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## Empires of Exception: History, Law, and the Problem of Imperial Sovereignty

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Most definitions of sovereignty highlight the ambition to control what and who crosses borders as well as the power to make laws to regulate what happens within them. Sovereignty is not a free-floating quality; it attaches to polities. “State sovereignty” and “national sovereignty” are terms that have lodged themselves in our political vocabulary to such a degree that they appear to have no logical substitutes. Yet, we also know that sovereignty is often more myth than reality, more a story that polities tell about their own power than a definite quality they possess. Most boundaries are porous and many are contested, and states cannot consistently enforce laws to regulate activities across and within borders. Territory plays tricks. Mere patches of regulated land may appear to signify claims to vast holdings, while integral “sovereign” space may fracture into many odd-shaped pieces. The problem is not just that tumultuous times produce unmanageable complexity. Political space everywhere generates irregularities: polities and sub-polities secure exemptions from legislation, jurisdictions guard their autonomy, and subjects and citizens seek to expand or protect extra-territorial legal rights. Peculiar forms of attenuated sovereignty are as common to political life as acts of corruption, and they are politically more far-reaching in their effects.

How do we reconcile these two kinds of knowledge about sovereignty, our certainty about its definition and our recognition of its inevitable anomalies? One way would be to refine the theoretical understanding of sovereignty; another, to re-tell its history. Both projects are underway, with political theorists and historians challenging the traditional narrative of the Treaty of Westphalia as the foundational moment of European sovereignty and historians tracing multiple and overlapping forms and expressions of sovereignty<sup>1</sup>. These and other lines of critique both depend upon and contribute to a more refined understanding of imperial sovereignty, in particular its construction in two dimensions: the extension of sovereignty through the actions of representatives and subjects of sovereign powers, and the structuring of delegated legal authority in empire. In both dimensions, imperial rule developed historically as a form of divided sovereignty, so that the unitary structure and territorial integrity of ideal-typical representations of modern state sovereignty did not apply<sup>2</sup>. By definition and in practice, sovereignty in empire splintered as multiple agents positioned themselves to act as proxies for imperial powers, and as subject polities and populations negotiated scope for their own autonomy, sometimes forcing radical

<sup>1</sup> There are many examples of the literature challenging the old understandings of Westphalia, but see in particular S. BEAULAC, *The Power of Language in the Making of International Law*, Leiden 2004. See also S. KRASNER (ed.), *Problematic Sovereignty*, New York 2001 and Ch. MAIER, *Among Empires: American Ascendancy and Its Predecessors*, Cambridge 2007.

<sup>2</sup> On the roots of the concept of divided sovereignty, see E. KEENE, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*, Cambridge 2002.

adjustments in systems of rule. These processes were not unique to empire by any means, but distant rule brought them into sharp focus.

Consider first the extension of European political authority through the movement of European subjects. Often before European powers advanced formal claims to overseas dominions, sovereignty traveled with imperial officials, merchants, soldiers, sojourners, settlers, captives, and even pirates<sup>3</sup>. Europeans outside Europe had many good reasons to assert their continued and direct ties to sovereigns; both informal and formal imperial agents positioned themselves for future patronage, sought protection of their interests and property, and claimed sponsorship in order to secure or improve their social standing. All European empires gained advantage at some point from unofficial agents of empire, whose activities cost governments little or nothing yet promised to extend their influence and eventually produce revenue that would reach their coffers. Yet, the relationship of subject and sovereign was not one of mere convenience. Demonstrations of loyalty in distant places marked membership in political communities within colonial settlements, imperial enclaves, and trade entrepôts.

A second important mechanism for the extension of sovereignty in European empire was the formal recognition of delegated legal authority. A variety of individuals and corporate groups could carry delegated legal authority besides colonial courts; ship captains, leaders of reconnaissance voyages, trading companies, colonial governors or viceroys, and garrison commanders possessed an array of often overlapping legal prerogatives. Imperial representatives presided over local legal proceedings, often on the basis of a familiar jurisdictional arrangement whereby only capital offenses needed to be referred to metropolitan courts for judgment. Relations between delegated legal authority and imperial sovereign legal authority became the basis, in turn, for the articulation of indigenous legal and political systems with the law of imperial powers. The resulting “layered sovereignty” emerged as the defining characteristic of empire<sup>4</sup>.

