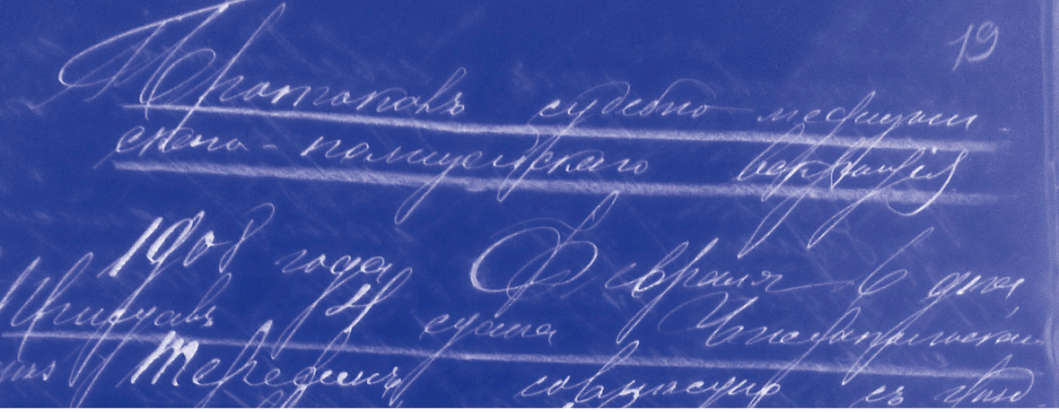

Stefan B. Kirmse (ed.)

One Law for All?

Western Models and Local Practices in (Post-) Imperial Contexts

campus

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Volume 25

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Stefan B. Kirmse
Berlin, May 2012

Introduction

Stefan B. Kirmse

To avoid potential misunderstandings: "one law for all?" is not used as a political slogan in this book. Admittedly, along with related concepts in other languages, such as *idem ius omnibus* or *gleiches Recht für alle*, the phrase has been used to further a wide range of political agendas. Feminist, civil liberties and gay rights groups have utilized the slogan to call for greater equality; racist groups in North America have exploited it as a means to denounce the allegedly preferential treatment of minorities; and most recently, a secularist movement in the United Kingdom has adopted it as the title for its campaign against *shari'a* law, which it views as gaining influence among British Muslims.

In this book, the phrase is neither employed to advocate a political cause nor used to refer solely to legal equality (or the lack of it). Offering a point of entry into the study of legal debate and practice in imperial and post-imperial contexts, it served as a guiding research question for a conference hosted by the Department of East European History (which explains the strong representation of historians of Russia in this volume) at Humboldt University in the fall of 2010. It struck the organizers of the conference, on which this volume is based, as a useful tool to capture different aspects of legal reform in the nineteenth and early twentieth centuries: the drive for "modernization" and the importance of legal borrowing in various parts of the globe; claims to legal integration and greater equality; and the continuing specificity of legal practice and interpretation.

That said, to a degree "one law for all?" is a rhetorical question. Neither has legal homogenization ever materialized on a global scale, nor have most polities ever put "equal justice for all" into practice. Some forms of inequality persist even in today's liberal democracies. What is more, if the question is used to investigate the worldwide diffusion of "Western" law,

as in the sociological "world polity" approach (see, in particular, Boyle and Meyer 2002), it faces a twofold problem: analyses of diffusion tend to claim either the obvious or the impossible. If diffusion is taken to refer "only" to the imitation of Western law in different parts of the world, it is a commonplace. Mimesis is part of most legal reform processes. On the other hand, the spread and use of European legal norms and institutions is best not discussed in terms of a transfer of laws from one country to another. As critics of Watson's concept of "legal transplants" (1974) have argued, such transfer is impossible since the law consists not only of words but also of the culturally specific meanings attached to these words (Legrand 2001). As a result, any analysis of legal borrowing must not only take local adaptations and reinterpretations into account but also acknowledge the complete novelty of the resulting laws.

Regardless of these caveats, "one law for all" remains valid not only as an ideal for lawmakers. Thanks to its multi-dimensionality, it can also be a useful guide for inquiry. It directs our attention to the dynamic relationship between two competing, but often overlapping, trends that characterize most imperial and post-imperial spaces: legal integration, on the one hand, and the recognition and promotion of difference, on the other. The latter, at times, even included forms of legal segregation. Framing the inquiry in such terms allows an analysis of different steps towards, or away from, legal equality while revealing an array of local interactions with Western law(s).

The role of "Western" law must indeed be given careful consideration. A focus on East-West or North-South interaction admittedly runs the danger of being charged with "Eurocentrism"; and past inquiries into the role of Western legal blueprints and institutions in the South, such as the Yale Law and Modernization project in the early 1970s, have been rightly criticized for their developmental assumptions, that is, the idea that the adoption of "one type of law—that found in the West—[was] essential for economic, political and social development in the Third World" (Trubek 1972, 2; see also Trubek and Galanter 1974). This volume, by contrast, has no interest in extolling or denouncing any particular normative order. Yet, it suggests that a close consideration of interactions with Western laws is helpful—in fact, it is necessary—for a cross-cultural discussion of legal debate and practice in the nineteenth and early twentieth centuries.

