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## Book Review: Law and Colonial Cultures: Legal Regimes in World History, 1400-1900

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LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900. By Lauren Benton. Cambridge University Press: Cambridge, United Kingdom, 2002. Pp. 285. \$65.00 (cloth).

Challenging scholars of both colonial history and globalization, Lauren Benton's *Law and Colonial Cultures* argues that state-centered legal orders emerged as a result of the presence of colonial powers, both European and non-European. She describes how the colonial state developed through jurisdictional conflicts between native judicial systems and colonial legal systems.<sup>1</sup> These conflicts led colonial states to assume increased control of important economic transactions. Benton tackles both the scholarly accounts that claim colonizers overran helpless native populations<sup>2</sup> and those that argue only European or Western powers pursued policies aimed toward promoting markets or economic growth.<sup>3</sup> Benton even takes on one of the sacred cows of traditional colonial studies: Chinua Achebe's *Things Fall Apart*.<sup>4</sup> In Achebe's novel, the protagonist, Okonkwo, faces two trials: the first by his fellow villagers and the second by a British colonial tribunal. In Benton's rendering, Achebe depicts the first as part of a generally well-functioning Nigerian society suddenly ripped apart by the arrival of British colonialists, and the second as an entity almost entirely foreign to Okonkwo.<sup>5</sup> In essence, Benton argues that, as a historical matter, not only would Okonkwo have been aware of the law governing British colonialists, but he would have taken advantage of it if he saw the possibility of a better outcome.<sup>6</sup>

Benton traces, through five episodes in world history, how the colonizer's law began as one of several legal systems, then gradually expanded to areas of economic concern, such as the enforcement of contracts or the transfer of property, and finally made a place for both indigenous and colonizing litigants. In seventeenth-century North America and Iberia, eighteenth-century Africa and India, and nineteenth-century Uruguay, Benton traces parallels in the historical development of the state-centered order. The reader will find engaging and thorough narratives on the legal history of these regions, but will be left unconvinced that a single phenomenon is at work. Benton is more successful at completing the historical narratives that emphasize the colonial state as resulting from competing European empires<sup>7</sup> or from local processes

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1. LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900*, 3 (2002).

2. *Id.* at 167.

3. *Id.* at 80.

4. *Id.* at 15–16; CHINUA ACHEBE, *THINGS FALL APART* (2002).

5. BENTON, *supra* note 1, at 16.

6. *Id.* at 17.

7. See generally RONALD E. SEAVOY, *ORIGINS AND GROWTH OF THE GLOBAL ECONOMY: FROM THE FIFTEENTH CENTURY ONWARD* (2003) (describing history and development of the global economy through the prism of imperialism).

that developed "national" consciousness in colonies.<sup>8</sup> To this end, she claims that jurisdictional conflict formed a type of regime for this period.<sup>9</sup>

Benton takes the reader through three basic processes of colonial legal development: jurisdictional conflict and convergence, absorption of indigenous legal structures and participants, and the state-forming function of courts. One of the strengths of the book is its use of evidence from a wide range of sources and episodes: the settlement and expansion of the Spanish along the Atlantic coast of North and South America, the Ottoman conquest of southwest Asia and North Africa, as well as better known cases like the British and French enterprises in Africa. Benton asserts that, in all these cases, the colonizing powers more often than not sought to accommodate indigenous legal orders,<sup>10</sup> and that the jurisdictional fluidity between these pre-existing orders and the new orders established for settling populations gave rise to confused legal mechanisms subsequently exploited by both settlers and indigenous populations.<sup>11</sup>

In five chapters Benton compares colonial enterprises and their administrative legal structures across both history and geography. She compares colonial enterprises conventionally regarded as having few similarities: the Catholic and Islamic empires, the British in Bengal and the French in West Africa, and the Dutch in the Cape Colony and the British in New South Wales. Benton first traces the various legal frameworks in place when the colonial companies and agents arrived, employing a range of sources including court records, journals of settlers, and a thorough interweaving of the secondary literature (drawn mainly from colonial and post-colonial studies focusing on legal history). She then examines numerous jurisdictional boundary conflicts falling broadly into two categories: those in the legal regimes of the colonial powers (e.g., canon versus state law in the Spanish empire) and those between indigenous legal regimes and new legal regimes (e.g., the resort of Muslim litigants during the early days of the Spanish Reconquest to royal courts if they believed there to be a better chance of success).<sup>12</sup> Finally, Benton returns to the main theme of the book: that the jurisdictional boundaries within colonial regimes and between the colonial and native legal orders were highly fluid until late in the nineteenth century.<sup>13</sup> She summarizes, "[t]he connecting thread is that these disparate sets of relations were shaped out of the same legal matrix: a structuring of multiple legal authorities that permitted

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8. See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 1991) (describing the history and development of nationalist identities in the world).

