Law, Bureaucracy and the Practice of Government and Rule.

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1. Introduction: Reframing 'Law and Empire'

"Law is an instrument for civilizing the peoples of the world".[1]

In 1964 Emperor Haile Selassie I - "the Conquering Lion of the Tribe of Judah, King of the Kings, Elect of God" – provided the "Inaugural Statement" for the first ever issue of the *Journal of Ethiopian Law*. Published in English, the statement begins by tracing Ethiopia's rich, multilingual, legal heritage back to the *Fetha Negast* or 'Law of the Kings': a legal code which included authoritative (canonical) Christian writings, probably written in Arabic by a thirteenth-century Coptic Christian in Egypt, then translated into Ge'ez - the written language of the ancient Aksumite and medieval Abyssinian Empires and the liturgical language of the Ethiopian Orthodox Church - and adapted by Ethiopian (Amhara) kings in the mid-fifteenth century. Having situated Ethiopian law within a specific – but at the same time universalising - Christian context, the "Inaugural Statement" then turns to enumerating the legal developments effected under Haile Selassie's own imperial rule (1930-74): the promulgation and implementation of a written constitution (1931, revised 1955) alongside other legal codes; the "modernization of the legal system"; the establishment of a Faculty of law (in 1963) "…to educate persons capable of ensuring the effective application of the law"; and the creation of the *Journal of Ethiopian Law* itself, which would contain "…reports of the decisions of Our courts and commentary on the law of Ethiopia".[2] Each of these four elements: a set of codified (state) laws; a modernised system of courts; an institutionalised Law School to train Ethiopian lawyers in Ethiopian laws; and the publication of an official *Journal of Ethiopian Law*, were to constitute a single 'Ethiopian' legal system. If doubt existed as to the meaning of the provisions of the (state) law, or a question arose that was not covered by the law, then the courts had to interpret the law and decide upon its application - and one of the functions of the

With thanks to Akhila Yechury and Dimitri Kastritsis for bibliographical help and advice - and to Peter Fitzpatrick for the inspiration to think 'beyond the box'.

[1] Haile Selassie I 1964, v.

[2] Haile Selassie I 1964, v.

Journal of Ethiopian Law was to make these court judgements known "…to all engaged in the administration of justice and the study of the law". "Law", continues Haile Selassie I, "is a unifying force in a nation". As Emperor of Africa's oldest independent country and its second largest in terms of population (almost 25 million people in 1964), with a territory encompassing around eighty spoken languages, seventeen 'ethnic' groups, a mixture of cultures and religions (including various forms of Christianity and Islam) and "…memories of diversity and autonomous rule (19th-century kingdoms or chiefdoms from Maale to Kafa, from Jimma to Gojjam)…", Haile Selassie I did not simply seek to 'modernize' law, bureaucracy and the practice of government according to a Western script. He strove to create a specific, Ethiopian, narrative of "unity in diversity".[3]

"Unity in diversity" is a hallmark of imperial rule from the multi-ethnic, empires of the ancient Near-East and China, to the city-state empires of the Classical Mediterranean and the early medieval empires of the Guptas (South Asia) and the Mayans (Central America). The same dialectic, played out in different ways and to differing effects, is evident in the early modern empires of the Songhai (Western Africa) and Incas (South America); the Ottoman, Mughal and Safavid empires of Eurasia; and the nineteenth- and twentieth-century 'historical bureaucratic empires' of Russia, Japan and Iran.[4] Empire-states differ, in this respect, from nation-states:

> "Empires are large political units, expansionist or with a memory of power extended over space, polities that maintain distinction and hierarchy as they incorporate new people. The nation-state, in contrast, is based on the idea of a single people in a single territory constituting itself as a unique political community. The nation-state proclaims the commonality of its people—even if the reality is more complicated—while the empire-state declares the non-equivalence of multiple populations. Both kinds of state are incorporative— they insist that people be ruled by their institutions—but the nation-state tends to homogenize those inside its borders and exclude those who do not belong, while the empire reaches outward and draws, usually coercively,

[3] Arbink 1997, 164. Arbink's focus is on Ethiopia after the 1974 revolution, in particular the complex topic of the "explicit re-instatement of ethnicity in law", constitutionalism and the practice of government and rule in the context of the (Ethiopian) Federal Constitution of December 1994.
[4] On the classic Weberian distinction between 'patrimonial' and 'historical bureaucratic empires' see Eisenstadt 1963; Scheidel 2013, 29; and Barkey 2016, 105-106.

peoples whose difference is made explicit under its rule."[5]

Burbank and Cooper's distinction between empires and nation-states implies a basic contrast between plurality (associated with empire-states) and monism (the "one state – one society – one law model" associated with nation-states). Situating this contrast within the dominant Western historical narrative - according to which empires, from the nineteenth century onwards, gradually gave way to nation-states - has led, in turn, to a seductive developmental model in which the *legal* pluralities of empire are seen to gradually, but inevitably, give way to a 'modernizing', nation-state, mono-legalism. Historical reality, however, is much more layered and complex. Haile Selassie I's centralizing legal, bureaucratic and administrative reforms should not be understood simply as a staging post along (African) Ethiopia's (Western) path to nation-state modernity. As we shall see, the 'Ethiopian law' of Haile Selassie I was a tool of empire, adapted and reshaped from Anglo-American materials in the context of multiple state, non-state and supra-state inter-legalities and conflicts.