In many parts of the globe, European legal reforms and institutions were among the most common points of reference at this time, as efforts to rationalize local judicial systems and make them more efficient gained momentum. Policies of centralization and the standardization of legal practice were meant to create both stability and a minimum of legal certainty. This frequently involved an overhaul of laws and legal institutions in accordance with European models, or at least a partial appropriation of such models. Legal reforms were usually designed and presented as part of the wider project of "modernization" and linked to related efforts in the political, economic and cultural spheres. Subscribing to the idea of universal, mono-linear progress and Europe's advanced position on this developmental path, many elites were convinced that non-European regions could learn from the experience of European nations—usually by following their lead, but sometimes also by avoiding previous mistakes.

To be fair, there was no such thing as a singular "Western model". The legal reality in Europe was a multitude of different and differently interpreted models. Thus, it is worth exploring which of these (and why!) Russian, Latin American, Afghan and other reformers decided to draw upon. What is more: how did local actors re-interpret and adapt these models to local circumstances? For reform movements throughout the South and East, "modernization" often consisted of a selective re-combination of European and local ideas and practices (in which the former were discussed less in terms of their "superiority" than in terms of their compatibility with the latter). The resulting, new legal systems could then be promoted as regional models. The new Turkish legal system of the mid-1920s, for example, though based on a mixture of Swiss, Italian, German and French influences (Örücü 1992), soon became a reference point in neighboring Muslim majority states. The question of borrowings and references in legal debate and practice, then, forms one key set of questions addressed in the chapters that follow.

This volume is also designed to examine the discrepancy between the claims of reformers, on the one hand, and the implementation and reception of legal change, on the other. It highlights the simultaneous development of growing uniformity in some areas of law, both within and between countries, and diversity in others. The promotion of universal legal norms in reform debates and the resulting legal institutions often bore

striking similarities whereas legal practice often remained idiosyncratic, not least because local actors behaved pragmatically. All cases discussed in this volume were legally "plural" in one way or another. Local administrators, judges and litigants could pursue their own agendas by drawing on different legal traditions at different times.

In short, this volume examines law as both debate and practice in the imperial and post-imperial world. Case studies from Latin America, Russia, Africa and East Asia explore the ways in which rulers, parliamentarians, jurists, mid-level bureaucrats and ordinary people talk about and actively use the law. Before introducing the individual chapters by identifying a number of common themes, I briefly discuss the role and meaning of law in (post-)imperial contexts and offer a short summary of the disciplinary background and premises on which this volume is based.

Exploring Law during and after Empire

For the regions and time period under scrutiny in this book, law was of utmost importance. Rulers and policy-makers took pains to refine their legal systems and individual laws in order to make their rule more secure and efficient. At times, they employed laws and law-enforcement agencies to keep opponents at bay and neutralize troublemakers. On a day-to-day basis, however, they put enormous resources, financial and social, into the administration of their polities and the maintenance of law and order. While many empires—and some post-imperial spaces—are portrayed as realms in which the law mattered very little or could be bent by rulers and bureaucrats at any time, many of them were, in fact, full of legal forums. Ordinary people interacted with the law in numerous ways. Instead of being confined to legislative chambers and courts, law was an everyday experience.

In order to capture this experience in its specific cultural and historical contexts, this volume views the law both from "above", as a set of individual laws or legal systems designed and debated by lawmakers, and from "below", as an array of manners in which the system was implemented, used, and experienced. The former perspective concentrates on

legal reforms and, in particular, on the ways in which they were negotiated, justified, and communicated to the people. Processes of prolonged debate could take place either in parliament, as in the Russian Duma, or between the ruler and regional or tribal leaders, as in the case of Afghanistan.

The view from "below" then introduces the perspectives of local officials and legal practitioners as well as litigants, witnesses, and defendants, alerting us to the everyday operation of law. The focus on legal intermediaries and on local judicial, administrative and police institutions helps us explore the connections between governors and governed. It also highlights the importance of choice in the legal sphere. Lower and mid-level officials reveal a spectrum of approaches in dealing with cases—a spectrum particularly wide in colonial contexts where vague instructions and the usually military background of judges gave much discretion to local officials. Choice is also fundamental to the analysis of court use. This analysis documents the ways in which ordinary people dealt with legal change, and appropriated institutions for their own ends. The combination of these perspectives offers a vantage point from which multiple meanings of law can be examined, in both discourse and practice.

While written by historians, this volume is indebted to the field of "law and society" research, a form of interdisciplinary socio-legal inquiry that became institutionalized in the United States in the 1960s and is concerned with the study of law in its social and cultural context (Levine 1990; Munger 1998). In Germany, this field is only beginning to emerge (Wrase 2006).[1] Law and society research tends to focus on the social and cultural embeddedness of legal institutions—trials, lawyers, juries and courts; at the same time, scholars in this tradition have also turned to interpretive theory, which links the notions of culture, meaning and agency. As Geertz famously argued, "the 'law' side of things is not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real" (1983, 173). What is more, at any point in time and space there is more than one distinctive manner of "imagining the real" (Aguirre and Salvatore 2001, 14). From the perspective of interpretive theory, then, the law is best understood as a series of interactions and the meanings that ac-

1 The Berlin-based study group "legal reality" (*Rechtswirklichkeit*) was created in 2005, with the associated research program "legal cultures" launched in 2010.

tors attach to these. Litigants, lawyers and lawmakers continually produce the law as they give meaning to it as part of their everyday interaction. Law and everyday life thus "interpenetrate" (Yngvesson 1988).

