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Book Review

AN EMPIRE OF LAWS: LEGAL PLURALISM IN BRITISH COLONIAL POLICY[1]

by Christian R Burset

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> There seems to be no ground for affirming that the Common Law is especially attached to any one form of government, or is incompatible with any that makes substantial provision for civic liberty and the representation of the governed.[2]

1 Colonising is hard work, even to a seasoned coloniser like Britain in the 18th century. Planting a colony is the easy first step. The next step is the onerous job of governing, and no government is functional without law. However, a colony cannot create laws that have the mellowness its motherland has because that kind of fruitfulness requires time – unless, of course, the laws of the motherland are transplanted wholly onto the colony. But that is far easier said than done, and that is what *An Empire of Laws: Legal Pluralism in British Colonial Policy* ("*An Empire of Laws*") discusses.

2 What made it particularly difficult for Britain was that no two of its colonies were alike; in the 18th century, these spanned from Quebec to Louisiana, the West Indies to Bengal and to Australia. Thus, Burset begins with an inquiry into Jeremy Bentham's *quaere* as to whether it is possible "to craft a body of laws that was fit for every society".[3] Bentham, as Burset writes, "had no love for *the* common law; but he suggested that Britain might pursue *a* common law for its empire"[4] [emphasis added]. The choice between "the" and "a" became a decades long tussle between politics and commerce. Law, as it were, merely got in the way.

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1 Yale University Press, 2023.
2 Sir Fredrick Pollock, *The Genius of the Common Law* (The Columbia University Press, 1912).
3 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 1.
4 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 2.

3 When Quebec was wrested from the French and taken over by Britain, it became the subject of a decade-long experiment with English law until the Quebec Act of 1774[5] restored the application of the former French laws for matters respecting property and civil rights, but English law would continue to apply in matters of public law, criminal law and personal estate. The flowering of English law in Australia was a different matter. In the former, legal pluralism was at its summit and in the latter, at its nadir. Burset explains:[6]

> Broadly speaking, scholars tend to describe empire using one of two paradigms: elimination or difference. The former focuses on so-called settler colonies, such as Australia and the United States, where the colonial project sought to erase indigenous inhabitants (whether literally through genocide or displacement, or fictively through forced assimilation). The latter paradigm is used to describe 'colonies of exploitation', such as those in Africa and South Asia, where Europeans sought not to exterminate natives but to control their labor.

4 The paradigms of elimination and difference implies a choice. *An Empire of Laws* is about how Britain chose. The choice was not specifically and narrowly centred on whether to eliminate or accommodate indigenous subjects. It was a much more complex question that the colonial governors and parliamentarians had to answer. The reasons are myriad and the circumstances vary from colony to colony, as did the governors and commercial directors of the British East India Company ("East India Company"). As will be seen, the East India Company had a major role in shaping the governance (and hence, the law) of the British colonies in Asia. There was no equivalent company in the West Indies because the Spanish, French, Dutch and other Europeans were already there. When Britain began her own colonisation of the West Indies, it did so directly. There was a short lived British West India Company that was sold and had no impact in the same way the East India Company had in the East.

5 The result was a complicated process that lasted a decade or two, with differing outcomes. *An Empire of Laws* is thus about that process. It is clear from Burset's account that no one specifically identified the question or the alternatives. No one asked whether Britain ought to opt for legal pluralism or to transplant the British legal system and its laws directly into her colonies. Different forces compete for their own desired method, yet those forces have no name for themselves or their objectives.

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5 c 83 (UK).

6 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 13.

6 Burset, unfettered by the rules of taxonomy, gave his own nomenclature to the three groups that vied in varying ways to find the golden answer to governance. Burset called them "populists", "paternalists" and "moderates". The names may be misleading in that the choice for or against legal pluralism was not a direct one. All three wanted "to use colonial law to effect its vision of empire", and there were diverging approaches within each group. Generally, "Populists wanted to create a relatively 'inclusive' empire, in which the residents of Britain and its colonists enjoyed similar political status and economic opportunities".[7] They are also less (much less) tolerant of religious and cultural minorities, so they tended to favour "an empire based on commercial exchange, anglicization, and global common law".[8] They were led by William Pitt and William Petty in Parliament, and had strong supporters in the American Revolution, but whichever side of the Atlantic they were on, populists were known as "patriots".

7 In contrast to populists, Burset described paternalists as being "focused on maintaining a stable empire and on extracting wealth from the colonies to solve Britain's fiscal woes. In many respects, their priorities reversed those of the populists: paternalists were less economically and politically egalitarian but more culturally and religiously tolerant."[9] One of the influential paternalist leaders was Lord Mansfield CJ. Paternalists questioned the "long standing assumption that colonial laws ought to be patterned on the laws of England",[10] they learned the lesson of Rome which thrived when its subjects retained their personal laws and customs, but the eventual universalisation of Roman law led to anarchy and decay.[11]

8 The moderates pursued the middle path, criticising "both paternalists' eagerness to subordinate the colonies and populists' lack of concern for colonial minorities. Edmund Burke was the moderates' intellectual heavyweight, Lord Rockingham their parliamentary leader".[12]

9 Burset discusses the initial push by the populists in America to turn Quebec into another New York or New England, but eventually the

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7 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 10.

8 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 138.

9 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 10.

10 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 50.

11 See Baron de La Brède Montesquieu, *Reflections on the Causes of the Rise and Fall of the Roman Empire* (Oxford, 1825) at pp 94–96.

