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English Laws, Global Histories; or, What Makes a Court Supreme?

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Abstract This paper was presented as the Presidential Address at the North American Conference on British Studies in Atlanta in November 2021.

I begin by acknowledging that I speak to you on the lands of the Muscogee Nation and that I wrote this on the lands of the Monacan people, where I am so fortunate to live.

I feel morally obliged to make this acknowledgment. But it also announces one of my main concerns today: about how moral assertions sometimes do, and sometimes do not, operate through those practices we call law. Americans, Canadians, and others in this organization live each day with one of the most remarkable consequences of English law's global experience: its capacity for mutation. Consider, for instance, how English laws of property generated novel forms to make possible the dispossession of peoples around the globe, from the Abenaki to the Zulu. This mutation destroyed the worlds they inhabited. Mutations wrought elsewhere in the world often transformed laws in England, where the imperial origins of new practices were seldom noticed.[1] Given this, when I think about basic areas of law, I have a hard time understanding English laws, especially over long spells, without doing global history.

This is a British studies organization; what follows is a British studies address. I am a historian, and our members have tended to be largely historians. But I hope this is not entirely the case and will be less so over time. So, I want to work in multiple modes: not only history, but also law, though law is less my subject than a position from which the historian might track other phenomena over long spells and wide spaces.[2]

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[1] For instance, new practices of title registration first used in the empire were later adopted in England. The first nationwide system of voluntary title registration was established by the Vendor and Purchaser Act of 1874: 37 & 38 Vict., c. 78; Stuart Anderson, "Property," in *The Oxford History of the Laws of England*, vol. 12, *1820–1914* (Oxford, 2010); *Private Law*, ed. William Cornish et al., 64–78, 106–7, 194–225. Title registration had been a colonial practice since the start of the Virginia Company. See Susan Myra Kingsbury, ed., *The Records of the Virginia Company of London*, vol. 3 (Washington, 1933), 104, 106.

[2] Paul D. Halliday, "Legal History: Taking the Long View," in *The Oxford Handbook of Legal History*, ed. Markus D. Dubber and Christopher Tomlins (Oxford, 2018), 323–41.

Though I am a historian, my interest in law requires that I work in an unapologetically presentist way, by which I mean that I deploy a properly historical way of being to make it possible to think anew about how to be in our own world. Today, as I think historically away from, then back toward our present, I intend to disregard the most important barrier that divides us in this room: the boundaries separating historians into modernists and premodernists. I'll admit that I know more about the era from 1550 to 1850 than others, and at the risk of correction by those of you who know the epochs to both sides of those centuries better than I do, I plan to range quickly across the last half millennium.

I will explore a question I've long puzzled over: how might one produce a global history of English laws? We need this history; a global orientation offers the only way to conceive English laws in all their Englishness. I stress *English*, for the laws of a British empire were peculiarly English. Yet they were also multiform: so much more than indicated by all the maps of common law countries one might find online. We also need this history because understanding English law's extra-English transformations will help us think through any number of problems that people around the globe confront now in the possession and protection of rights in all their forms: substantive and procedural, civil, constitutional, and human.

Once upon a time, a legal historian might have written a global history of English law as a celebratory, formalist exercise in comparison framed around modern legal categories: one imagines a thick book with chapters on property, contract, crime, and other such topics that law schools teach. But that would not provide the kind of history of global connections that we need.[3] Rather than a chapter on property as forms of tenure and modes of alienation, I could imagine a chapter that would consider how English property laws dispossessed English peasants, Scots Highlanders, and Bengalis in linked processes during the eighteenth century.[4] Instead of a chapter on criminal law, perhaps it would be better to write one on jury trials, given how debates over who might sit on juries raised contentions about race and class from Ceylon to New South Wales in the early nineteenth century, at the same time that the English juror was increasingly hemmed in by new rules of evidence that lawyers pushed courts to articulate.[5] I can imagine a chapter on forced labor and enslavement, another on registration of land, and one more on law's closure during imperial security crises.[6]

A connective history of practices like these would reveal how, over the last millennium, English laws were *always* imperial.[7] Laws within England and laws beyond constituted one another from the start; they do so to this day. This mutual constitution of English laws within and beyond the isles resulted in part from major economic, political, and cultural forces flowing across the planet. But it also arose

[3] Thomas Duve, "What Is Global Legal History?" *Comparative Legal History* 8, no. 2 (2020): 73–115.

[4] E. P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (New York, 1993), 164–75.

[5] John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford, 2003), chap. 4.

[6] Interesting work has certainly been done in the place where labor meets law around the globe and across centuries: see, for example, Douglas Hay and Paul Craven, eds., *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955* (Chapel Hill, 2004); Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865* (Cambridge, 2010).

[7] R. R. Davies, *The First English Empire: Power and Identities in the British Isles, 1093–1343* (Oxford, 2000), esp. 19, 106.

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owing to practices peculiar to lawyers and judges, who looked and still look over their shoulders at the work of their peers in other lands. Today, I want to work on one such aspect of English law's professional life that we can *only* see through a global frame: the work of courts that claimed and still claim to be supreme.

As I do, I want to develop a few of my own claims. First, a court's supremacy had and still has as much to do with its moral premises as with technical aspects of law. This supremacy depends in large part on the quality of the court's actions in relation to those premises, and thus on the extent to which the people who must live according to its judgments accept them because those judgments accord with their own moral premises. Second, legal procedures matter. Legal procedures are the means by which moral claims—rights claims—are made real in our world.[8] I will talk some about writs so that we can think about rights. Third, the work of such courts has always brought them into conflict with other arms of the state: with colonial governors and postcolonial presidents and their agents. We might call this constitutional conflict. This conflict arose and still arises from the work such courts do for rights protection, by which they pronounce their moral premises. Finally, this conflict involved and still involves supreme courts in cycles of assertion and failure. Their supremacy has always been a claim rather than a fact. Occasional impotence in the face of those governors and presidents makes it even more important for us to understand the assertions of supreme courts historically.

To see all this, we will take a quick trip through four courts in three epochs: the English Court of King's Bench, particularly in the early seventeenth century; the Supreme Court of Ceylon, two centuries later; and, after a brief detour through a novel North American court, the Supreme Court of Sri Lanka, especially since that republic wrote a new constitution in 1978.

ENGLISH LAW'S EMPIRE IN THE ISLES, OR, WHAT MAKES A COURT SUPREME?

Supreme: it's one of those words we think we know. "Highest, chiefest, or most eminent of all." "[H]ighest of all, or sovereign."[9] But a seemingly straightforward word like *supreme*, for all its aiming for sovereignty, starts to look pretty weird the more you stare at it.

Consider what the English judge, Sir Robert Atkyns, called "[King] Solomon's hyperbole," which he drew from the book of Ecclesiastes: "If thou seest the oppression of the poor, and violent perverting of judgment and justice in a province, marvel not at the matter: for he that is higher than the highest regardeth; and there be higher

[8] Law's technical aspects are never just technicalities; they provide the means by which people live according to what Robert Cover called their *nomos*. Understood from the position of our shared normative commitments, "law becomes not merely a system of rules to be observed, but a world in which we live." Robert M. Cover, "Nomos and Narrative," *Harvard Law Review* 97, no. 4 (1983): 4–68, at 5. All kinds of historians might thus benefit from following the injunction that Robert Gordon gave to legal historians nearly forty years ago: to attend to "mandarin texts" of law to tap "into a structure that isn't at all peculiar to lawyers." Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 57, nos. 1–2 (1984), 57–126, at 120.

[9] Nathan Bailey, s.v, "supreme," *An Universal Etymological English Dictionary* (London, 1721); John Kersey, s.v. "supreme," *A New English Dictionary* (London, 1702).