The mechanisms for extending sovereignty into distant territories raised challenges that were repeated across imperial legal orders. The understanding that subjects with ties to sovereigns in effect carried sovereignty with them, even into territories under the partial or nearly complete control of other polities, provoked an active interest in the definition of subjecthood. Could non-Christians become subjects? Under what conditions and by what rituals could subjecthood be established or abandoned? Moving and competing vectors of sovereignty also prompted new challenges to incipient international law, while the actions of delegated legal authority created anxieties about experiments in counter-sovereignty in empire. When did individual imperial agents act with too much autonomy, and how might metropolitan control be reasserted without

<sup>3</sup> L. BENTON, *Legal Spaces of Empire: Piracy and the Origins of Ocean Regionalism*, in «Comparative Studies in Society and History», 47, 2005, 4, pp. 700-724.

<sup>4</sup> In this regard, European empires were variants of a wider and longer historical pattern. See J. BURBANK - F. COOPER, *Empires and the Politics of Difference in World History*, Princeton forthcoming.



generating intolerable costs? Was it possible to create a stable intermediate condition of quasi-sovereignty, in which sub-polities of empire might have wide discretion to rule internally while permanently forfeiting their rights to engage in diplomacy with other states or quasi-states?

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These questions assumed varying forms in different periods of European imperial history, and in different regions. Local variations developed

against the background of two broad shifts in the global order. The first entailed the transformation of the plural legal order of early empires, in which multiple jurisdictions overlapped and sometimes competed, to a more hierarchically organized legal order in which the colonial and imperial state formulated a more explicit claim to legal hegemony<sup>5</sup>. A second shift involved the melding of a discourse about subjecthood into a discourse focusing on definitions on citizenship<sup>6</sup>. Across periods, conflicts cohered around markers of political membership, on the one hand, and the legal capacity of sovereign proxies on the other. The intensity of struggles surrounding these issues did not wane, even as international lawyers began clearly to identify “nation states” rather than “empires” as the fundamental units of the international order. As a result, empires continued to pose a problem within international law and remained important as structures of law in the global order, whether formally recognized as such or not. International law was supposed to make imperial law obsolete; instead, imperial law became more robust and elaborate in attempts to craft a coherent and consistent administrative order<sup>7</sup>.

This essay develops these themes to push the critique of traditional sovereignty narratives further, in particular by merging the benefits of three recent approaches. One is based loosely on the ideas of Schmitt and Agamben and suggests that empires functioned as spaces of exception in relation to imperial centers. The other proposes the study of “imperial constitutions” as a way of exploring links between emerging notions of state sovereignty and imperial sovereignty. And the third relates narratives of sovereignty to the history of the global order. The periodic suspension of law in empire stretches across the literature within these three perspectives, so I will use this problem as a touchstone for understanding the strengths and weaknesses of each approach. Viewed as fluid and iterative structures of layered sovereignty, European empires appear as composites of legally anomalous spaces which were in turn fashioned as much in relation to each other as in opposition to imperial centers. Perhaps not surprisingly, a politics centering on divided sovereignty produced empires that were legally uneven, spatially fragmented, and awkwardly positioned as participants in international regimes.

<sup>5</sup> L. BENTON, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, New York and Cambridge 2002.

<sup>6</sup> T. HERZOG, *Defining Nations*, New Haven 2003; A. MCKEOWN, *Melancholy Order: Asian Migration and the Globalization of Borders, 1834-1939*, New York, forthcoming.

<sup>7</sup> L. BENTON, *From International Law to Imperial Constitution: The Problem of Quasi-Sovereignty, 1870-1900*, in «Law and History Review», forthcoming.

## Spaces of legal exception

Historians have recently drawn connections between histories of imperial sovereignty and two aspects of Carl Schmitt's writings. The first is Schmitt's definition, "Sovereign is he who decides on the exception"<sup>8</sup>. The second is his notion that the ability of Europeans to imagine Europe as the seat of an international legal order depended upon the characterization of extra-European space as a realm of war and of lawlessness<sup>9</sup>. Collapsing these ideas produces a theoretical framework consistent with accounts of colonies as sites of legal exception.