Ethiopia's revised 1955 constitution states that the Emperor is "supreme co-legislator", "supreme judge" and "head of both the administration and the judiciary".[6] Article 36 specified that that the Emperor himself was the supreme sovereign guardian of the people's constitutional rights and liberties; rights and liberties that were defined by subsequent articles in the constitution (Articles 37-62). Article 63 placed these constitutional guarantees within a striking imperial framework which stretches all the way back to the first multi-ethnic empires of the Ancient Near East: "In these and other matters, everyone has the traditional right to present petitions to the Emperor".[7] The constitutional enshrinement of this "traditional right to present petitions to the Emperor" points us towards the diversity of Ethiopia's institutional forms, relationships and legal orderings – beyond the state-law codifications of the late 1950s and 1960s.[8] Prior to 1855 and the establishment of a centralized bureaucratic Empire, Ethiopia "… was split into numerous sub-divisions which were administered either by military officers and nobility appointed by Emperor, or by traditional leaders indigenous to a given area who agreed to co-operate with their conquerors. The administrators collected

[5] Burbank and Cooper 2010, 8.
[6] Krzeczunowicz 1964, 116.
[7] Article 63 of the Ethiopian 1955 Constitution, quoted from Krzeczunowicz 1964, 113. On 'petitioning' as a technique of imperial rule see sections 2 and 3 below.
[8] Ethiopia's legal codification project: Penal Code (1957); Civil Code (1960); Commercial and Maritime Code (1961); Civil Procedure Code (1967) (see Tuori 2015, 163; 2010, 49).

taxes and tribute in labour and kind, keeping designated portions for themselves and forwarding the remainder to the Crown".[9] After 1855, Ethiopian emperors pursued a centralizing strategy - including the use of violent state force – comparable to that seen in the Tanzimat era of the Ottoman Empire and Czarist Russia. The power bases of local kings and nobles were fragmented by the reconstitution of regional administrative units, with officials appointed directly by imperial power. In Ethiopia, this bureaucratizing process was intensified by the creation of a professional, salaried, army recruited from across the empire, independent from local lordship structures. On the ground, however, and especially outside the major cities, local and regional customary laws and dispute practices continued (until 1974) - most crucially in relation to slavery and systems of rural land ownership and tenure. Shari'a courts and dispute resolution by Christian, Jewish and other non-state officials further added to the diversity of the legal landscape. The 1955 guarantee of a 'traditional right' to petition the emperor was thus intended to reinforce imperial rule and authority, at the same time as making space – beyond the constitution - for diverse non-state customs and laws. Imperial rule could invoke multiple legal orders and orderings, whilst at the same time pursuing a strategy of "nation-building through legal reform".[10]

Aside from five years (1936–1941) during which Ethiopia was occupied by Italian forces and annexed as part of the newly created *Africa Orientale Italiana* (Italian East Africa) – an administrative division that was deliberately intended to evoke the imperial glories of ancient Rome - the Ethiopian Empire was never subject to direct colonial rule. The legal pluralities of the mid-twentieth century Ethiopian Empire thus differed, in important respects, from the situation of 'legal pluralism' identified – and theorized - by lawyers, social scientists, anthropologists and historians with respect to (former) imperial colonies.[11] Under some forms of modern European colonial rule the concept of "customary law" or "native law and custom" - a term used in British colonies - played a highly specific role in imperial governance:

> "['Customary Law'] was assumed to be a body of law existing before and independently of colonial state. But not all of 'native law and custom' received such 'recognition' and was treated as 'law'. Generally, for example, this did not occur in the area of criminal law, nor

[9] Keller 1981, 311.
[10] Quotation from Halliday 2013, 263.
[11] Shahar 2008 provides a critical review of the concept of 'legal pluralism'.

(depending on the extent to which 'indirect rule' was adopted as the technique of colonial administration) too much of public law. 'Native law and custom' was also not recognized as 'law' if it was 'repugnant' to European legal values."[12]

French and British colonial administrators, especially those involved in nineteenth-century African and Indian territories, also set out to codify (usable) 'native' rules, fundamentally altering their nature in the process.[13] From the colonists' perspective, putting 'native law' into writing made it 'reproducible' - and hence governable.

It was this 'colonial legal pluralism' that underpinned the work of postcolonial legal planners in the 1950s, '60s and 70's, particularly in postcolonial Africa: "Pluralism provided postcolonial planners with a diagnostic label, a way to identify a problem in need of a solution. The problem was that different sorts of people had different sorts of law".[14] Western-trained socio-legal engineers (as Halliday terms them), involved in postcolonial reconstruction projects, tended to view legal pluralism as an obstacle to 'modernization' and (nation-state) 'development'. The fact that Western-trained socio-legal engineers were also at work in Ethiopia during the 1950s and 1960s – drafting the national codes and the 1955 constitution, in addition to pursuing other legal 'restatement projects' – is an important reminder that 'entangled legalities' and relations of dominance are by no means limited to the forced imposition of colonial governance.[15] The Ethiopian Law School mentioned in Haile Selassie I's "Inaugural Statement" had in fact been founded with help from the Ford Foundation - a New York based, 'globally-oriented', private organisation, funded by profits from the Ford Motor Company. The Law School's initial curriculum was taken from American Law Schools, as were many of its professors. British, European and American involvement in Ethiopia's constitutional, administrative and military affairs was by no means a new phenomenon. Hence Haile Selassie I's insistence in his "Inaugural Statement" for the *Journal of Ethiopian law* – published in the same year as he took office as the first 'Chairperson of the Organisation of African Unity' – that: "The

[12] Griffiths 1999, viii.
[13] On "customary law" in colonial and post-colonial Southern, Central and East Africa see Chanock 1985, 2001; and Shadle 1999.
[14] Halliday 2013, 263
[15] On twentieth-century foreign, in particular American, involvement in Ethiopia see Tuori 2010; 2015, 162-164. It is worth noting in this context that Article 122 of the 1955 Ethiopian Constitution states that all acts inconsistent with the United States' Constitution shall be void (Krzeczunowicz 1964, 111).

foundation of the [Ethiopian] codes lies in the feeling of the people as to what is just". Ethiopia's codes drew on foreign sources, but Ethiopian "…courts and judges cannot rely exclusively on foreign sources in interpreting the codes".[16] Nonetheless, the involvement of private, global (capitalist), organisations – such as the Ford Foundation - in modern, 'neo-colonial', Law and Development projects is a reminder of the imperialism of (western) law itself.[17] An imperialism that, as we shall see in Section 3 below, had always worked through, beyond and - to a certain extent – aside from state structures.