One of the key insights of this interpretive perspective—the fact that legal action produces culture—proved influential among legal anthropologists, who then examined the process under conditions of colonial rule (Merry 1991; Mann and Roberts 1991). By the early 2000s, the "cultural turn" was in full swing in law and society research (Sarat and Kearns 1998; Sarat and Simon 2003). Historians have been slower at exploring the culturally productive role of legal systems. Early anthropological studies on law and culture across Asia, Africa and the Americas (especially Nader 1969) were neglected by many historians working on these regions. In recent years, studies of colonial history have become more interested in the different facets and effects of legal culture—a development that has been accompanied by a turn among scholars of imperial history away from the discussion of administration and towards cultural analysis (Benton 2006, 177). This volume seeks to contribute to this growing body of the cross-cultural and interdisciplinary study of law in the nineteenth and twentieth centuries.

Why was law so important to imperial and post-imperial governments? The law was not only a means to an end but also an end in itself (Fisch 1992). Imperial expansion was often justified in terms of spreading the "rule of law" (even if access to it was skewed in practice). Local legal traditions could also be promoted as the embodiment of "authenticity" and thus a form of defiance to the project of Westernization. Clearly, legal traditions were potent political weapons.

But most importantly, the legal sphere served imperial and post-imperial governments as an instrument of governance. They used it to establish and strengthen their control and authority, thereby encouraging new forms of state-centered "legal pluralism"—a plurality of differently legitimated legal systems and authorities in which categories of people were assigned specific rights and opportunities for legal action. This pluralism was highly unequal, with some of its constituent legal orders greatly depending on others.[2] It was reinforced, and constantly modified,

2 Some scholars, in fact, reject "legal pluralism" as a concept because it does not neatly capture this inequality and dependence (for example, Starr and Collier, 1989, 9).

by ongoing imperial expansion. Thus it was common in colonial empires, where it was particularly shaped by the encounter of European laws and local legal ideas and practices (Hooker 1975; Merry 1988, 871). Forms of legal segregation and discrimination, rooted in racial, religious, social or other distinctions, were often used as safeguards for the "superiority" and privileges of colonial rulers and thus helped to create and perpetuate social hierarchies. Many colonial officials had little interest in undermining the asymmetrical power relationship between colonizers and colonized (even if this boundary became blurred in practice as the subalterns used legal mechanisms to make claims, defend their autonomy and contest colonial abuse).

The commitment to control and regulation spurred many empires, and some post-imperial nation-states, to codify religious and various local legal traditions. As it was usually state-sponsored commissions that "froze" sets of highly flexible and diverse local practices into formal rules, "customary law" is a prime example of "invented traditions" (see Colson 1976; Ranger 1983; Chanock 1985; Gordon and Meggitt 1985; Jersild 2002, 89–109). Such codification efforts enhanced the role of the state in the legal sphere, and enabled officials to draw on local customs under certain conditions. In the German colony Cameroon, colonial officials could rule in accordance with local customs in both civil and criminal lawsuits between Africans (though they were obliged to take German law in criminal cases into account). With few exceptions, in the Russian Empire the consideration of religious legal traditions and custom was limited to village courts and certain types of civil law (especially family and inheritance law). At the same time, and in contrast to other imperial powers such as the British in India, the Russian authorities insisted on a strict adherence to religious orthodoxy in family law (Crews 2006, 143–191). In post-imperial China, customs could only be taken into consideration in civil cases not covered by the Civil Code. Thus, the integration of local legal traditions with state law differed considerably across time and space. However, state law(s)—which was not a unitary system but a mosaic of different laws, codes and practices—tended to play a privileged role in this constellation of orders. The state, for example, usually retained the right to dismiss customs that it saw as either a threat to public order or an insult to (state-defined!) social mores.

In many empires the legal sphere developed in a disjointed and contradictory fashion. Frequently, there was no such thing as a "legal policy"—rather, a set of incoherent views, reform proposals and decisions that differed over time and between individuals and institutions. Yet, overall a basic tension emerged, for the reliance on legal diversity as a mechanism of rule was increasingly met with strides towards legal unification. Both policies could be justified in terms of the developmental logic widespread among nineteenth and early twentieth century thinkers and policy-makers: the maintenance of legal differences could be advocated where groups were seen as not sufficiently "developed" to merit legal equality; and unification could be pursued as a reward and encouragement for "progress" towards a higher degree of "civilization". Thus, as my own article in this volume argues, some ethnic and religious minorities were more fully integrated in the state legal system than others.

Yet, legal pluralism was increasingly perceived as a problem in that it caused complications in matters of jurisdiction and authority, the training of legal practitioners, and the resolution of cases that affected several orders at the same time. Against this background, legal integration was used as a strategy to increase the efficiency of rule and strengthen central power.