We know that European powers experimented with formulae for extending legal authority into overseas enclaves and colonies while also streamlining the jurisdictional complexity familiar to European legal orders<sup>10</sup>. Legal jockeying in empire – including by conquered subjects – also quickly altered these schemata and introduced new complexities into an imagined simpler legal sphere. The divergence of law and authority in colonial societies emanated both from metropolitan policies and from colonial legal politics. Although the patterns of divergence had many variations, Europeans relied upon familiar dyads to characterize the differences between metropole and colony. The organizing tension between canon and secular law in European polities provided an early model for thinking about legal pluralism in colonial settings. The pre-existing law of non-European colonial subjects was often imagined as a variant of religious law, subordinate to an ascendant secular authority residing in imperial and colonial states<sup>11</sup>. By the late Eighteenth century, Europeans were more often portraying the extra-European realm as lawless, and contrasting it with a zone of civility in Europe<sup>12</sup>. Paradoxically, the sharpening discourse about lawlessness paralleled European reforms aiming at the creation of coordinated, centralized imperial institutions.

Schmitt's ideas seem to mesh with this narrative in several ways. First, Schmitt viewed the "bracketing" of a zone of war outside Europe as an essential element of the self-fashioning of Europe as a zone of peace and the seat of international norms. This development was in turn linked inextricably to the emergence of a global system of nation-states «because international law regu-

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<sup>8</sup> C. SCHMITT, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, München-Leipzig 1922; English trans. *Political Theology: Four Chapters on the Concept of Sovereignty*, Chicago 2005, p. 5.

<sup>9</sup> C. SCHMITT, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Greven Verlag 1950; English trans., *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, New York 2003.

<sup>10</sup> Historians of British imperial law usually begin their accounts, for example, with analysis of *Calvin's Case* (1608), in which Coke's opinion addressed the question explicitly of the differential application of law outside the realm, while historians of the Spanish empire trace the institutional anomalies purposefully built into the rule of overseas dominions. On both, see J. ELLIOT, *Empires of the Atlantic World: Britain and Spain in America 1492-1830*, New Haven 2007. On *Calvin's Case*, see especially D. HULSEBOSCH, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830*, Chappell Hill 2006.

<sup>11</sup> L. BENTON, *Law and Colonial Cultures*, cit.

<sup>12</sup> E. GOULD, *Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772*, in «The William and Mary Quarterly», 60, 2003, 3, pp. 471-510.



lating relations between empires could not be converted easily into a firm bracketing of war», that is, into a coherent global spatial order<sup>13</sup>. In this world order, imperial sovereignty became irrelevant, or, more precisely, relevant only for its preservation of types of polities (colonies and protectorates) not yet subsumed under the category of states.

The appeal of this formulation is no doubt that it describes a legal distinction between European and extra-European arenas that corresponds to a well-documented discourse, with many historical variants, delineating the legal distinctions between metropolitan centers and peripheral colonies. Yet it is important to keep in mind that Schmitt's formula collapses historical discourse and historical description. Viewing colonial territories as spheres of legal exception was overdetermined. European international lawyers working for European states would not have chosen to imagine a global legal order centering around a region outside Europe, nor would they have elevated a different kind of political formation to primacy in the international system in place of the nation-state. But European preference for describing the global order as an interstate system centered in Europe does not make this formulation either useful as theory or accurate as historical narrative. A broad array of legal routines extended authority transregionally and a varied set of political structures and conflicts constituted European hegemony.

Schmitt's other main insight about sovereignty seems to offer a more promising point of departure for the study of imperial history. For Schmitt, law makes sense only in the context of the "factual regularity" of order, and the general rule that describes order is, in turn, meaningless without the exception<sup>14</sup>. As Agamben puts it, «what is at issue in the sovereign exception is, according to Schmitt, the very condition of possibility of juridical rule, and, along with it, the very meaning of State authority»<sup>15</sup>. Going further, Agamben argues that the exception constitutes the rule by representing the suspension of the rule. Eliding "the rule" and "the rule of law" – a problematic confusion as we will discuss in a moment – both Schmitt and Agamben imagine the declaration of martial law and the state of siege as quintessential acts of the suspension of law.

Nasser Hussain takes this insight as his starting point in examining the history of the suspension of law in the nineteenth century British empire<sup>16</sup>. Hussain argues that emergency played a crucial role in the constitution of sovereignty, and he follows Schmitt in understanding emergency measures (the suspension of *habeas corpus* and the declaration of martial law) as exceptions to the rule of law. He argues that colonial settings were distinctive not because the suspension of law was exclusive to them but because the relation of emergency to sovereignty became most clearly visible in them. This greater visibility occurred because emergency came to be invoked with greater frequency than in the metro-

<sup>13</sup> C. SCHMITT, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, cit., p. 55.