Haile Selassie I was well aware of multiple legal, administrative and bureaucratic orderings in operation above and beyond the Ethiopian state. In 1932 Ethiopia joined the 'League of Nations' (later the 'United Nations'). Speaking in Amharic, Haile Selassie I addressed the General Assembly twice: first, in Geneva, as an emperor in exile, to seek aid against Mussolini's invading forces (1936) and second, in New York, in 1963. On this second occasion, Haile Selassie I appealed to the General Assembly as a "maker and enforcer of the international law", listing the aims of the United Nations from its founding *Charter*: "the abjuration of force in the settlement of disputes between states", "the assurance of human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion" and "the safeguarding of international peace and security":

> "The goal of the equality of man which we seek is the antithesis of the exploitation of one people by another with which the pages of history and in particular those written of the African and Asian continents, speak at such length. Exploitation, thus viewed, has many faces. But whatever guise it assumes, this evil is to be shunned where it does not exist and crushed where it does. It is the sacred duty of this Organization to ensure that the dream of equality is finally realized for all men to whom it is still denied, to guarantee that exploitation is not reincarnated in other forms in places whence it has already been banished."[18]

[16] Haile Selassie I 1964, vi.
[17] See Fitzpatrick 2001; Smandych 2005; and Esmeir 2015.
[18] Recording of Haile Selassie I, United Nations Address (1963), with simultaneous English translation: https://www.youtube.com/watch?v=MDscnpF4RsI (accessed 26 / 7 / 2018). Segments of this speech were used by Bob Marley and the Wailers in the song "War", from their 1976 album *Rastaman Vibration.*

Recent scholarship has begun to emphasize the fundamental role that imperialism – encompassing both rivalries between imperial powers and colonial exploitation founded on violence, slavery and racial subjugation – played in the development of international law itself from the 16th century to the present.[19] Haile Selassie I's 1963 'Address to the United Nations' General Assembly' famously ends with the invocation that "We must look, first, to Almighty God … We must become members of a new race, overcoming petty prejudice, owing our ultimate allegiance not to nations but to our fellow men within the human community". This explicitly religious form of universalism also underpins Haile Selassie I's 1964 "Inaugural Statement" for the *Journal of Ethiopian Law*: When he stated, in the concluding paragraph, that "Law is an instrument for civilizing the peoples of the world", Haile Selassie I - "the Conquering Lion of the Tribe of Judah, King of the Kings, Elect of God" (an imperial title first created by the late nineteenth-century Ethiopian emperor Menelik II) – was primarily invoking a Judaeo-Christian concept, not a modern, Western, rationalizing project of extending 'the rule of law' across the globe. Civilizing missions take many different forms.

Exploring the 'logic of empire' in relation to law, bureaucracy and the practice of government and rule thus forces us to break out from what William Twining has termed "the Country and Western tradition": a tradition that has, until recently, dominated mainstream Western legal scholarship with its almost exclusive focus on "the positive laws and 'official' legal systems of nation-states".[20] Section 2 of this essay explores how different empires fostered different 'repertoires of rule' – at the same time as making space for multiple 'ad hoc' administrative regimes (for example martial law, 'emergency regulations' and 'special jurisdictions'), in addition to sanctioning numerous forms of violence and abuse (for example, indentured servitude in the colonies; galley slavery; forced military conscription). Section 3 surveys some of the numerous ways in which empires put law 'to work', facilitating the development of multiple, normative orders and institutions far beyond the jurisdiction of their own imperial officials. Finally, in Section 4, we briefly turn to postcolonial legal scholarship and the concept of 'legalism from below': the practice of citizens invoking state legal norms and structures, and in the process transforming them. As we shall see, the study of colonial

[19] Anghie 2005, 2006, 2016; Benton and Ford 2016; and Koskenniemi 2017.
[20] Twining 2000, 25. As Whimster 2016, 441 states: "Empires... have no inherent narrative driving them towards nation-state modernity."

courtroom archives is beginning to transform our understanding of how law's empire shifted and changed through time, 'out there' in the provinces and colonies but also, crucially, 'at home' in the imperial heartlands.

2. Repertoires of rule

> "What was said by Homer, 'The earth was common to you all', you have made a reality, by surveying the whole inhabited world (the *oikoumenê*), by bridging the rivers in various ways, by cutting carriage roads through the mountains, by filling desert places with post stations, and by civilizing everything with your way of life and good order… And now, indeed, there is no need to write a description of the world, nor to enumerate the laws of each people, but you have become universal geographers for all."[21]

The world of the Roman (civil) law was fashioned and shaped by imperial expansion, just as the world of the Anglo-American common law was later "built through the global spread of colonialism and capitalism"; both "… carried a story of delivering law as [their] gift, bringing order to chaos, light to darkness".[22] Speaking in praise of Rome during the second century CE, the Greek orator Aelius Aristides described Rome's universal "civilizing mission" as extending over multiple peoples, their (local) laws and even the natural world itself. The 'justness' of this domination, according to Aristides, did not lie in military force or right of conquest, but in Rome's superiority over all others in the art of governing: "For you alone are rulers according to nature, so to speak… Since you were free right from the start and had immediately become rulers, you equipped yourselves with all that was helpful for this position, and you invented a constitution such as no one ever had before, and prescribed for all men rules and fixed arrangements".[23] As Peter Fitzpatrick has argued with respect to modern empires and colonialism:

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[21] Aelius Aristides, *Oration* 26. 101-102, trans. Behr 1981, 78.
[22] Quotations from Geary, Morrison and Iago 2013, 85.
[23] Aelius Aristides, *Oration* 26.91, quoted from Fontanella 2008, 209. Compare the opening words of the preface to the sixth-century Roman Emperor Justinian's *Institutes*: "Imperial majesty should not only be graced with arms but also armed with laws, so that good government may prevail in time of war and peace alike".

