On the Coloniality of Modern Law

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Abstract

The article investigates modern law in its colonial career as it consisted in two paradoxical itineraries. Colonial rule developed under the auspices of governing through modern positive law as it claimed independence from religion and the administration. But the colonies also surfaced as zones of lawlessness, administrative measures, arbitrariness and excessive exceptions. Rather than posit the second itinerary as exceptional to the general first one, notwithstanding how constitutive the exception may be of the rule, this article examines a number of legalities that exemplified these two itineraries in colonial Egypt and theorizes them as co-existing modalities of juridical power that shared similar objectives and fields of intervention. In particular, under historical investigation are legalities that managed agricultural labor through penal/administrative measures. It is argued that these legalities co-existed with positive and liberal legal institutions. Agricultural legalities were “pervasive legalities,” enhancing modern positive law’s production of a gapless legal order that aspired to capture limitless terrains of social life. This legal history reveals that the hallmark of modern colonial law did not consist in substituting a regime of separation of powers and codification for that of pre-colonial fusion or administrative legalities. Rather, the historical achievement of modern law consisted in its “elastic positivism,” that is to say, in wedding positive law to pervasive legalities as both served to dominate the social: the first from the independent terrain of codified law and the second from the material domains of social life. This hallmark of gaplessness and pervasiveness is what made modern law fit for colonial rule.

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Modern law in its colonial career embodied a paradoxical formation. Colonial authorities ruled over colonized populations by imposing modern law’s doctrines, institutions and practices. Positive law and jurisprudence, comprehensive codes, judicial autonomy, rule of law, and other liberal legal ideologies were but a few aspects of the modernizing juridical transformation through which colonial states endeavored to colonize countries and to govern subjects. Modern law was a civilizing force mobilized to overcome pre-modern legal orders, which colonial states branded as arbitrary, primitive, and uncivilized. 1 In the words of Talal Asad, modern law was an “element in political strategies” aimed at “destroying old options and creating new ones.” 2 Meanwhile, colonial rule also consisted in practices that suspended the very project of modern legality when it ceased to serve colo-

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nial interests and no longer secured the colonial state’s control over the population, even as these suspensions worked to affirm the general normative order. These included martial law, military tribunals, emergency regulations and administrative measures. In the first instance, colonial rule developed under the auspices of governing through modern general juridical technologies, and in the second, the colonies surfaced as zones of lawlessness, arbitrariness and excessive exceptions.

How to explain this paradoxical legal history? Arguably, this paradox points to the historic failure of modern law to materialize its own ideals and general principles of legality into practices in the colonies. Alternatively, this paradox confirms what Partha Chatterjee called “the rule of colonial difference”: the particular paradox of colonialism that cannot but exclude the colonized from the universality colonial modern rule claims to instill in the colonies. Interestingly, these responses must deploy modern law’s narrative about itself—that it consists in general, universal and unified legalities—in order to explore its failure or suspension in the colonies. Put differently, the meta-narrative of modern law guides the discovery of the exceptional absence of modern law in the colony.

In what follows I depart from this line of inquiry, and propose a measure of distance from the meta-narrative of modern law, a narrative that compels us to think in terms of universal, general legalities and exceptions to them (however constitutive of the universal they may be). I propose to trace the similarities underneath the differences between these two itineraries of colonial law, and the modern law they bring to light. Might it be that one itinerary is not exceptional to the other, but that they are both co-existing modalities of juridical power that share similar objectives and fields of intervention?

I pursue this inquiry by investigating some elements of the criminal legal history of Egypt under British colonial rule (1882-1936), when Egypt’s soil was exploited and Egyptians were recruited for the production of cotton for British and other world markets. Egyptian colonial criminal legal history saw the rise of both modern positive law, as well as forms of legal ordering that arguably suspended its general institutions. In 1883, a year following British occupation, Egypt witnessed the birth of a new criminal legal order that displaced the pre-colonial, khedival legal order which was rooted in the Islamic-Ottoman tradition. The main institutional innovations of the colonial legal order were the codification of the law, the cultivation of a professional class of judges and lawyers separate from administrators and the religious jurists, and the founding of independent courts known as the national courts (al-mahakim al-ahliyya). Liberal and positivist in their orientation, these textual and institutional innovations reconfigured the law into a field

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3 See Radhika Singha, A Despotism of Law (1998); Discipline and the Other Body: Correction, Corporeality, Colonialism (Steven Pierce & Anupama Rao eds., 2006); Rande Kostal, A Jurisprudence of Power: Victorian Empire and the Rule of Law (2006).


independent of religion and state administration, and separated the judiciary accordingly. This order replaced a khedival regime of legal plurality in which Islamic shari‘a courts operated next to state-run administrative-judicial councils (majalis siyasi‘a), and in which the administrative legislation of the political authorities (qanun siyasi) accompanied the shari‘a.7 From a colonial perspective and that of the new emerging class of Egyptian lawyers, the khedival legal order consisted of the whim of local authorities and administrators, whereas independent courts, positive law and general codified legalities overcame the ills of the pre-colonial past.8

Yet, this was not modern law’s only itinerary in colonial Egypt. Another consisted in institutions that fused judicial and administrative powers. These institutions included military tribunals that punished crimes against the occupying army,9 as well as commissions that penalized bandits or notorious criminals (ashqiya’).10 And there was also another less known hybrid penal/administrative institution: the agricultural commission, which is the focus of this inquiry. These commissions administered agricultural labor through punishment: they penalized peasants who failed to maintain the irrigation system, and who used irrigation water to cultivate crops other than cotton during periods when Nile water was scarce. With the outbreak of the First World War and the correlating decrease in the demand for cotton, commissions penalized peasants who cultivated cotton notwithstanding the prohibition on its cultivation. In all of these instances, commissions, which were established and operated by the ministries of the interior and public works, exercised judicial functions.

What does the proliferation of hybrid commissions in the midst of a criminal legal order (marked by codification, separation of powers, and the autonomy of the law) reveal about modern law in its colonial career? And how did the persistence of fusionist legalities in the midst of a positivist liberal legal order that posited the independence of law reconfigure the relationship between the modern colonial and the pre-colonial khedival?

In formulating these questions, my concern is not to ask where these commissions stood in relation to the general institutions of the judiciary. That would inquire into the

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7 In addition, there were a number of institutions, such as majalis al-tujjar (the merchants’ councils), and the Mixed Courts. Egypt’s Mixed Courts were established in 1875, with jurisdiction over European or mixed European-Egyptian interests. They operated according to comprehensive penal and civil codes, which were based on the French model. See Jasper Brinton, The Mixed Courts of Egypt (1968); Mark Hoyle, Mixed Courts of Egypt (1991).


location of the exception in relation to the general order and into the suspension of the
general institutions of the law; it presupposes the law to be a limit concept, or a concept
that describes a bounded entity in relation to an outside. Rather, I am concerned with the
governing operations of these hybrid institutions, their reach, and fields of intervention;
that is, with the “how” and the “what” of these institutions, and in the order of law their
operations reveal.

