Review Essay

LAW AND COLONIALISM

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Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia.* Cambridge: Cambridge University Press, 1985.

Sally Falk Moore, *Social Facts and Fabrications: "Customary Law" on Kilimanjaro, 1880–1980.* Cambridge: Cambridge University Press, 1986.

Joan Vincent, *Anthropology and Politics: Visions, Traditions, and Trends.* Tucson: University of Arizona Press. 1990.

Peter James Nelligan, "Social Change and Rape Law in Hawaii." Ph.D. dissertation, Department of Sociology, University of Hawaii, 1983.

Robert J. Gordon and Mervyn J. Meggitt, *Law and Order in the New Guinea Highlands: Encounters with Enga.* Hanover, NH: University Press of New England, 1985.

Yash Ghai, Robin Luckham, and Francis Snyder (eds.), *The Political Economy of Law: A Third World Reader.* New Delhi: Oxford University Press, 1987.

Timothy Mitchell, *Colonising Egypt.* Cambridge: Cambridge University Press, 1988.

Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society.* Berkeley: University of California Press, 1992.

Bernard S. Cohn, "Law and the Colonial State in India," in June Starr and Jane F. Collier (eds.), *History and Power in the Study of Law: New Directions in Legal Anthropology.* Ithaca, NY: Cornell University Press, 1989.

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Bernard S. Cohn, "The Command of Language and the Language of Command," in Ranajit Guha (ed.), *Subaltern Studies IV: Writings on South Asian History and Society.* Delhi: Oxford University Press, 1985.

Law has been described as the cutting edge of colonialism (Chanock 1985:4). It was central to the "civilizing mission" of imperialism, particularly British imperialism of the nineteenth and early twentieth centuries (Darby 1987). The introduction of Western law justified and legitimated conquest and control, particularly for the British and Americans. During the nineteenth and early twentieth centuries, British law represented to the colonizers in India and Africa a substantial advance over the "savage" customs of the colonized. Law was conceptualized, as Fitzpatrick (1989a) points out, as "the gift we gave them."

Colonialism is an instance of a more general phenomenon of domination. Events that happened in the past, such as those in the period of colonial conquest and control, can provide insights into processes of domination and resistance in the present. The study of colonialism describes processes of domination at the periphery of the world system. But the way European societies expanded and endeavored to dominate culturally distinct societies indicates much about the nature of European society itself and about the ways it seeks to achieve control over other societies. This review considers the role law played in the establishment of colonial control in the past and at the periphery, but in doing so, it provides insights into processes of domination in the present and in the core.

Colonialism typically involved the large-scale transfer of laws and legal institutions from one society to another, each of which had its own distinct sociocultural organization and legal culture. The result was a dual legal system: one for the colonized peoples and one for the colonizers. Dual legal systems were widespread in colonized parts of Africa, Asia, Latin America, and the Pacific. Postcolonial countries are now grappling with this legacy as they debate how to fashion a unified legal system out of this duality and how to resurrect and implement the remnants of indigenous, precolonial law.

The language of transfer and duality, however, ignores the central feature of colonialism: It was a process in which one society endeavored to rule and to transform another. The courts and police established by colonial powers, arrayed beside the mission, the school, the store, and the local government office, enforced compliance to a new political order and at the same time sought to impose a new culture. Colonial governments often promulgated regulations concerning land and labor, regulations that frequently extended to specifying conditions of marriage and divorce and patterns of dancing, drinking, and entertainment. Thus, law, along with other institutions of the colonial state, transformed concep-

tions of time, space, property, work, marriage, and the state. The role law played in the colonizing process is an instance of its capacity to reshape culture and consciousness.

A review of some of the literature on the role of law in the colonial process shows that the process was highly varied in place, time, and situation. Patterns developed in one colony were often transferred to another, but the needs for land and labor varied greatly, as did the strategies of rule and the social order of the colonized and their patterns of resistance. The rich, contextualized, historical work in this field resists generalization. Nevertheless, one can discern some common themes. This review explores a body of recent work on law and colonialism and offers some ideas toward a theory of law and colonialism and, more broadly, a theory of law and domination.

Taken together, the works under review show that European law was central to the colonizing process but in a curiously ambiguous way. It served to extract land from precolonial users and to create a wage labor force out of peasant and subsistence producers. Yet, at the same time, it provided a way for these groups to mobilize the ideology of the colonizers to protect lands and to resist some of the more excessive demands of the settlers for land and labor. Moreover, the law provided a way for the colonial state to restrain the more brutal aspects of settlers' exploitation of land and labor. Thus, the legal arena became a place of contest among the diverse interest groups in colonial society. The contest included struggles between traditional leaders and new educated elites of the colonized population as well as colonial officials, missionaries, and settler populations. It was an unequal contest, however, in which colonial officials and settler populations exerted vastly greater power than colonized groups. The use of law in colonial processes therefore parallels other state efforts to assert control through law, efforts often undermined by patterns of noncompliance and appropriation by the subjugated.[1]

[1] There are many examples of the ways law promoted the capitalist transformations of the colonial period. In colonial Zanzibar of the early twentieth century, for example, many Africans were arrested for drinking, dancing, and assaults: events which were regarded as linked to idleness and the absence of labor discipline (Cooper 1987:240). Frederick Cooper quotes officials who bemoaned the possibility that the "childish savages" would dissipate their "very small stock of energy in a demoralizing dance" and would reach a "dangerous state of sexual excitement" (ibid.). Peter Fitzpatrick (1987:256–57) describes the indentured labor system in Papua New Guinea in the early twentieth century which converted civil wrongs such as desertion or failure to work into criminal wrongs susceptible to punishment. Other works under review here provide further examples. But European law imposed in colonial situations not only defined the terms and circumstances of the new wage relation, it occasionally circumscribed the exercise of violence in that relation. It defined the relationship of master and servant, slaveowner and slave, employer and employee, allowing flogging in many cases but also setting outer limits on permissible violence. For example, legal limits to white behavior existed in colonial Papua New Guinea (ibid., pp. 259–60). In 1931, a European who flogged a native to death was convicted and sentenced to ten years of prison and hard

The works under review show the ways in which the introduction of colonial law promotes cultural transformations of colonized peoples, yet also establishes limits to these transformations, and provides opportunities for resistance to its control. For example, colonial law fostered the creation of a wage labor force available to the plantation, mine, and factory and facilitated the commodification of land. Laws were passed in various colonies to regulate labor contracts, land tenure, vagrancy, desertion and to control social activities that impinged on work.[2] At the same time, law contributed to the construction of a new consciousness, a new set of understandings of persons and relationships. For example, Anglo-American law incorporates conceptions of fee simple landholding, of monogamous marriage and divorce, of contractual relations, and of individual rights linked to conceptions of the autonomous choice-making individual that are embedded in post-Enlightenment Anglo-American culture.

I argue that moments when cases are handled by police or courts are particularly important in introducing the culture of a dominant group. These moments can be analzyed as cultural performances, events that produce transformations in sociocultural practices and in consciousness. I am applying the important theoretical model developed by Mather and Yngvesson (1980–81) to situations of legal pluralism. In a court hearing, persons and events are given meaning in a formal and ritualized setting (Yngvesson 1988). The judge or police produce an authoritative interpretation of a person's life situation. Everyday events and relationships are named and defined, decisions rendered, and penalties imposed. These performances introduce new meanings to those subject to them as well as to the wider audiences who watch or hear about them. Thus, as they handle cases, the courts serve as a critical site of cultural production. In colonial situations, when ordinary people's problems are handled in courts which embody laws or procedures of the metropolitan country, their problems are reinterpreted in the language of these new institutions, judgments are rendered in these terms, and penalties are imposed or withheld. In

labor (ibid., p. 260). Fitzpatrick notes that while the law on occasion overrode personal racially based authority, it did not try to eliminate that authority. Sometimes laws protected certain categories of workers such as juveniles. Similarly, law often provided some minimal protection of native land rights, although often by redefining land as individually rather than communally owned, a redefinition that hastened the alienation of land from indigenous peoples and its acquisition by the colonial elite. In nineteenth-century Hawaii, for example, Anglo-American land tenure law was imposed on peoples with previous communal rights (Lam 1985). The justification among some proponents of the new law was that it would protect the commoners from the power of the chiefs who controlled the communal lands.