9. See BENTON, *supra* note 1, at 5.

10. See *id.* at 2.

11. See *id.* at 3.

12. See *id.* at 41.

13. *Id.* at 79.

both parallel and independent adjudication and, under specific and clearly defined circumstances, an appellate or controlling authority for state's law."<sup>14</sup>

Benton begins by examining ecclesiastical and state law in the Iberian peninsula, early relationships between maritime trading Europeans and Africans, agreements between maroon communities and colonial administrators in North and South America, and the prevailing legal regime for custody and ransom of captives taken on the seas.<sup>15</sup> Benton here reveals a series of parallel legal institutions in the indigenous communities bordering the Atlantic and the new European arrivals. For example, the Spanish Reconquest of Valencia oversaw the transition from Muslim to Christian authority (although Muslims remained the majority for centuries), yet the Christian authorities salaried the officials of Muslim courts and thus preserved a system of Islamic law that in turn submitted to Christian authority.<sup>16</sup> In this way, multiple legal orders were able to coexist side-by-side for a significant time before the development of a single, more centralized legal order.<sup>17</sup>

Benton's underlying assumption regarding these multiple legal regimes appears to be that the alternative was a shocking imposition of foreign law on long-standing communities.<sup>18</sup> Indeed, Benton's argument relies on the idea that basic legal and political structures persevere through significant changes in demographic balance and accompanying authority.<sup>19</sup> Benton is right to emphasize that central colonial state control begins with important economic transactions. But that revelation may be at odds with the idea of jurisdictional fluidity. There is strong evidence that law as well as cultural presuppositions of superiority were "imposed from above."<sup>20</sup> While Benton offers a thorough scholarly account of the development of centralized legal regimes, she does not address specifically how "the project of commerce" became the "project of conquest," although she does offer tremendous insight into one of its dimensions.<sup>21</sup>

Having discussed common forms and structures of legal ordering in the Atlantic world of the sixteenth century, Benton moves on to describe how jurisdictional overlap operated to create multicentric legal orders. She rejects

14. *Id.* at 78.

15. *Id.* at 31.

16. *See id.* at 41.

17. *Id.* at 44–45.

18. *Id.* at 31–32.

19. *Id.* at 43.

20. "Valencia received its 'Customs of the Sea,' its fundamental maritime law, from Barcelona in 1283." J. N. Hillgarth, *SPAIN AND THE MEDITERRANEAN IN THE LATER MIDDLE AGES: STUDIES IN POLITICAL AND INTELLECTUAL HISTORY* § II-iii, 18 (2003). *See also* EDWARD W. SAID, *CULTURE AND IMPERIALISM* 9 (1993) ("As for the curious but perhaps allowable idea . . . that some of Europe's overseas empires were originally acquired absentmindedly, it does not by any stretch of the imagination account for their inconsistency, persistence, and systematized acquisition and administration, let alone their augmented rule and sheer presence.")

21. *See* John H. Elliot, *The Seizure of Overseas Territories by the European Powers, in THEORIES OF EMPIRE 1400–1800*, at 139, 145 (David Armitage ed., 1998) (arguing that dynastic rivalry helps to explain the transformation from "project of commerce" to "project of conquest.")

the tendency of scholars in many disciplines to exaggerate the differences between the Islamic and European expansions during this time.<sup>22</sup> The methods of the Spanish in the New World and the policies of Ottomans toward dhimmi communities<sup>23</sup> in Southwest Asia and North Africa were similar in their treatment of indigenous populations and their struggles to create and accommodate new legal orders to cope with the altered political landscape.<sup>24</sup> The early Spanish legal policy for indigenous inhabitants left tremendous room for traditional indigenous legal practices, and this traditional law was encouraged as the basis for decisions made by local Spanish courts.<sup>25</sup> Similarly, the Ottoman expansion preserved the local legal processes used by Christians and Jews.<sup>26</sup> Benton's argument recognizes the fluid nature of Islamic law under the Ottomans and accommodates the mutual influences of Islamic, Christian, and Jewish law.<sup>27</sup>