> "To the imperial eye, law was pre-eminent among the 'gifts' of an expansive civilisation, one which could extend in its abounding generosity to the entire globe… Law, that is, had not only to extend into new found worlds but had also forcefully to bring them into a determined order. The supreme justification of imperial rule was that it brought order to chaos, reined in 'archaic instincts', and all this aptly enough through subjection to 'laws'".[24]

Islamic imperial rulers also framed 'subjection to [their] laws' as a civilising gift, bestowed through the practice of an ordered, rational, 'art of governing'.[25] "According to Islamic and Turkic theories of state, the primary duty of the sultan to his subjects (*reaya*: literally, 'flock') was the provision of justice, especially against the harassment of the local ruling authorities or of illegal taxation".[26] The *mazalim* institutions of medieval Islam – involving the adjudication of complaints relating to "injustices" – were "usually regarded as an expression of the sovereign's direct justice", distinct from the dispensation of justice by qadis.[27] Similarly, according to Baldwin: "The key component of Ottoman legitimation, alongside the claim to defend and expand Islam, was the provision of justice. This involved providing security for people and property by suppressing crime, and providing facilities that enabled subjects to resolve their disputes".[28] In ancient and modern empires alike, the 'art of governing' was used to legitimate imperial rule, at the same time as defining it.[29]

Empires put 'law' to work in numerous different contexts. Arguments from law were employed in the acquisition and the ordering of imperial space: from the 'piling up' of multiple and layered claims to sovereignty to the negotiation of treaties, coalitions and trade charters in early modern colonial empires; from the development of modern juridical tools to 'justify' the violent dispossession of indigenous peoples from land newly designated as 'property', to the cumulative elaboration of legalistic concepts

[24] Fitzpatrick 2000.
[25] On empires and Islamic law in practice see Stilt 2012 and Ingalis 2017 [Mamluk]; Pirbhai 2016 [Mughal]; Gerber 1994, 2015, and Barker 2017 [Ottoman]; Abisaab 2017 [Safavid Iran]; and more generally, Darling 2013.
[26] Barker 2016, 108.
[27] Tillier 2015.
[28] Baldwin 2017, 32.
[29] Mattei and Nader 2008, 2 argue that contemporary 'rule of law' ideology is itself imperial and functions as an 'illegal' justification for plunder: "the often violent extraction by stronger international political actors victimizing weaker ones".

such as 'territorial jurisdiction' and 'extraterritoriality'.[30] "Legal rules also localize people's rights and obligations in space".[31] One fundamental obligation of imperial subjects across ancient and Asian land empires, as well as modern commercial and colonial empires, was the payment of taxation (and other tribute) to the imperial centre. The assessment of land for taxation underpinned the development of innumerable juridical tools related to the imperial 'art of governing' - each concretely situated in time and space. Early modern Ottoman rulers developed numerous categories for use in land administration, implying "different forms of rule and levels of bureaucratization".[32] "In India", moreover, "the first act of English officials was to survey native land laws and to try to organise a system of taxation based on land ownership. They subsequently invented the modern techniques of land survey in order to rule the Indian subcontinent".[33]

Arguments from law were also put to work in the juridical ordering of people (see section 1 above). The "Ottoman desire to rule diversity", for example, led to the development of a highly specific form of non-territorial rule, namely what came to be termed the millet system (in operation from 1453 through to the nineteenth century):

> "The Ottoman rulers recognized the diversity of religious and ethnic communities that made up the empire and also understood that this diversity could not and should not be assimilated into an overarching principle of sameness. Instead, they organized a series of ad-hoc negotiations with the heads of religious communities, resulting in what became known as the millet system. Under these arrangements Jewish, Greek Orthodox and Armenian communities organized their existence in the empire and survived through a generalized system of imperial toleration and intense negotiation."[34]

The millet system was a "…form of indirect rule based on religious difference", through which "The state gave up its control of the internal dynamics of the [Jewish, Greek Orthodox or Armenian] community in return for regular taxation and cohesive

[30] Sovereignty claims: Benton 2007, 2002; and Benton and Straumann 2010; treaties and trade: Benton and Ross 2013 and Stern 2013; dispossession: Kedar 2014; 'extraterritoriality': Kayaoğlu 2010, with reference to the Japanese, Ottoman and Chinese empires.
[31] Benda-Beckmann and Benda-Beckmann 2014, 33.
[32] Barkey 2016, 121. For a more detailed discussion of the 'Ottoman millet system' see Barkey and Gavrilis 2016. For detailed studies of 'legal pluralism' under the Ottomans see Gerber 1994; Peirce 2003; and Baldwin 2017.
[33] Seed 1993, 128.
[34] Barkey and Gavrilis 2016, 24.

and obedient administration".[35] The Ottomans also permitted non-Muslims to litigate personal matters in shari'a courts, if they chose to do so.[36]

Different imperial aims underpinned the adaptation and development of different kinds of "repertoires of rule".[37] As Christopher Tomlins states with respect to early modern European colonialism:

> "To *colonize* means, fundamentally, to appropriate, to take possession. What is appropriated varies. In the Americas, the Spanish appropriated both metallic wealth and an indigenous population to extract it. The Dutch appropriated routes, connections, to sustain commerce. The English appropriated territory, which required that they find ways either of sharing it with a pre-existing population or of depopulating it – mostly the latter."[38]

English colonisers, like ancient Roman lawyers and imperial bureaucrats, differentiated between 'citizens' and 'subjects' - a distinction that does not, necessarily, map directly onto (metropolitan) 'core' and (colonized) 'periphery'.[39] In juridical terms, citizenship tended to be a well-defined status, even if its application in practice was frequently fuzzy and contested. The juridical category of 'subject', however, was relatively ill-defined. Across the British Empire, before 1780, the term "subjects of the crown" was a "…term without precise legal meaning, connoting nothing more than residency in territories claimed or, in the case of India, administered by Britain".[40] The juridical definition of 'unfree', as opposed to 'free', status likewise varied widely across time and space, from the 'chattel slavery' of ancient Rome and the 'New World' (recast into a different, racialized, form), to the indentured servitude of Colonial English America and the 'serfdom' of Czarist Russia. For the leaders of Imperial Russia, "…governance was about control over resources—territory and labor—and the social