[2] For example, courts imposed new regulations against vagrancy and breaking labor contracts in Central Africa (Chanock 1985), against tribal fighting in Papua New Guinea (Gordon and Meggitt 1985), against drinking and dancing in Zanzibar (Cooper 1987) and Papua New Guinea (Fitzpatrick 1987) and against festivals in Egypt (Mitchell 1988).

the past, these performances were often initiated by colonists striving to manage and control their labor force, but sometimes they were the result of colonized individuals bringing complaints about one another and, infrequently, about their colonial masters. The same dynamics occur when ethnic minorities have been incorporated into a nation state and are subjected to its laws or when elites mobilize the legal system to transform the social and working lives of the lower classes.

The content of these performances depends on ongoing efforts by the state to assert control over local courts and police. In the colonial situation, contests over rules, procedures, and personnel pitted the varied interest groups of the colonial state against one another. Among the colonized population, this included the educated elites, union leaders, traditional chiefs, and peasant farmers and among the metropolitan population, settlers, missionaries, colonial officials, and merchants. The outcome of these contests for control of the local courts determined the shape of the performances in court and, consequently, the transformations wrought on the culture of colonized peoples. In the British colonies in Africa, for example, colonized people's cases were typically handled in "native courts" enforcing "customary law." However, as the works under review demonstrate, this "customary law" was itself a product of the colonial period, shaped by the efforts of "native" modernizing elites to create law attuned to the new market economy and the efforts of European officials to preserve traditional culture and the power of tribal political leaders. Similarly, subordinate groups in modern states often develop distinctive legal systems only partially acknowledged and accepted by the dominant society.

This essay draws on a wealth of research published in the past decade, much of it in anthropology and history. For decades, anthropologists have studied colonized peoples, but in recent years they have examined the colonizers as well: the institutions they established, the messages they imparted, and the new subjectivities they created in the colonized (e.g., Wolf 1982: Jean Comaroff 1985; John Comaroff 1989; Comaroff and Comaroff 1986, 1989; Cohn 1985, 1989; Starr and Collier 1989; Rosen 1989a, 1989b; Nader 1989; Stoler 1989; Cooper and Stoler 1989; Vincent 1990; Kaplan 1990). At the same time, a burgeoning historical literature on subaltern groups in colonial situations reexamines the meanings of colonialism, particularly for the colonized (e.g., Said 1978; Ranger 1983; Guha 1985; Spivak 1985; Cooper 1989; Chatterjee 1989; Prakash 1990). I hope that this review will demonstrate the theoretical richness of this work and show its critical importance to sociolegal scholarship, both that which examines the postcolonial world and that which explores the role law plays in contemporary multiethnic states in the West.

The books and articles reviewed all focus in various ways on the culturally productive role of colonial legal systems. Many ex-

amine the way these systems fostered new relations of power in colonial states. Some are framed in the language of structure and process, others talk about domination and resistance, others talk about the extension of Foucauldian disciplinary systems. Some place more emphasis on processes of capitalist transformation than others. All take a historical perspective, and all view the legal system as a point of intersection between colonial interests and local interests. I have not attempted to cover all the relevant material available but to mine the existing literature for discussions which focus on the way the legal arena served as a site of struggle between colonized and colonizing populations. Consequently, the review provides a detailed discussion of a few important books and suggests wider resources but inevitably neglects other fine works. A great deal more on colonialism and law lies embedded in studies of colonial history, legal history, and historical and contemporary studies of the social and political organization of colonial and postcolonial societies. I have discussed only literature published in the past ten years in order to put some boundary on the project. I cover exclusively materials in English, although this regrettable limitation derives from my own linguistic skills. There has been considerable work done under the framework of legal pluralism and the imposition of law, but I am not going to discuss this work here because I have examined it elsewhere (see Merry 1988).

In sum, these works show how law served the "civilizing mission" of colonialism—transforming the societies of the Third World into the form of the West. They discuss the ways colonial legal systems interacted with existing systems and the new forms of law which emerged.[3] They also consider hidden veins of precolonial law that remain buried within the new systems.[4] I have attempted to show how these works are relevant to a broader theoretical understanding of law and power.

THE NATURE OF COLONIALISM

Colonialism has a narrow definition and a broader one, as it is commonly used. In its broader sense, it is a relation between two or more groups of unequal power in which one not only controls and rules the other but also endeavors to impose its cultural order onto the subordinate group(s). In its narrower sense, the term generally refers to the European political, economic, and cultural expansion into Latin America, Africa, Asia, and the Pacific during the last four hundred years. Although similar processes have been

[3] I found less work on Latin America than on Africa, India, and the Pacific probably because I did not include works in Spanish and Portuguese.

[4] The precolonial period was itself not pristine, of course, but was deeply shaped by the West. In Asia, Africa, the Pacific, and Latin America, colonial rule was preceded by long periods of contact, intensive trade, slave raiding, missionary activity, the establishment of settler mines and plantations, the ravages of introduced diseases, and military skirmishes.

going on for thousands of years, it is the recent European expansion, intimately connected with the spread of capitalism and the search for land, labor, and markets, which has shaped the contemporary world. In a comprehensive overview of the meanings of the term, Beverley Gartrell (1984:4) defines colonialism narrowly as "formal political control of a territory and population by a state, usually through some form of specialized administrative apparatus, with an ideology justifying such control." The ideology includes a definition of the dominated population as different and inferior, usually expressed in an idiom of race. Colonialism is a coercive relationship: In most cases, colonial control is initiated by military force and subordinate groups often resist with violence. In its broader meanings, colonialism has been expanded to include any situation in which a distinctive cultural group exists within a larger society or state which controls it. This situation has been labeled internal colonialism and welfare colonialism.[5]

Colonialism, even in its narrow sense, is a highly diverse process, with great variation geographically, historically, and culturally. It ecompasses vastly different geographical regions, quite different historical periods, distinctive styles of colonialism among different European nations, and extraordinary diversity in the cultures of the peoples who were colonized. Tropical areas were less likely to develop substantial settler populations than temperate regions. Metropolitan countries varied in their demands for land and labor as they moved from mercantilism to industrial capitalism, while colonies differed in their capacity to supply the requisite land and labor (ibid., p. 5). For example, British imperialism in Central Africa of the late nineteenth and early twentieth century which focused on the development of mines produced very different labor relations and a different colonial society than did the sugar plantation economies of the Spanish and Portuguese emerging in the Caribbean and Brazil in the sixteenth and seventeenth centuries (see, e.g., Wolf 1982; Curtin 1990:46–73; Mintz 1985). Nevertheless, there are some common features to the process, particularly in more limited time periods and regions. This review concentrates on British colonialism in Africa during the nineteenth and twentieth centuries but makes reference to other cases from the same time period in Papua New Guinea, India, Yemen, and Oceania.

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[5] Forcible immigration through slavery or the conquest of small indigenous populations has produced situations in which small enclaves of subordinated groups of different cultural and/or racial identity exist within modern nation states. The concept of colonialism has recently been expanded to include such situations, which are labeled internal colonialism or welfare colonialism (Gartrell 1986). The term has been applied to Native American populations in Mexico, Canada, and the United States and to African Americans in the United States. Gartrell argues that this derivative usage of the term dilutes its meaning and fosters confusion by lumping together very diverse phenomena (ibid., p. 4).

Viewed in retrospect, after its establisment, colonialism appears to be an irresistible process. But as scholars reexamine the colonization process, they are rewriting its history as one of resistance and struggle (e.g., Guha 1985; Comaroff 1985; Scott 1985). The colonizers themselves often saw their project as a formidable and possibly futile task of cultural reformation. Although most colonizers were motivated by desires for power and wealth, some were humanitarians endeavoring to bring God, progress, and civilization to unappreciative peoples they thought of as fundamentally different from themselves.[6] In late nineteenth-century British thinking, advanced peoples had an obligation to help those less advanced, to provide guidance and instruction and even to rule them (Darby 1987:31). This duty was expressed in a language of trusteeship, colonial development, and modernization (ibid.).[7] Many British colonizers acted with a sense of the moral superiority of Christianity, belief in progress and civilization, commitment to an idea of white racial supremacy, and faith in the rule of law and individual rights. Nevertheless, there was constant resistance: armed insurrection, evasion, secret worlds of noncompliance. The situation conjures up an image not of a triumphant victory but of a dutiful yet hopeless campaign: Conrad's image, in *Heart of Darkness*, of the futility of a European ship lobbing shells into a faceless, uninhabited African jungle.