<sup>14</sup> Quoted in G. AGAMBEN, *Homo Sacer. Il potere sovrano e la nuda vita*, Torino 1995; English trans., *Homo Sacer: Sovereign Power and Bare Life*, Stanford 1995, p. 16.

<sup>15</sup> *Ibidem*, p. 17.

<sup>16</sup> N. HUSSAIN, *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, Michigan 2003.

pole; colonial authorities declared martial law numerous times in the nineteenth century while, in the same period, authorities in Britain would not have dared to do so – though, as Hussain shows, the mechanisms for the suspension of law were rooted in metropolitan law and always potentially available. The implication of Hussain’s study is that the difference in the application of exceptional measures rendered colonial territories as zones of legal exception.

This is an interesting approach, and one that adds greater depth to the observation that colonial powers constructed the law of empire as a purposeful variation on metropolitan law. The specific insight about the deep association of colonial law and emergency also helps us to understand the links between legal politics in distant parts of empire. Yet, in following Schmitt, Hussain does not place questions about imperial sovereignty at the heart of his analysis. Instead, he explores constructions of exceptional legal moments in empire in order to understand their relation to state sovereignty. Like Chatterjee, who notes «the inherent impossibility of completing the project of the modern state without superseding the conditions of colonial rule» Hussain wants to reveal «the colonial as an iteration of the modern»<sup>17</sup>. The paradoxical effect of privileging “the modern” is to preserve certain assumptions about state sovereignty that tie it to imagined Westphalian competencies, especially «the state’s obligations to maintain its territories and institutional integrity»<sup>18</sup>. It becomes hard to see how this approach can move us beyond a variant of a core construction of European international law in which the exceptional character of colonial law dooms the colonial state to “failure” as a sovereign entity.

The problem, in other words, for both theorists and historians is that the study of imperial sovereignty begins and ends by reproducing the

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form of a familiar European discourse characterizing Europe as the historical seat of modern sovereignty. This problem is not trivial. It cannot be removed by railing against Eurocentrism or by acts of “re-centering” global history<sup>19</sup>. In fact, it makes no sense to seek to correct the Eurocentrism of the study of European empires in this context since a particular and important kind of global power cohered in the metropole. At the same time, it is easy to see how the dyad of European sovereignty and “incomplete” sovereignty outside Europe could replicate itself without shedding much light on the workings of empire. Historians are bound to find the discourse repeated in various periods and contexts, and can cite it if they like as evidence of the distinctions between the rule of law in Europe and rule by law in empire. As with Schmitt’s approach to global “bracketing” of extra-European space as a zone of war, this exercise ultimately threatens to obscure the difference between examples of historically observed discourse

<sup>17</sup> *Ibidem*, p. 7.

<sup>18</sup> *Ibidem*, p. 22.

<sup>19</sup> On the limits to corrections to Eurocentrism, see A. DIRLIK, *Confounding Metaphors, Inventions of the World: What is World History For?*, in B. STUCHTEY – E. FUCHS (eds.), *Writing World History 1800-2000*, Oxford 2003.



about imperial sovereignty and historically occurring conflicts over imperial rule.

The overlay of Agamben's musings on exception provides another variant of this perspective. Marking the difference between state sovereignty and imperial sovereignty as one of rule and exception, scholars can claim that they are elevating colonial histories to a new level of importance and, at the same time, revealing historically transcendent processes of rule. Yet, besides encouraging the conflation of discourse and description, this variant also blurs valuable distinctions between "rule" as a statement of a norm and "rule" as political hegemony. This purposeful elision is possible because the two "rules" are bridged by a third concept, the rule of law. Agamben makes the interesting choice of justifying this blending by promoting an understanding of "the rule" as referencing a wider context of repeated behaviors that constitute a normative order: «The law has a regulative character and is a "rule" not because it commands and proscribes, but because it must first of all create the sphere of its own reference in real life and *make that reference regular*»<sup>20</sup>.

The "rule" announces more than sanction, then. Its very expression depends upon the recognition of the "exceptional case", which is included in the juridical order at the same time that it is formally excluded. In Agamben's view, a subtler understanding of "the rule" as a normative statement nested within a habitus, a context of norms, provides the basis for a meaningful analogy with the rule of law.