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than they."[10] Earthly judges err. For centuries, they were reminded how they would answer someday to a higher judge. We can thus appreciate why the "Supreme Court of Heaven" loomed large in reflections on the judicial office: all judges would be judged.[11]

Here on earth, where mortals likened kings to gods, it made sense that the king's court should serve the same function that "the supreme court of God's presence" served in heaven: as the ultimate site of judgment.[12] A medieval king could not do this alone. In the twelfth and thirteenth centuries, courts proliferated as the king delegated to others the performance of his obligation to give his subjects the protection of his laws.[13] The greatest of these courts convened in Westminster Hall: King's Bench, Common Pleas, Chancery, and the Exchequer. Sovereignty divided as it flowed from the king along multiple channels into many courts.

So, might there have been more than one site of supremacy? The patriarchal theorist Robert Filmer did not think so.[14] Nor did John Cook, who would later prosecute Charles I. Every kingdom must have "one supreme tribunal from which there can be no appeal, otherwise . . . civil war must follow unevitably [*sic*]."[15] Supremacy was singular and absolute, or it was nothing.

Only one English court accorded with this idea of supremacy: Parliament.[16] Judgments by Parliament were produced as statutes and judges could not nullify statutes. But this did not prevent them from silently curbing statutes in application.[17] As they did so, we might say that *a* supreme court—King's Bench—quietly pushed back at *the* Supreme Court: Parliament. Debates about supremacy's location thus pitted different forms of lawmaking—legislative and adjudicative—against each

[10] Robert Atkyns, *The Power, Jurisdiction and Priviledge of Parliament; and the Antiquity of the House of Commons Asserted* (London, 1689), 36–37, quoting Ecclesiastes 5:8.

[11] William Cowper, *Heaven opened, Wherein the counsaile of God concerning mans salvation is yet more cleerely manifested* [. . .] (London, 1611), 12. Christ was thus "our blessed advocate in the Supreme Court of Heaven." Thomas Curteis, *Essays Moral and Divine* (London, 1715), 44.

[12] John Prideaux, *The Christian's Expectation. A Sermon Preached at the Court* (Oxford, 1636). 21.

[13] Giles Jacob, author of the most important legal dictionary of the eighteenth century, noted that a court "signifies the King's palace, or mansion; and is more especially the place where justice is judicially administered." Jacob silently marked a temporal shift: that a court, as a place where certain work was done in the king's presence, had been transposed over time into an institution derived, but now separated, from the king's person. Giles Jacob, s.v. "court," *A new law-dictionary: containing the interpretation and definition of words and terms used in the law* [. . .] (London, 1729).

[14] "The last appeal in all government must still be to an arbitrary power, or else appeals will be *in infinitum*, never at an end." Robert Filmer, *The free-holders grand inquest touching on our Sovereign Lord the King and his Parliament to which are added observations upon forms of government* (London, 1679), 40.

[15] John Cook, *The vindication of the law: so far forth as scripture and right reason may be judge, and speedy justice (which exalts a nation) may be advanced* (London, 1652), 88. Wilfrid Prest, s.v. "Cook, John (bap. 1608, d. 1660)," *Oxford Dictionary of National Biography.*

[16] Lord Chancellor Ellesmere called Parliament "the Supreme Court of all." Thomas Egerton, *The speech of the Lord Chancellor of England, in the Eschequer Chamber, touching the post-nati* (London, 1609), 17. Parliament exercised this supremacy in part by regulating courts of judicature. Thus, "Parliament is the supreme court, by which all other courts, which derive their power for execution of laws from the king by his commissioners, are to be regulated." John Geree, *Siniorragia the sifters sieve broken, or a reply to Doctor Boughen's sifting my case of conscience touching the Kings coronation oath* (London, 1648), 117.

[17] Coke's report of *Bonham's Case* is the traditional starting point for discussion of this. See David Chan Smith, *Sir Edward Coke and the Reformation of the Laws: Religion, Politics and Jurisprudence, 1578–1616* (Cambridge, 2014), 174; Charles M. Gray, "Bonham's Case Reviewed," *Proceedings of the American Philosophical Society* 116, no. 1 (1972): 35–58, at 42.

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other. As legislating came increasingly to be entangled in debates about representation, it also set up a conflict between the will of majorities and the rights of minorities and individuals, which petitioners increasingly asked courts to articulate and defend. But I get ahead of myself.

For all the glories of Parliament, many called the Court of King's Bench "supreme." That made sense: it was the court in which the king himself was presumed to sit in judgment, even when he left that work to his judges.[18]

This made King's Bench "the *custos morum* of the realm, [that] may punish any offence contrary to the first principles of justice. It keeps all inferior jurisdictions within the bounds of their authority."[19] John Sheridan drew here from the 1663 trial of Sir Charles Sidley for showing "*son nude corps in un balcony in Covent Garden al grand multitude de people*." As the court decided what to do with the scandalous Sidley, it explained that King's Bench "*est custos morum de touts les subjects le Roy.*"[20] In Sidley's case and others where the justices' role as *custos morum* was invoked, the morals they guarded were often sexual. But Sheridan expanded the concept. Moral problems addressed by the court might concern something else altogether: "the first principles of justice," especially because defending those principles had something to do with keeping other jurisdictions—other agents of the state—within bounds. Sheridan thus entangled the moral and the constitutional. The seemingly dull matter of minding jurisdictional bounds is how "first principles of justice" are to be realized.[21]

Here, transcendent claims about morality converge with the technical business of writs, by which the court binds others. Writs made and make possible the protection of the "first principles of justice" and the protection of what were increasingly called rights. The rights-protecting work of the *custos morum* was and remains the fundamental business of any court claiming to be supreme.

Where did Sheridan and others get such grandiose ideas? From Chief Justice Sir Edward Coke, in the case of the obstreperous Plymouth alderman, James Bagg, dismissed from office by his peers, then restored to it by King's Bench in the most important early use of the writ of mandamus. Coke explained, in his court's order for Bagg in 1615: "to this Court of King's Bench belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extrajudicial . . . so that no wrong . . . can be done but that it shall be (here) reformed or punished by due course of law."[22] This bold language expresses a repugnancy

[18] Smith, *Sir Edward Coke*, chap. 8, esp. 250–51, 268–71.

[19] John Sheridan, *The Present Practice of the Court of King's Bench* (London, 1784), 15.

[20] 1 Siderfin 168, 82 *Eng. Rep.* 1036. This description was often invoked: e.g., 2 Strange 790, 93 *Eng. Rep.* 850 (1727); and 3 Burr. 1438, 97 *Eng. Rep.* 915 (1763).

[21] Sheridan, *Present Practice of the Court of King's Bench*, 15.

[22] 11 Co. Rep. 98a, 77 *Eng. Rep.* 1277–78. Coke repeated his formula from *Bagg's Case*, though expanding it as a justification of the court's use of all the prerogative writs: Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* (London, 1644), 71. At the turn of the next century, Chief Justice Sir John Holt accorded himself similar powers for similar reasons: "The Court of the King's Bench hath the Supreme Intendancy over all Jurisdictions and Authoritys in England"; see justification by Chief Justice Holt, British Library, London, Add. MS 35980, fol. 122, quoted in Philip Hamburger, *Law and Judicial Duty* (Cambridge, MA, 2008), 208n77. On mandamus before *Bagg*, see John Baker, *The Reinvention of Magna Carta, 1216–1616* (Cambridge, 2017), 203–6, 396–98.