My argument in addressing these questions is briefly the following. Neither excep-
tional nor indicative of failure, fusionist legalities are more aptly described as “pervasive.”
“Pervasiveness” signals how powers did not map solely and effectively onto the positivist
distinction between the legal and the social, or onto the judicial and the administrative.¹¹
Pervasiveness also signals the spatial and temporal prevalence of these legalities, and inva-
siveness of the social. In colonial Egypt, these legalities belonged to a modern law which
constituted itself in opposition to a social outside, while being pervasive in it. Through its
positivist conceptualization, modern law depicted itself as autonomous and uncontam-
nated and its powers as properly divided. This autonomy, coupled with its codification
technologies, was key to modern law’s capacity to govern the entirety of social life from a
distance and to produce a unified legal order. Pervasive legalities revealed modern law’s
endless elasticity and invasiveness into social life; the fusion of administrative and judicial
powers facilitated this invasiveness. Far from representing proper, general law and its ad-
ministrative suspension, positivist and pervasive legalities are institutions of what I call
“elastic positivism.” This order does not correspond to the positivist concept of the law or
to its constituted limit, which marks modern law as distinct from the extra-legal. Instead,
this order stretches to govern as many domains of the social as possible, through positiv-
ist and pervasive legalities, with the aspiration to produce a gapless terrain. This hallmark
of gaplessness and pervasiveness is what made modern law fit for colonial rule in Egypt:
Modern law provided multiple technologies to govern Egypt, and in particular to govern
the peasantry that labored to produce cotton for world markets. Modern law was constitutive
of colonial rule; it itself was a colonizing force.

The first two parts of this article introduce the case of the agricultural commis-
sions and investigate their criminalizing operations and fields of intervention. These
commissions left very few marks on the general institutions of the criminal justice system
and the new texts of positive law in Egypt, which I introduce in the third part and exam-
ine what they shared with the agricultural commissions. To gain a better understanding of
the pervasiveness of these commissions under the modern regime of positive law, the
fourth part contrasts them to khedival legalities that similarly fused administrative and ju-
dicial powers, but from within a tradition other than legal positivism. Lastly, I conclude
with some thoughts on the relationship between the modern and the modern colonial by
highlighting the colonizing capacity of modern law.

¹¹ In Egypt, and prior to 1923 when a constitution was promulgated and a Parliament elected, the separation
of powers doctrine referred to the independence of the judiciary in relation to the administration, and not to
the separation of the three powers (the legislative, the judicial and the executive).
I. The Canals of Law and Irrigation

Any search in the law textbooks introducing Egyptian students to the criminal law of the time reveals a law that mirrors the crimes and institutions of the criminal codes. But the crimes, procedures and institutions of punishment were not limited to the national courts and their procedures, or to the crimes numerated in the penal code. Agricultural commissions were one example of administrative-judicial institutions that administered labor through punishment.

Agricultural commissions were part of the technological and administrative expansion of agriculture. Towards the end of the nineteenth century, the irrigation system in Egypt extended into new territories, enabling the production of cotton in all seasons, while transforming much of Egypt’s landscape into agricultural land. Engineering projects and administrative measures enabling this growth constructed Egypt’s natural resources as an object of techno-administrative intervention. The irrigation network became the target of various schemes aiming to intervene in it, protect it and improve it. A circular issued by the Ministry of the Interior to governors on September 4, 1893 reminded them that “irrigation is the first most important matter deserving their efforts because it benefits both the people and the government and is the source of fortune and well-being.” The circular cited an earlier khedival decree instructing governors and officers to assist engineers and to reach “total harmony between engineering and administration.” Weekly reports about the state of irrigation became obligatory. Governors reported on the criminal activities within their jurisdiction, such as murder, kidnapping, or the stealing of cows, as well as on irrigation matters, including the maintenance of the canals and bridges, and disputes relating to irrigation. A circular from the Ministry of the Interior in 1890 informed the governors that they were deputies of the government and had “complete authority and influence to establish security.” Another circular in 1893 reminded them that as deputies of government, they were responsible for all matters pertaining to the administration of the country, including security, crime, health and irrigation—and they had “complete freedom to carry out their tasks” with respect to irrigation. Webs of administration and law followed networks of irrigation, merging one with the other, and further materializing the lives of law and administration.

13 Ministry of the Interior, Telegraf ila hadarat mudirin, Sept. 4, 1893, Qarارت wa-manshurat 514 (1893).
14 Id.
15 Id.
16 See, e.g., Governor of Assyout, Taqrir marfou’ li-dawlatahou nadhir al-dakhiliyya min mudir assyout ‘an al-ahwal bil-usbu’ al-awwal min tarikh amr al-dakhiliyya, Qaratrat wa-manshurat 532-38 (1888).
17 Ministry of the Interior, Circular, Qaratrat wa-manshurat 18 (1890).
The expansive irrigation system became one objective structure in relation to which other activities were tailored. The government encouraged peasants to follow the irrigation network and utilize it. For example, in 1891, the British advisors to the Ministry of Finance and the Ministry of Public Works proposed a plan to settle some territories in the area of Toker in the Suez governorate. The plan encouraged peasants to move to that area by allowing them to use the khedival mail transportation facilities and by granting them property.19

Irrigation was an expansive system, requiring specialized expertise for its maintenance, and inviting new technological-social relations. Professional engineers increasingly staffed irrigation departments and contributed to recasting state power through scientific lenses. The Ministry of Public Works issued circulars to irrigation inspectors asking them to safeguard the irrigation system. Irrigation inspectors and engineers were to “undertake all necessary measures and employ engineering means to guarantee the distribution of irrigation in all territories generally and in Eastern territories more particularly.” The inspectors were to submit reports every ten days on the state of irrigation to the ministry,20 thereby intensifying the operations of the administration in public life.

The agricultural commissions arose and operated in this context of expansive irrigation and agricultural projects. As the irrigation networks infiltrated the land of Egypt, commissions paralleled this expansion and enforced the networks’ prevalence. One central concern of the colonial state was to govern peasants’ interactions with irrigation. At first, penal measures and the judicial institutions of punishment carried out that task. Failure to maintain the irrigation network resulted in penalties. The 1890 Bridges and Canals Statute provided for punishments for destroying bridges or canals while also allowing for appeals against the punishment. Governors soon recognized these penal measures were ineffective. The authorities of the Beni Sweif province began to try irrigation offenders in commissions originally set up to try offenses related to forced labor; these commissions carried out their rulings within twenty-four hours.21 On his part, the Minister of Public Works found the Beni Sweif solution innovative, and proposed that local forced-labor commissions in all provinces be authorized to try irrigation contraventions.22 The Minister’s proposal was accepted, shifting the govern-

19 Ministry of the Interior, Manshur . . . ila al-mudiriyyat wa-l-muhafazat [Circular . . . to the Districts and Provinces], Qararat wa-manshurat 18 (1902).

20 Ministry of Public Works, Manshur . . . ila mufatishi ‘umum al-rayy [Circular . . . to Irrigation Inspectors], Qararat wa-manshurat 520 (1893).