Post-imperial nation-states tended to take steps towards legal unification as part of their state and nation-building efforts. Some sought to model all legal relations on state law and administer them through state institutions. Yet, even those states that strove towards homogeneity rarely achieved it. Multiple legal cultures coexisted and were deeply entangled with each other. Minorities did not just disappear. Ethnic, religious and social prejudice inherited from the imperial period often continued to inform new legal orders, as the Latin American cases in this volume illustrate. Around the globe, in fact, some groups remained outside the jurisdiction of regular courts, sometimes at their own insistence, especially in civil law. As the case of republican China shows, such diversity could even be entrenched in new civil codes and be accompanied by further efforts at codifying non-state law. States with long-standing religious and "customary" legal practices, such as Indonesia, chose to integrate these with the state legal order while giving particular weight to religious norms (Benda-Beckmann 2008). Legal pluralism, in short, remained the rule in many states even after empire.

There are differences in what this pluralism looked like. Since a coexistence of different forms of normative ordering (court-based or other) can be found in virtually every society (Merry 1988), the challenge is to find the specificity of each individual case of legal pluralism. Is it parallel, inclusive, or does it take the form of aggressive competition (Benda-Beckmann 2010)? How does it evolve over time, and how does it differ between and within states? More importantly, how much freedom do litigants have to step outside the legal category to which they have been assigned and to engage in so-called "forum shopping" (Benda-Beckman 1981), that is, to move and choose between legal forums? Some constructions of legal pluralism are not state-centric at all and therefore best analyzed in different ways (Benton 2002, 30; Benda-Beckmann 2008; Randeria 2006). That said, for the cases presented in this volume the state is a key player.

The case studies also underline that institutional and normative designs were usually rather different from the legal reality, which could not be fully scripted. Formal segregation of different groups in society, often along racial lines, did little to stop these groups from developing legal relations with each other. The legal institutions created for different parts of the population were deeply entangled and developed multiple forms of cooperation. In addition, by relying on the help of informal legal practitioners to go to court or other legal forums, the disenfranchised masses utilized the very instruments that were originally put in place to ensure the domination of elites. The plurality of legal forums and the selective use of such forums by litigants, moreover, helped to determine the authority of different legal institutions, and thus had an impact on legal practice. The design and use of new laws and legal institutions were closely linked; different legal forums were affected by each other's existence. As a result, the making, use and internal differentiation of law during and after empire must be studied together.

For all their commonalities, the debates and practices discussed in this volume were part or the result of specific reform programs. In imperial Russia, the Judicial Reform of 1864 established an independent judiciary and court system. Trials began to be held in public, and a new generation of trained jurists put emphasis on the lawfulness and accountability of police and court actions. The new courts turned into interactive spaces in which jurists, policemen and ordinary subjects of the Empire shaped and

experienced state policy. As some (albeit not all) minorities were granted access to the new legal system, a hesitatingly unified legal space emerged. Along with the emancipation of the serfs, the Judicial Reform was perhaps the most radical and successful element of the so-called Great Reforms of the 1860s. These were a watershed in imperial history, even if debates over new legal codes and individual laws continued, and certain amendments were passed over the years that followed. Western Europe supplied key reference points in the process of legal change while in some legal initiatives, such as legislation on the death penalty, Russian reformers saw themselves as being at the forefront of European progress.

In China, legal reforms were more gradual, spanning across the imperial and republican periods. They were part of a much wider reform process underpinned by the universalization of Western norms, the establishment of a new political order and the transformation of the social and economic spheres. In the course of the first four decades of the twentieth century, a series of legal codes kept defining and re-defining "criminal" acts as well as opportunities for lawsuits. Legal behavior changed only gradually: by the mid-1930s, the choices of litigants and judges were still influenced by imperial codes. The universalistic model of legal modernization, moreover, did little against *de facto* legal pluralism; on the contrary, the state continued to integrate different local practices with this model.

The reform program in Afghanistan was gradual yet ambitious. As long as the country was under British influence (albeit not part of the British Empire), rulers were busy trying to strengthen the central state. Yet, before full independence in 1919, efforts were already made at codifying existing (Islamic) laws and restructuring the judicial system. The 1920s then witnessed a period of dramatic reform. Like their fellow reformers in the Ottoman and Russian Empires, the "Young Afghans" sought to implement their vision of a "modern" Afghan state and society. Beginning with a new constitution, the post-independence ruler soon announced far-reaching changes that would enhance state control in both private and public law, over taxes, army service and religious institutions. This strengthening of the state legal system entailed the disempowerment of those in charge of coexisting legal orders, which ultimately led to the ruler's downfall. Yet, many elements of his "one law for all Afghans" policy remained and were continued by his successors.

Like other post-colonial states, Peru faced a number of legal challenges in the mid-nineteenth century. It had to develop a new set of codes and norms to replace colonial legislation (which took several decades and led to a multiplicity of state legal norms); it had to create new institutions and agents—tribunals, courts, local magistrates, schools for lawyers, and others—that would meet the needs of the new legal system. And crucially, it had to address the existing legal discrimination against its large indigenous population which had been considered inferior and unworthy of citizenship rights by colonial elites. The emerging state-centered legal system was thus forced to reconcile ideas of race, status and power inherited from colonial rule with new liberal concepts about the rule of law and citizenship rights. Given these challenges, Benton characterized legal systems in post-independence Spanish America as "fractured" (2002, 211). Peru offers a good example of such a fractured system. While independence brought equality before the law to all Peruvians, the reality was ridden by exceptions and continuing inequalities that kept women, rural and indigenous people marginalized.