[35] Barkey and Gavrilis 2016, 26.
[36] al-Qattan 1999. Baldwin 2017, 6-7 gives the following summary of the complexity of one 'provincial' Ottoman legal system: "…Ottoman Cairo's legal system was a complex network of judicial forums and practices with poorly-defined and therefore overlapping jurisdictions: the shari's court, the governor's tribunal, the imperial council which received petitions from Egypt and across the Empire, several military officials who shared responsibility for policing and market regulation, and political notables who offered justice as part of their cultivation of client networks" (see also Baldwin 2017, 54-71 and 117-135).
[37] Burbank and Cooper 2010, 3.
[38] Tomlins 2001, 26.
[39] Early modern English (American) colonial rule can be divided into three, different, constitutional forms: Crown or state 'provinces'; proprietary rule ('fiefdoms'); and 'charter' or corporate rule (Stern 2013, 30). On 'charter' rule, see section 3 below.
[40] Greene 2016, 320.

order required to secure them. Administration, rather than law, was the primary imperative of Russian rulers, but law entered the picture as soon as the imperial state asserted its claim to define the rights and obligations of people living on its terrain".[41] Hence, as Burbank, explains:

> "Over time, the [Russian] empire produced a series of regulations and decrees that asserted the particular rights and obligations of whole groups of people, defined by territory, confession, ethnicity, or work. This cumulative kind of legalism corresponded to real differences in social norms and legal practices throughout the empire. The multiplicity of legal regimes legitimated within the empire both asserted the superior authority of Russian rule and allowed populations to do a great deal of governance themselves. Drawing 'customs' in under the umbrella of law expressed an imperial social contract: the empire enforced local judicial practices—a cheap way to keep the peace—in return for tribute and taxes."[42]

The phenomenon of serfdom, moreover, meant that roughly half of Imperial Russia's peasant population were classed as citizens - under the legal authority of landlords who were not necessarily Russian - with their own local courts and governance practices. As citizens, serfs had the right to present petitions to the emperor - creating a 'rights regime' in which the citizenry related to the imperial state 'as petitioners'.[43] As Kollman has argued in relation to the earlier Muscovite court system, the right to petition the emperor also had a crucial ideological function: it 'mitigated' the imperial authorities' own use of judicial violence through the tsar's capacity to grant mercy.[44] The right to petition the emperor was, in other words, used as a tool of governance.

"Bureaucracy was an essential component of imperial rule".[45] As we have already seen however, not all empires are alike. During the Tang dynasty (618-907 CE), China developed a sophisticated system of administrative and penal law. The T'ang (penal) code covered aspects of what Western scholars would term 'family law' and

[41] Burbank 2006, 401.
[42] Burbank 2006, 402.
[43] Burbank 2006, 431. Burbank 2004 uses the archives of 'peasant' courts to reconstruct local legal practices and governance.
[44] Kollmann 2006, 7. For comparison with other imperial regimes see Section 1 above.
[45] Crooks and Parsons 2016, 7.

the ‘law of property, contract, and succession’, in addition to setting penalties for ‘deviant’ conduct: “The emperor’s subjects are instructed to behave in certain ways; should they fail to comply, punishments are to be imposed”.[46] Bureaucratic rule was here intended to function as a counterbalance to local elites: “Rule by officials helped Chinese emperors avoid dependence on local lords, making China’s imperial trajectory different from that of Rome and post-Roman polities in western Europe”.[47] As the example of the T’ang Code suggests, the codification of law was an important technique of the ‘art of governing’, but it was by no means ubiquitous or even essential to imperial rule. Chinggis Kahn’s thirteenth-century CE Eurasian conquests led to the creation of the largest land empire of all time, yet neither he, nor his direct descendants, promulgated a ‘Mongol’ code of law.[48]

The state codification of law under the Ottoman Empire, on the other hand, was part of a much broader programme of imperial legal and bureaucratic reform undertaken during the Tanzimat era (1839–1876). The Ottoman civil code, the *Mecelle-i Ahkam-i Adliye* - in force from 1869 onwards - was derived from Hanafi jurisprudence and covered contracts, torts and (some) civil procedure. It was applied in both (‘religious’) shar’ia courts and the new ‘Nizamiye’ (‘secular’) courts; the former were presided over by qadis and the latter by imperial bureaucrats, overseen by the Ottoman Ministry of Justice. The *Mecelle* was just one aspect of “the remarkable growth of the civil bureaucracy” during the Tanzimat era: “In the nineteenth century, activities and institutions that had traditionally been the purview of religious groups or communities – education, forms of tax collection, orphanages, hospitals, policing – were assumed by the state. In instituting these reforms, the bureaucracy and the imperial administration battled older institutions of the empire: tribes, religious groups, guilds, the janissary corps, provincial rulers and recalcitrant subjects, to mention nothing of the external military threats and financial woes”.[49] The processes of state bureaucratisation seen in the nineteenth-century Ottoman Empire can be compared directly to processes of centralisation and ‘modernization’ associated with modern European colonialism: “Colonial authorities ruled over colonized populations by imposing modern law’s doctrines, institutions and practices. Positive law and jurisprudence, comprehensive

[46] MacCormack 1996, xiv.
[47] Burbank and Cooper 2010, 444.
[48] Pochekaev 2016 reviews the complex historiography relating to the nature of the ‘Great Yasa’ (or ‘Great Zasag Law’) of Chinggis Kahn.
[49] Barkey 2016, 125.