And, of course, the colonizers did not operate in an open field. There was competition among potential colonial powers attempting to claim sovereignty.[8] Deep divisions split early settlers and missionaries. The former were typically more concerned with transforming a precapitalist peasantry into a disciplined labor force to work on plantations and mines (Stoler 1989; Cooper 1987, 1989; Fitzpatrick 1987). The latter sometimes became involved with the problems of the native populations, serving as their spokespeople and representatives, even as they taught them that their customs of marriage and religious life were sinful and wrong (Comaroff and Comaroff 1986). On occasion, the missionaries turned to the imperial government to protect "native" peoples from the exploitation of the settlers (ibid.). Thus, the colonial situation provides a particularly vivid and stark setting in which to consider the ambiguous and contradictory part law plays in situa-

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[6] Philip Darby (1987:3), in his historical study of British imperialism in Asia and Africa from 1870 to 1970, notes that European colonial expansion incorporated three motivations: power politics, moral responsibility, and economic interest.

[7] The West was understood as dynamic and active, while Asians and Africans were understood as essentially objects, passive, "material from which something could be made" (ibid., p. 38).

[8] Darby (ibid.) points out that much of the competition over colonies after 1870 was a diffusion into a new sphere of the developing competition among the five major European powers: Britain, France, Germany, Russia, and Austria-Hungary, with Italy aspiring to be a sixth.

tions of domination: exerting control and establishing new forms of discipline but constraining the very forms of power that it makes possible.

THE CREATION OF CUSTOMARY LAW

The law of colonized peoples recognized by colonial governments was generally labeled "customary law" and was considered to be indigenous law. Colonial governments typically endeavored to retain some aspects of "native" law. This commonly produced a dual legal system, with one set of laws and courts for the Europeans and one for the colonized in a relation of dominant and servient legal systems (Hooker 1975). The British in Africa, for example, generally recognized indigenous law, with the exception of laws that violated British law or were "repugnant to natural justice, equity, or good conscience." African courts were charged with enforcing indigenous law, or "customary law," for Africans, while English law was enforced in a separate system of British courts for Europeans. There was limited appeal possible from African to European courts.

One of the major insights produced by work on law in colonial situations is that the customary law implemented in "native courts" was not a relic of a timeless precolonial past but instead an historical construct of the colonial period. Several careful historical and anthropological studies demonstrate that the so-called customary law of the colonial period was forged in particular historical struggles between the colonial power and colonized groups. Modernizing elites, for example, often took a central role in defining "indigenous law" in the native courts, as Francis Snyder describes in Senegal (1981a, 1981b). The nature of law changed as it was reshaped from a subtle and adaptable system, often unwritten, to one of fixed, formal, and written rules enforced by native courts. I discuss in this section two detailed histories of colonial law in Africa which demonstrate how customary law was formed in the interaction among various constituencies, both British and African. One is by a historian and one by an anthropologist. These studies demonstrate the conflicts surrounding the law which Africans experienced in their encounters in court and the kinds of cultural performances they witnessed.

In *Law, Custom, and Social Order* (1985), Martin Chanock traces the historical creation of customary law in Zambia and Malawi from the late nineteenth century to independence in the 1960s. He describes the process by which African customary law was reconstructed from a fluid, shifting set of principles and procedures to a fixed, written set of codes which claimed continuity with an African past. These codes served as the basis for the formation of a new, national legal system in the postcolonial period (p. 55).

During the colonial period, the British gradually came to see customary law as part of a timeless African tradition formed during a golden age of stasis and stability before the disruptions of colonialism. Chanock shows, however, that far from being a set of rules handed down from the precolonial period, customary law was a historical product created by colonial institutions—the outcome of complex intersections of precolonial African polities, British law as understood by early administrators, and the creative efforts of emerging African elites who shaped the law to meet their needs under changing political and economic conditions (p. 145). Early missionaries were also heavily involved in administering justice, applying Christian principles rather than British law.

In the early years of colonialism in Africa, the reigning theory among British colonial administrators was that African "customary law" was a primitive, less developed form of law. They hoped that the intervention of the British and their legal system would help it to evolve further. Consequently, they wanted to hear as many cases as they could and resisted devolving authority onto African chiefs. However, in these African societies, custom (rules and practices existing before the creation of "native courts" enforcing "customary law") was a political resource useful in continuing renegotiations of status and access to resources. This flexibility of rules and the significant role played by inequalities between the parties in African law disturbed the British colonial officials. They interpreted this flexibility as a further indication of the primitive nature of African law, a conclusion based in part on a misunderstanding of British legal processes. Because most of the early British judges had little or no legal training or practical experience in British courts, they imagined that British judges simply applied rules and precedents rather than adapting them to fit new situations (p. 237).

At first, beginning in the late nineteenth century, Africans brought their problems to the colonial courts in significant numbers. Courts were flooded with women seeking divorces, many of whom were Chewa or Tumbuka "captive wives" seeking to be released and to return home (p. 87). Early British administrators and judges took these complaints seriously and used them to attack the systems of inequality and control by which village life had been ordered: the authority of men over women, masters over slaves, witchfinders over witches. They tried to protect women from abusive husbands by allowing more frequent divorces and refused to recognize slave status altogether. But these policies, which lasted into the early decades of the twentieth century, gradually undermined the power of traditional authorities.

An apparent breakdown in order beginning in the 1920s led the British to shift course, putting greater support behind traditional authorities. Colonial officials saw the decline in traditional authority as a threat to the stability of the colonial regime (p. 172).

Both African men and British District Officers gradually came to agree that women were getting out of control and that the authority of parents and husbands was being dangerously undermined. Magistrates also became concerned about the declining authority of chiefs and the erosion of bonds of kinship under the onslaught of new ideas of individualism. Women who had flocked to the courts for protection against abusive husbands now found the courts more interested in preserving customary marriages and upholding the authority of husbands. The courts began to enforce ideas of Christian marriage, returning women to their husbands rather than protecting them from these husbands.[9]

Major changes in social relations during the 1920s, 1930s, and 1940s associated with the spread of the market, migratory wage labor, and the growth of towns further undermined the authority of elders over younger people, chiefs over subjects, and husbands over wives. The market began to transform the social order from a system in which wealth and power depended on rights in and control over people to one in which wealth and power came from rights in and control over property (p. 236). Local courts become more active in labor discipline and tax prosecutions, enforcing new British regulations about work obligations, labor contracts, vagrancy, and tax paying (p. 108). The legal basis for labor employment during the early twentieth century was based on penal sanctions for breach of labor contracts. Such cases came to constitute much of the courts' business (p. 109). By the end of the 1920s, fewer people brought their cases to court voluntarily (p. 111). By the 1920s and 1930s, local British courts had become to a large extent places to enforce discipline about work and tax paying rather than places for women and followers to escape the control of chiefs and husbands (pp. 103–11).

By the 1930s, colonial officials decided it was necessary to give formal recognition to African courts to shore up traditional authority and strengthen traditional custom. The colonial government created a new system of Native Courts under the control of local chiefs to apply rules derived from the "traditional" past of each tribal group. However, within these courts, the law changed from an informal and flexible system to one in which fixed and determined rules were applied. Anthropologists were occasionally commissioned to produce handbooks of traditional law and custom. Although the emerging mission-educated African elite wanted a more legalistic, British form of law as they became more involved in the cash economy, the colonial officials decided that the Native Courts should administer a codified customary law under the authority of the traditional chiefs. The courts were to apply the customary law of each tribe, strengthening tribal divisions and draw-

[9] Chanock develops this argument in an earlier article (1982).

ing sharper lines between what had been fluid and conflicting spheres of local law (p. 182).

As nationalism and trade unionism began to develop among the African elites in the 1930s, the British desire to westernize Africans waned. Colonial administrators sought to leave village justice under the control of the village and its traditional chiefs rather than in the hands of an educated African elite (p. 138). Old men were seen as the repositories of customary law, conceived as a set of rules that existed in the changeless precolonial past. However, as Chanock observes, by the 1930s even old men had had little adult experience with the precolonial era. As conflicts developed between the old rulers and the "new" Africans, specifically the mission-educated elites, the government sided with traditional rulers (p. 138).

In the 1960s a new cultural nationalism surrounding independence and a rejection of the colonial heritage spurred interest in customary law as authentic African law, the basis for building a new unified African legal system (p. 54). Native Courts were abolished in the interest of Africanizing the entire legal system. Yet, this customary law, now touted as indigenous African law and the basis for a new unified African legal system, is the product of colonial relations and incorporates the inequalities of the colonial past. Chanock worries (p. 238):

> [I]f it is rules that the legal systems of the successor states require in the areas in which the customary law now operates, it would be possible to formulate far more equitable ones than those deriving from the inequities of the colonial situation which currently find acceptance on the basis that they are essentially and traditionally African.