The legal challenges faced by early to mid-nineteenth-century Mexico were broadly similar. The replacement of the colonial system with a new legal order that would suit the needs of the newly independent state was an arduous and violent process. Monarchists and republicans, conservatives and liberals, elites and peasant rebels were locked in battle for decades, giving rise to a rapid succession of wars, political leaders and forms of government (for one, two short-lived "Mexican Empires" were interspersed in the post-independence, republican period). As the reformers emerged victorious from these power struggles, the new Constitution (1857) and Penal Code (1871), inspired in large part by Western European models, reflected the liberal ideal of universal equality before the law for all citizens of the Mexican Republic. Jury trials were introduced, at least in the capital city, in order to increase popular participation in state institutions—another liberal ideal—and educate the masses as "citizens". Like in Peru, however, "one law for all" remained an ideal that large parts of the population did not experience in practice. Regardless of all efforts at legal unification, a multiplicity of legal cultures continued to coexist and interact. Older, imperial notions, especially racial prejudice, persisted. At the same time, as liberal thinking became enmeshed in popular ideas of

crime and punishment, ordinary people began to express support for the work of state legal institutions.

As the only case of an existing colonial state and society in this book, the German colony Cameroon unsurprisingly showed the least interest in introducing greater equality, or even in "modernizing" its legal system. It offers a prime example of a territory in which the law was used as a tool for maintaining colonial domination and repression. Legal segregation along racial lines, justified in terms of different stages of "development", helped to keep the "natives" in a subordinate position. While there was some support for the idea that African law should be slowly transformed towards idealized European legal principles and practices, no serious attempts were made to further legal equality. Greater equality, in fact, would have eroded the racist foundation on which the entire colonial system was built. After 1905, the Colonial Office in Berlin attempted to bring the legal decisions of colonial officials more closely in line with German criminal law. At the same time, the colonial government tried to increase the autonomy of "native" courts and subjected court cases that involved both Europeans and Africans to greater regulation (mainly to increase the predictability of legal decisions for the European party). "One law for all", however, was not considered an option. At the same time, Schaper's article suggests that litigants tended to perceive the highly differentiated legal sphere as a single space, also because strict segregation was more of a utopian vision than a description of legal reality. In practice, there much was interaction and "forum shopping" across legal spheres.

In the remainder of this opening chapter I highlight a number of themes that form the core of this volume: legal borrowing, agency, legitimacy, performativity, and inequality. The first of these themes is most prominent in debates over and the implementation of legal reform at the "top"—be it in parliament or between the ruler and regional interest groups. It is particularly pronounced in the first sections of the volume, which focuses on the role of Western models in the context of the Russian and Afghan reform processes. This is not to suggest that non-Western models were insignificant. Benjamin Buchholz points to the influence of Turkish and Iranian experience and advisors on debates in Afghanistan, while research on Russia highlights the role played by the Ottoman Empire as a model for some spheres of law—especially, the integration

of the *shari'a* with the state legal system (Crews 2006, 143–191). Directly or indirectly, however, European antecedents were decisive for the cases covered in this volume, which reveal an array of engagements with European models ranging from mimesis and adaptation to their use as templates against which alternative, "local" ideas were formulated.

By the late nineteenth century, Russian jurists, scientists and leading politicians were referring to "Europe" predominantly as a positive example. Lena Gautam, for one, shows that Western European scientific claims concerning criminal responsibility were discussed among the educated public and selectively appropriated by legal scholars and policy-makers (who then communicated their contributions back to the "West", thus creating a degree of reciprocity). As some of these debates popularized new ideas about human behavior, stressing social or physiological constraints on the free will, they helped to change the ways in which criminals were viewed and treated in court. The keepers of new expert knowledge had vested interests in disseminating such knowledge in Russia: since the courts became dependent on expert testimony, they also offered livelihoods to medical-legal specialists (who often had few other sources of income). The growth and increasing professionalization of this new social group, in turn, and their integration into courtroom practice, turned some imported scientific claims into locally accepted "facts". Nevertheless, the legal reality in the courtroom remained distinctive, as Western ideas about criminal responsibility were integrated with the Russian codes and court design.

Benjamin Beuerle's analysis of the debate over the death penalty in the Russian Duma exposes a more ambivalent engagement with Western models. The discussion shows that in the minds of Russian lawmakers Western experience was to be given close attention but not necessarily to be followed. Opposed to the death penalty as a symbol of the hated autocratic regime, most Duma deputies insisted that Russia had to pursue a different path (rather than join most of her European neighbors in maintaining the death penalty). The idea of "Europe" thus dissolved into a multitude of states and individual thinkers, some of which—the "true West"—deserved emulation while others were suddenly presented as being more "backward" than Russia herself. In fact, some parliamentarians proudly asserted that for once, Russia stood at the forefront of European

"development". Yet crucially, the arguments on all sides indicate the importance of European states, policies and thinkers as points of reference in Russian debates on new legislation.