codes, judicial autonomy, rule of law, and other liberal legal ideologies were but a few aspects of the modernizing juridical transformation through which colonial states endeavored to colonize countries and to govern subjects".[50] And yet, as legal pluralist studies have shown, "…systems of law crafted from afar cannot simply be imposed in toto on different social contexts. Instead, imported legal institutions and codes get significantly reshaped to fit the local reality."[51]

The on-the-ground development of modern European colonial legal institutions – the complex networks of martial law and other kinds of 'exceptional' powers, state courts, police, prisons and penal colonies – all testify to the fundamental role that legal and bureaucratic techniques played in imperial, hegemonic, domination. As we have already seen, however, the development of imperial 'repertories of rule' tends to rely on a 'cumulative kind of legalism' – which, in turn, suggests "… the incompleteness of imperial control through the instrument of law".[52] As we shall see in Section 3, the "complex and contingent configuration of imperial law" needs to be understood "not as a structure of command, but as a set of fluid institutional and cultural practices".[53]

3. Practiced empires

> "We sit there to administer Buddhist law, or Hindu law, or Mohammedan law, one after the other. We administer Roman-Dutch law from South Africa or from Ceylon, or French law from Quebec, or the common law of England from Ontario, or curious mixtures of law which prevail in various colonies, sometimes Italian law, sometimes Roman law. We sit there and we do our best."[54]

Viscount Haldane's description of the work of the 'Judicial Committee of the Privy Council' was given as an after-dinner speech to the Cambridge University Law Society in 1921, almost a century after the 1833 'Judicial Committee Act' provided for the structured hearing of appeals against court decisions originating from every far-flung

[50] Esmeir 2015, 19. For a specific example see Comaroff and Comaroff 1997 on the European imposition of colonial-capitalist rights of private property, together with the concepts of contract, debt and wage-labour, in colonial South Africa.
[51] Calavita 2010, 92.
[52] Quotation from Sahadeo 2003, 952.
[53] Benton and Ross 2013, 2.
[54] Haldane 1922, 148.

corner of the British Empire.[55] Having warned his audience that "…we who sit on the Judicial Committee have taken a tremendous oath not to disclose any of the secrets that come to the fore there", Haldane went on to describe the physical experience of walking into the "Judicial Office", just off Downing Street in London:

> "You will not think that it looks like a Court, particularly as you will see one or two gloomy officials glancing enquiringly at you. Brush them aside. This is the Supreme tribunal of the Empire, and every subject of the King-Emperor is entitled to go in there. You will see to your right a rather dilapidated-looking red-covered stair. Go up it – which you will do in company with white men, some of whom look as if they had come from the far West, and may be of American appearance; yellow men, some of whom come from Hong Kong; Burmese, who come from Burma; Hindus and Mohammedans from India; Dutch from South Africa; a mixed race from Ceylon – all sorts of people may be straying in there, and you will feel yourself in good imperial company."[56]

The members of the 'Judicial Committee of the Privy Council' were accordingly expected to administer and decide upon multiple, different, kinds of law: Buddhist, Hindu, Mohammedan (Islamic), Roman-Dutch, French, the 'common law of England from Ontario', alongside what Haldane refers to as "curious mixtures of law which prevail in various colonies". In an article published over twenty years earlier, in *The Juridical Review*, Haldane had described "the administration of justice on its Imperial Side" – along with religion and education - as constituting "…a real and most important portion of the silken bands which, with so little friction, hold our great Empire together".[57] In his 1921 address to the Cambridge law students, Haldane elaborated on how these 'silken bands' were woven: "You cannot learn much about [the Judicial Committee of the Privy Council] from documents… Its constitution is mainly unwritten, and its conventions are unwritten; so that, unless you have lived in it and in the atmosphere, you do not know what happens there".[58] Imperial 'repertoires of rule' were constituted and shaped by the shared thought-worlds and situated practices

[55] Haldane's speech was made in the same year as "British Imperial Justice reached a milestone" with the Judicial Committee of the Privy Council's landmark judgement in the 'Amodu Tijani' case, an appeal lodged "…by an African Chief, Chief Oluwa, against the colonial government in Nigeria demanding compensation for the 'illegal' expropriation of his ancestral lands." (Ibbawoh 2014, 1).
[56] Haldane 1922, 144.
[57] Haldane 1900, 2.
[58] Haldane 1922, 146.

of specific groups of legal, judicial and administrative actors. As we shall see in section 4, these actors included the colonised - as well as the colonisers.

Much of the existing scholarship on law and empire focuses on rulers, state officials and state-backed military violence as the architects of imperial power. Yet legal practices and governance regimes were also spread via religious and commercial networks: "Churches, colleges and merchants no less than imperial administrative structures provided points of entry for law created or ratified in the metropolis."[59] These religious and commercial networks should not be understood as mere 'transmitters' of state law and patterns of government; they had their own customs, laws, procedures and practices. The corporations that developed in Tudor and Stuart England for the purposes of overseas trade and imperial expansion were "not simply commercial firms but forms of political and social association"; they developed their own regimes of corporate government, including corporate courts, within the parameters specified by the royal charters which established their existence as legal entities.[60] The royal charter, as Tomlins puts it, was "an exercise in the creation of jurisdictions".[61] According to Halliday, the chartered company – "whether Dutch, French or British" - was the "archetypal form of imperial expansion" in the modern period: "Like kings, the Dutch and English East India Companies made treaties with Asian sovereigns. They created courts, regulated property, collected taxes, and hired armies. From St Helena to Bengkulu, they built fortresses as well as factories."[62] Radhika Singha's classic 1998 study *A Despotism of Law: Crime and Justice in Early Colonial India* reveals the extent to which the British East India Company was in the business of developing its own, highly complex, 'cumulative kind of legalism', specifically in the fields of criminal law and administration. Early Company rule in India produced numerous "…artefacts and images of colonial civil authority, the permanent gallows, *phansitola* [gallows quarter], *phansichauk* [gallows crossing], and the jailroad left their mark on the municipal map"; whilst, at the same time "The baleful figure of the police *darogha* ['constable'] in popular skits, the jail sentence parodied as a festival journey to one's *sasural* [father-