Next, Benton focuses on the process of multicentric legal development using narrower case studies from British Bengal and French West Africa. These processes involved a developing assumption by both indigenous and colonial litigants that state law represented the highest possible authority,<sup>28</sup> despite multiple legal orders that preserved customary indigenous law and administrative procedures meant only for colonial officials such as employees of the British East India Company. In one illustrative case, Benton shows how a widow and a nephew contested the inheritance of a deceased Indian Muslim employee of the British East India Company.<sup>29</sup> A Muslim court heard the original case and issued an opinion consistent with Muslim law.<sup>30</sup> The case was then appealed to the newly established Supreme Court of Judicature, which had jurisdiction over "British subjects, Company employees (including Indians), and other who wished to submit to its jurisdiction."<sup>31</sup> The Supreme Court, administering English law, issued a warrant for the arrest of the Muslim officials and the detention of the nephew. This episode is also helpful in showing how state law in colonial regimes gradually became the most authoritative and legitimate source of law. Although courts for minor-

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22. See, e.g., JANET ABU-LUGHOD, *BEFORE EUROPEAN HEGEMONY: THE WORLD SYSTEM A.D. 1250–1350*, at 12 (1989) ("The usual approach is to examine ex post facto the outcome—that is, the economic and political hegemony of the West in modern times—and then to reason backward, to rationalize why this supremacy had to be.").

23. "Dhimmi" refers to a tax status imparted to Christians and Jews living under Ottoman rule. Dhimmi status entailed paying a poll tax in order to live under the local and religious law of Christianity or Judaism. Dhimmi status was not automatic, and, as Benton mentions, Christians and Jews could and did serve in high levels in the Ottoman administration, whereupon their status may or may not have remained that of dhimmi. See BENTON, *supra* note 1, at 107.

24. See BENTON, *supra* note 1, at 125.

25. See *id.* at 83.

26. *Id.* at 107.

27. See COLIN IMBER, *OTTOMAN EMPIRE, 1300–1650: THE STRUCTURE OF POWER* 216–20 (2002).

28. See BENTON, *supra* note 1, at 128.

29. See *id.* at 140–49.

30. See *id.* at 141.

31. *Id.* at 136.

ity and indigenous communities were retained, the nature of the jurisdictional and legal conflicts led litigants to resort to state law. The colonial regimes became “a repository of rules about legal interactions.”<sup>32</sup>

Incorporation of indigenous populations as participants in state court represented yet another process by which state law assumed hegemony over earlier multicentric legal orders. Studying the process by which the British incorporated the Khoi in the British Cape Colony and developed a similarly expanded role for Aborigines in New South Wales, Benton argues that an original “weak pluralism” that permitted roles for various indigenous and colonial judicial fora<sup>33</sup> gave way as “frontier violence, labor relations and internal political conflicts” brought more Khoi and Aborigines into colonial courts, reinforcing the idea that those courts were ultimately the fora of last resort.<sup>34</sup>

The Khoi, for example, maintained an independent legal administration during the early years of Dutch settlement, until the imposition of British control and the increasing frequency of Khoi/settler disputes created a multicentered legal order that eventually gave way to British legal reforms insisting on greater legal equality for Khoi litigants.<sup>35</sup> This process occurred through the increasing inclusion of the Khoi into the whole of colonial legal procedure—for example, the acceptance of the validity of testimony given by Khoi witnesses.<sup>36</sup> Benton argues that these changes were the British response to the shifting role of the colonizer—the drive to close the frontier and integrate the colony into world markets and metropolitan authority instigated a reevaluation of colonial occupation.<sup>37</sup> Benton attributes similar origins to the legal regime in New South Wales, where Aborigines were originally placed outside the law of colonial administrators, and then as interactions increased, were absorbed as legal participants under a centralized, hegemonic state law.<sup>38</sup>

In these cases, Benton has a tendency to draw analogies in the legal history that perhaps, again, minimize the significant differences among colonial regimes. Benton pays little attention to the episodes of imperial rivalry that also shaped the colonial administrative and legal orders. For example, in roughly the same period as these events occurred in Australia and South Africa, British colonization of Jamaica was perceived by native Jamaicans more

32. *Id.* at 167.