The reception and selective use of Western references in the legal system is also illustrated by the Mexican case. A diverse set of imported scientific ideas and legal models interacted not only with local understandings but also with each other, as Manuel de los Reyes García Márkina shows in his article. The Mexican Penal Code of 1871, which drew on over twenty European and North American codes (with an emphasis on French models), reflected liberal ideas of freedom, equality before the law, and the importance of individual agency. In the decades that followed, however, a new generation of legal scholars emerged who—like their contemporaries in Russia—cast doubt on the free will of the individual and focused on the social and biological reasons for crime. This new generation thus challenged the new legal order, inspired by European models, by using legal arguments put forward by French, Italian and British theoreticians.

Such multi-layered and explicit engagement with European models was unthinkable in Kabul. While Afghanistan's post-independence ruler Amânullâh Khân sought to strengthen the fledgling Afghan state by supplying it with a more "modern" political, legal and social system, he had to couch this project in local terms. The ruler's legitimacy depended on his public respect and support for Islamic and "traditional" norms. As long as he presented himself as the chief defender of Islam, framed innovation in terms of adaptations of earlier Afghan institutions, and assured both tribal leaders and higher Islamic scholars of their moral and political authority, he managed to implement reforms (including a new constitution). Iran and the Ottoman Empire served as surrogate reference points for legal borrowings from the West, granting these borrowings an air of Islamic legitimacy. The ruler took pains not only to construct his reforms around religious terms and institutions but also to leave the power of established elites untouched. Thus, it was not until Amânullâh Khân changed course and called for an all-out revolution in accordance with European models (inspired by the ruler's own tour of European countries) that the ruler's authority began to crumble and open confrontation ensued. While on the surface this conflict was about competing values (which mattered on

a symbolic level), first and foremost it was a conflict over resources based on legal authority.

The second and third sections of this volume move the discussion from debates over legal reform and competing reference models to legal practice. The chapters tease out the role played by different local legal actors and forums during and after empire. They show that state efforts at universalizing legal norms across the judicial landscape were accompanied by a continuing diversity of legal practice.

The key concept for this discussion is agency. In analogy with the three parts of the book, we may distinguish between the agency of central authorities, the agency of lower-level officials and legal practitioners, and the agency of ordinary people in legal institutions. The behavior of actors in key state institutions, both legislature and executive (which were often hard to separate in imperial contexts), was critical to the success or failure of legal reform and administration, especially where central power was tenuous and contested, either because of the vastness of territory—a feature of many empires—or because of a short history of statehood, as in Afghanistan. Central authorities could not rely on force alone in governing such territories, but had to try and insert themselves into existing networks of power at the local and regional levels. In Afghanistan, for example, the *loya jirga* was first and foremost a site for negotiation and alliance-building without which legal reform would have been unthinkable. While the contested operation of state law has been widely discussed in "law and society" research on the contemporary period, it has received only occasional attention among historians and cultural anthropologists working outside Western contexts (for example, Moore 1986; Mann and Roberts 1991; Collier 1994; Lazarus-Black and Hirsch 1994; French 1995).

The Afghan case also points to a crucial constraint on the agency of central authorities: legitimacy. While the power of Russian rulers, by contrast, rested in their perceived ability to "modernize" the Empire, the Afghan amir's legal authority and right to introduce reforms was rooted, in some measure, in his defense of Islamic norms. More importantly, and given the weakness of his law-enforcement authorities, his legitimacy was dependent on his readiness to satisfy the demands and interests of elites and to consult with them in all major policy areas. Reform proposals that undermined the authority and resource base of elites were unlikely to succeed. By ta-

king the concerns of elites into consideration, however, the ruler could use legal reform as an opportunity to enhance his own legitimacy.

A number of chapters address the agency of legal intermediaries and local officials. The second section of the volume addresses the operation of law by such individuals in greater detail, offering case studies from early twentieth century Russia and nineteenth century Peru. Jane Burbank's in-depth study of two cases from one of Russia's most multiethnic provinces looks at law from the perspective of intermediary officials. She argues that these officials—usually above the village but below the central authorities—served crucial functions in the Russian Empire, a territory characterized by long distances and the devolution of administrative and judicial power to local authorities. Crucially, the everyday legal interaction between subjects and officials expressed and reinforced the authority of the state in the countryside. While interpreting and enforcing the law on a day-to-day basis, officials communicated the state's authority to peasants of various ethnic groups who, in turn, reported crimes, incriminated community members and lodged appeals, thereby accepting and utilizing this authority for their own ends. It was this interaction that ultimately imbued the "state" with life in rural areas.