Chanock points out that this region and period were critical for the formation of important theoretical models of the anthropology of law. Many prominent scholars such as Max Gluckman and A. L. Epstein worked here during the colonial period and were influenced by it.[10] These anthropologists focused on law as order maintenance. Their accounts did not sufficiently acknowledge the existence of a single legal field encompassing both African and British law within a situation of colonial domination and subordination. Gluckman endeavored to prove that the Africans had a legal system similar to that of the British by emphasizing continuities of function and ignoring substantial differences. Ordeals, for example, were described as evidentiary proceedings instead of techniques for combatting evil and finding out who was a witch. Moreover, Gluckman saw customary law as unchanging and traditional rather than as an historical product shaped by the polit-

[10] Among Gluckman's extensive work in this region, his best known is *The Judicial Process* (1955). Epstein has also written extensively on law in urban Zambia (e.g., 1953, 1954, 1958). Gluckman's work has been critiqued along the lines followed here in the past (e.g., Starr and Yngvesson 1975).

ical economy of colonialism. Thus, Chanock's book is valuable for considering not only the colonial construction of customary law but also of the anthropology of law itself.

Chanock's book contains more British voices than African ones, and the African world is not differentiated by ethnicity, class, or region. Chanock says little about the various African perspectives on the legal system, from tribal chiefs to new elites to ordinary peasants. Yet, the focus on historical change and the continual remaking of customary law serves as a valuable corrective to the view that customary law is an unchanging remnant of a traditional past.

Sally Falk Moore's *Social Facts and Fabrications* (1986) richly evokes the African voice. She analyzes the transformation of legal and political ideas and practices among the Kichagga-speaking people of Kilimanjaro from 1880 to 1980 (p. 10). As in Chanock's work, customary law is theorized as constructed in the colonial period, not as "traditional." Customary law refers to that part of African culture classified by colonial rulers as "native customary law" (p. 11). The present sociocultural order of the Chagga represents a *bricolage* of tradition, not tradition itself; it has continuities with the past as well as changes in form. Her concern in this book is with small-scale legal "events" in rural areas of Kilimanjaro which are shaped by complex, large-scale transformations. This approach takes into account the broad shape of historical change in Tanzania during the precolonial, colonial, and postcolonial period but focuses on the way these changes played out in a single place. Consequently, her book presents customary law as historically formed, as does Chanock's, but with greater attention to the African understandings of these changes. Because of Moore's local focus, she can show more clearly how Chagga peoples understood and manipulated the imposed legal systems of the colonial period. The book's careful ethnography presents a far richer analysis of the processes by which local peoples constructed customary law out of past practices and colonial institutions to meet the exigencies of daily life. It is, however, less attuned to the periodicity of these changes than Chanock's book.

The book divides the discussion of changing Chagga law into three sections: Kilimanjaro during the precolonial period in the late nineteenth century, the broad changes of the twentieth century in Tanzania, and the organization of postcolonial rural life presented through a series of cases that tie together particular lives and relationships. The third segment is particularly valuable as a supplement to Chanock's account.

Early European visitors to the Chagga in the precolonial period recorded lists of rules, but Moore argues that Chagga law at the time was negotiable and flexible. The visitors were searching for rules, and the Chagga were willing to provide them when asked. But laws were subject to negotiation and political pressure.

For example, a complex body of rules regulated lending and inheriting cattle—animals of great economic and social importance to the Chagga. Yet daily life consisted of a succession of unpaid debts, arguments, and court cases surrounding the transfer of rights in cattle. Even today, inheritance of cattle depends on patrilineage micropolitics as well as inheritance rules, even though Chagga themselves, when asked, will talk about inheritance rules rather than guidelines to be applied with discretion by the patrilineage (p. 80).

During the colonial period, the Chagga had a dual legal system of courts: one for the "natives" and one for the Europeans. At first the native courts were supervised by a British administrative officer, but by 1929, the two systems were made completely separate (pp. 150–51). By 1951, the colonial government began to reintegrate the courts, a project that was completed after independence in 1961. In 1969, a new system of informal arbitration tribunals was created to handle family controversies and other minor problems, staffed by local party leaders (laypeople) charged with handling these problems informally and reaching an amicable settlement. The government did not specify what law these tribunals were to apply (pp. 161–64).

A detailed discussion of case records from the "native" primary courts in the twentieth century shows the kinds of cases that came to local courts and their surrounding kinship framework. The civil side of the primary courts was dominated by cases involving sales of goods and services. For much of the early twentieth century, they constituted about half of the entire caseload, while cases involving kinship relations and "customary" law constituted about one third. This statistic is noteworthy since it suggests that the courts were largely engaged in handling problems for which "customary law" was not considered relevant. It shows that the Chagga were deeply involved in the cash economy early in the colonial period and that chiefs and magistrates were hearing cases and making decisions on matters to which customary law did not apply, drawing instead on their knowledge of general principles of loaning, buying, selling, and hiring developed from their own experience in the cash economy (p. 190). The issues that could be defined as part of "customary law" became less and less significant as a proportion of the caseload of the local courts as the twentieth century advanced (p. 209).

The final section of the book is a detailed account of conflicts and court cases involving a single patrilineage over the last three or four decades. This fascinating story shows the ongoing quality of disputes and illustrates how accusations of witchcraft, local informal lineage hearings, and court hearings weave in and out of daily life. When disputes within lineages and troubles such as car accidents draw these rural farmers into the primary courts, they have some ability to shape them to their purposes. Local courts are used

by weaker parties for asserting rights, but they are also vulnerable to manipulation and pressure by local people with greater wealth, education, and connections. "The manipulation of witnesses, of evidence, of court personnel, shows that, though the formal legal agencies at the local level are an adjunct of national institutions, they are often used as the instruments of the local social system" (p. 302).

Moore summarizes the present situation with the metaphor of a stratigraphy of law and politics. On top are the new, postcolonial inventions. Below these and only partially displaced by them are the legal ideas and forms of authority developed during the colonial period. Beneath these are:

> remnants of the basic foundation of Chagga arrangements of kinship and property whose outlines come from a time before the Europeans appeared, and which have been subtly but deeply altered. A common history has made this present form of Chagga law and politics something uniquely Chagga, but something that is not to be mistaken for the "customary" system that was in being a hundred years ago. (Pp. 316–17)

She concludes by emphasizing the continuity and the continual reformulation of Chagga law over this period (p. 317). She challenges the illusion that custom was static and essentially obsolete while innovation was linked to the national political leadership and the top of the political system by demonstrating the capacity of the Chagga to reformulate and reshape their tradition to live in a constantly changing world, a process which retains some of the past while reforming it.

Although Moore talks about the expansion of the world system and colonialism and although she has written an explicitly historical study, the theoretical orientation is structure in process. The book is more attuned to the micropolitics of power within Chagga chiefdoms than to the power relations of colonialism. *Social Facts and Fabrications* does not talk about imposition, cultural restructuring, or struggles between ideological currents. Here, and to a greater extent in subsequent work (Moore 1989), relations between colonizer and colonized as well as other unequal relations are named "asymmetrical power relations," a term that itself depoliticizes power and focuses on structure rather than larger processes of domination.

Moore's and Chanock's books talk about the same time period and closely related regions, and they make similar arguments about the nature of customary law and the processes of its formation. Both see customary law emerging in struggles between colonial authorities with their vision of a transformed social order and local people attempting to direct and manage these transformations to their own benefit. Yet Chanock provides a stronger sense

of historical development and change, while Moore is clearer about the micro-level interactions taking place within local communities.

Joan Vincent's magisterial *Anthropology and Politics* (1990) takes a slightly different angle on the way colonialism has influenced the study of local law. The book traces the intellectual development of political and legal anthropology from 1879 to 1989. Vincent's purpose in this book is not to examine the role of law in the colonizing process but to situate the history of the anthropological study of politics and law within world-historical time. Its central thesis is that theoretical developments in political and legal anthropology are influenced by changes in the larger world and that the anthropological study of politics is itself historical (p. 1). Dominant paradigms change as the world itself poses new problems and reveals the limitations of past models. As the text moves through a succession of periods of anthropological work on law and politics, it becomes clear that a focus on history itself within the discipline is shifting and fitful. Many early anthropologists were concerned with history, but they were replaced by others working with evolutionary and neo-evolutionary models, with ahistorical studies of social structure, and with micro-level examinations of politicking. Vincent suggests that one of the dominant themes of contemporary political anthropology is the linkage between a global, world-system orientation and the particularities of place, a concern which she identifies as influenced by Marx, if not itself Marxist.[11]

Vincent shows that the way anthropologists approached law, and indeed the law they studied, was a product of the colonization process. African societies in the 1930s and 1940s, for example, were described as systems in which law and politics were embedded in lineage structures. But, Vincent reminds us, these were typically societies whose political institutions had been truncated by British colonial authorities. Thus, the lineage analysis of politics, predominant for several decades, developed from research in places in which states had never existed or had been suppressed by colonial rule.