21 The institution of corvée labor was abolished during the colonial period. But in effect, it was regulated, not abolished; the managing of the flooding Nile and the fighting of plagues continued to rely on corvée labor. See Nathan Brown, Who Abolished Corvee Labour in Egypt and Why?, 144 Past & Present 116 (1994). The corvée labor commissions were also hybrid administrative-judicial institutions, though they received much more scholarly attention than the agricultural commissions discussed here. See also Samera Esmeir, Juridical Humanity: A Colonial History 189-95 (2012).

22 Minister of Public Works Abdul Rahman Rushdi, Mudhakkira bi-khusus tahwil al-fallahin al-lathin irtakabu mukhalafat rayy ila lijan al-mudiriyyat [Memo Regarding the Referral of Peasants’ Irrigation
ance of irrigation by Egyptian peasants from the general judicial institutions of the criminal justice system to these administrative commissions. Jurisdiction over foreigners, however, continued to be in the hands of the Mixed Courts, and their cases were tried in the commissions.23

Commissions promised to expand the governance of agriculture to areas that the penal code was unable to effectively reach: they infiltrated the materiality of land, water and labor. Irrigation projects consisted of networks of canals, dikes and pipes stretching throughout the country, and the commissions were mapped out on these networks. Commissions served, in the words of Michel Foucault, as “permanent vehicles for relations of domination, and for polymorphous techniques of subjugation.”24

Foucault’s articulation of power is useful primarily because of its spatial dimension. Power, he argues, is not located in the general institutions of right; its analysis should not focus on “rule-governed and legitimate forms of power with a single center.” Instead, he suggests looking at power “at its extremities, at its outer limits at the point where it becomes capillary,” to understand it at “its most regional forms and institutions.” Like the irrigation system, power, in Foucault’s terms, takes the spatial forms of vessels, tubes and passageways. This spatiality is revealed when power “transgresses the rules of right that organize and delineate it, oversteps those rules” or when its exercise becomes “less and less juridical.” Power, then, does not transgress right in general, but its rules; it is not non-juridical, but “less and less juridical.” The power to punish therefore is not to be located in rules of the penal code and the criminal courts, but in the “institutional, physical, regulatory, and violent world of the actual apparatuses of punishment.” Arguably, these forced labor commissions constituted these “actual apparatuses of punishment.”25

The forced labor commissions were soon abandoned, and in their place new commissions were sanctioned for the specific purpose of trying irrigation offences. Because the procedures of these commissions were more detailed, they facilitated further infiltration and control. An 1894 Irrigation Statute set forth regulations concerning such matters as dates, permits, and conflicts. It fixed a penalty ranging from two weeks to two months of imprisonment, in addition to a fine, for conducting the following activities without a permit: building a bridge or obstructing the flow of water; endangering the equipment maintaining the barrages; removing a bridge in order to block a canal or decrease the amount of water channeled through it; and building structures on public bridges and canals. Other similar infractions were broadly defined as obstructing the work of irrigation, or irrigating the land in contravention of the prohibitions of irrigation inspectors. A commission to try these contraventions would be composed of the mudir, the


23 Id. at 103-05.


25 Id. at 27-28.
chief engineer or his deputy, in addition to three ‘umdas (village chiefs). No appeal was permitted against a sentence consisting solely of a fine. 26

The multiple actors in the different sites involved in the operations of the commissions guaranteed a tighter grip and ever more perfected pervasiveness. The Ministry of the Interior issued detailed regulations that specified actors responsible for the tasks of inspection and reporting. Upon noticing an infraction, the district engineer was to write a protocol stating the infraction. The ‘umda, one village shaykh, or a policeman in the absence of the shaykh, was to sign the protocol. The protocol was to be sent within twenty-four hours to the district engineer. The latter, in turn, had to prepare a report and submit it to the district office within three days. The secretary of the commission would then write a letter to the person mentioned in the report and ask him to appear within twenty-four hours before the commission. The report prepared by the engineer would form the basis for the allegations, and the contravener was expected to defend himself against the allegations. The commission would decide on the matter on the same day. In exceptional cases, it could decide to conduct further investigation, in which case it had to schedule a second hearing in no more than fifteen days. 27 The important feature of these commissions was not only their exceptional summary nature, or the speed with which the different actors operated. The hallmark of this system was also the mobilization of an impressive network of administrators, each in a different site, able to reach, to touch and to make available more expansive spaces for law’s interventions.

Sanctioned by the Ministry of Public Works, the commissions also enjoyed juridical powers in civil matters, such as in matters related to the right to use the irrigation canals and compensations for violating this right. The Egyptian High Court decided that in accordance to an 1894 khedival decree, these matters were not within the jurisdiction of the national courts. 28 On its part, the Ministry of the Interior reminded the commissions that they held “real judicial power”:

The regular distribution of water and speedy infliction of punishment on those who harm irrigation work are two important matters that constitute the basis for agriculture and the increase in the wealth of the country. As important as it is to punish contraveners, it is also important to make sure that the rules of justice are not violated and that innocent people are not punished . . . . It is very important that the infliction of punishment is carried out immediately after committing the contravention, for otherwise the effect of punishment will be lost. 29

At issue was the transformation of the network of state administration in the provinces into judicial institutions without sacrificing the speed with which the administration can operate and the networks it can deploy. The Ministry of the Interior even clarified to go-

26 Su‘udi, supra note 22, at 105.
27 The Ministry of the Interior, Qarar [A Decision], Mar. 24, 1994, Qararat wa-manshurat 191 (1894); see also similar decision issued on Oct. 29, 1899, Qararat wa-manshurat 386 (1899).
errors that changes to the penal code should not affect these sentences.\textsuperscript{30} Egypt, then, did not see judicial institutions and punishment, on the one end, and administrative ones and regulation, on the other. Rather, the regulatory was transformed into the penal, the administrative into judicial. Far from simply indicating an absence of separation of powers, or the existence of exceptional or administrative legalities, commission legalities reveal the limitations of thinking of the law in terms of a limit concept, whereby some zones are juridical and others are not (or are “less and less” so, as Foucault would have it).

Commissions did not “transgress the rules of right,” but complemented them while materializing their capacities in new social domains. While both statements describe a similar practice, their consequences for mapping the law are different. The first begins from the grounds of law, as an always-bounded entity, and moves to identify administrative exceptions that suspend the general legal order. The second begins from material grounds of legality in which the law is always expanding and forming, via its administrative networks, measures, codes, courts, or penalizing commissions. Law, through its hybrid penal and regulatory institutions, emerges as a “mode of governance” that infiltrates the socio-agricultural with more flexibility than codified legalities, while expanding along the networks of agriculture.\textsuperscript{31}

The shifting penalty/regulation relationship was evident in the proposals put forth by a 1908 government-appointed committee to inquire into the work of the commissions. The committee proposed to authorize the commissions to substitute fines for imprisonments. This measure, the committee maintained, would prevent the overcrowding of prisons and avail new monetary sources to the government. The peasant would prefer prison so long as he could ensure the irrigation of his land; the fine, which the peasant could not pay, was a better deterrent. A 1909 statute incorporated this proposed amendment.\textsuperscript{32} Fines became substitutes for imprisonment but metamorphosed again into imprisonment if the offender was unable to pay.