The analogy is clearly an imperfect one, however. There are many ways in which the rule of law is distinguished from "the rule" even in its subtlest rendering. Three of these distinctions are particularly important to an understanding of imperial sovereignty. First, the rule of law implies not just a statement of the normativity of social relations but also the existence and location of coercive power. This is not an aspect of the rule of law entirely lost on Agamben, who describes the concentration camp as the quintessential example of a site of exception. But this construction locates the worst forms of violence in and after the act of exclusion from the legal order. It is through this logic that the imperial realm comes to be described by Schmitt as a zone of lawlessness and war, and by Hussain as a place of more frequent removal of the constraints of law. Yet, the most pervasive and systematic violence may occur at the heart of the legal order. In emphasizing the diffusion of power in broad structures of governance and the very definition of social categories through which rule is constructed, Foucault's account linking modernity to governmentality has paradoxically helped to shift attention away from state-sponsored violence. Agamben's post-Foucauldian correction reinserts bare violence but situates it in acts at the margins. Historical accounts tell a different story. Lawful hangings in Eighteenth century Eng-

<sup>20</sup> G. AGAMBEN, *Homo Sacer*, cit., p. 26 (emphasis in original).

land, punishment of slaves in the Atlantic world, the rise of mass incarceration in the United States – these phenomena simultaneously depended on the state's coercive authority and announced the legitimacy of violence by state and imperial proxies. One can certainly read the violence committed against convicted criminals as something rendered acceptable by their conversion through sentencing to the status of legal outsiders. Similarly, the harsh punishment of slaves increasingly depended upon their racial exclusion. But these and other forms of outsourcing of violence were integral to layered and fully modern systems of sovereignty in which the state's claim to a singular coercive power was either undisturbed or strengthened. This view reminds us that “the rule of law” is not necessarily associated with democratic, liberal, or European political formations, and “exceptional” violence does not indicate an absence or mitigation of the force of law<sup>21</sup>.

Two other aspects of the rule of law that distinguish it from “the rule” are more important to an understanding of imperial sovereignty. One

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involves the nature of the norms said to provide context and meaning to the rule. In legal orders, the normative context is composed of *more law*. The regular patterns of social interaction that come to be expected and morally accepted aspects of social life do not merely inform the law but constitute customary law and shape standards of justice. Multiple jurisdictions sometimes operate in ways that reference but also explicitly challenge hegemonic state law. As a result, rules and exceptions can be generated in de-centered ways across the plural legal order. This observation does not imply that Agamben is somehow wrong in identifying the rule-exception relation as an important structure of politics and of social life. But to the extent that we allow privileging this relation to focus our attention on a particular arena of politics and power, we will miss routines of inclusion and exclusion that originate across the legal order. In empire, these multiple arenas of law had real and important consequences for governance and sovereignty.

Finally, it is important to note that the rule of law depends upon peculiar kinds of rules. They are rules about rule, or statements about ordering that encompass the relation between rule and exception, and the structural relation of multiple arenas of law and political authority. The normative/legal context of the “rule of law” is a constitutional order, and the rules about rule compose constitutions, including and especially imperial constitutions. These arrangements do not have to be written and often exist in the familiar form of overlapping discourses rather than doctrines.

Before considering the implications of these three characteristics of the “rule

<sup>21</sup> On this disconnect between the rule of law and liberalism, see B. TAMANAHA, *On the Rule of Law: History, Politics, Theory*, Cambridge 2004.





of law” for an understanding of imperial rule, we might consider an illustration that brings these characteristics together: E.P. Thompson’s well-known musings about legal exception and the rule of law in late Eighteenth-century England<sup>22</sup>. In Thompson’s telling, the evident and increasingly coercive power of the state both conditioned the rise of the rule of law and challenged its legitimacy. The resolution of this contradiction consisted in the willingness of commoners to believe that occasional just outcomes were possible under the law, even when the results of most legal actions were blatantly supportive of ruling class interests. This logic was possible precisely because commoners viewed the normative order of their daily living to be a source of law; that is, it demanded occasional legal actions curtailing the property rights and prerogatives of the gentry. In this telling, rare acts of justice rather than the suspension of law formed the exception, and the exception represented the containment or inversion of the coercive power behind the law. As with Agamben, the exception figures here as an “original form of law” in that the legitimacy of the legal order could not be defended or sustained without implicit and explicit referencing of the exception. But the rule of law is also, in this approach, a more elaborate social and political construction than “the rule” in the three ways I have described: the coercive power of the state marked the law as oppressive even while placing limits on its violence; the pluralism of the legal order generated both challenges to state law and standards that contributed to its legitimacy; and the prevalence of rules about rule transformed routine legal actions into constitutional conflicts.