[11] It is unclear from Vincent's account that the anthropology of law has developed a similar world-system and local-level perspective with which to examine contemporary legal processes. She notes that much of the classical anthropology of law emerged within the structural-functional paradigm of the 1940s and the conflict and equilibrium models of the 1950s associated with the Manchester school. The conflict approach lead to a tendency to focus on extrajudicial dispute processes and legal pluralism. Dispute process work tends to focus on micro-level interactions to the neglect of larger systems that impinge on the local level. Legal pluralism tends to present a static picture of multiplicity in legal systems, with a colonial system existing alongside a precolonial one. Following Vincent's model for political anthropology, the anthropology of law needs to look at local-level legal processes as part of a world economic and political system accompanying colonial expansion and cultural domination. She describes subaltern studies, peasant resistance, and studies of gender and law as fruitful for an examination of local-level legal institutions in the context of the social changes accompanying the spread of global capitalism.

There is clearly a need to reexamine the classic works in the anthropology of law from the perspective of colonialism: a need to rethink how the situations studied and the accounts themselves were a product of a particular historical moment, as Vincent suggests. For example, since African law was defined as primitive, to dispell this argument anthropologists emphasized the similarities between the law of the colonized and that of the colonizers. At the same time, there has been in previous work a curious blindness to the transformative effects of colonialism on these legal systems themselves. In her own study of Uganda, Vincent (1989) demonstrates the processes by which colonial law is produced, emphasizing the way colonizers imported ideas and legal codes developed from experiences with other colonies.

Several recent articles address the modes by which customary law is formed in colonial situations outside Africa south of the Sahara. Laura Nader (1989) argues that a culture of harmony was brought to the colonized peoples of Mexico as well as other nations by Christian missionaries, and that this has shaped their public presentation of conflict. Lawrence Rosen (1989a, 1989b) has examined the nature of customary law in Morocco. Sally Falk Moore's (1989) conception of the role of assymetrical power relations in the creation of customary law has been applied more broadly by June Starr and Jane Collier (1989) in a recent collection on law and anthropology.[12] The processes of creating customary law can be observed in the United States as well, as distinctive subgroups resist the authority of the formal legal system and construct their own rules and legal forums. To some extent, the alternative dispute resolution movement can be seen as an effort to develop customary law and customary forums outside of and in opposition to the formal legal system.

Peter Nelligan's excellent study (1983) of the changing meanings of rape law in nineteenth- and twentieth-century Hawaii linked to shifting ethnic relations under colonial conditions provides a longitudinal study of the formation of a particular kind of customary law with its changing relation to state law. Hawaii's earliest rape law, passed in 1835, followed Hawaiian custom to some extent by defining rape as an offense requiring a fine of $50, of which $35 went to the victim and $15 to the judge. In 1844, a celebrated case focused international attention on the embarassingly meager penalty that Hawaii imposed for rape (p. 85). A new rape law which was passed in 1850 and was based largely on a penal code proposed for Massachusetts imposed a maximum fine of $1,000 and imprisonment at hard labor for life or any number of years with no compensation provided to the victim (pp. 91–93). Nelligan points out that the new statute reflected the declining

[12] There is also a burgeoning literature on women in colonial situations, with articles by Gartrell 1984, Brownfoot 1984, and Stoler 1989.

status of women, particularly chiefly women, during this period as American missionary advisors to the Hawaiian government sought to foster monogamous, Christian marriage among Hawaiians. Coverture laws passed in 1846 gave rights over women's property to their husbands and sought to confine their activities to homemaking and childrearing (p. 87). Women were increasingly expected to be dependent on their husbands and sexually available only to them. In this cultural transformation of the meaning of rape, the victim was effaced. The change reflected not only the increasing dominance of the Massachusetts conception of marriage but also the gradual wresting of control over the lawmaking process from the Hawaiian chiefs by the American missionaries and their American friends. This historical example reveals clearly how changing laws concerning rape reflect deep-seated ideas about the nature of women and how, as such ideas change, so does the meaning of rape and the way it is punished. The example suggests approaches to looking at the changing ways rape is viewed in American society.

STRUGGLES OVER LOCAL JUSTICE

A recurring issue in postcolonial countries is which law—"customary" or that derived from European colonial law—should be enforced and in what kinds of courts. A related debate is the extent to which local judicial institutions should be under the control of the central government or of local polities. Some postcolonial countries are now experimenting with new forms of local justice that are more rooted in customary law, more conciliatory, and more locally controlled as the more established local courts become more formalized and bureaucratic over time and replicate the forms of the colonial courts.[13] These concerns parallel those raised by the alternative dispute resolution movement in the United States.

Efforts to expand supervision, to develop formal procedures, and to reduce customary law to writing contradict efforts to reproduce local power relations and replicate a more informal, situationally informed vision of justice. Courts designed in a capital city are very different when they are implemented in remote villages and towns, places not easily supervised by the center and already dominated by a local elite. Local courts are, to use Sally Falk Moore's term (1973), semi-autonomous social fields: semi-independent social systems that develop local practices within a larger structure which constrains the way they function. Fitzpatrick (1983) uses the term *interlegality* to describe this porous quality of local-level legal institutions: their openness to larger economic and legal structures, yet their existence as distinct social arenas. These are institutions not easily dominated by a central

[13] Westermark (1986) provides one example of this process in Papua New Guinea. For other examples and a discussion of this process, see Merry (n.d.).

government, particularly if language or cultural differences are large or supervision is hindered by distance.

Law and Order in the New Guinea Highlands (1985) by Robert J. Gordon and Mervyn J. Meggitt illustrates the way national and local groups seek to control local courts and police. It also describes arguments over the role of customary law in contrast to European law in these institutions. Papua New Guinea, with more than seven hundred distinct language groups, is a very different cultural milieu from Central Africa and has had a distinctive colonial experience. After a century of colonial rule by the Germans, the British, and the Australians, Papua New Guinea became self-governing in 1972 and independent in 1975. The first part of the book explores changes in national policies toward policing and courts, and the second half focuses on the Enga people, looking at the growth of local government and changes in the role of the courts and police in a small region. The central question of the book is why there was a resurgence of tribal fighting in the highlands of Papua New Guinea immediately after independence.

Gordon and Meggitt attribute the growth of tribal fighting to the disappearance, in the postindependence years, of the colonial *kiap*, or all-purpose field officer/policeman/judge and his replacement by a Papuan police officer. In the colonial period of the 1950s and 1960s, law and order was maintained by lone expatriate field officers who patrolled the highland valleys on foot and made decisions on the spot. Most of the cases they handled concerned land disputes. The kiaps were the key agents of the colonial state and combined judicial, administrative, and policing functions. They were at the frontier of the Australian government's efforts at colonization and pacification (p. 34). Kiaps are now Papua New Guinea nationals and exercise considerably circumscribed functions.

In the late 1970s and early 1980s, political and economic changes produced a more powerful local elite. Since the 1970s, a florescence of local government councils and development projects and a great expansion in the number and specialization of local government employees has taken place. Village Courts with their own magistrates were introduced in 1974 "to ensure peace and harmony in their areas by mediating in and endeavoring to obtain just the amicable settlements of disputes" (quoted on p. 214 from the Village Courts Act). The act was intended to legalize existing tribunals and to prevent abuses in them. When Enga and other highland peoples discovered that the postcolonial courts could not quickly settle land disputes, however, they returned to fighting as a way of handling them. These courts have curtailed the arbitrary power of kiaps and their ability to make quick decisions. As a consequence, the new kiaps are less effective in preventing fighting, despite their increased numbers. Not only do they lack the expatriate kiap's appearance of power and distance, but they are sus-

pected of having personal connections to local political leaders and of seeking to establish themselves as rival Big Men (pp. 176–77).

When they turn from national policy to look closely at the Enga, Gordon and Meggitt find that the Enga are actively involved in efforts to manipulate the government as it expands into their region. The state has become a favored arena for political competition between rival Big Men, or clan leaders. With economic development, the state has become a major source of wealth (p. 181). The spoils of office are dispersed through long-established patterns of competitive gift-giving which brings power to aspiring politicians (p. 158). The more the government and the courts become intertwined in local life, the more they are appropriated by aspiring leaders for their own political advancement. Thus, the expanding state provides a new arena for the kinds of political competition which have long been the warp and woof of Enga social life. The spread of tribal fighting is simply another example of this competition, and the inability of the kiaps or the courts to restrain it reflects the extent to which local government has been absorbed into the competition. Before, the kiaps were outside the local political arena; now they are part of it. The state has become disenchanted as the Enga have penetrated it and gotten to know it better (p. 182). As the Enga move into government, it becomes another arena for Big Men to build their followings and enhance their power.

