. A comparativist knows that there are more reasons for all influences (copying, reception, transplanting of laws) than the obvious. Often the non-obvious reasons are much more important. Politics is the word.

#### **5. [The real] Cause of legal transplants: Is it prestige or is it [covered] imposition?**

It is often argued that law, in many legal systems, was the result of legal borrowing, of legal transplants· that the “logic” of these transplants was formed, defined by elites of jurists, competing each other. Monateri insists that those jurists were seeking a certain legitimation – both of the rule(s) that were adopted from another law and of themselves, proposing that adoption. He argues that in such cases of “competition” among jurists who are seeking a primary role in a procedure of law creation, there is a “basic strategy”, consisting in finding legal solutions, in order to “cover cases” that they had not handled in the past.

If the “internal” sources do not cover certain cases, basic strategy imposes to jurists to find authorities in the “external” space and to borrow solutions from them. This borrowing, transplanting, is easier to be accepted, if it is being done from a law from which other laws too have borrowed rules. As Monateri convincingly argues, the best strategy for a legal transplantation is “ideology and propaganda”. That means that the elites of jurists must be convinced that the offered model meets their expectations.<sup>18</sup>

Often, the strategies followed by those seeking to transplant foreign rules and those “representing” the law/rules which might be transplanted, are absolutely competitive between each other. This has been obvious in cases such as the ones of States which

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<sup>17</sup> G. Corstens, *Understanding the Rule of Law* (Hart Publishing/Bloomsbury 2017) 41.

<sup>18</sup> P.G. Monateri, ‘Methods in comparative law: an intellectual overview’ in: P.G. Monateri (ed) *Methods of Comparative Law* (Edward Elgar 2012) 7, 20.

transplant rules of Western legal mentality, in order to fortify themselves politicoeconomically and to compete Western States on that level.

That happened, for example, in Japan, at the end of the 19<sup>th</sup> century and that happens actually in China. That is mainly the reason why members of societies of other parts of the world (Africa, Asia) study in Western States. They believe that this way they will be able to face the political and economic aspirations in their countries, often former colonies, by the citizens of the Western States.

As it is very accurately pointed out, the reason that is often put forth for such a legal transplantation, is the desire for modernization. It can happen, though, that the meaning that people attribute to modernization is different than the meaning that an external observer attributes to it. It often happens too, that modernization means negation of the people's traditions. This fact, it is argued, plants a sense of guiltiness in the people's hearts, originated in the "sin" of not being one contemporary. This complex of modernization may create a vicious circle that often can explain the weird attitude of a society's members.<sup>19</sup>

This is, in essence, a case of a "ceaseless discursive warfare"<sup>20</sup> between antagonistic groups of different legal cultures. And it is the duty of the comparative law to see that and to comprehend the consequences that will be imprinted in the law of the concerned borrowing State.

## **6. Law protects dignity**

Many countries' laws protect ethnic and racial groups from threatening, abusive, or insulting publications calculated to bring them into public contempt. There are exceptions, though.

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<sup>19</sup> T. Tanase, 'The Empty Space of the Modern in Japanese Law Discourse' in: D. Nelken and J. Feest (eds) *Adapting Legal Cultures* (Hart Publishing 2001) 187.

<sup>20</sup> F. Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism* (Duke University Press 1991) 397.

In USA there is a Constitutional debate about the Freedom-versus-dignity dilemma. Law may also protect dignity by prohibiting invidious discrimination. This has been proved very important in South African and Canadian jurisprudence.<sup>21</sup>

Law should be just, says Waldron. “Naturally the law should be just”, says Gardner, “but it should also be honest, humane, considerate, charitable, courageous, prudent, temperate, trustworthy, and so on ...”<sup>22</sup>

People treat certain concepts as identifying a value or disvalue but disagree about how that value should be characterized or identified, Dworkin argued. The concept of justice is one of those concepts. People agree that this is a value, but they do not agree about its precise character. People do not agree about what makes an act just or unjust, right or wrong.<sup>23</sup> And this is most obvious when one studies (and compares) many and different legal systems. So, are moral concepts interpretive concepts, as Dworkin claimed?

## **7. Legal validity of laws**

On what does the validity of an entire legal system rest? asks Frederick Schauer: “We know that laws are made valid by other laws, and those other laws by still other laws, and so on, until we run out of laws. But what determines the validity of the highest law? What keeps the entire structure from collapsing?”<sup>24</sup>

And what about the indigenous legal systems, where there are no written laws? And what about the legal systems of the former colonies, now independent States, that have copied Western laws and at the same time have recognized directly or indirectly their indigenous peoples’ laws as equally applicable, at least at certain issues? What

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<sup>21</sup> J. Waldron, *Dignity, Rank, & Rights* (Oxford University Press 2012) 48.

<sup>22</sup> J. Gardner, ‘The Virtue of Justice and the Character of Law’, (2000) *Current Legal Problems* 149, 183.

<sup>23</sup> R. Dworkin, *Justice for Hedgehogs* (The Belknap Press of Harvard University Press 2011) 160.

<sup>24</sup> F. Schauer, *The Force of Law* (Harvard University Press 2015) 78.

determines the validity of those legal systems? Which is their highest law and what determines its validity? If their highest law is a legal transplant of some Western law, what sort of independence is it? If the validity of those indigenous laws is determined by a legal transplant that has become the country's highest law, on what does the validity of such a legal system rest? The argument about a "freely" decided legal transplantation would not be so solid. Who decided about that? How free was such a decision?

Although one would doubt whether Schauer considers "the rule systems" of "indigenous tribes" as law, Schauer himself would cast doubt on that doubt, since he declares: "Accordingly, we may again learn more by observing just how much nonstate organizations betake of law, or simply *are* law, than assuming too quickly that they are not".<sup>25</sup>

Law has many facets. The conversation between law and justice is still on the road. And the road, probably, has no end...

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<sup>25</sup> F. Schauer, *ob.cit.*,163.