I bring up E.P. Thompson not in order to propose that we reject Agamben and instead emphasize either the autonomy of normative orders outside the circle of power or the straightforward instrumentality of state power. But keeping in mind that the rule of law denotes not an amalgam of rules but a configuration of power, a complex of beliefs about law, *and* a constellation of rules about rule is helpful in trying to capture the complexities of imperial sovereignty. We can glimpse the possibilities briefly by returning to Hussain’s treatment of the suspension of law in empire. Another way of describing the suspension of law is as the unchecked display of power by delegated legal authorities. For example, martial law represents both the suspension of “normal” law and its replacement with military authority with fewer legal constraints. In colonial settings, this condition broadly defined did not require extraordinary measures because it was embedded in the structure of imperial sovereignty, in which delegated legal authority in one form or another was always present. A first important implication of this structural logic is that acts for the suspension of law in empire did not refer only, or primarily, to metropolitan law as the normative order being held in suspension but occurred as variations of similar acts elsewhere in empire. A second is that structures and practices of imperial sovereignty depended upon conflicts

organized around alternative positions about the relation of multiple authorities and of overlapping regulatory frameworks. The martial law was contingent, in other words, upon interpretations of the imperial constitution.

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## The Imperial Constitution

To find models for an approach to the study of imperial constitutions, we can turn to recent writings by historians on the transatlantic constitution of the first British empire<sup>23</sup>. Daniel Hulsebosch, for example, in his study of imperial constitutionalism in the colony and then the state of New York, first deconstructs the English law of empire, then shows that discourses about the special legal qualities of empire were turned on their head by American colonists. Hulsebosch goes further to reveal that the processes in empire contributing to the definition of imperial sovereignty were multiple. In effect, there were "multiple empires within the empire" (*"imperia in imperio"*), and, as a consequence, multiple meanings of the transatlantic constitution. Hulsebosch's most far-reaching conclusion is that this multi-stranded and multi-sited constitutional discourse called into existence a new genre of jurisprudence that took as its object of analysis the re-composition of the jurisdictional puzzle of English law. The resulting transformation recast the horizontal maze of overlapping jurisdictions in English law as a vertically organized hierarchy of imperial legal authorities<sup>24</sup>.

This American example can be viewed as belonging to a broader pattern of imperial legal change. The impulse of simplifying a jumbled, multi-jurisdictional legal order in colonial settings merged with the pressures created by legal conflicts in empire to produce hierarchically ordered legal systems in which colonial states (with an undefined and shifting relation to imperial states) increasingly became sites of debates about the structuring of plural legal authorities in empire<sup>25</sup>. The imperial rule of law, in other words, represented a particular kind of political and legal project involving the definition of rules about distant and delegated rule. This project gave rise not only to new forms of imperial sovereignty but to newly robust claims about state sovereignty. As Armitage has argued about the American Declaration of Independence, new "declarations" of sovereignty from the late Eighteenth century on presented the historically novel claim that polities within empire might become – would become – sovereign states<sup>26</sup>.

Attention to the legal jockeying across empire and new discourses of sovereignty takes us some distance beyond a reflexive application of the analogy of

<sup>23</sup> M.S. BILDER, *The Transatlantic Constitution: Colonial Legal Culture and the Empire*, Cambridge 2004.

<sup>24</sup> D. HULSEBOSCH, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830*, cit.

<sup>25</sup> L. BENTON, *Law and Colonial Cultures*, 2002, cit., and see L. BENTON, *Constitutions and Empires*, in «Law & Social Inquiry», 31, 1, 2006, pp. 177-198.