We know little about the actual life of peasants under this system of regulation/penalty. Isolated evidence sheds light on its violence. For example, in a dispute over irrigation water in a village near Shibin al-Kum in the province of Manufiyya,\textsuperscript{33} there had been a long-standing dispute between a landowner named Bedawi Henein and a large number of peasants. Henein refused to contribute, either in workmen or in money, to the annual clearing of an irrigation canal, which passed by his fields. He also refused to allow the peasants in the village to use his steam-pumping machine. In response, peasants prevented him from irrigating his fields. Henein complained to the Irrigation Department, and received special permission to irrigate his lands during three days in which he was not

\textsuperscript{30} Manshur min nadharat al-dakhiliyya ila kull al-mudiriyyat, Qararat wa-manshurat (1892).

\textsuperscript{31} See Law as Punishment/Law as Regulation (Austin Sarat et al. eds., 2012).

\textsuperscript{32} Su'udi, supra note 22, at 108-09.

\textsuperscript{33} This incident was described in a Report Addressed to the Advisor of the Ministry of the Interior, and forwarded on June 18, 1911 to the Foreign Office in London (FO 371/1114).
scheduled to irrigate. When the authorities arrived at the site to ensure the execution of the special irrigation order, they were met with opposition from the villagers. More police forces were brought to the site the next day. The Ministry of Interior dispatched a British inspector to the scene. The inspector, Milne Cheetham, reported that the villagers were armed with sticks and standing around the dam, which had to be cut to allow for water to pass from the main canal into the channel irrigating Henein’s fields. The *mulabiz* (officer) attempted to arrest two people, but this action “was forcibly resisted.” The following day, the *ma’mur* (superintendent) arrived with police reinforcements. According to the British inspector’s report, events escalated quickly. One villager attempted to attack one of Henein’s employees and was immediately arrested. Women and children used sticks, stones and lumps of dirt; one policeman was injured and another commandant received a wound to the temple. Thirty or forty shots were fired into the air, and two members of the crowd were “mortally wounded.” One policeman received a scalp wound from a club and another had his nose broken by a stone. The crowd withdrew as they became aware of the death of the two villagers. Henein was able to irrigate. A considerable number of arrests were made. Reporting to the Foreign Office in London, Cheetham stated that: “the shortage of water in Lower Egypt during the summer had rendered all irrigation questions very acute, and to this fact, added to the great unpopularity of the proprietor concerned, the present regrettable incident must, I think, be ascribed.”

While the Inspector’s report reveals very little about the operations of the commissions, it discloses the terrain of violence in which the management of agriculture, of which the commissions were a part, was carried out. It also demonstrates the extent to which the network of administration infiltrated socio-agricultural activity and prevailed it, governing it not from without and afar like the general institutions of the law, but from within and nearby.

**II. Infiltrating Agricultural Calendars**

Governance of the expanding network of agriculture unfolded through another major institution: the cotton commission. The colonial state put these commissions in place in order to ensure that Egyptians cultivated cotton for the export economy, rather than cereals for local consumption. But the coloniality of these commissions far exceeded their economic function in facilitating the exploitation of the natural resources of Egypt. By controlling the exact size of land to be cultivated with cotton or cereals, deciding on exact periods of time for cultivation, and punishing lack of adherence to such measures, the colonial state turned every inch of Egypt’s land and every day of its calendar into a site for legal intervention.

The story of the cotton commissions began with a memo published in 1900 by William Garstin, the English advisor to the Ministry of Public Works. The memo anticipated that the 1900 season would be dry, and that the Nile’s water level would drop.

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34 Mr. Cheetham to Sir Edward Grey, June 18, 1911 (FO 371/1114).
Garstin outlined methods to ensure the equal distribution of water. Restrictions were imposed on the cultivation of cereals, such as rice and corn. These cereals required water, which was scarcely available and much needed for the irrigation of cotton. The irrigation of rice in lands distant from the Nile was prohibited, and the irrigation of corn was prohibited entirely in the early months of the year. Garstin explained that the Nile water in June would not be sufficient for both cotton and corn; corn should not be irrigated until the water level of the Nile rose and flooded. According to Garstin, the Ministry was drafting a decree imposing “severe punishments on those who violated its regulations.”

The Legislative Advisory Council (Maglis shura al-qawanin) criticized Garstin’s proposed “regulations restricting the irrigation of corn.” Nevertheless, his recommendations were soon implemented: a 1903 decree introduced penalties for violating the restrictions on irrigation. In subsequent years, other regulations were introduced to prevent corn irrigation when the Nile’s water supply was low, usually between the months of May and July. However, in 1914, and with the outbreak of the First World War, the European market’s demand for cotton decreased. Immediately following the beginning of the war, there was a failure in selling the cotton crop. Whereas the cotton crop of 1913 realized £31,000,000, in 1914, it sold for just £19,000,000. In September 1914, the ministry of agriculture decided to reduce the cotton-cultivated area. In October of the same year, the ministry allowed for cotton cultivation in one third of a land plot excluded from the general cotton-cultivated area. An application had to be filed with the province’s agricultural inspector for approval. The ministry also allowed for the exceptional inclusion of some areas generally excluded from cotton cultivation. The province’s agricultural inspector was authorized to decide on requests to cultivate cotton in these new exceptional localities. Cultivating cotton in breach of the order resulted in imprisonment for a period not exceeding one week and/or a maximum payment of one pound in fines. In addition, regulations stipulated to uproot the cotton planted in areas wherein cultivation was prohibited.

36 William Garstin, Ministry of Public Works, Tarjamat mudhakkira, Qararat wa-manshurat 104 (1900).
37 See, e.g., regulations for the year 1901 preventing the irrigation of corn and then removing the restrictions in July: Ministry of Public Works, Tarjamat qarar, Qararat wa-manshurat 215 (1901). In the year 1905 similar restrictions were imposed: Ministry of Public Works, Qarar bi-sha’in man’ rayy al-aradi al-Sharqi [A Decision on Preventing the Irrigation of al-Sharqi Lands], al-Waqa‘i al-misriyya 1379 (1905). Also see regulations of the year 1914: Ministry of Public Works, Qarar raqam 25 bi-khusus man’ rayy al-aradi al-Sharqi [Decision No. 25 on Preventing the Irrigation of al-Sharqi Lands], al-Waqa‘i al-misriyya 1450 (Apr. 25, 1914). Another example is an order issued in 1916 preventing the irrigation of corn starting May 1916 until a further notice was issued: Ministry of Public Works, Qarar wuzari bi-khusus man’ al-rayy fi aradi al-Sharqi [A Decision Regarding Preventing the Irrigation of al-Sharqi Lands], al-Waqa‘i al-misriyya 3 (1916). Similar regulations were issued in the intervening years.
On February 19, 1917, Egypt was governed by martial law. The general officer commanding-in-chief in Egypt issued a proclamation giving power to the irrigation and agricultural services to water lands in the basins of Upper Egypt, which do not usually get water during the spring and winter. The objective was to cultivate cereals, and indeed 200,000 **ardebs** (5.62 bushels per **ardeb**) of millet were produced. The proclamation authorized a summary military court to deal with related petty contraventions. In addition, an appointed board was to settle claims for compensation. Its members were one member of the military and two inspectors of irrigation and agriculture. The summary military court had powers to try “natives of Egypt only.” Cases of foreigners were submitted to the headquarters of the commander-in-chief for another military court to be convened. The authorities regularly dismissed petitions to cancel or restrict the prohibition on cultivating cottons. Such was the fate of a petition submitted in 1918 by several landowners from Assiut and Girga who hoped to limit the restriction on cotton cultivation now that the war was about to end. The authorities rejected the petition, suggesting that “we shall require all the cereals which the country can produce next season.” Other petitions were similarly denied.