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principle: a non-specific idea of wrong that only law's due course, determined by a supreme court, may right. Such a repugnancy principle is a constitutional limit that might only be located by the all-supervising court that makes itself supreme by creating and using writs like mandamus to perform its role as *custos morum*.[23]

Lord Chancellor Ellesmere was stunned by Coke's arrogant claim in *Bagg's Case*.[24] Their personal battle for supremacy ended badly for Coke when the king dismissed him from the bench in late 1616.[25] Remarkably, Coke's ambitious, supremacy-asserting formulation stuck. King's Bench justices continued to correct all wrongs as they used what were called the prerogative writs: especially mandamus, to order others to perform some function that, by law, they are obliged to perform; certiorari, by which proceedings of other officials might be reviewed and perhaps quashed; and habeas corpus, by which prisoners might have the terms of their detention reviewed.[26] These prerogative writs made King's Bench supreme, giving it the survey of the entire institutional landscape. Such procedural devices made King's Bench, and imperial courts following in its footsteps, the *custos morum*.

From the beginning, use of these writs was imperial work, within the isles and beyond. To find the empire within the isles, managed by an English supreme court, we might look to strange legal spaces like Berwick-upon-Tweed, the Cinque Ports, and the Marches of Wales: places using different kinds of law in distinctive sorts of courts, which often operated at defiance of laws used in the rest of the English realm. Normal writs from the king's courts in Westminster did not go to these places. But the prerogative writs were not normal writs, because their purpose was to ensure that the king's subjects would not be harmed by the king's officers wherever they used the king's laws. Sometimes, officers in odd jurisdictions like these initially disobeyed the court when they received these special writs. To enforce its commands, King's Bench used its roughest powers, fining and even jailing those who showed such contempt for its supervisory jurisdiction. Nothing like a £500 fine against Berwick's sheriff or incarceration in his own jail for the jailer of the Council of the Marches of Wales to show recalcitrant local officials who the *custos morum* was.[27] Ordering imperial spaces like these was, from the

[23] On repugnancy as a constitutional principle, see Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, MA, 2004), 1, 40–49.

[24] "[T]he words do import as if the King's Bench had a super-interdependency [*sic*] over the government itself." By such claims, Ellesmere observed, King's Bench threatened to replace the king and his privy council as "the chief watch tower for all points of misgovernment." "Observacions upon ye Lord Cookes Reportes," in Louis A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge, 1977), 307–8.

[25] J. H. Baker, *The Legal Profession and the Common Law: Historical Essays* (London, 1986), chap. 13. David Chan Smith has shown how Coke and Ellesmere—and common law and equity—were largely cooperative, this episode notwithstanding. Smith, *Sir Edward Coke*, chap. 7.

[26] John Baker, *An Introduction to English Legal History*, 5th ed. (Oxford, 2019), 153–64; Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA, 2010), chap. 3, esp. 79–87; Edith G. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Cambridge, MA, 1963); Kevin Costello, "The Writ of Certiorari and Review of Summary Criminal Convictions, 1660–1848," *Law Quarterly Review*, no. 128 (2012): 443–65; Kevin Costello, "Mandamus and Borough Political Life, 1615 to 1780," *Journal of Legal History* 42, no. 2 (2021): 171–201.

[27] Halliday, *Habeas Corpus*, 11–14, 82–83, 259–61.

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beginning, the work of a court making itself supreme by commanding the force, through contempt process, that ensured obedience to its orders.

As we conclude consideration of our first court and our first epoch, three things stand out. First, a court that claims to be supreme is not only a superior jurisdiction telling others what they may do; it is a superior moral force, a *custos morum*, guarding "the first principles of justice." Second, this court did that work using very special tools: the prerogative writs, by which "no wrong" could not be righted. Finally, it did so within England and beyond, all across a jurisdictionally complex empire as it then existed around the isles.[28] What happened when the idea of the *custos morum* began to spread around the globe?

SUPREME COURTS, FROM THE CARIBBEAN TO CALCUTTA

Given judicial supervision of the English sovereign's servants in imperial dominions close to home, it is little wonder that the practice traveled to dominions far away. If authorities in the Channel Isles could be questioned in King's Bench, why not do the same to question authorities in Caribbean isles? But Westminster is awfully far from Spanish Town or Bridgetown. Geography meant that King's Bench could not order the empire beyond the seas. Courts *like* King's Bench, using writs *like* those of King's Bench, would. There would not be one imperial supreme court. There would be many.

If you Google "common law countries," you will be served up endless maps of the globe showing where English laws have something to do with the laws used in those places today. Such maps depict a Westphalian fantasy of law's empire: that neat notion of sovereignty that has ostensibly ordered the world since 1648, by which clean lines and the printer's contrasting colors smooth the wrinkles and blotches of sovereign possession, from Britain's archipelago to New Zealand's. If we reimagine those maps, we might do better to think of English law's empire as little red nodes connected by black dashed lines crossing the seas. Those lines were not just shipping lanes; they were vectors by which English laws moved. Those red nodes? Those weren't just ports or colonial capitals; they were the seats of supreme courts. This was an empire made as much or more by courts as by commerce or cotton, military power or scientific knowledge, or any of the other goods, ideas, or practices historians track when they go global.[29]

The first imperial court called "Supreme" was Jamaica's, created in 1664.[30] But as in nearby Barbados, Jamaica's governor and council served as a Court of Appeal *from*

[28] One might reasonably argue that, as time passed, this impulse to impose the judiciary's idea of what constitutes law on other state actors increased in imperial settings while it declined within England itself. See John McLaren, *Dewigged, Bothered, and Bewildered: British Colonial Judges on Trial, 1800–1900* (Toronto, 2011), 275.

[29] On European laws' global work, see Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge, 2002); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge, 2010). For examples of group projects that suggest possibilities for going global by following law, see the articles in "The Travels of Law: Indian Ocean Itineraries," ed. Renisa Mawani and Iza Hussin, special issue, *Law and History Review* 32, no. 4 (2014): 733–889; and the contributions in Lauren Benton and Richard J. Ross, eds., *Legal Pluralism and Empires, 1500–1850* (New York, 2013).

[30] Acting according to his commission, Sir Thomas Modyford, Jamaica's governor, created "one Supreme Court to have jurisdiction over all pleas whatsoever" and to police the island's other courts.

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the Supreme Court.[31] To quote Ecclesiastes, there was a court "higher than the highest."[32] The same pertained in New York, where a 1691 statute created a Supreme Court, and in Quebec, where in 1764 the British erected a Supreme Court, or what was known colloquially as King's Bench. Like its namesake in Westminster, Quebec's Supreme Court used the prerogative writs to monitor the work of other agents of colonial government; so did New York's. But their supremacy was restricted by the simplest fact of all: they were all constitutionally entangled with local colonial governors.[33]

Looking east instead of west, the vast powers granted to the new Supreme Court established at Calcutta in 1774 were also raised by likeness to King's Bench.[34] The court's royal charter declared: "All justices of peace, sheriffs, and other magistrates . . . shall be subject to the order and control of the Supreme Court, in the like manner as inferior courts and magistrates in England are subject to the order and control of the court of King's Bench; to which end, the Supreme Court is impowered to award writs of mandamus, certiorari, procedendo, and error, directed to the said inferior courts or magistrates, and to punish any contempt of willful disobedience thereto by fine and imprisonment."[35] No imperial executive had faced such a judicial juggernaut before. Chief Justice Elijah Impey wore the same robes Coke had worn when he performed his claims to supremacy. The East India Company, unimpressed by his red, fur-lined outfit, begged to differ, leading to a series of major constitutional conflicts.[36]

See entries for 15 February 1664 and 20 February 1668, respectively, in *Calendar of State Papers Colonial, America and West Indies*, vol. 5, *1661–1668*, ed. W. Noel Sainsbury (London, 1880), 185–86, 550–51.