This book is an intriguing and sometimes odd blend of anthropological and criminological approaches. On the one hand, it is sensitive to the native point of view, to the way one small group views the national situation, and to its culture and social organization. It describes the Enga perception of tribal fighting and their explanation for this fighting in the decline in influence and power of the kiaps. Unlike some of the classic studies in the anthropology of law, *Law and Order* encompasses both the perspective of the local community and that of the state. On the other hand, its focus on the adequacy of institutional structures of policing, courts, and punishment overemphasizes institutional arrangements and neglects political economy. For example, it seems probable that land pressure contributes to increased warfare among the Enga. They are located in an area with a dense and rapidly growing population and the beginnings of a transition to cash cropping. Many of their fights are about land. Land cases also represent a substantial portion of the caseload of the local village courts (p. 229). Gordon and Meggitt's explanation for the resurgence of tribal warfare focuses on the failure of such criminal justice machinery as the patrols, the kiaps, and the village courts rather than on intensified sources of conflict.[14]

[14] They note, for example (p. 229), that the village court magistrates endeavor to stop tribal fights but that their jurisdiction often does not cover both sides of the fight, so that they have the authority to prohibit only one side from fighting.

Like the other books reviewed here, *Law and Order in the New Guinea Highlands* shows law as a mechanism for subduing colonized peoples. It clearly demonstrates that the colonial legal system constructed new definitions of crimes, new forms of political organization, and new property relations, enforced through the courts and the kiaps.[15] Yet, the study also shows the uncertain and halting progress of this project in the hands of recalcitrant and clever nationals. The Enga seized this new system, absorbing it into their existing patterns of political competition. Instead of becoming a Big Man through competitive feasting and the exchange of pigs, an Enga could become a Big Man by giving away jobs building roads and schools. As individual Enga became educated, they gained added strength in this new arena of competition, an arena that quickly came to include the courts as well as other political offices and committees.

Thus, the process of imposing a postcolonial legal order in highland New Guinea, as portrayed by Gordon and Meggitt, ultimately produces a struggle over local judicial systems. Although the Enga absorbed new ideas of the self, of the authority of the state, and of the legitimacy of legal procedure from the colonial legal system, they also reinterpreted these ideas through Enga categories of action and knowledge. As in British colonial Africa, the institutions and rules designed to serve colonial expansion and control are to some degree subverted by the colonized.[16] Similar processes of subversion have been studied among ethnic minorities in nation states (e.g., Massell 1968) and among working-class clients of the U.S. legal system (e.g., Merry 1990).

LAW AND CAPITALIST TRANSFORMATIONS

Some work, from a more Marxian theoretical perspective, emphasizes the role law played in the transformation to capitalist production during the colonial period. This work focuses on the ways colonial law fostered institutions of capitalist production and contributed to transforming a subsistence peasantry into a wage labor force. The edited collection of readings, *The Political Economy of Law* (1987), by Yash Ghai, Robin Luckham, and Francis Snyder, provides an excellent introduction to this work. It also includes selections on the role law plays in relations between rich nations and poor in the world economy and its functions within developing countries (p. xi). The volume contains eighty-five articles drawn from classic works in the Marxian theory of law, from contemporary studies of courts and the state in Third World countries, and

[15] The colonial government sought, e.g., to transform communal land tenure to individual land tenure through the courts.

[16] Silliman (1985), e.g., analyzes such processes in the Philippines, and Westermark (1986) provides a somewhat different account of Papua New Guinea.

from theoretical and empirical studies of the internationalization of capital, law, state, the economy, and ideology. Several articles address the historical linkages between colonialism and capitalism, while some examine the role of law in social transformations within postcolonial nations.

The collection is organized around several questions posed by the editors (p. 7) concerning the linkages among capitalism, colonialism, and the law, such as, Why did imperialist powers use the legal form to legitimate their role? How was the export of legal models and ideologies tied to the export of capital and to patterns of colonialism? How did the legal form manage to obscure the inequalities which existed within the international legal order? Most of the articles describe situations in Africa, the Middle East, Asia, the Caribbean, and Latin America, but the collection provides a theoretical framework for the study of law and legal institutions in developed countries as well.

The theme running through most of the essays is that the transformations wrought by the expansion of capitalism and colonial control of the Third World were implemented by law, and that the imposition of law by colonial powers played a critical role in integrating peripheral areas into the world economy. The articles excerpted in this reader include classics by Maine on the development of law, Marx and Engels on the determinants of legal development, Pashukanis on the specificity of law, Weber on the legal foundations of modern capitalism, E. P. Thompson on capitalism and the rule of law, Gramsci on state and civil society, Poulantzas on ideology in capitalism, and Lukacs on legality and illegality. Of the many articles on the Third World, a few are of particular relevance to the theme of this review: Snyder's discussion of the formation of customary law in Senegal demonstrating the processes by which it was constructed in the colonial era, Santos's analysis of forms of legality and illegality in a squatter settlement in Brazil, Kidder's ethnography of lawyers in India, Ietswaart's study of law and labor relations in Chile from 1900 to 1970, and Fitzpatrick's study of the role of law and indentured labor in Papua New Guinea.

The book begins with the tragic and compelling story of the Ocean Islands case involving a small Pacific island that was denuded of its valuable phosphates and converted into an uninhabitable honeycomb of pinnacles, pits, and refuse piles during mining operations under British colonial supervision dating from 1900 (pp. 11–34). Although regulations passed in 1893 established severe restrictions on the purchase and lease of land from native landowners, the mining company found numerous ways of getting around this restriction and pressuring the Colonial Office in London into giving it easier access to the lands. A 1913 agreement allowed the mining company to purchase mining rights for some areas and to pay royalties for this land as long as they promised to replant it

with coconut trees and return it to the owners when it was worked out. In 1971, the previous inhabitants of this land sued the British government for unpaid royalties and for restoration of their lands so that they might return. In a 1976 judgement, the courts required only that the mining companies return the land to its previous state in terms of vegetation, not to level the pinnacles or restore the soil, so that replanting a few coconut palms in the hollows beneath the pinnacles fulfilled their legal obligations. Plaintiffs were awarded damages of $A75 (Australian) an acre to replant the pinnacles and hollows with coconut palms (p. 34).

This article reflects a basic theme of the volume—that the expansion of European and U.S. capital, including the expansion of colonial rule, has determined the patterns of economic development and social transformation of the Third World. Considering the present situation, however, Ghai, Luckham, and Snyder (p. 275) comment:

> Now, however, the social and economic systems established in this way tend to reproduce themselves with less overt reliance on foreign coercion, although it has been necessary in recent decades to establish a number of new institutions and rules to provide a more orderly framework for the maintenance of the international capitalist system.

Here the editors refer to transnational corporations, the World Bank, systems of patents, copyrights, and trademarks, and the International Monetary Fund, among other institutions.

The introduction and several of the readings indicate not only the extent to which law transformed colonized peoples but also the incompleteness of that transformation. Capitalism has often failed to wholly suppress alternative forms of law and regulation. The effects of ongoing cultural and social structures plus processes of popular resistance deflected some changes. The result has been an enduring legal pluralism rather than a uniform legality. The editors note that these lacunae in capitalist legality suggest areas of compatibility between capitalism and the alternative systems of rules and institutions. Further, they argue that the existence of social spaces in which capitalism and law have been resisted and neutralized indicate that the subordination of Third World countries to Western legal forms is neither historically inevitable nor irreversible. In the search for new forms of political action, Third World countries have on occasion even called on Western law for instrumental and strategic purposes (p. 10).

Like the previous studies reviewed, this book sees the legal situation of Third World countries as a complex combination of legal systems. Its theoretical perspective, however, begins from an analysis of the impact of global capitalism and the legal form with which it is joined, in contrast to the previous studies which looked more closely at micro-political arrangements and the impact of changing government policies on these arrangements. The earlier

studies placed greater emphasis on the significance of local struggles in structuring the extent of dominance of the metropolitan legal system; this book is more concerned with the macro processes that structure local competition.

CULTURAL TRANSFORMATIONS

Some recent work focuses on the impact of new modes of thinking and new modes of organizing social life introduced by European colonialism, emphasizing in particular the development of more routinized and bureaucratic forms of organization. Since European law constitutes one such system of meaning and organization, studies which take this perspective have relevance to the general theoretical problem of the ways in which Western law produced cultural transformations. The two studies under review in this section both take inspiration from Foucault's (1977) analysis of the transformation of forms of discipline and order in France during the eighteenth century. These studies focus on the ideological aspects of domination, examining power as it operates through the restructuring of consciousnesss.