33. Benton is careful to note that the legal order was “weak” rather than “strongly” pluralistic. *See id.*

34. *Id.* at 174–76.

35. *See id.* at 182–83.

36. Benton again uses one particular case (the Cloete case), concerning the murder of a Khoi woman by a Dutch settler, to illustrate the more general claims she makes after assessing the secondary literature. *See id.* at 176–82.

37. *See id.* at 182.

38. Aborigines appeared in settler courts mainly as criminal defendants. The question, as Benton summarizes, was: if Aborigines could appear as criminal defendants, could they not also appear as witnesses? *See id.* at 195–205.

in terms of comparing Spanish and British practices than in terms of preserving native processes in the development of the colonial legal order.<sup>39</sup>

Benton concludes her substantive case studies with an analysis of the consolidation of the legal system of the Uruguayan state in the nineteenth century. She uses the Uruguayan example to investigate what happens where “Western powers did not assert political control and did not therefore assume the task of overseeing legal administration[.]”<sup>40</sup> She argues that the formation of the centralized legal order in Uruguay was driven by the search for a hegemonic legal order that brought law, or at least localized legal administration, to the frontier and ended humiliating capitulations to nationals of outside powers (like Britain and Brazil) through a single framework directed by a central Uruguayan authority.<sup>41</sup> Benton introduces the episode to show that state formation based on the gradual incorporation of jurisdictional conflicts and legal multicentrism into a single, more cohesive legal entity occurred not only in states colonized by European powers, but also in states that had gained independence significantly earlier in world history. Benton analogizes the capitulations made to foreign powers in Uruguay to similar capitulations made by Ottoman Turkey and nineteenth-century China to show that extraterritoriality played a major role in the legal debates of those regions.<sup>42</sup> She concludes that concessions made to outside powers served as the impetus both for legal reform and for larger debates about the nature of sovereignty for states in unequal relations with Europe and America.<sup>43</sup>

While the discussion of the Uruguayan episode is typical of Benton’s excellent research and argumentation, it also offers a possibly unintended counterpoint to her earlier claims. On one hand, colonial legal administrations developed as important economic transactions were removed from local or traditional legal fora to a centralized legal order. This occurred through a process of accommodation and fluid jurisdiction between colonial and local courts. On the other hand, the Uruguayan example seems to show that centralized legal order also developed where there was no jurisdictional fluidity.<sup>44</sup> In short, the theory that emerges from the case studies indicates that courts matter in the development of the colonial state—a claim superbly supported, but less grand than that initially proposed by the author, and less fittingly called a regime or episode in world history. Indeed, the extent to which courts matter varies widely even among the episodes Benton presents.

Benton’s claim is an enormous one: she aims to show that there existed, in essence, an *institution* of jurisdictional multicentrism in the sixteenth to eight-

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39. James Robertson, *Re-writing the English Conquest of Jamaica in the Late Seventeenth Century*, 117 *ENG. HIST. REV.* 813, 813–39 (2002).

40. BENTON, *supra* note 1, at 210.

41. *See id.* at 242–43.

42. *Id.* at 244–47.

43. *Id.* at 251–52.

44. Foreign nationals in Uruguay pressed their governments to let them remain legally distinct. *See id.* at 235.

eenth centuries<sup>45</sup> that has not been, as she sees it, appreciated by colonial studies that emphasize the “imposition” of sovereignty by European powers, or the revolutionary movements leading to independence beginning in the late nineteenth century and continuing throughout the twentieth century. In this regard, Benton falls short of her aim. The book offers tremendous insight into how indigenous legal orders were accommodated, how legal administration was manipulated by vying factions within colonial communities, and how indigenous and colonial peoples became absorbed into unitary legal administrations. However, the cases Benton uses are more effective in illuminating single episodes (like the British in India or the Spanish in the Americas) than in demonstrating that the episodes are part of a coherent “system” that spanned a significant period of time and geographic area and included parties driven by multiple interests and motivations. In short, Benton asks us to believe that Okonkwo would have had legal expectations in both his traditional trial and that of the colonial authority, but the fact is that the latter may have been as foreign to him as Achebe originally suggested. Readers of this book will find basic knowledge of how colonial regimes unfolded effectively challenged, but may not find in it a new, free-standing chapter of world history.

—Sam Foster Halabi\*

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45. *Id.* at 78–79.

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