[31] In 1680, Jamaicans asked the Board of Trade and Plantations to allow "some method of appeal from the judgment of the Supreme Court" of Jamaica modeled on appeals to the Exchequer Chamber in England. Instead, the board recommended that appeals continue to go the governor and council, and from thence to the Privy Council. W. Noel Sainsbury, ed., *Calendar of State Papers Colonial, America and West Indies*, vol. 10, *1677–1680*, 631, 639. There are tantalizing signs of King's Bench attempts to supervise Jamaica and Barbados by habeas corpus, though not by appeals to Westminster on writs of error. See Halliday, *Habeas Corpus*, 236, 268–69, 271.

[32] Ecclesiastes 5:8.

[33] "An Act for the Establishing Courts of Judicature," in *Laws & Acts of the General Assembly for Their Majesties Province of New-York* (New York, 1694), 66–67; *An Ordinance of His Excellency and Council for the Establishing Courts of Judicature* [. . .] *within this Province of New-York* (New York, 1699). Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill, 2005), 50; Julius Goebel and T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664–1776)* (New York, 1944), 25–29; Eben Moglen, "Settling the Law: Legal Development in New York, 1664–1776" (PhD diss., Yale University, 1993), 55–57, 142–43, 157, 164n149; Adam Shortt and Arthur G. Doughty, *Documents Relating to the Constitutional History of Canada, 1759–1791* (Ottawa, 1907), 120–21, 129, 137, 149, 190–92. For examples of gubernatorial obstruction of Quebec's King's Bench, see Halliday, *Habeas Corpus*, 274–78.

[34] The statute that outlined the court's form noted that unchecked East India Company dominion did not "provide for the due administration of justice." 13 George III, c. 63, §13.

[35] *A collection of statutes concerning the incorporation, trade, and commerce of the East India Company, and the government of the British Possessions in India* (London, 1794), l.

[36] Robert Travers, *Ideology and Empire in Eighteenth-Century India: The British in Bengal* (Cambridge, 2007), chap. 5; Benton, *Law and Colonial Cultures*, 127–52. Mithi Mukherjee discusses these conflicts in Calcutta to open up an important distinction between "the colonial as the discourse and practice of power and governance, and the imperial as the discourse and practice of justice." Mithi Mukherkee, *India in the Shadows of Empire: A Legal and Political History, 1774–1950* (Oxford, 2010), xv–xix and chap. 2, at 46.

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Who then would be supreme? The company, which gained its victory in Parliament when it passed the Judicature Act of 1781. Here we might use the language of modern lawyers and call this a jurisdiction-stripping attack on Calcutta's court using legislative weapons.[37] As a sop to their bruised dignity, the company granted the justices' wish for a new courthouse, one befitting what turned out to be their supreme self-conceit. A balustrade along the top and a wall around the bottom gave architectural expression to the court's constitutional containment: executive authority in India had engaged legislative authority in Westminster to wall off judicial authority in India.[38]

THE SUPREME COURT OF CEYLON, OR, *THE CHIEF JUSTICE* V. *THE GOVERNOR*

The Calcutta Supreme Court illustrates how, as supreme courts proliferated around the globe, they came into ever greater conflict with others who claimed to speak in the sovereign's voice.[39] One such site of conflict was Ceylon, taken by the British from the Dutch in 1796.

By a charter of 1801, the king erected a new supreme court at Hulftsdorp, on the edge of Colombo. As elsewhere, Colombo's justices were empowered to use the prerogative writs to supervise other authorities, "in such manner and form as the inferior magistrates of . . . England are by law subject to the order and control of our court of King's Bench."[40] By simile, Ceylon's Supreme Court gained use of the prerogative writs, by which it might constrain errant forms of the sovereign's authority.[41] Using them produced cycles of judicial assertion and failure as island governors contested judicial claims of supremacy.

Such contests began immediately.[42] Personal slights bred suspicions; suspicions bred competing claims for supremacy. Both sides used constitutional language, full of words like *separation*, *balancing*, and *checking*.[43] A new justice appointed in

[37] 21 George III, c. 70.

[38] Thomas Daniell, "Plate 5: The New Court House," in *Views in Calcutta* (London, 1786–88).

[39] For a broad look at this phenomenon across the empire in the nineteenth century, see McLaren, *Dewigged, Bothered, and Bewildered*. For a specific example, see Haruki Inagaki, "Law, Agency, and Emergency in British Imperial Politics: Conflict between the Government and the King's Court in Bombay in the 1820s," *East Asian Journal of British History*, no. 5 (2016): 207–24.

[40] G. C. Mendis, ed., Charter of 1801, §82, in *The Colebrooke-Cameron Papers: Documents on British Colonial Policy in Ceylon, 1796–1833*, vol. 2 (Oxford, 1956), 193–94.

[41] T. Nadaraja, *The Legal System of Ceylon in Its Historical Setting* (Leiden, 1972), 60.

[42] Like Calcutta's justices, Ceylon's were often offended by what they took as acts of contempt for them, and thus for English law, by governors and others: for instance, when Colombo's military commander barred access to their court, and not long after, when the governor removed them to other premises altogether. Gov. Frederick North, to the justices of the Supreme Court, 2 October 1804, The National Archives, Kew, CO 54/14, fol. 214–18. (This repository is hereafter abbreviated as TNA.) Governors also continually sought to cut judicial budgets. See Gov. Sir Robert Brownrigg to William Huskisson, 30 May 1817, British Library, Add. MS, 38741, fol. 108; Gov. Sir Edward Barnes to Chief Justice A. H. Giffard, 20 May 1825, Sri Lankan National Archives, Colombo, 7/234, p. 153.

[43] During ugly personal battles of 1807–08, Governor Thomas Maitland complained that Chief Justice Edmund Lushington was "setting himself up against government." Maitland asked for "a considerable change of the whole constitution of the Supreme Court." Justice Alexander Johnston, note of conversation with Chief Justice Lushington, [1807?], Sri Lankan National Archives, 25.1/34, fol. 236v; Gov. Maitland to anonymous, 4 January 1808, TNA, CO 54/27, fol. 1v.

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1806, Sir Alexander Johnston, improved relations as he pursued a goal the governor shared: adoption of jury trials. As a result, by a new charter of 1810, Ceylon became the first British colony with so-called native jurors.[44] At the same time, and also led by Johnston, Ceylon began a halting process to abolish slavery in the island.[45]

Governor Robert Brownrigg agreed with Chief Justice Johnston about the need to end slavery. But the way Johnston deployed the new jury process to pursue abolition angered him. Johnston summoned Sinhalese and Tamil residents of Colombo and around the island as "special juries" and had them sign petitions to force the governor's hand on emancipation.[46] Worse than this politicization of juries, Johnston launched a multi-media campaign in the island and in Britain to advertise his court's beneficence. He commissioned James Stephanoff to create a painting that simultaneously depicted the first jury trial and celebrated the promise to end slavery; this was then reproduced in aquatints by multiple printers (figure 1). The hand-colored prints were the heart of a political marketing program, complete with an antislavery drama by the evangelical poet Hannah More and music by a young Felix Mendelsohn.[47] An English court, Stephanoff's image told viewers, does something magical: it integrates diverse peoples under a single set of moral-legal commitments. This was a visual argument that a court's supremacy must be exercised over other agents of sovereign authority: governors, councils, military leaders. Brownrigg knew that the claims of Ceylon's *custos morum* came at his expense; conflict ensued.

By the time that Stephanoff's image appeared in Britain, imperial security problems following the 1815 conquest of the kingdom of Kandy were provoking more battles between court and governor over the administration of justice in the island's interior.[48] Many of these were fought with the same prerogative writs supreme courts had used since *Bagg's Case* two hundred years earlier.[49] The court

[44] The 1810 charter and accompanying instructions are in Mendis, *Colebrooke-Cameron Papers*, 200–13.