Timothy Mitchell's book *Colonising Egypt* (1988) provides a fascinating analysis of colonialism understood as part of wider processes of capitalist transformation. Mitchell is interested in the differences in forms of knowledge between nineteenth-century Europe and Egypt and the linkages between these forms of knowledge and power. This, the second half of the nineteenth century, was a critical period in the creation of Orientalism as an academic discipline and as a mode of thinking about the mentality and culture of "the East" (see Said 1978).

The book describes the array of new disciplinary measures introduced by the British and the French into nineteenth-century Egypt, including European systems of ordering in schools, the army, public health, and government. New forms of military-style policing developed along with statistical surveys of population characteristics, census taking, and the redesign of cities to create more legible city forms with straight roads (pp. 44–46, 175). European systems of criminal courts, prisons, and insane asylums were part of the overall process, although they do not receive extensive treatment in this book. The forms of ordering Michel Foucault (1977) traces in Europe are reproduced in the colonization of Egypt: the panopticon,[17] the timetable, the control over bodies, the reliance on regimentation. Mitchell compares these European forms with Egyptian ones, emphasizing that they represent entirely different ways of understanding and representing the world.

[17] The panopticon was an early prison design in which all the cells were organized around a central observation station from which a single observer could see all the inmates but they could not see him. Foucault (1977) uses this model as a prototype for other systems of ordered surveillance.

The fundamental argument of the book is that nineteenth-century Europe developed a new conception of the relationship between representation and reality, a notion Mitchell defines as the "world-as-exhibition." This refers to a conception of the material world as only a physical representation of an underlying plan or structure (p. 13). The book opens (p. 1) with an account of the great Paris Exhibition of 1889, which incorporated exact replicas of the East: an entire mock street of Cairo, complete with façades of mosques and coffee houses and imported Egyptian donkeys and donkey drivers. He describes the reactions of the shocked Egyptian visitors touring the representations of their city streets, disgusted to find that the door to the mosque, for example, opened into a coffee house with dancing Egyptian girls. In Mitchell's view, this exhibit, bounded by a fence from the surrounding city, promoted the view that it is possible to make a representation of something else which is more real. These world exhibitions were premised on the possibility of a distinction between a model or image and an "external reality" which it represented. They were part of the process which objectified the East and made its subjects into objects (p. 21).

The exhibition creates a world divided in two: a material, physical world of things and an abstract world of the structure and meaning of these things. The person is similarly divided into a body and a mind (pp. 14–15). The disciplinary order of the school and the military, with its use of uniforms, regimented formations of persons, and the creation of ordered arrangements of bodies and gestures, highlights the order behind the appearance and reveals the existence of an underlying structure.

It is this notion of an underlying structure or realm of meaning which, he argues, British colonialism brought to Egypt at the close of the nineteenth century. In contrast to the new order, the cities, schools, and writing of Egyptians, to use some of his examples, appeared disordered: Their principles of construction were not an underlying structure but instead homologies and metaphors of growth and fullness. For example, in Egyptian schools, texts were learned by recitation from those who had learned from other teachers in a line of succession back to the original author of the text. Texts themselves are arranged in a radiating structure, with the Quran as central text surrounded by commentaries on the Quran and commentaries on the commentaries. Texts were best understood as recited, so that nuances of meaning could be conveyed orally. Learning took place in a series of individual interactions between teacher and student. In contrast, the British model of the school replaced the oral teacher/student interaction with group lessons by senior students teaching a group of similar students at the same time. The British scheme focused on disciplining the body, moving the individual through a series of stages of learn-

ing punctuated by examinations, and developing a routine of daily activities designed to induce docility and order (pp. 69–87).[18]

The idea of the world-as-exhibition parallels Durkheim's notion of society as an entity that could be thought of separate from its expression in daily life and Michel Breal's theory of the meaning of language in which words are merely signs, meaningless in themselves but communicating between speaking subjects by their juxtaposition (pp. 140–41). Their meaning, he argued, lay not in the words or in the mind of the individual alone, but outside both as a "structure" with an "ideal existence." In the nineteenth century, Europeans generally were beginning to conceive of everyday experience as meaningful only within the terms of this abstract analysis of meaning. To colonize Egypt was to impose this pattern, to make Egypt into an object picture-like and legible, available to political and economic calculation (p. 33).

Yet, Mitchell does not indicate the extent to which these new forms of representation and thinking spread throughout Egyptian society or how deeply they penetrated into the lives and understandings of ordinary Eyptians. In several cases, Mitchell describes schools that epitomized the panopticon approach yet were closed within a few years. Some of the political leaders who brought the new models from Europe were quickly replaced. Perhaps more struggle took place and greater efforts were made to resist these new ideas through political action or by passive noncompliance than he describes. Mitchell does note that the military had great difficulty in recruiting soldiers into the new army. The ordinary peasant may have discovered modes of resisting this disciplinary order.

Although relatively little on legal institutions such as courts, police, or prisons appears in this book, I think Mitchell's approach offers possibilities for the study of law in colonizing processes. It helps to explain why European colonizers interpreted the oral and flexible legal systems of colonized peoples as primitive and disordered.[19] Understanding the world as subject to a plan behind the

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[18] Similar differences are found even in the structure of words, in which Arabic words, written as a string of consonants, are linked by different "movements" (of the mouth and vocal cords) that produce different meanings depending on how each letter is moved; but in European words, with vowels included in the words, both vowels and consonants take on a fixity and independent existence that gives words a quality of objectness and existence independent of their being said (pp. 148–49). Mitchell argues (p. 141) that the European mode of writing presumes a prior and separate realm of existence preceding the repetition of the word—an independent realm of meaning.

> In Europe the words of a language had come to be considered not meanings in themselves but the physical clues to some sort of metaphysical abstraction—a mind or mentality. Since the end of the nineteenth century, this mentality has been formulated into an entity in its own right, existing apart from mere individuals and mere words, as an abstract realm of meaning that gives order to ordinary life.

[19] Rosen (1989a, 1989b) describes a similar critique of Islamic judging as arbitrary and despotic that developed during this period. Brinkley Messick

physical reality fueled the codification of customary law and the formalization of courts which would replicate European legal procedures. Prisons and the whole apparatus of punishment and correction embody distinct theories of the relationship between the mind and the body and the relative importance of physical and social pain in punishing.

Brinkley Messick's book *The Calligraphic State* (forthcoming) is a masterful account that complements and enriches Mitchell's book by examining local history and ethnography in the context of a larger story about the transformation of texts, laws, courts, and schools in Yemen from the Ottoman colonial period to the present. Unlike Mitchell's book, Messick's provides a picture of ordinary life and conveys a sense of the impact of the new forms on inhabitants of a small town in highland Yemen. Moreover, he focuses more directly on changes in the nature of law and on the practices of judging. For example, he describes the efforts of Ottoman reformers between 1869 and 1876 to produce a more "orderly" legal code based on the reorganization and clarification of the Islamic shari'a, newly perceived by Ottoman reformers as archaic and obscure. In contrast to most of the other materials reviewed, this book discusses Ottoman colonialism rather than British. Yet, like the other studies under review, the book describes the transformation of a legal system to a more fixed, abstracted, and disembodied system as it becomes part of the bureaucratic structure of an expanding capitalist economy and state.

Reforms of the judicial system made under the Ottomans in the nineteenth century and under Yemeni rule in the twentieth century constructed a system of specialized courtrooms, functionaries of distinct and graded ranks with specified tasks, strict controls on access to the judge, and more interchangeable judicial personnel. The goal of impartiality became tied to impersonality: the primacy of the role rather than the primacy of the person. Instead of a notary whose prestige and person suffused the text, the authority of the new documents was that of formal abstractness, implemented by the use of standardized printed forms. It was the Ottoman Turks who first introduced these forms. They also revamped Yemeni schools, following the same European models promoted in Egypt.

Messick draws fascinating analogies between shifting styles of writing and the design of cities, the organization of education, and the provision of justice. In the nineteenth century and earlier, Yemeni writing was done in spirals, beginning from the center of the page and proceeding to fill up the space by turning the paper until the discussion of the topic was completed. He contrasts these

(1986) describes how rules can themselves appear to be embodied in the legal scholar and judge in his study of Yemen. For an account that examines how lower courts in the United States are defined as disorderly by legal elites, see Merry 1990.