<sup>26</sup> D. ARMITAGE, *The Declaration of Independence: A Global History*, Cambridge 2007.

rule and exception. Yet there is room, too, for carefully combining insights inspired by Schmitt and Agamben with the analytic strategies of imperial constitutional history. The dyad of metropole and colony, of normative and exceptional zones, gives way to an image of multiple legal spheres defined as different against both the metropole and each other<sup>27</sup>. As an example of the promise of combining the study of the imperial constitution with an awareness of discourses of exception in empire, we might return to the historical problem of martial law in empire. Rande Kostal's study of the controversy surrounding the imposition of martial law in Jamaica after the Morant Bay rebellion of 1864 highlights the connections between debates about martial law and profound questioning of the viability of an imperial constitution<sup>28</sup>. The Governor of Jamaica, Edward Eyre, declared martial law over a part of the island after a crowd attacked the Morant Bay courthouse and killed eighteen people, including the chief magistrate. If the response to the attack had been limited to the first violent weeks of repression targeting black Jamaicans in the district around Morant Bay, it is unlikely that the events would have developed into a major political and legal controversy. As Eyre would later explain in his defense, the Governor was relying on Jamaican legislation approving martial law in times of emergency that dated from the era of slavery and was considered a necessary and established element of local law. When the execution of a prominent opposition politician during the weeks of martial law after the uprising had been suppressed, the controversy raised two broader questions: From what imperial source did the authority arise for either colonial legislatures or colonial governors to declare martial law? And was there such a thing as "imperial citizenship" that guaranteed British subjects the same rights everywhere in empire, or could location in the empire alter legal status? Both questions addressed the nature of subordinate legal authority in empire – of colonial governors, colonial legislatures, and the military. And while they were taken up in England precisely because English jurists understood these questions to reflect upon metropolitan controversies about state authority and rights, both the events and the discourse also referenced particular imperial conditions. The controversy focused the attention on the peculiarities not just of empire in general but of Jamaica in particular. Reliance on the doctrine of necessity as a rationale for the imposition of martial law was historically associated in Jamaica with the threat of slave insurrection. Arguments of "necessity" referred to ideas about racial difference already inscribed in the law. At the same time, the crisis makes little sense without recognizing that anxieties about the consequences of authorizing the colonial suspension of law cut both ways: Colonial authorities were entitled to act to protect white lives and property, but they were not entitled to assume the role of sovereign powers. The Jamaican controversy was about rule and exception, but

<sup>27</sup> On early European sojourners' attempts to describe and define places within empire as having singular characteristics, see L. BENTON, *Spatial Histories of Empire*, in «Itinerario», 30, 2006, 3, p. 19-34. Singularity has a meaning and political valence different from the properties of "exception".

<sup>28</sup> R.W. KOSTAL, *A Jurisprudence of Power: Victorian Empire and the Rule of Law*, Oxford and New York 2005.

it also connected to a broader discourse about imperial constitutions. The jurisprudence of emergency belonged to a supple “moral imagination” that was «fundamentally ... a legal imagination»<sup>29</sup>. This legal imagination of empire simultaneously projected sovereignty outwards as a force of conquest and control, and attached sovereignty unevenly to pockets of empire and to empires in crisis<sup>30</sup>.

Consider another example. In one sustained exercise to try to construct a formal model that accommodated both expansive power and irregular, negotiated sovereignty, imperial officials and international lawyers in the late nineteenth century tried to erect a coherent typology of polities with different degrees of sovereignty. Attempting to enumerate the subset of qualities of sovereignty held by, and granted to, quasi-sovereign entities within European empire, jurists imagined an imperial order that reserved full sovereignty for European imperial governments while defining precisely the nature of partial sovereignty in subordinate but semi-independent colonial polities<sup>31</sup>. The task of imperial administrators became one of tinkering continually with these typologies of rule in order to be able to label the different patterns of articulated legal authority represented by hundreds of petty states within the empire. In the new context of an international order explicitly described as resting upon sovereign nation-states, the old legal challenges of defining political membership and limiting local authority posed new and persistent puzzles<sup>32</sup>.

Jurists imagined an imperial order that reserved full sovereignty for European imperial governments while defining precisely the nature of partial sovereignty in subordinate but semi-independent colonial polities

## Imperial sovereignty and the history of global order

It is tempting to adopt the conceptual aid of “exception” to talk about such imperial projects. But we find ourselves very soon in an exercise much like opening successively smaller boxes; an intact imperial sovereignty is split by exception, yielding further exceptions to the exception. We can adopt the more fluid and complex framework of imperial constitutions, certainly, but something still is missing: the ability to evaluate, as contemporaries were clearly doing, the implications of different constructions of imperial sovereignty for conceptualizations of the international order.

This connection between understanding imperial sovereignty and the history of global legal ordering is hard to grasp for a reason. The link proved an unsolvable puzzle for international theorists of the late nineteenth century<sup>33</sup>. Schol-

<sup>29</sup> *Ibidem*, p. 20.