Evidently, these commissions and military courts served colonial interests. When England needed cereals, the cultivation of cotton was restricted; when it needed cotton, the cultivation of cereals was limited. But these institutions had effects, other than serving colonial economic interest. Not only did they infiltrate socio-agricultural activity by gluing themselves to the materiality of the land, cotton and cereals, making the law present in the land and in the crops, but they also controlled the calendar of Egyptian cultivators. Commissions and military courts were pervasive not only spatially, but also temporally. They occupied and made available both the land of Egypt and its calendar of months. And they did so though the mobilization of the state administrative network, while aspiring to engender a totalizing administrative grip in space and in time. Yet, in Egypt, as elsewhere, this capacity of intensified intervention was not alien to the objectives of the general positive law, to the examination of which I now turn.

**III. The Code of the Concept**

The hallmark of the new legal regime introduced in 1883, one year following the English occupation of Egypt, consisted of two main institutional innovations: the codification of the law (following the French model) and the establishment of national courts to replace the **majalis siyasa** and the **shari’u’a** courts. The **shari’u’a** courts continued to operate, but their jurisdiction was limited to personal status, succession, and **waqf**. The 1883 penal and civil codes established the singular authority of the code, as the primary medium for articulating the law. With regard to the codes and the national judiciary enforcing them, British

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40 Letter from the Undersecretary of State, Ministry of Agriculture, Mar. 20, 1917; Letter from the High Commissioner in Cairo to the Commander in Chief, Mar. 22, 1917; and Letter from the Commander in Chief to the High Commissioner, Mar. 24, 1917 (FO 141/664/4).

41 Id.
legal scholar Harold Perry wrote in 1885 that they established “equality before the law as the first step on the path which will eventually lead to something like equality in civilization.”42 This statement summed up colonial conceptualization of colonial reform practices by equating a just law with the introduction of an independent judiciary and comprehensive codes applicable to all. From a colonial perspective, pre-codified, khedival legalities consisted in arbitrary factual decisions made by Egypt’s rulers without reference to a general law, as well as by governors and state officials whose absolute power was ill-defined and unconstrained by an independent judiciary. Egyptian jurists from the turn of the twentieth century advocated similar positions.43 Inspired by Montesquieu, they found codification and separation of powers to have enabled Egyptians to transition from subjugation to arbitrary administrators to the protective order of law, its autonomous codified order, and its independent judiciary.44

Criminal law textbooks took the penal code as the main medium for articulating the truth of the law, and mirrored its provisions and institutions. Meanwhile, the annual reports of the English advisor to the ministry of justice made no reference to the penalization of disobedient laborers or the management of labor. In 1891, the Procuer-General detailed the offences examined by his office without mentioning crimes of labor punished by the commissions.45 Official reports only covered the institutions of the juridical field: the national courts, the Mixed Courts, the shari’a courts, the School of Law, the prisons, the Commission of the Public Debt, and the Judicial Surveillance Committee (Lajnat al-muraqba al-qada’iya).46 One exception was the discussion of the jurisdiction of the ‘umda (village chief) in some of the Judicial Advisor’s reports, especially between the years 1899 and 1905.47

There appeared then a view that systematized the order of colonial law as autonomous and properly split from the administration, and distinguished it from pre-colonial legal system. The latter now emerged as fusing law with administration and religion. The realization of this view became possible with the increasing influence of positivist jurisprudence that confined the law and defined it in accordance to its concept. Positivist jurisprudence offered a way to view the law as a bounded entity, a concept that signified practices and institutions that could be delimited as uniquely juridical, and therefore as

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42 Harold Perry, Justice in Egypt, 34 L.Q. Rev. 53 (1885).


45 Procuer-General, Taqrir ‘an a’mal al-mahakim al-ahliyya li-‘am 1891 [Report on the Working of the Native Courts for the Year 1891], Qararat wa-manshurat 164 (1892).

46 See, e.g., Judicial Advisor, Taqrir ‘an ‘am 1894 [Report for the Year 1894], Qararat wa-manshurat 91 (1899); The Ministry of Justice, Report for the Year 1910 (1911).

47 Judicial Advisor Malcolm McIlwraith, Taqrir ‘an ‘am 1900 [Report for the Year 1900], al-Huquq 86, 101-02 (1901); Judicial Advisor Malcolm McIlwraith, Taqrir ‘an ‘am 1901 [Report for the Year 1901], Qararat wa-manshurat 121, 137, 139 (1902).
distinct from administration, religion and morality. The exclusion of the institutions I
called pervasive legalities from the law was possible under its definition as a limit concept;
administrative pervasive legalities did not belong to the concept of the law.

The influence of positivist jurisprudence was most obvious in the new law textbook genre. Authored by Egyptian lawyers and jurists who taught in the newly established Egyptian law schools, this genre modeled itself upon positivist jurisprudence. There
were of course many brands of positivism and theorists of positive law available to Egyptian jurists at the time, including John Austin and later Hans Kelsen. But two positivist jurists in particular offered Egyptian lawyers this new vision of the law: T.E. Holland and Jeremy Bentham. Taken together, they helped Egyptian jurists to articulate the law as a limit concept independent of the non-legal, and to map out this concept of the law on the model of the comprehensive code. That is to say, the code became the lens through which to view and define what is law.

In his 1880 book, *The Elements of Jurisprudence*, Holland argues that jurisprudence is not the “material science of those portions of the law which various nations have in common, but the formal science of those relations of mankind which are generally recognised as having legal consequences.” Law is “a general rule of human action, taking cognisance only of external acts, enforced by a determinate authority, which authority is human, and, among human authorities, is that which is paramount in a political society.” The reference here is to jurisprudence—that is, the science of positive law—and not to the actual codes or provisions of positive law. Jurisprudence here is only concerned with the law as “general rule of human action.” That is to say, it can only define as law, or as proper law, that which already contains general rules. In other words, positivist jurisprudence can only see positive law.