[45] Fully ending slavery would take decades. Nira Wickramasinghe, *Slave in a Palanquin: Colonial Servitude and Resistance in Sri Lanka* (New York, 2020).

[46] The "special juries" that spoke on the slavery question were, Brownrigg reported, "invited to convene periodically on political consultations, which the court undertake to record." Brownrigg to the Earl of Bathurst, 22 May 1817, TNA, CO 54/70, fol. 331.

[47] Stephanoff reportedly worked from a drawing made on the scene by a Sinhalese juror. Alexander Johnston Papers, file 40, British Library, EAP835/5/1/3, https://eap.bl.uk/archive-file/EAP835-5-1-3. For the painting, see Yale Center for British Art, B1975.4.2003. On Stephanoff's image, island politics, and Johnston's media campaign, see Paul D. Halliday, "Envisioning Law's Empire: Art Meets Constitutional Politics in the Supreme Court of Ceylon, 1800–1833" (unpublished manuscript).

[48] For later conflicts over jurisdiction in Kandy, see Gov. Edward Barnes to the justices of the Supreme Court, 18 June 1825, Sri Lankan National Archives, 7/234, fol. 176–83.

[49] The 1801 charter had appointed use of the prerogative writs, though it did not name habeas corpus. As did other supreme courts, the justices in Colombo analogized their authority to use habeas corpus by common law. As Justice Charles Marshall put it, "the right of issuing writs of habeas corpus has constantly been exercised by this court, in similar cases, and according to the same rules, in and by which the power is exercised by the Court of King's Bench"; see Evidence of Justice Marshall to the Commissioners of Eastern Inquiry, 30 March 1830, TNA, CO 416/17, p. 169. The court also used certiorari extensively, as indicated in the court's records of criminal proceedings, Sri Lankan National Archives, 81/151, 152, and 153. Successive governors condemned the Supreme Court's habit of using such writs; see, for example, Gov. Brownrigg to the Earl of Bathurst, 17 November 1815, TNA, CO54/57, fol. 39–41v. The court regularly used habeas corpus to police everything from the governor's use of martial law to family custody battles: see Return of writs of habeas corpus issued by the Supreme Court, TNA, CO416/16,

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Figure 1—"The Supreme Court of Judicature in the Island of Ceylon." Hand-colored aquatint by William Bennet, published by Rudolph Ackermann and dedicated to Chief Justice Sir Alexander Johnston, based on a watercolor by James Stephanoff (ca. 1818). Yale Center for British Art, B1977.14.13147.

routinely used certiorari to control lesser courts and magistrates, many of whom otherwise reported to the governor. When they disobeyed, sometimes with the governor's support, the Colombo Supreme Court did as its forbears in Calcutta and Westminster did: it imposed its will by proceedings on contempt. Governors responded by using their councils to pass regulations to neuter the court's supervision. Little wonder that, by 1830, a former Ceylon justice could look back on the last three decades and identify an almost unbroken string of governors' "hostility to the Supreme Court."[50]

THE FIRST POSTCOLONIAL SUPREME COURT

Hostilities of this sort continued wherever supreme courts appeared. Nova Scotia got its *custos morum* in 1754; Newfoundland did so in 1793. A Supreme Court was

fol. 364–68; Supreme Court session of 9 January 1824, Sri Lankan National Archives, 81/152 (unfol.); and Justice Rough in chambers, 10 December 1832, 81/154 (unfol.).

[50] Comments for the Commissioners of Inquiry by Sir Harding Giffard, [1830], TNA, CO 416/14, fol. 30v.

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established in Madras in 1801, in New South Wales in 1823, and in Van Diemen's Land the year following.[51]

The most distinctive of these supreme courts began sitting in New York City in 1789. American historians and lawyers, pondering what they call "the early republic," project forward into a nascent national history as they consider this court's first decades. A British studies scholar might observe that this was the first postcolonial supreme court. We are thus left to wonder of the new Supreme Court of the new United States: how did English law's empire persist in this first postcolonial state?

An American lawyer or historian, for good reason, might respond that a new nation's Supreme Court had been given life by a novel written constitution; this made the Constitution, not the court, supreme. But people at a British studies conference might say two things in reply. First, imperial supreme courts had long been established by written constitutions, though we usually call them charters or commissions. Second, whether penned in a Philadelphia courthouse or in the colonial office, the matter of who would serve as the supreme interpreter of that constitution or charter remained unresolved. Whether it was in a written document or in norms found elsewhere, we are left with the same repugnancy principle Coke proclaimed in Bagg's case in 1615, and with the fact that some judge must be supreme to locate the line between actions that are good by law and those repugnant to it.

Chief Justice John Marshall gave the most important early postcolonial answer to questions about a supreme court's work in *Marbury* v. *Madison* in 1803. Marbury's counsel encouraged Marshall to take a broad view of his authority on the prerogative writ of mandamus, speaking words that echoed Coke's almost two centuries before: "This is the supreme court, and by reason of its supremacy must have the superintendence of the inferior tribunals and officers, whether judicial or ministerial . . . From this principle alone the court of King's Bench in England derives the power of issuing the writs of mandamus and prohibition."[52] Marshall ran with this claim, channeling English norms of judicial duty, even as he searched out the bounds of an innovative republican constitution and the role of his court in policing those bounds: "It is emphatically the province and duty of the judicial department to say what the law is. . . If two laws conflict with each other, the courts must decide on the operation of each . . .This is of the very essence of judicial duty."[53] The unusual supremacy of Marshall's court would be built out of his opinion in the years ahead.[54]

Justices in an American supreme court would accomplish what justices in Colombo and Calcutta in the same period failed to achieve: they would make themselves the arbiters of the meaning of the Constitution by which they and all other authorities under the sovereign operated. The way US justices did so drew from

[51] Philip Girard, Jim Phillips, and Barry Cahill, eds., *The Supreme Court of Nova Scotia, 1754–2004: From Imperial Bastion to Provincial Oracle* (Toronto, 2004), chap. 4; Judicature Act of 1792 [Newfoundland], 32 George III, c. 46; *Letters Patent Establishing the Supreme Court of Judicature, at Fort St. George in the East-Indies* (1800); Bruce Kercher, *An Unruly Child: A History of Law in Australia* (St. Leonard's, 1995), 71.

[52] *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 146–47, quoted and discussed in James E. Pfander, "*Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers," *Columbia Law Review* 101, no. 7 (2001): 1533–34.

[53] *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 177–78.

[54] G. Edward White, *Law in American History*, vol. 1, *From the Colonial Years through the Civil War* (Oxford, 2012), 191.

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English law's global experience, in which supreme courts acted as custodians of morals by using writs first developed in King's Bench. But this was not a simple transfer of English law into American law. It was a reimagining of English law; it was a redeployment of something old in forms that were new, and which were now directed toward ends previously unforeseen. Here we encounter the strange postcolonial persistence of English law's empire, through independence and despite a novel written constitution; we encounter very English ideas of judicial duty to declare what is repugnant to law in new environments around the globe. We can see how this works today by looking into one more postcolonial space.

THE SUPREME COURT OF SRI LANKA, OR, *THE CHIEF JUSTICE* V. *THE PRESIDENT*

In Ceylon, hostilities between executive officers and a court claiming to be supreme continued: past 1948, when Ceylon became a dominion; past 1972, when it became the fully independent Democratic Socialist Republic of Sri Lanka; and past 1978, when it made a new constitution.[55] Nonetheless, on ceremonial occasions, Sri Lanka's Supreme Court justices continue to wear the same red robes that Elijah Impey wore on the banks of the Hooghly and Edward Coke wore on the banks of the Thames. I want to take seriously what those justices may be telling us when they wear such robes today, about what historians, if not lawyers, sometimes dismiss as nothing but a sham: "the rule of law."