[59] Benton and Ross 2013, 12 – with specific reference to the early modern, trans-Atlantic, empires of the French, Spanish and English.
[60] Stern 2013, 28 and 32-37. See also Greene 2016.
[61] Tomlins 2001, 32.
[62] Halliday 2013, 269. Also Heath 2016, 369: "Up to 1858, the colonial bureaucracy in India served a trading company: the East India company, founded by royal charter in 1600 – whose primary interest was to maximise profits". As Heath goes on to explain, the East India Company "assumed authority for the civil administration of Bengal" in 1765, opening the way for "an age of plunder".

in-law's residence] and the punishment of hard labour as *sarkar ki naukari* ['employees of government, used in ironical self-reference by prisoners'], indicate that the imagination of power was being re-shaped at various social levels."[63] The East India Company worked through and around indigenous 'cultural norms' and 'codes of sexual and social conduct', in order to develop new ideological and practical conceptions of 'sovereign right'.[64]

Chartered companies, colonial proprietors and settler-directed plantations all made use of private contracts, adapted commercial laws and developed private property rights, in their own interests.[65] The phenomenon of 'settler sovereignty' and its impact on gender and family law, race, class, labour and property, in particular, is an expanding field of research.[66] As an entrenched structure of oppression, settler colonialism could pose a greater threat to native and indigenous populations then the distant laws and 'silken bands' of (some) imperial governing institutions. In any case, thinking through law, bureaucracy and the practice of government and rule with reference to chartered companies and 'settler sovereignties' forces us to exchange a monolithic, top-down, nation-state, model of law, for a more nuanced picture of multiple, intersecting and entangled, socio-legal practices and jurisdictions.

4. 'Legalism from below'[67]

> "In many cases, if we wish to understand the history, structure, and functioning of the legal system, we should focus much more attention on the actions of the members of the subject society than on those of the imperialists."[68]

One corollary of the deep-rooted (Western) ideology of law's 'civilising mission' – in which subjection to imperial power brings with it the gift of justice and social order – is the myth that indigenous people are 'lawless', or else are 'primitives' with 'savage

[63] Singha 1998, xi-xii. See also Kolsky 2010 and Heath 2016.
[64] See further Singha 1998 and more generally, Benton 2007.
[65] "The relations of public law and private law— or sovereignty and property as I have elsewhere put this— are much closer than standard histories of the role of law in imperial expansion suggest" (Koskenniemi 2017, 12).
[66] Tomlins 2001, 2010 [English Colonies in America]; Ford 2010 [America and Australia]; Sahadeo 2003 [Imperial Russia]; Barclay, Chopin and Evans 2018 [French Algeria].
[67] Quotation from Eckert 2006.
[68] Brown 1995, 104.

customs' as opposed to legal ideas and doctrines of their own.[69] Early work on law and administration in modern colonial settings – in particular India and Southern Africa – tended to frame law first and foremost as the 'emissary' of imperialism. As Brown wrote in 1995: "…while previous scholars have noted the various ways in which imperialism could affect law, what is most surprising is the extent to which most writers have viewed law in imperial and post imperial settings as largely, and even exclusively, a product and even a tool of imperialism".[70] Law was framed as a "core instrument of colonial control".[71] In seeking to unmask the pervasive brutality of ('liberal') legal regimes, early studies on modern colonial law thus tended to present native / indigenous populations as subjects of colonial power – rather than as (justice-seeking) agents in their own right. From the 1980s onwards, however, broad developments within the field of postcolonial studies led to a new emphasis on the agency of local, native, elites. Brown's comparative research across the Middle East, for example, revealed that:

> "…the areas least penetrated by Europe (including much of the Arabian peninsula) saw the least comprehensive attempts to adopt Western-style legal systems. Yet the initial – and often the most comprehensive attempts to recast local legal systems along Western lines were taken not by regimes under direct control of Europe but by ambitious, centralizing elites (in Iran, the Ottoman Empire, and Egypt) who often worked to stave off further Western penetration."[72]

Native resistance to imperial hegemony was not limited to overt rebellion and protest, but could also take the form of powerful, native, elites looking to consolidate their own power by re-framing their own laws and institutions.

Recent archival and ethnographic research by lawyers, anthropologists and legal historians, working on (post)colonial courtroom records and the interactions of 'everyday law' has reframed scholarly interest in indigenous agency, beyond the study of native elites. Beginning in the 1960s, Marc Galanter's work on legal pluralism in (post)colonial India has focused explicitly on access to justice for 'backward classes';

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[69] Myth of lawlessness: Napolean and Friedland 2014, 227; Primitivism: Chandra 2013. As Geertz 1983, 208 argues: "The mischief done by the word 'custom' in anthropology, where it reduced thought to habit, is perhaps only exceeded by that which it has done in legal history, where it reduced thought to practice".

[70] Brown 1995, 104.

[71] Kolsky 2010, 973. On the technical topic of colonial (and postcolonial) 'repugnancy clauses' and their relationship to 'customary (indigenous) law' see Demian 2014.

[72] Brown 1995, 106. Compare Merry 2000 on colonial Hawai'i.