Carlos Aguirre also addresses the role of intermediary actors in linking the population with the state, but shifts the attention from administrative and judicial institutions to informal legal practitioners. He explores the activities and functions of the so-called *tinterillos* in post-independence Peru in order to scrutinize the relationship between the disenfranchised masses and the state legal system. Legal practitioners helped to disseminate and re-appropriate notions of justice, rights, and legality among the lower classes. Aguirre's analysis illuminates ordinary people's understanding and use of state law while highlighting the ways in which language, location, and social and economic status hindered their access to it. Pointing out that after independence *tinterillos* were allowed to represent litigants in towns and villages where no or few certified lawyers existed, Aguirre contends that these practitioners provided a link between indigenous peoples, the state, and local elites; between the oral and the written world; and between urban and rural spaces. Despite their predominantly negative image in contemporary debates and literature, they gave shape to a culture of contestation and helped to promote the rights of indigenous peasants and

communities. While recent scholarship on lawyers and legal practitioners in the colonial world has focused on their contribution to the formation of colonial identities (for an overview, see Sharafi 2007), Aguirre presents the *tinterillo* as a social and political actor in local, regional, and national networks of power (but without vilifying or glorifying this figure, as some scholars of the new field of "colonial lawyering" are wont to do).

Various articles in this volume show that the actions of local agents and institutions allowed ordinary people to experience the "state" at the village level. The discretion of these officials was admittedly at the root of much legal uncertainty and usually least beneficial for disadvantaged groups. Yet, this discretion was so intrinsic to the maintenance of colonial rule that legal constraints on the officials' legal powers were often kept to a minimum. Informal legal practitioners, by contrast, tended to be viewed with skepticism, if not outright hostility, by the legal establishment and ruling elites. They became influential where state expansion was limited (see also Macauley 1998). Finally, Buchholz's discussion of *loya jirga* delegates introduces another type of intermediary whose actions illustrate the ways in which the meaning of state institutions was re-appropriated by those who interacted in them. The delegates had little interest in debating the proposed constitution but used the opportunity to confront the ruler with their pressing concerns. Delegate agency was more critical in the *loya jirga* than institutional structure.

The operation of law is also greatly dependent on the behavior of the litigant. The practice of going to court has been a research focus of legal anthropology since at least the 1960s (Gibbs 1963; Nader 1969; Collier 1973; Starr 1978; Lazarus-Black and Hirsch 1994) and more sociologically-oriented scholars of the "law and society" tradition since the 1970s (*Law and Society Review* 1974, 1975; Munger 1998, 30). Along with these studies, the work of historians such as E.P. Thompson (1975) helped to expose and undermine the assumption that the law is mainly a tool wielded by elites to defend their hegemonic power. Yet, in works on imperial history, the agency of the masses, especially outside the cities, was long neglected. For historians of Russia, among others, what mattered was not what peasants did, but what was done to them. It is only in the last twenty-five years that scholars have begun to explore how the Empire ruled with the masses, rather than over them (Gaudin 2007, 7;

Burbank 2004). Among scholars of empire there is increasing agreement that the dominant mode of interaction between imperial powers and local populations was accommodation (Aguirre and Salvatore 2001; Benton 2002, 27; Burbank and Cooper 2010, 14). Law is only gradually being incorporated into these discussions. Yet, as Carlos Aguirre puts it in this volume, "the peasants' approach to law and legal intermediation was much less naive than what the standard literature want[s] us to believe."

Examining litigation in China, sub-Saharan Africa, Latin America and Russia, various authors in this book discuss ordinary people's use of the state court system and other legal forums to deal with crime, settle family and community disputes, or to improve their life chances. State courts were attractive for people who sought protection from officials (and many of the legal reforms in the nineteenth and early twentieth centuries were aimed at making officials more accountable for their actions). They also offered possibilities for those who preferred external mediation, for example because their communal support networks were weak or unreachable (in cases of travelling). These courts also appealed to those who feared that alternative—communal, religious or other—legal forums were likely to rule against them.

Yet, the degree to which people could engage in "forum shopping" differed from context to context: we shall see, for example, that litigants happily jumped between forums in the German colony Cameroon (despite formal legal segregation) whereas they were more limited in their options in imperial Russia. That said, extra-legal arrangements were an alternative in both (and most other) cases; and where people reached out-of-court solutions, they were quick to drop their cases. Litigants knew the rules of the game. As Xiaoqun Xu's discussion of marriage and divorce in republican China shows, they manipulated cases and fabricated grounds for litigation when it was in their interests to do so. The chapters by Burbank, Kirmse and Gautam on court use in the Russian Empire reveal the same pattern: aware of the forms of activity that constituted "crimes" or the mental states that would allow for mitigating circumstances in cases of criminal indictment, litigants skillfully utilized this knowledge to gain advantages. However, as officials were also aware of such forms of legal behavior and did not just accept denunciations at face value, court use was about ongoing negotiation. Peasant masses, women and ethnic minorities

turned to the courts in significant numbers to argue their cases (despite continuing discrimination). By choosing one legal authority rather than another, moreover, they also enhanced or diminished the legitimacy of individual legal forums.

In several chapters of this volume the notions of interactive spaces and performance play a central role. The performative dimension of trials—even their "theatrical" qualities—has been noted many times (Merry 1994; Aguirre and Salvatore 2001, 13, 21; Benton 2002, 16). The courtroom is discussed in such terms in Gautam's and, to a degree, in my own article (though I offer a more detailed discussion of ethnic minority representation in imperial courtrooms elsewhere [2012]). Gautam views the court as a space for the public enactment and dissemination of new psychological and medical ideas and discourses whereas my own analysis shows Russian courts as arenas of encounter for ethnic and religious minorities and the wider society around them. How many of the ideas, images and power constellations the participants and audiences in the courtroom actually internalized is difficult to gauge; yet, there is little doubt that the post-1864 courts presented a new public forum—a major change from the closed courts before the Judicial Reform—that offered constant exposure to new ideas of equality, citizenship, and criminal responsibility.