To do so, I want to focus on one justice you can see in photos of such occasions: Shirani Bandaranayake. Long before she became Sri Lanka's first female justice, then chief justice, Bandaranyake earned her doctorate at London's School of Oriental and African Studies, where she wrote a history of the law of local/central government relations in Sri Lanka and the United Kingdom. There she gave extensive attention to the use of the prerogative writs as judicial tools for keeping executive actors within legal bounds.[56] Words written in her youth, and those she later wrote from the bench, suggest that she did something more serious than wearing an odd, old outfit whenever she put on her robes and stood with her colleagues for portraits before the large copy of Stephanoff's painting that hangs in Sri Lanka's Supreme Court building today (fig. 1). Rather, she declared the Sri Lankan judiciary's place in English law's persistent empire; she made claims about the rule of law, a rule supervised by a *custos morum*.

I want to see how we might think with history about the place of the judicial function in defining and maintaining rights in liberal democratic postcolonial places, and especially in those like Sri Lanka and the United States that are rocked by political conflicts. Sri Lanka's Supreme Court, like its predecessors and its companions

[55] Rehan Abeyratne, "Uncertain Sovereignty: Ceylon as a Dominion, 1948–1972," *International Journal of Constitutional Law* 17, no. 4 (2019): 1258–82; Deepika Udagama, "The Sri Lankan Legal Complex and the Liberal Project: Only Thus Far and No More," in *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex*, ed. Terrence C. Halliday, Lucien Karpik, and Malcolm M. Freeley (Cambridge, 2012), 219–44.

[56] Shirani Bandaranayake, "The Devolution of Government in Sri Lanka: Legal Aspects of the Relationship between Central Government and Local Government; An Historical and Comparative Study" (PhD diss., University of London, 1986), chap. 7.

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around the globe today, persists in the same cycles of assertion and failure as *custos morum*. Bandaranayake's story helps us see this. To understand how, we must first make a quick tour through the history of Sri Lanka's modern judiciary and its use of the prerogative writs in new forms.

For all the rupture produced by independence, at critical moments, members of Sri Lanka's judiciary have seen themselves as maintainers of practices that passed from colony to nation state. It was perhaps no accident that in 1962, Justice Henry Tambiah, a minority Tamil and author of works of historical jurisprudence, declared for judicial supremacy in surprisingly English terms. He, like others on the bench, celebrated how "England is different" from Sri Lanka in the constitutional, statutory, and normative contexts in which its courts work. Nonetheless, like American Supreme Court justices, Tambiah cited Blackstone approvingly for "the independence of the judiciary," which "should not be subjected to any extraneous interference." The Sri Lankan Supreme Court, like its colonial predecessor, was thus "clothed with certain powers, rights, and duties," including "original jurisdiction . . . to issue prerogative writs," without any necessity that such power be granted to courts by statute following independence.[57] In other words, Tambiah claimed his court's possession by common law of the procedural instruments that make it the *custos morum*.

A new constitution in 1978 lay new ground for judicial work, in part by articulating a number of "Fundamental Rights," including freedom of speech and conscience, equality before the law, and freedom from arbitrary arrest, detention, and torture. By Article 125, the Supreme Court has "sole and exclusive jurisdiction . . . relating to the interpretation of the Constitution," and by Article 126, "sole and exclusive jurisdiction to hear and determine any question relating to . . . any Fundamental Right." Like an imperial supreme court charter, the Constitution empowers Courts of Appeal and High Courts to use the prerogative writs to monitor the workings of executive and administrative power; where "there is prima facie evidence of an infringement" of a Fundamental Right, the matter must be referred to the Supreme Court.[58] By these means, King's Bench's imperial writs had been constitutionalized for use in the postcolonial state.[59] We might go further to say that the function of *custos morum* had been constitutionalized.

But, as Sir Edward Coke learned in 1616 and as a succession of Ceylon justices learned two centuries later, a court *claiming* supremacy runs through cycles of assertion and failure owing to pressures from without. Perhaps no pressures are greater than security emergencies arising from civil war, which Sri Lanka suffered from

[57] *Piyadasa* v. *Bribery Commissioner* (1962), 64 NLR 388-90. After retiring from the Supreme Court, Tambiah wrote *The Judicature of Sri Lanka in its Historical Setting* (Colombo, 1977), among other works. He carried such ideas with him through the post-empire, first as a justice of Sierra Leone's Supreme Court and later as an appeals court judge in Gambia. See S. Arumugam, s.v. "Henry Tambiah," *A Dictionary of Biography of Ceylon Tamils* (London, 1997), 217–18.

[58] 1978 Constitution of Sri Lanka, §§126 (3) & (4), 140, and 154 P (4).

[59] Melissa Crouch, "The Prerogative Writs as Constitutional Transfer," *Oxford Journal of Legal Studies* 38, no. 4 (2018): 653–75. As she notes, "The writs are an example of the legacy of post-independence constitution-making. The writs are also a demonstration of the way ideas about the need to entrench administrative review travelled across the postcolonial world in the form of a constitutional transfer (at 656)." See also Dinesha Samararatne, "Judicial Borrowing and Creeping Influences: Indian Jurisprudence in Sri Lankan Public Law," *Indian Law Review* 2, no. 3 (2018): 205–23, at 208–9.

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1983 to 2009, and a constitution that grants broad powers to the president in making legislation and judicial appointments.[60] Supreme Court supremacy, especially in its purview of Fundamental Rights, has thus waxed and waned, just as the supervisory abilities of its predecessors did. Can this or any supreme court ever be the *custos morum* it claims to be?

The Supreme Court of Sri Lanka has certainly tried, with mixed success.[61] It has been most ambitious at the place where constitutionally defined Fundamental Rights have been defended by proceedings on prerogative writs in the new forms by which they operate today: as "orders in the nature of writs" of mandamus, certiorari, and so on.[62] The puissance of these procedures has grown as Sri Lanka's judiciary has built a new jurisprudence for old writs motivated by new constitutional concepts, especially by reference to guarantees of equality and notions of public trust.[63]

Use of these judicial tools has grown further as the court has relaxed it expectations about who might have standing to sue in proceedings of this kind.[64] In 1982, Justices Dharmadasa Wimalaratne and Barnes Ratwatte suggested the broadest possible notion of standing to protect rights by mandamus: "To apply for a Writ of Mandamus it is not necessary to have a personal interest, but it is sufficient if the applicant can show a genuine interest in the matter complained of and that he comes before Court as a public-spirited person, concerned to see that the law is obeyed in the interest of all."[65]

Judicial claims like this one arise from a centuries-old power, which inheres in any court purporting to supremacy, to use mandamus to command other officers of the state to do as law requires of them. In a nation enduring civil war and racked by the detention and disappearance of thousands at the hands of police and other state actors, the Supreme Court's insistence on its historical powers in the use of habeas corpus has been even more important, even if the results have been limited when considered from a human or constitutional rights perspective.[66]

[60] Sachintha Dias, "The Presidency and the Supreme Court: The Constitutional Jurisprudence of Presidential Powers under the 1978 Constitution," in *Reforming Sri Lankan Presidentialism: Provenance, Problems, and Prospects*, ed. Asanga Welikala (Colombo, 2015), 224–59; Dinesha Samararatne, "Recent Trends in Sri Lanka's Fundamental Rights Jurisdiction," *Bar Association Law Journal, no.* 22 (2016): 234–46, at 240–41.