"spiral texts" in which the production of words determined the space to be filled with the newly introduced geometrically ordered texts in which the form—the margins, the straight lines of writing—preceded the content. A similar transformation in the primacy of form over content swept urban design as cities built around the needs of particular houses, with streets filled in between in winding and irregular shapes, gave way to geometric grids or plans that preceded the construction of houses. The work of judges and officials moved out of their houses into offices specially intended for this activity. This transformation clearly parallels that discussed earlier in the forms of education and the codification of law. Messick (p. 448) describes these linked changes:

> Within the sphere of formal knowledge, specifically within the discourse of the shari'a, the codification shift . . . had a structure parallel to that occurring between spiral and straight texts. In a manner analogous to the change in the form/content relation of spatial ordering in writing, the (casuistical) old discourse differs from the (abstractly rational) new. While the former developed principles within cases (form following content), the latter elaborates principles independently of and prior to the cases to which they are subsequently applied (content following form). In the disenchanted thought of shari'a legislation, the old primacy of the concrete instance has given way to a new primacy of the rule. Having cut its ties to human embodiment, the shari'a of the legislated code relies instead on an authority internal to the new discourse itself. The "straightened" (Bourdieu 1977:169) thought that has appeared entails a changed character of knowledge, a different relation to and among humans, and a new locus for truth.

Messick links these changes to the shift to a bureaucratic state occurring along with the incorporation of Yemen into the world system and capitalist transformations. The situation in Yemen, relatively isolated from outside influences and colonized by the Ottoman Turks rather than a European nation, obviously takes its own distinct shape governed by its particular history. Messick emphasizes that he is not describing an evolutionary change but one distinctive in time and place. Here, again, the analysis of cultural domination at the periphery reveals processes that parallel those of the center.

Despite the vast historical and cultural differences, Bernard Cohn's study (1989) of the construction of Hindu law in India by the British colonial government offers intriguing parallels to Messick's account of Yemen. Here, the British effort to "find" Hindu law introduced a form of law very similar to English law because it assumed that Hindu law would be found through similar methods of deduction from precedent and a focus on cases. Hindu law gradually came to be based on previous judges' decisions, not Hindu sacred texts. These texts themselves were mistranslated and selected

according to conceptions of English civil law, so that Hindu law was ultimately defined in terms of European conceptions of Hindu law (p. 147). Similarly, Cohn (1985:283) shows how the British effort to find a language in which they could rule the Indian subcontinent and to convert this into print and manuscripts "had the effect of converting Indian forms of knowledge into European objects." Through the acquisition of knowledge and the mastery of language, the British officials were able to issue commands and to gather the information that made possible the collection of taxes, the maintenance of law and order, and the classification of groups in Indian society. In the process, they produced a knowledge of Indian society that was essential to the conquest of India itself.

Thus, Cohn traces a transformation in the nature of law as British colonizers took the embodied, spoken, and interpreted text and made it into a fixed, abstracted, and disembodied one. This process parallels the legal transformation in Yemen Messick describes and the changes in forms of knowledge and representation Mitchell portrays in Egypt. Moore and Chanock describe similar processes in Africa. These transformations, including the codification of "customary law," were central to the processes by which the colonizing power attempted to learn about and to order the very different legal systems of the colonized. They are part of the construction of a bureaucratic legality compatible with the organization of the expanding capitalist economy of the West. They reveal a subtle form of power, one based on control over knowledge and representation and one which exists alongside more overt, coercive forms. These forms of power rely on the ideological role of law in shaping conceptions and practices through local performances in courts.

CONCLUSIONS

This series of studies demonstrates the central but ambiguous role law played in establishing control in a wide range of colonial situations. Such ambiguity pervades other situations of domination as well. Law often serves as the handmaiden for processes of domination, helping to create new systems of control and regulation. At the same time, it constrains these systems and provides arenas for resistance.

These studies indicate that in the colonial context, Western law contributed in significant ways (both obvious and subtle) to the cultural transformations accompanying colonialism and capitalist expansion. European law instituted and enforced the new relations of labor and land that undergirded the economic enterprises of the colonies. Colonial authorities fostered the transformation of oral and flexible legal systems to written codes and required the construction of bureaucratic courts with formal procedures. These new systems, as Mitchell, Messick, and Cohn

point out, often relied on very different forms of knowledge and representation. As courts created by colonial authorities handled cases, they introduced colonized peoples to different ways of determining truth and making decisions. At the same time, they provided performances in which the experiences of colonized peoples were interpreted according to the rules and categories of metropolitan law. None of the studies under review have looked at the nature of these performances or at the impact they had on the consciousness of the participants or other audiences.

These studies show that the process of imposing the new legal system was complex and subject to political wrangling among various interest groups, over which the colonial government officials and local business leaders exerted disproportionate power. But some segments of the colonized populations welcomed and influenced these systems. At least in British colonial Africa, local educated elites moving into the cash economy seized the law and helped to construct a "customary law" responsive to their new economic needs. Colonial officials, in response, sometimes sought to revive a precapitalist law derived from a traditional past to enhance stability and discourage political and union activity. Some pockets of custom and non-Western law remained and even flourished despite the efforts of colonial officials to eradicate them. The resurgence of tribal fighting in Papua New Guinea is one striking example. Because of the difficulty of supervising and controlling local courts by central governments, local leaders were often able to assert control and reshape these courts. This political wrangling over the shape of judicial institutions is, of course, found in American communities as well.

One of the striking aspects of these studies is the consensus on the importance of a historical and ethnographic approach yet the divergence in language and theory. All these studies show the importance of looking at local places in terms of their cultural worlds and at changes over time as larger structures exert different pressures and provide different opportunities. Each shows the historical construction of a law that shares some features of Western law and some features of other forms. And in each, the subordinate group acquired a denigrated identity as "traditional," "backward," "primitive," or racially or culturally inferior. The books generally reveal a contest between colonizers's visions of law and courts and that of the colonized, who tried to make the courts into different kinds of institutions under their own control. Each illustrates that these struggles occur in discursive realms as well as in terms of who controls the power to judge and to punish.

Yet, despite these similarities, the authors use different words to talk about these processes. Some talk about transfer, pluralism, duality, asymmetrical power relations, and policing systems—terms that focus on structure and are denuded of the dynamics of power. Others situate their work within a more explicit analysis of

power and its linkage to capitalism, referring to political economy, disciplinary systems, and the power/knowledge relation. The linguistic shift from talk about contact, borrowing, and duality to domination, resistance, and power reflects a theoretical difference as well.

I think work using the first set of terms has sidestepped critical questions of power, particularly that of global processes rather than local. Many anthropologists, historians, and other social scientists have, of course, been members of a colonizing society studying their colonized subjects. Such membership may have had some influence on their work. As previously subjugated members of postcolonial societies become more active in rewriting their history and culture, they are challenging these earlier modes of thinking and focusing more explicitly on power, including the power inherent in systems of meaning (e.g., Fanon 1963; Said 1978; Spivak 1985, 1987; Guha 1985; Prakash 1990; Chatterjee 1989). Reframing the questions for the investigation of law in colonial and postcolonial societies in order to acknowledge the dynamics of domination and resistance is essential for further theoretical work in this area. As much of the recent literature in the field of colonialism suggests, the dynamics of power under conditions of cultural difference and domination demand attention to the power of meanings and the ways these meanings become established and transformed.

There are other important issues that these books and articles do not address. Who were the people who brought and imposed new conceptions of law and what were their concepts of law? Many of the colonial officials were working-class and lower middle-class people from countries in which there were struggles over industrialization, over the spread of rights, over inequalities (cf. Comaroff 1985). They brought legal conceptions and institutions forged in these contexts. What effects did their earlier experiences have on the way they treated colonized peoples? And how did their encounter with the legal systems of an indigenous people reshape their ideas of their own law, their own identities, and their sense of entitlement and cultural supremacy? One of the most interesting and difficult questions concerns the way these experiences contributed to conceptions of white supremacy in metropolitan nations. Did the reports of colonial officials, judges, and police influence conceptions of people viewed as racially different in the metropolitan country?

A focus on cultural performances in court offers some insight into these questions by highlighting the interaction between the representatives of the metropolitan country administering the legal system and the leadership of the local community. Local courts, residues of the "native" part of the dual legal system, are locations which reveal the transformative power of European law as well as the energetic but, given the vastly unequal power rela-

tions, sometimes futile efforts of subjugated groups to resist some aspects of this transformation and to appropriate others to their own purposes. This review indicates the need for more studies of the legal systems of the West from the perspective of subjugated and culturally dominated groups, work that examines processes of domination defined in its broadest sense and at the same time tracks forms of resistance by subjugated groups.

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