<sup>30</sup> On the construction of sovereignty in the context of imperial crisis, see especially J. ADELMAN, *Sovereignty and Revolution in the Iberian Atlantic*, Princeton 2006.

<sup>31</sup> The quintessential example of quasi-sovereign states, the princely states of India, were not formally under British sovereignty but were clearly under British suzerainty. See L. BENTON, *The Trouble with Quasi-Sovereignty*, cit.

<sup>32</sup> A. ANGHIE, *Imperialism, Sovereignty and the Making of International Law*, Cambridge 2007.

<sup>33</sup> *Ibidem*. See also M. KOSKINNIEMI, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge 2004.



ars have noted that the main way to resolve the tensions between a world of empires and a theorized world of nation-states in the nineteenth century was by elaborating the concept of civilization as a key to membership in an international order centered in Europe<sup>34</sup>. This trope made it possible to explain the anomalies of non-state polities – mainly empires or pieces of empire – as a function of their different stages along a shared path toward nation-state formation, civilization, and membership in the society of nations. Yet there was another solution that paralleled this one and has received less attention. It was to declare the limits of international law and the inadequacy of national law and to invent a third kind of law – imperial law – as a construct with hybrid (and some new) characteristics. Unlike both national/municipal law and international law, “imperial law” highlighted divided sovereignty. In its most classic formulation, quasi-sovereign entities within empire were awarded sovereignty over their internal affairs but deprived of the right to engage in foreign relations. Writing about the basis for such an arrangement between the British government and the princely states of India, Henry Sumner Maine described this quality of sovereignty as consistent with the principles of international law: «A sovereign who possesses the whole of this aggregate of rights is called an *independent* sovereign; but there is not, nor has there ever been, anything in international law to prevent some of those rights being lodged with one possessor, and some with another. Sovereignty has always been regarded as divisible»<sup>35</sup>. This effort to show that imperial law flowed from international law faltered, in particular because imperial powers and their legal administrators concluded that it was necessary to infringe repeatedly upon the quasi-sovereignty of lesser states. They justified such breaks with the imperial constitution on the basis of the familiar doctrine of necessity and, also, on the principle of intervention to correct perceived injustices resulting from bad governance. Just as the suspension of law became an integral part of imperial rule, violations of sovereignty to correct misgovernment formed a central part of imperial law. As with Thompson’s argument that the legitimacy of state law in Eighteenth century England rested on the belief that the rule of law made exceptional acts of justice rare but possible, imperial law inverted the exception. Imperial officials did not suspend law in moments of crisis in their dealings with quasi-sovereign states; they instead defined political intervention as the default mode of empire and the autonomy of law as an exceptional product of enlightened rule<sup>36</sup>.

We have arrived at a far more complex construction of imperial sovereignty, one that returns us to an analysis of the legal politics surrounding the definition of the scope and limits of delegated authority and the possibilities for imperial subjecthood and citizenship. The metropolitan tendency to construct imperial space as a zone of legal exception is an important part of this picture, but by it-

<sup>34</sup> G.W. GONG, *The Standard of “Civilization” in International Society*, Oxford 1984.

<sup>35</sup> The British Library, India Office Records V/27/100/3, No. 22, pp. 35-38.

<sup>36</sup> This argument and examples are developed further in L. BENTON, *From International Law to Imperial Constitutions*, cit.

self this insight cannot expose the range of conflicts and forces producing imperial constitutions and the legal imaginary of empire. When we take seriously the power of local legal politics to shape imperial sovereignty, the picture that emerges clearly is one of legally variegated empires, in which different mixes of contested layered sovereignty, or multiple “anomalous legal zones”, shaped a political authority that was deeply familiar to Europeans at the same time that it departed clearly from the imagined model of nation-state sovereignty or a progression towards it<sup>37</sup>. I have argued here for the importance of two distinctions: between “rule” and “rule of law” and between a historically occurring discourse about empires as spheres of legal exception and historically observable patterns of conflict in empire that generated legal anomalies. I have proposed, too, the need for greater attention to the relation of imperial and international law. Together these analytic moves offer ways to merge new social theory with new imperial histories. The resulting perspective places imperial sovereignty rather than nation-state sovereignty at the center of the story of legal politics and global ordering.

<sup>37</sup> G. NEUMAN, *Surveying Law and Borders: Anomalous Zones*, in «Stanford Law Review», 48, 1996; and see L. BENTON, *Constitutions and Empires*, cit.