[61] For analyses of the court's Fundamental Rights jurisdiction over the last few decades, see Samararatne, "Recent Trends," 237; Dinesha Samararatne, "Judicial Protection of Fundamental Rights," in *Sri Lanka: State of Human Rights* (Colombo, 2018), 109–37; and Radhika Coomaraswamy and Charmaine de los Reyes, "Rule by Emergency: Sri Lanka's Postcolonial Constitutional Experience," *International Journal of Constitutional Law* 2, no. 2 (2004): 272–95, esp. 285–94.

[62] Samararatne, "Judicial Borrowing," 210. Mario Gomez, "Blending Rights with Writs: Sri Lankan Public Law's New Brew," *Acta Juridica*, no. 1 (2006), supplement, 451–77.

[63] Samararatne, "Recent Trends," esp. 236–38; Dinesha Samararatne, "Sri Lanka's Public Trust Doctrine as Judicial Review?" (unpublished manuscript).

[64] Gomez, "Blending Rights with Writs," 466–71.

[65] *Wijesiri* v. *Siriwardene* (1982), 1 SLR 171.

[66] *Leeda Violet and Others* v. *Vidanapathirana, OIC, Police Station, Dickwella and Others* (1994), 3 SLR 383-84. Mixed results have been most evident in proceedings on habeas corpus for disappeared persons. In *Leeda Violet*, the court ordered that exemplary costs be paid by the officials alleged to have been involved in a forced disappearance. The result has been little followed, in part because of problems surrounding standards of evidence. Kishali Pinto-Jayawardena and Jayantha de Almeida Guneratne, *Habeas Corpus in Sri Lanka: Theory and Practice of the Great Writ in Extraordinary Times* (Colombo, 2011), esp. 91–120;

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English law's empire stumbles on, for better and for worse, across the post empire. It does so as Sri Lanka's justices draw directly from English court judgments, in the manner of citations like those of Justice Tambiah. More important, they draw such ideas laterally, as justices in Sri Lanka, India, and other commonwealth states borrow from one another's evolving jurisprudence. Indian Supreme Court decisions have proved particularly important as Sri Lankan jurists have thought through questions about who has access in what circumstances to remedies of the most important kind because they protect human, civil, or constitutional rights.[67]

By these means, two things have happened. First, empire as law has been attenuated, even as its influences endure in quiet, shape-shifting ways. As in the United States, English law's empire persists not by way of a simple genetic transfer but as something old that has been made into something new through the operation of epigenetic forces. As Dinesha Samararatne observes, "trends in the development of public law in Sri Lanka suggest that the influence of English law as 'the source of law' for the development of the common law and the influence of British constitutional law in the judicial interpretation of the Constitution is perhaps diminishing . . . Drawing inspiration from a jurisdiction from the global South in the development of a received tradition of law by the Sri Lankan Courts even hints at some form of subversion of the continued influence of colonialism in the present moment."[68] At the same time, new ideas about rights have been made real in the world by turning to old ideas about writs, and thereby, to the idea of a supreme court as *custos morum*.

A supreme court will only be able to serve as *custos morum* to the degree to which its personnel understand their role in these terms, and to the degree they are insulated from pressures from other parts of the state. Chief Justice Bandaranayake had once been criticized for being too close to the regime that put her at the top of the judiciary. Some of her rulings seemed to confirm such concerns. Photos of the chief justice in her red robe, standing before Stephanoff's painting in the Supreme Court building with then president Mahinda Rajapaksa and his family, sharpened fears for judicial independence.[69] Then, in 2012, Bandaranayake made a ruling

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and International Commission of Jurists, *No More "Missing Persons": The Criminalization of Enforced Disappearance in South Asia* (Geneva, 2017), 39–45.

[67] Rajiv Goonetilleke, "Public Interest Litigation: A Species of Direct Democracy and Good Governance," *Sri Lanka Journal of Development Administration*, no. 4 (2014): 83–96, esp. 86–89. Samararatne, "Judicial Borrowing," 216–22. Rehan Abeyratne, "Rethinking Judicial Independence in India and Sri Lanka," *Asian Journal of Comparative Law* 10, no. 1 (2015): 99–135. On Public Interest Litigation in Indian law, see Pratap Bhanu Mehta, "India's Unlikely Democracy: The Rise of Judicial Sovereignty," *Journal of Democracy* 18, no. 2 (2007): 70–83. For an historical approach to the development of writ petitions to remedy constitutional wrongs, see Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic* (Princeton, 2018), esp. 9–15.

[68] Samararatne, "Judicial Borrowing," 221–22. For a replacement of the language of transfer with metaphors of hybridity and organicism, see Dinesha Samararatne, "Sri Lanka's Writ Jurisdiction: Legal Transfer to Organic Growth," (unpublished manuscript).

[69] "A Dozen Issues Related to Namal Rajpaksa's Oath Taking—What Do You Think?," *Colombo Telegraph*, 17 December 2011, https://www.colombotelegraph.com/index.php/a-dozen-issues-related-to-namal-rajapaksas-oath-taking-what-do-you-think/. See also Nihal Jayawickrama, "The Judiciary under the 1978 Constitution," in Welikala, *Reforming Sri Lankan Presidentialism*, 118–223 at 188, 210–13; International Bar Association, Human Rights Institute, *A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka* (London, 2013), 20. Bandaranayake's ruling upholding the eighteenth amendment to the Constitution, which expanded presidential powers, was

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that threw up a roadblock against a bill that would have given greater authority to Rajapaksa's government at the expense of provincial councils. The regime that once favored the chief justice now turned on her and, through Parliament, launched impeachment proceedings. Much of the nation's bar protested what they saw as a partisan attack by the president's allies against a judge now exercising too much of the independence her forbears asserted two centuries earlier. To little avail. She was removed in January 2013.[70] So much for judicial independence. Colonial or postcolonial, the supremacy of a *custos morum* has always extended only as far as its independence.

Dinesha Samararatne has called for the Supreme Court, which still sits at Hulftsdorp, "to view itself as a norm setting institution," and to guard its independence "jealously."[71] Likewise, the United Nations' special rapporteur on judicial independence suggested in 2017 that Sri Lanka's Constitution should "expressly recognize . . . the separation of powers, establish checks and balances, and guarantee the independence of the judiciary and the courts."[72] These are pleas for the Supreme Court to assert itself as the *custos morum* that any court that pretends to supremacy must be. And assert itself the court did, in 2018, when it stopped the president's dissolution of Parliament. As it did, the court reminded readers of its judgment in *Sampanthan* that "our Constitution and system of government are founded on the Rule of Law; and to prevent the erosion of that foundation is the primary function of an independent Judiciary."[73] But as in other liberal democratic postcolonial states—the United States and Canada, India and many others—Sri Lankan judicial independence, and constitutional and human rights, remain unavoidably compromised by the political procedures by which justices are appointed and removed.[74] Supremacy remains an assertion and an illusion at the same time.

SUPREMACY MATTERS

Asserting supremacy, even where it fails, matters in everyday ways to billions of people: in the United States and Australia, in Hong Kong, India, and beyond. It thus becomes hard to imagine doing English legal history without doing it as global history and without thinking across many centuries at once. Only then

especially criticized. The nineteenth amendment of 2015 went some way to diminishing presidential powers and reviving judicial independence. See Dinesha Samararatne, "Resilience through Synergy? The Legal Complex in Sri Lanka's Constitutional Crisis," *Asian Journal of Law and Society* 9, no. 1 (2022): 1–25, esp. 9–11, 16.