Holland’s influence was considerable in Egypt. Consider a textbook jointly authored by two modernizing jurists. The first was Muhammad Kamil Mursi Bayk, who held a doctorate in jurisprudence and taught at the School of Law. The second was Sayyid Mustafa Bayk, who was a judge in the national courts and a deputy to the Prosecutor in Chief. Following Holland, Mursi and Mustafa defined the science of jurisprudence:

> Aimed at investigating the general principles which constitute the basis for positive law, this science is confined to the investigation of general principles shared by various systems of law. It does not examine detailed principles that are specific to each legal system. British Scholar Holland compared the relationship between jurisprudence and the laws themselves, to the relationship of grammar to languages. All languages have plural forms and prepositions, verbs and subjects, etc. But each language has its own specific details

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49 See Esmeir, supra note 21, at 21-66.


51 Id. at 36.

52 Marianne Constable makes a similar point. See Marianne Constable, The Law of the Other 67-95 (1994).
Many other textbooks repeated this theme of similarity between grammar and jurisprudence in order to articulate a unified, delimited jurisprudential lens through which to view the law. And most textbooks of jurisprudence came to be organized along lines of deduction. Principles stated at the outset of each textbook and organizing the structure of the book gave the law they analyzed the appearance of an ordered and bounded system. The statement of abstract principles and the deduction of all details from them produced a law that took on the qualities of the principles that framed it—abstraction, generality, coherence and boundedness. The conceptual autonomy of the law enabled the separation of its jurisprudence from its practice. And the codes, as I shall argue next, provided the law with a demarcated body.

Scholarship on colonial codification and legislation critically highlight the export of codes to the colonies; how customary practices were deprived of their flexibility and historical contingency by fixing them in a code or extracting them from their legal tradition; and the production of a homogenous world where certain principles become “true in every country.” Further, in her study of codification in India, Kolsky extends the argument that the Indian colony provided a laboratory for metropolitan legislative experiments. She suggests that codification provided colonial authorities with a mechanism of control over the community of criminal Europeans who violated the existing law with impunity, and was molded by ideas about Indian difference between Indians and Europeans. In Egypt, however, codification had other colonizing effects. It provided what pre-nineteenth century legislation and practice of law failed to imagine: an aspiration to cover all possible scenarios of social life with the legislation of general and abstract principles that can be at once delimited and applied to a maximum number of situations.

This aspiration is not characteristic of all codification attempts. Some attempts are merely compilations of existing statutory laws, while others incorporate an element of reform to existing legislation. But in Egypt, codification consisted in neither: the drafters


54 Examples of such textbooks include: Ahmad Amin Beik, Sharh qanun al-’uqubat al-ahli: al-qism al-khass [Clarifying the National Penal Code: The Specific Part] (1924); Amin Ifram al-Bustani, Sharh qanun al-’uqubat al-misri [Interpretation of Egyptian Penal Code] (1894); Mustafa, supra note 44.


56 Judith Tucker, Women, Family, and Gender in Islamic Law (2008); Bernard Cohn, An Anthropologist Among the Historians and Other Essays (1987).

57 Martin Chanock, Law, Custom, and Social Order (1985).


rejected all prior pre-colonial penal legislation and drafted an entirely new text modeled on the French example.\footnote{In fact, the first penal code in Egypt was drafted for the Mixed Courts; that is, the courts that had jurisdiction over foreigners and foreign interest. The penal code that was enacted in 1883 was modeled on the Mixed Courts penal code, which in turn followed French models.} The aspiration was to rid Egypt of the incompleteness and plurality characteristic of khedival law, and to introduce a unifying code that would offer general principles to all possible scenarios.\footnote{One jurist who articulates this aspiration is Omar Lutfi, Al-Wajiz fi al-qanun al-jana‘i [Abridgment of Penal Law], vol. 1 (1901).} Bentham’s writings on codification were helpful in articulating this aspiration, especially given his influence on Egyptian jurists.\footnote{See, e.g., Salama ‘Abdullah, Muqaddimat al-qawanin [Introduction to the Laws] (1913); Muhammad Afandi Ra’fat, Usul al-qawanin [The Sources of the Laws] (1897-98); Ahmad Safwat, Muqaddimat al-qanun [Introduction to the Law] (1st ed. 1924).} Bentham had contemplated a complete code—a *pannomion*—in which “no case that can present itself shall find itself unnoticed or unprovided for.” And while he admitted that the attainment of completeness may be “too much for human weakness,” he insisted that the effort made toward achieving it results in increasing the security of people against suffering.\footnote{Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 702 (1823).} This aspiration to draft a complete code in effect aims to produce a gapless legal order.

Bentham’s comprehensive code went hand in hand with his positivist jurisprudence, in particular his insistence on the autonomy of the law and its conceptual coherence, which he understood as the opposite of plurality of powers and laws that are also in part unwritten. He defined the complete body of statute law as a “succedaneum to that mass of foreign law, the yoke of which, in the worldless, as well as boundless, and shapeless shape of *common*, alias *uncommon* law.”\footnote{Id. at 698.} The problem was with a law that was based on “some random decisions, or string of frequently contradictory decisions, pronounced in this and that barbarous age, almost without any intelligible reason, under the impulse of some private and sinister interests.”\footnote{Id. at 703.} For this reason, he thought that the code ought to be authored by “one hand” and this hand should preferably be that of a “foreigner.” The singular hand guaranteed objectives such as consistency, the allocation of responsibility, the minimization of influence and the singularity of the moral force.\footnote{Id. at 868-74, 877.} The foreign hand also ensured the elimination of prejudice and contamination by the social world and, therefore, a measure of distance and autonomy.\footnote{Juan Pablo Couyoumdjian, An Expert at Work: Revising Jeremy Bentham’s Proposals on Codification, 61 Kyklos 503 (2008).} In England, codification promised to remove the perceived disorder of the common law while preserving its rational substance. In Egypt, and through the lens of Benthamite jurisprudence, incompleteness, arbitrariness, and particularism became the main adjectives associated with pre-codified legal order.
By endowing the law with discrete unity, and by promoting consistency and unity against the multiplicity of arbitrary wills, the code also extended state power to the multiple domains of the social. As Lindsay Farmer argues in relation to English codification attempts (which, in his reading, exemplify Bentham’s approach), the positive expression of this unity was achieved by the elaboration of principles of classification, extending “over the entire realm of social life.” In this view “a complete catalog of offenses would lead to a complete understanding of everything that could be done by law.”

In Egypt, Frederic Goadby, an English law instructor, remarked: “No code however complete can be expected to do more than lay down the main principles upon which law is to be administered to and to provide clear rules of those cases are common occurrences.” This never fully realized aspiration to completeness made the work of commissions necessary. Both the code and the commissions governed the social: the first from afar and the second from nearby. While codes aimed at the production of a comprehensive gapless legal order, pervasive commissions filled in gaps that nevertheless persisted; they materialized the objectives of the codes.