Beuerle and Buchholz discuss legislative assemblies rather than courts as performative spaces. Short of being parliaments in a democratic sense, both the Duma and the *loya jirga* had limited political influence; yet, they were spaces in which the tsar's and amir's power could be either staged and thus reinforced, or challenged and symbolically diminished. The Duma's unanimous vote for abolishing the death penalty may have had no legal consequences in 1906; yet it sent a symbolic message, a widely noted public signal, that the government was not speaking on behalf of the people, forming a legal precedent later used by the Provisional Government and the Bolsheviks both of whom abolished capital punishment as one of their first measures in 1917. The *loya jirga*, by contrast, was a symbol of the ruler's "new order" and his willingness to negotiate on controversial issues; it was also a tool to achieve this new order and build alliances against opponents. Keen to increase his own legitimacy, he used it as an instrument for staging, negotiating and revising reforms. Yet, it remained a tempo-

rary consultative space, as the amir had no intention of sharing his power indefinitely. When his last summoning of the *jirga* marked a turn away from consultation and toward the use of this space for Afghanistan's visual embrace of European "modernity"—in clothes and appearance, women delegates and Western entertainment—his strategy broke down.

Finally, the partially rhetorical nature of the question "one law for all?" already hints at the importance of inequality to this volume. While several articles choose the perspective of the underprivileged masses, granting agency to the disenfranchised at the same time, they suggest neither an equality of power nor an equality of opportunities. The law has always been a double-edged sword in that it creates and sustains the hegemony of the powerful while it can also facilitate the resistance of the poor (Hirsch and Lazarus-Black 1994, 8). Hegemony and resistance are inherently contested and come in multiple shapes. More often than not, the key form of interaction between the haves and have-nots was accommodation.

To be sure, inequality must be part of any discussion of law, for the law is never neutral and impartial, but always constructed by human agency in a way that is advantageous to some at the expense of others (Starr and Collier 1989, 3, 7). Beuerle's discussion of the death penalty offers one of many examples: in the eyes of many contemporaries, capital punishment mainly targeted the politically active poor and thus served as a tool for the ruling elites to maintain their hold on power.

Due to the influence of structuralist and functionalist theory, until at least the early 1970s, the law was widely perceived as an integrative instrument that helped to create and sustain social order. Since then it has come to be seen as a contingent cultural and political force experienced differently by differently situated people. While the British social history of crime acknowledged that legal institutions defended the interests of the ruling classes, it also showed that they offered voice and opportunities to the oppressed (Thompson 1975; Hay et al. 1976). In both "law and society" research and legal anthropology, access to justice and the experiences of underprivileged groups are key fields of enquiry (Galanter 1974; *Law and Society Review* 1976; Starr and Collier 1989; Lazarus-Black and Hirsch 1994); and the work of "poverty lawyers", who give voice to the poor, is now an important subfield of socio-legal research (for example, *Cornell Law Review* 1992; Montoya 1994).

Studies from imperial and post-imperial contexts contribute rich material to these discussions as they offer a wide range and stark forms of inequality, from formal legal segregation rooted in social and racial prejudice, to an indirectly skewed access to the legal system and more subtle forms of discrimination against women, the poor, and ethnic minorities.

Numerous barriers including social and legal status, economic resources, rural-urban discrepancies, language, literacy and gender put parts of the population at a disadvantage regarding the use of these courts. Economic constraints were particularly acute in civil lawsuits, which involved substantial litigation fees, so that it was mainly those with the necessary resources who launched them. Where writing and literacy became the key criteria for full citizenship rights, as in Peru, indigenous communities were *de facto* denied access to these rights. At the same time, indifference and even the boycott of state legal institutions on the part of disenfranchised people were hardly uncommon. While the legal reforms in most of the cases discussed in this book were underpinned by liberal ideals about universal equality before the law, in reality they were particularly beneficial for the urban, male population who commanded significant economic and social capital. Xu's discussion of women's marriage and divorce lawsuits in China, for example, shows that regardless of a *de jure* transformation towards equality between the sexes from the imperial to the republican periods, lower legal institutions and functionaries continued to discriminate against women in practice.

The legal status and experiences of groups that did not share the religion or ethnicity of the ruling elites were highly context-specific. These indigenous groups formed the majority of the population in imperial possessions overseas, such as the German colony Cameroon, and in newly independent states that emerged from overseas empires, such as Mexico; yet, they suffered a range of racial, religious and other discriminations. In some contiguous empires, such as Russia and China, by contrast, these groups remained a smaller part of the population, which perhaps spurred efforts at integration in the late nineteenth and early twentieth centuries. Burbank's research on Russia's multiethnic Middle Volga region suggests that ethnicity or religion did not figure as a decisive or even relevant legal category for the authorities; my own research comes to the same conclusion for Muslim subjects in this region, but also emphasizes that the integration