'oppressed', 'vulnerable' and 'disadvantaged' groups, including 'untouchables'; and other questions relating to (re-made) 'indigenous' legal traditions, religions, and castes.[73] Galanter describes a long and gradual process – from 1858, when the British Crown supplanted the administration of the East India Company, onwards – whereby dispute-settlement shifted "… from local tribunals (and local notables) to the government's courts":

> "The common law courts undertook to deal with the merits of a single transaction or offense, isolated from the related disputes among the parties and their supporters. The 'fireside equities' and qualifying circumstances known to the indigenous tribunal were excluded from the court's consideration. In accordance with the precept of 'equality before the law', the status and ties of the parties, matters of moment to an indigenous tribunal, were deliberately ignored. And unlike the indigenous tribunals which sought compromise or face-saving solutions acceptable to all parties, the government's courts dispensed clear-cut "all or none" decisions. Decrees were enforced by extra-local force and were not subject to the delays and protracted negotiations which abounded when decisions were enforced by informal pressures. Thus "larger prizes" were available to successful litigants and these winnings might be grasped independently of the assent of local opinion."[74]

The colonial courts of British India, in others words, were attractive to ordinary, native, litigants. Comparative research on litigation conducted in colonial courts in the Spanish Americas reveals a comparable situation: "In the sixteenth century, some suits were brought against Spaniards by Indians, but most of the litigation in the Indian General Court in New Spain involved Indian groups suing other Indian groups over access or rights to resources like land and water".[75] As Calavita states: "Women in Hawaii used colonial law to contest the violence that was part of traditional patriarchal relations; colonial law was also central to the politics of slave resistance in the British West Indies in the eighteenth century; and women in sixteenth century Istanbul went to the courthouse, an affront to customary gender practices, to challenge their

[73] For example, Galanter 1984 and Galanter 1989.
[74] Galanter 1968, 70. On India post-Independence – and attempts to revive 'an indigenous legal system' - see Galanter and Krishnan 2003, especially 104-127.
[75] Benton 2011, 60-61.

subordination by local and colonial male authorities."[76] Galanter's point, however, is that these local actors, and their legal representatives, effectively shaped and changed (post)colonial legal cultures through their repeated interactions with (post)colonial government agents and structures: "Traditional society is not passively regulated by the modern system; it uses the system for its own ends. Traditional interests and groupings now find expression in litigation, in pressure-group activity and through voluntary organization".[77] Or, as a young 'slum dweller' from Dehli put it: "The powerful break the law. We also have rights in law. Law makes us illegal, but the business that others make from us being illegal is even more illegal. We want to use the law against them".[78]

Within any given legal order, some litigants may "…have power to manage, to exploit, to manipulate, avoid, or evade the existing order for their own ends; for others law is a manifestation of other people's power that confronts them; and, of course, there are many gradations in between."[79] Research on (post)colonial courtroom records suggest that some local agents, working within specific historical contexts, played an active role in shaping colonial legal cultures through their repeated, everyday, interactions with legal structures and officials. "Postcolonial critics remind us that the colonies were sites of legal experimentation in which European powers invented new forms of sovereignty and rights of contract and property, spatial orders and regulated intimacies, racialized communities and subjects for management and control."[80] Socio-legal categories, bureaucratic practices and technologies invented and practiced in the colonies did not remain confined to the colonies.[81] Legal experimentation in the colonies also shaped and changed the legal culture of the 'homeland' (as we saw with the example of Viscount Haldane and the work of the British 'Judicial Committee of the Privy Council' in Section 3 above). Detailed archival research, moreover, reveals these colonial 'sites of legal experimentation' as - sometimes arbitrary, illogical and inchoate - jurisdictional arenas, rather than sites where colonial powers simply attempted to impose and extend their command:

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[76] Calavita 2010, 89. Baldwin 2017, 3 notes that: "New scholarship on the Ottoman shari'a court records, often referred to as *sijills* after the name for the registers in which they were kept, has transformed our understanding of Muslim legal practice".
[77] Galanter 1968, 83.
[78] Quoted from Eckert 2006, 54.
[79] Twining 2003, 247-248.
[80] Munshi 2017, 232 citing Cohn 1996. See also Skuy 1998.
[81] Munshi 2017, 232 gives the concrete example of practices of biometric identification, including the fingerprint, which were invented in colonial India, but "…would become a routine part of criminal investigation in Europe and eventually everywhere".

> "In the eighteenth century, colonial women, natives, and slaves sued their social superiors before royal judges in increasing numbers. Both the content and the quantity of their civil lawsuits against husbands, native lords, and masters are evidence that the Spanish colonial courts served not as receiving houses for Enlightenment legal concepts as much as their proving grounds. Increasingly as the eighteenth century progressed, colonial Spanish Americans used the civil courts with a zeal that their Spanish counterparts on the peninsula did not match, challenging a traditional legal culture long rooted in notions of justice with a new culture oriented in modern notions of law."[82]

Ordinary litigants, native and colonial, shaped and re-cast 'hegemonic' imperial cultures as they sought to vindicate (new) 'rights in law', negotiating and manoeuvring their way through colonial courtrooms.

As we have seen, the history of law's empire stretches back to the ancient and medieval eras, at the same time as it extends far beyond any (twentieth-century) narrative of imperial decline and the 'rise of the nation state'. It incorporates the study of – ideological and practical – imperial 'repertoires of rule', whilst simultaneously revealing how imperial and colonial governance was repeatedly shaped and re-shaped by the thought-worlds and situated practices of both ruling and ruled. "In modernity, the paradigm location of the juridical has been the nation-state, a location necessarily matching the constituted and constituent dimensions of the juridical".[83] And yet:

> "Imperialism … is an ancient form of rule that, over the centuries, has operated through ideological, social, political, and legal means. It has developed a formidable arsenal of technologies of governance. Indeed, new mechanisms of governance, such as international institutions, often reproduce and serve the logic of Empire and the 'civilizing mission', whether through the Mandate System of the League of Nations, the United Nations itself, or the International Financial Institutions. Not

[82] Premo 2017, 3. Ibhawoh 2014 develops a comparable argument for colonial-era (British) Africa.
[83] Fitzpatrick 2004, 44.

only do new technologies of governance reproduce colonial relations, but very old forms of management, suppression, and control persist."[84]

Thinking *through* empire opens up multiple, new, 'locations of the juridical' – challenging and reframing ideas about law, bureaucracy and the practice of government and rule that 'we' might otherwise tend to take for granted.

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[84] Anghie 2016, 171.

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