What then is colonial about these commissions? On the one hand, their institutional form was indeed different from some other forms of the general legal order. But in terms of objectives and fields of intervention, these commissions intersected with and operated alongside the institutions of the code, as their capacities and fields of intervention fulfilled the promise of the general, codified juridical order. The promise of the positivist code was fulfilled by pervasive legalities that engender what I call “elastic positivism”—the hallmark of modern law in its colonial career.

That said, in postcolonial scholarship, the difference of the colony from the metropolis has been a central analytic for the articulation of colonial law. Ranajit Guha’s magisterial study Dominance Without Hegemony marks colonial law through its difference from metropolitan law, a difference that signifies the limits of liberalism. He makes this argument in the course of his critique of E.P. Thompson’s take on the rule of law in Whigs and Hunters. There, Thompson argues against the view of what he calls “schematic Marxism,” which finds that the law is “a part of a ‘superstructure’ adapting itself to the necessities of an infrastructure of productive forces and productive relations.” Against this view, Thompson writes of the universal achievement of the rule of law, even when it was intended as an instrument of imperialism: “For this law has found its way to a good many parts of the globe. But even here the rules and the rhetoric have imposed some inhibitions upon the imperial power.” For Guha, however, the law in the colonies has

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72 Id. at 265-66.
always been an imposition from above, an instrument of colonial rule, exerting dominance, but not hegemony.\textsuperscript{73} As he writes: “[C]olonialism stands thus not merely for the historical progeny of industrial and finance capital, but also for its historic Other.”\textsuperscript{74} Against the universalism of the rule of law, Guha asserts the difference of colonial law and state.

My concern here is not to question the distinctiveness of the colony and to flatten out all differences between its institutions and those associated with the metropolis. Rather, my concern is to point out that pervasive legalities were part and parcel of the modern legal order, and not merely as a constitutive outside. This order comprised many forms, including those of the code and the commissions. It was the modern, positive legal order itself, and not the institutions suspending it, that unleashed colonizing operations. In other words, what marked these commissions’ coloniality was not their difference from, but homology with, the general institutions of modern positive law.

**IV. The Great Divide**

If modern colonial law continued to rely on plurality and pervasiveness, how different was it from the pre-colonial, khedival law characterized by plural legalities and the fusion of administrative and judicial powers? The point of this question is not to reconstruct the khedival legal order, an inquiry that exceeds the scope of this inquiry. Nevertheless, a comparison with some hybrid legalities of the khedival order, which have been reconstructed by historians of khedival Egypt, is methodologically helpful in shedding light on the distinctiveness of the colonial legal order.

One institution from the first half of the nineteenth century is particularly relevant because it too managed labor through punishment: The Cultivation Statute for Successful Peasant Cultivation and the Application of Government Regulation of 1829-30.\textsuperscript{75} The Cultivation Statute did not represent every aspect of the khedival legal order, which changed considerably over the course of the nineteenth century.\textsuperscript{76} Still, it exemplified the fusion of powers typically blamed for the subjugation of the peasants that the colonial legal order claimed to have historically overcome. As such, it is a fit site for examining the meta-narrative of modern colonial law that depicts it as breaking away from pre-colonial pasts.

\textsuperscript{73} Guha, supra note 70.

\textsuperscript{74} Id. at 67-68.


The Cultivation Statute was the first penal statute of khedival Egypt dealing primarily with rural crime. It was the predecessor of both the agricultural commission and the penal code. Another statute enacted in 1830 dealt with crime in general. The Cultivation Statute addressed the problem of declining revenues and peasants’ increasing desertion of the land; one of its objectives was to prevent the escape of peasants from their villages and to compel them to work their lands. Fifty-five paragraphs stipulate in detail the punishments for over seventy separate “failures of duty” in the statute. They cover negligence by administrative officials, the cutting of dikes, conscription evasion, conflicts between peasants, and murders or injuries by violence. Additionally, the Statute made peasants’ negligence and flight from the land punishable. It included protective measures for the peasants, who received the right of petition and redress, and also regulated unlimited or unrestrained punishments and every infraction of the ordinance carried a specific punishment. Village *shaykhs* (chiefs) were also targeted by the central government for fleeing their villages when unable to deliver the taxes demanded from them or for failing to carry out other administrative orders. Significantly, like the colonial commissions, the Statute administered peasants’ labor by criminalizing failure to work; it fused criminal law with administration, and punishment with labor management. The Statute asserted the government’s command over rural areas as peasants abandoned the farming of overtaxed land, and enforced the production of a crop that peasants had no interest in growing since it could not be used for local consumption.

While the Statute did not stand for the entirety of the khedival legal order, it laid the groundwork for subsequent statutes dealing with rural labor crimes. Several statutes were issued between 1842 and 1845, dealing with maintenance of the dikes, the duties of engineers and other officials in connection with public works, and the offences by farmers of revenue. In 1844, a new, comprehensive penal statute consisting of 73 articles was enacted. In 1845 a booklet compiled all the legislation between 1829 and 1844, and it became known as *al-Qanun al-Muntakhab*. The majority of the articles in this statute dealt with official crime, some of which related to agriculture. Another summary was published in 1849, called “General Law” or “Qanun ‘amm” and became known as *Code d’Abbas*. Its first twenty-six articles dealt with agricultural crimes and offences, mainly in accordance with the Cultivation Statute as well as the Dikes Statute. Another penal statute was adopt-

78 See Kato, supra note 75; for additional analysis of the Statute, see Timothy Mitchell, Colonising Egypt 40-41 (1988).
81 See, e.g., an order issued to one governor stating that some of the village *shaykhs* were escaping from their villages and they should be traced, returned and punished. See al-Manufiyya Court, Sjl 44 (Mubaya’at) 1254 Hijri (1838), cited in: ‘Ali Shalabi, al-Rif al-misri fi al-nisf al-thani min al-qarn al-tasi’ ‘ashar [Rural Egypt in the Second Half of the Nineteenth Century] 94-95 (1983).
82 Mitchell, supra note 78, at 41.
ed in 1852. It borrowed, for the most part from the Ottoman Tanzimat, and was titled *al-Qanunname al-sultani* (The Statute of the Sultan, also known as Sa'id’s Statute). It included twenty-seven articles taken from the Cultivation Statute and the Dikes Statute. This Statute remained in force until 1883.

The Cultivation Statute and its articles, which persisted in other khedival legislations, represented a practice of law not equated with unified and complete legislated codes enforced by independent judiciary. Positive law that excluded other sources of law (such as divine law, customs and ethics) was absent from the legislative action of the early nineteenth century. As both Khaled Fahmy and Rudolph Peters have shown, this administrative activity did not restrict the *shari’a*; rather the *shari’a* itself authorized this administrative activity with regards to some criminal matters. The *shari’a* co-existed with the penal statutes that supplemented it, as the main source of law. Clause 33 of the Cultivation Statute states: “As regards a person who has an enemy, in the event of his killing secretly his enemy’s domestic animals such as cows, oxen, and the like, because he cannot display his hostility to him or devise a trick to him,” he will be first punished by 100 stripes of the whip and he will then will be also judged by the provisions of Islamic law. Reference to the *shari’a* by the above articles is thus not an act of authorization, but of self-subordination.