12 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 11.

paternalists again prevailed.[13] The anti-Catholic bigotry of the populists was on the wane, and what little force remained alienated their allies, such as Edmund Burke, towards the paternalists' camp.[14] The main battleground, however, was in the Eastern empire – in Bengal, where the paternalists won a hard-fought political battle with the help of the moderates, especially their chief defender, Edmund Burke: "In 1783, Edmund Burke concluded that the law of Bengal was too English and not English enough … and concluded it would have been unwise and unjust to impose all of English law on the natives of India".[15] Many others, such as Timothy Brecknock, a barrister, though not opposed to the conqueror imposing his laws on the conquered, was fearful that that might turn the British; had they followed the conqueror's path as the Spanish did in South America, they might end up "committing the same 'butcheries' and 'inhumanity' as the conquistadors".[16]

10 At the time, Bengal was subjugated not by the British Army, but by the East India Company. The task of governing eventually fell to William Hastings. The objectives of the British Government and the East India Company were not the same. The latter preferred to let the natives govern themselves while the Company extracted their wealth to England. That was not the case until Robert Clive, the first military commander of the East India Company became the Governor-General of Bengal. He succeeded in propagating legal pluralism through turning Bengal into a tributary state, and therefore its value to Britain lay more in the tributes sent home rather than commerce generated by the East India Company. Thus, the need to ensure English law and the English system in the pure form became less important. Indeed, "English law was at best irrelevant and at worst unhelpful".[17]

11 There was also the tussle between administering English law directly through the cutcherry courts (an old form of administrative tribunals) set up by the governor, or through arbitration. The former inclines to the direct application of English law, the latter is more legally pluralistic. Paternalists worried about vexatious litigation and feared that "English-style litigation might lead newly acquired subjects to forget

13 Quebec was originally a French colony, but eventually administered by Britain.

14 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 136.

15 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 90.

16 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 117.

17 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 107.

their place".[18] But there were, initially, problems galore where arbitration was concerned. Arbitrators were merchants serving, and unpaid. The fact that they had also to neglect their own businesses contributed to the lack of enthusiasm among the arbitrators.

12 Furthermore, there was a pervasive perception that the "Company sponsored arbitration contravened both Mughal custom and Islamic laws".[19] There was, therefore, pressure brought to bear upon the East India Company to find arbitrators among the natives. At the same time, the East India Company also acknowledged the need for "speedy and effectual administration of justice; through courts".[20]

13 In the end, legal pluralism held sway in Bengal, as it did in Quebec. The populists' quibbles in Parliament antagonised the moderates, who might have been their allies, and lost the challenge to legal pluralism in Bengal.[21] One of the last nails in the proverbial coffin was the passing of the Regulating Act of 1773.[22] That was intended to regulate the East India Company, but it also set up a Supreme Court of Judicature in Calcutta. The huge omission in this feature was that it did not specify what law the court should apply. That, in turn, turned the screws for legal pluralism in Bengal as the first judges arrived in Bengal, including Elijah Impey, the first Chief Justice of Bengal, who found themselves unable to fully extend English law.

14 Then, in 1781, the British Parliament passed the Bengal Judicature Act that allowed the Supreme Court of Judicature to "hear suits among Indian natives living in Calcutta, but it was now directed to apply Hindu or Islamic law to all inheritance and contract disputes, depending on the religion of the parties".[23] Thus far, the details in *An Empire of Laws* reveal that "Britain's turn to legal pluralism was the product of politics, not precedent".[24] There is no dispute that the British held their laws and legal system in the highest regard. The basic principle of the supremacy

18 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 70.
19 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 102.
20 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 103.
21 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 141.
22 *c* 63 (UK).
23 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 143.
24 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 144.

of a conqueror's law was espoused by Edward Coke in *Calvin's Case*.[25] This 17th century case was qualified by Lord Mansfield a century later in *Fabrigas v Mostyn*[26] ("*Mostyn*"), a case that is still instructive three centuries later in so far as evidence and procedure are concerned.

15 In *Mostyn*, a native Minorcan sued the Governor, John Mostyn, for unlawful imprisonment. Mostyn relied on ancient Spanish law as justification for his action. When he lost in the Common Pleas, he appealed to the King's Bench where Lord Mansfield held that Spanish law had not fallen. He held that this case was proof that "the constitution of England does not necessarily follow a conquest by the King of England". Hence, Governor Mostyn might have justified his action under Spanish law; but Spanish law must be pleaded and proved. That Mostyn did not do, and his appeal was dismissed.[27] Hence, Burset concluded: "Cases like *Mostyn* reassured domestic audiences that an English tribunal would be available to punish egregious abuses of British authority, even in legally plural colonies."[28]

16 *An Empire of Laws* ends with two questions. Would it have been possible for Britain to apply the same laws to everyone in its Empire? Would it have been just? "In 1760", Burset writes, "most Britons would have answered 'yes' to both questions. By 1780, the typical answer was 'no'". The reason, he thinks, was that "British officials elected to administer different kinds of law as a way of shaping what kind of colony each place would become".[29] It was a matter of choice, not happenstance.

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25 (1608) 77 ER 377.

26 (1773) 20 Howell's State Trials 181 CP.

27 *Mostyn v Fabrigas* (1775) 98 ER 1021.

28 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 148.

29 Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press, 2023) at p 168.