Scholars of Egyptian legal history have written extensively on this Statute, the objectives it served, the protections it provided and the punishments it stipulated. However, the language of the statute and the jurisprudence this language exemplifies remain unexamined. The Statute’s concrete language reveals the specificity with which certain criminal activities were defined, shedding light on the larger legal order to which the Statute belonged. Rather than begin with the crime of abandoning or neglecting cultivation and an outline of punishments under different circumstances, the articles of the Statute state some of the most concrete instances of abandonment and negligence. For example, clause 5 states:

> As regards those who do not pay attention to the cultivation of summer and winter crops, neglect the plowing or the hoeing even if the land is submerged, the weeding, the irrigation of their land, or other services for cultivation, and those who are not employed in the cultivation in such a manner as it is required, they will be warned for the first offence, and if they repeat to do it in spite of the warning, he will be punished by 50 stripes of the *kurbaj* [whip] for the second offence, and by the same stripes of the *kurbaj* for the

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86 Cultivation Statute, supra note 75.

third offence. As for the person who is unable to cultivate the flax in such a manner as it is suitable for it and does not carry out his duties of fertilizing, the macerating, and the dusting, the punishment which is settled as to the summer crops in this Clause will go into effect. 88

Distinctions and classifications exist in this clause, but their totality does not attempt to comprehensively sum up all possible cases. What about a fourth repetition? How many lashes should the offender receive? If clause 5 specifies concrete cases of negligence or abandonment of cultivation, clause 6 specifies more concrete cases of abandoning public works.

The Statute also defines the most detailed scenarios of crime. Clause 15 states that “in the event of a fallah hiding himself among the nomads, wearing their clothes, and being discovered among them afterward, if he owes the state arrears, the arrears will be collected from the nomads who hide him. If he does not owe arrears, the nomad who hides him will be conscripted into the military service if he is a young man, if he is an older man, he will be sent to the jail for six months.” 89 Exemplifying the principle of collective responsibility, this clause further reveals the attention to details (“the fallah hides among the nomads and wears their clothes”). At issue here is not precision in classification; there is no additional consideration of the fallah who hides among the nomads but does not wear their clothes. Rather, the Statute punishes one particular practice that seems to have been common among the peasantry without endeavoring to cover a whole range of other possible practices; the concrete references represent different instances that are not directed at conclusively deciding all possible instances. The Statute, unlike the codification attempts of the late nineteenth century, or the legislation establishing the commissions, did not attempt to produce a comprehensive gapless legal order to govern the social.

This concreteness might signify the rise of the regulatory state in Egypt (and elsewhere). 90 However, this language also testifies to another legal tradition. Far from a failure to be concise, these repetitions indicate that even when illegal practices and prescribed punishments are similar, no single abstract principle can be subtracted and applied to all cases. The plurality of the concrete, in other words, is the substance of the law. Its spatiality is fragmented and full of gaps. The singularity of the Statute’s provisions does not collapse them into a general narrative of law that applies everywhere. The provisions belong to an era before the advance of positivistic scientific legislation and the codification of “general rules.” The jurisprudence at the core of these early qanun-making practices is similar to the kind of writing of history in which, according to Jacques Rancière, one could insist on the singularity of the name, or on the concrete event, and refuse scientific writing that transforms the historical stage into a set of patterns and models. 91

88 Cultivation Statute, supra note 75.
89 Id.
Skeptical of modern law’s historical meta-narrative, post-structuralist accounts of modern law suggest that pre-modern legalities that modern law presumes to have overcome continue to haunt it; they are constitutive outsides against which the modern defines itself.92 In Egypt, too, modern colonial law claimed to have overcome the fusion of powers as manifested in the encroachment of the administration, and to have consequently established a purified, independent regime of law.93 Meanwhile, as the proliferation of pervasive legalities reveals, the fusion of administrative and judicial powers continued to haunt the regime of separation. But this post-structuralist approach to colonial histories focuses primarily on how the modern produces its powers against the pre-modern. It is less concerned with examining the pre-modern on its own terms, or in articulating differences between the two regimes that are not instrumental to the production of the modern.

The comparison with the Cultivation Statute reveals that it belonged to a different legal tradition, one that shared little with the elastic positivism of modern colonial law. Despite the fusion of administrative and judicial powers, as well as the management of labor through punishment, characteristic of both the Cultivation Statute and commission legality, the objectives of these institutions and their operations were different. Specifically, the Cultivation Statute aimed less to encompass the socio-agricultural and more to address particular problems facing the administration of the country. Unlike the elastic positivism of modern law, the Cultivation Statute manifested a lack of interest in capturing the entirety of social relations, even as it attempted to infiltrate them. Because the Statute operated without a framework of a positivist concept of the law and codification, the deployment of administrators to penalize crime and of penal measures to manage labor in concrete situations that did not correspond to general situations were practices that lacked a totalizing, colonizing capacity. The latter was intensified in the wedding of positivist codified law to pervasive legalities.

V. Conclusion

In Egypt, modern law’s codified operations and regime of separate powers were directed at expanding the reach of colonial law, eliminating pluralistic pre-colonial legalities, and establishing a gapless universe of the law. At the same time, different administrative-judicial commissions were constantly reinvented, representing the flexible operations of pervasive legalities that further contributed to the production of a gapless legal order. These two legal technologies can be read as representing the inside and outside of law, if one accepts the boundedness of the law, and begins from the grounds of the law as a limit concept. This law’s inside, however, was only the launching ground for other operations that did not share the form of the general law, but disclosed similar objectives, reach and


93 I borrow the argument about purification from Bruno Latour, We Have Never Been Modern (1993).
operations—to transform the socio-agricultural into a total, gapless terrain and to govern it from above and from below. The two technologies combined constituted elastic positivism.

At issue in colonial Egypt was not the suspension of modern law, but its intensified operations whether in the form of codes or pervasive legalities. The coloniality of the law does not only lie in its difference from metropolitan law. While such differences existed historically, the coloniality of modern law is also to be found in its own capacities and operations. In the case of Egypt, the first historical force of modern law was unleashed against the pre-colonial khedival legal order to obliterate it. Modern law, and its general institutions of positivism and liberal legality on the one hand and pervasive legality on the other, assumed its place and added one more country to the list expanding the universal reach of modern law. But for such a view of modern law to materialize, modern law as a coherent limit concept in relation to which there is an other or an outside (constitutive or otherwise) should be rethought as a zone of multiple legalities aspiring to govern the entirety of the social and the natural. When approached outside the meta-narrative and the concept of the law, pervasive legalities emerge as fulfilling the promise of positive codified law, and sharing with it its objective and fields of operation: the production of a gapless order to govern as much of the social as possible through the institutions and practices of elastic positivism. In this sense, modern law was a technology constitutive of colonial rule, enabling the state to assert its control over the entire socio-agricultural field. Without modern law, and its production of totality and gaplessness, this control would have been more difficult to materialize. In the colony, there was too much law.