[70] International Bar Association, *A Crisis of Legitimacy*, 20–22. See also Nira Wickramasinghe, *Sri Lanka in the Modern Age: A History* (Oxford, 2014), 404–5; Nira Wickramasinghe, "Citizenship Reborn in Sri Lanka," *Current History* 114, no. 771 (2015): 154–56, at 155. Bandaranayake tells her own story in Shirani A. Bandaranayake, *Hold Me in Contempt: A Memoir* (Colombo, 2018).

[71] Samararatne, "Fundamental Rights Jurisdiction," 243.

[72] UN Human Rights Council, "Report of the Special Rapporteur on the Independence of Judges and Lawyers on Her Mission to Sri Lanka, 23 March 2017," A/HRC/35/31/Add.1, 17.

[73] *Premachandra* v. *Jayawickrema*, 2 SLR 102 (1994), quoted in *Sampanthan et al.* v. *Attorney General et al.*, SC FR Application no. 351, etc., at 66; Samararatne, "Resilience through Synergy," 12.

[74] Abeyratne, "Rethinking Judicial Independence"; International Crisis Group, *Sri Lanka's Judiciary: Politicised Courts, Compromised Rights*, Asia Report no. 172, 30 June 2009.

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might we make sense of the circumstances we in this room share with so many around the world today. In India, the Supreme Court remains the arbiter of its postcolonial constitution by acting out the role of the *custos morum*. As Rohit De has shown, vigorous use of mandamus in Indian courts has "made the people a constant presence for the government."[75] If so, the Indian Supreme Court, like Sri Lanka's, has done so using new forms of very old tools, first crafted in the Court of King's Bench over four centuries ago. To say this is not to suggest that there are simple genealogies we can trace to explain current practice. The traumas of empire, the transformations of independence, and developments since have for centuries refracted whatever English laws were as they moved about the globe. But bits and pieces of those laws remain. Only historians can offer the accounts we need of the law that survives in those bits and pieces as we deploy them in novel ways.

It might seem like I am flirting here with a history that is utilitarian in ways we associate with presentism. True enough. But the problem with presentism is not in any admission of the obvious: that historians inescapably inhabit a present in which they explore past experience. Presentism becomes a problem only when historians look in the past for validation of their own normative commitments rather than for all the other commitments they might find there. If we look for those other commitments, we discover that the past is filled with unexpected possibilities for understanding our own normative choices better by seeing them from the position of the normative choices others made long ago.[76] If, after seeing our norms anew, we decide to maintain or reconstitute them, this is all the more reason we must do history, and especially, do history in the long temporal and broad geographical modes I have deployed here.[77]

I conclude in the present because what we learn about English laws by seeing them globally and across centuries should matter to us both as scholars of British studies and as citizens of liberal republics that always find themselves on shaky ground. A court's supremacy involves judicial repertoires that we can find in Westminster Hall and then follow around the globe. These repertoires have been used—awkwardly, fitfully—to police state power where it impinges on the many kinds of rights that people continue to identify.[78] Indeed, we might go further, to say that the procedural instruments by which supreme courts have done this work for centuries have provided the chief means by which those rights have been discovered, then defended.

Because we are scholars of humanity as well as British studies, it is worth quoting E. P. Thompson at some length as I conclude: "[T]he notion of the regulation and

[75] This has done nothing less than produce a "new postcolonial governmentality." De, *People's Constitution*, 215–16.

[76] Quentin Skinner, *Liberty before Liberalism* (Cambridge, 1998), 112.

[77] Markus Dubber has proposed that "what makes critical analysis critical is precisely its search for a normative payoff." Markus D. Dubber, "New Historical Jurisprudence: Legal History as Critical Analysis of Law," *Critical Analysis of Law* 2, no. 1 (2015): 1–18, at 11.

[78] On the limitations of courts in such work, see Adam S. Chilton and Mila Versteeg, "Courts' Limited Ability to Protect Constitutional Rights," *University of Chicago Law Review* 85, no. 293 (2018): 293–335. Chilton and Versteeg contend "that rights enforcement ultimately falls on citizens themselves" (297). Samararatne, "Resilience through Synergy," makes a similar point about Sri Lanka: that courts cannot perform rights-protecting work without the help of the legal complex outside the courts.

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reconciliation of conflicts through the rule of law. . . seems to me a cultural achievement of universal significance . . . [T]his 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. If the rhetoric was a mask, it was a mask which Gandhi and Nehru were to borrow, at the head of a million masked supporters."[79]

Thompson's words were controversial.[80] Historians of empire tend to be skeptical about liberal rule of law claims, for good reasons.[81] For equally good reasons, to which Thompson points, lawyers and human rights advocates are often less skeptical as they look to supreme courts around the globe as the best, if still imperfect, means by which fundamental rights might be protected. In Sri Lanka and beyond, the rule of law is routinely linked to judicial independence and rights protection in the reports of human rights groups and in debates among lawyers about constitutional reform and judicial duty.[82] For all the vagueness of "the rule of law," and for all its frequent failure to realize our highest aspirations, these lawyers understand what Thompson understood:

> [T]he rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all intrusive claims, seems to me an unqualified human good. To deny or belittle this good is, in this dangerous century, when the resources and pretentions of power continue to enlarge, a desperate error of intellectual abstraction . . . [I]t is a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power. It is to throw away a whole inheritance of struggle *about* law, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger.[83]

[79] E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York, 1975), 265–66. Gurdit Singh, barred from disembarking in Vancouver in 1914, provides a good example of the use of this mask when he argued that his treatment was not according to law but against it. Renisa Mawani, *Across Oceans of Law: The* Komagata Maru *and Jurisdiction in the Time of Empire* (Durham, NC, 2018), 227–28. In a similar way, Rohit De points to how in post-independence India the "new regime would set itself apart from the colonial regime by reclaiming and instituting the rule of law"; De, *People's Constitution*, 15. Mithi Mukherjee, in a brief but telling reference to Thompson, develops a similar idea about the law "being turned into a site for a public critique of power"; Mukherjee, *India in the Shadows of Empire*, xxxv–xxxvi.

[80] Morton J. Horwitz, "The Rule of Law: An Unqualified Human Good?," *Yale Law Journal* 86, no. 3 (1977), 561–66, at 564–66; Robert W. Gordon, "E. P. Thompson's Legacies," *Georgetown Law Journal*, no. 82 (1994): 2005–11; Daniel H. Cole, "'An Unqualified Human Good': E. P. Thompson and the Rule of Law," *Journal of Law and Society* 28, no. 2 (2001): 177–203; Mark Brown, "'An Unqualified Human Good'? On Rule of Law, Globalization, and Imperialism," *Law and Social Inquiry* 43, no. 4 (2018): 1391–1426; Ranajit Guha, *Dominance without Hegemony: History and Power in Colonial India* (Cambridge, MA, 1997), 66–67, with a response by Benton, *Law and Colonial Cultures*, 254–60. For a celebration of the rule of law by one of the last generation's most prominent English justices and proponents of human rights, see Tom Bingham, *The Rule of Law* (London, 2010), esp. chap. 1.

[81] For a brief account, see John McLaren, "Chasing the Chimera: The Rule of Law in the British Empire and the Comparative Turn in Legal History," *Law in Context* 33, no. 1 (2015): 21–36.

[82] For instance, UN Human Rights Council, *Mandates of the Special Rapporteur on the Independence of Judges and Lawyers*, 10 December 2020, OL LKA 9/2020; Amnesty International, *Old Ghosts in New Garb: Sri Lanka's Return to Fear* (London, 2021), 19 and 23; Niran Anketell and Asanga Welikala, *A Systemic Crisis in Context: The Impeachment of the Chief Justice, the Independence of the Judiciary, and the Rule of Law in Sri Lanka* (Colombo, 2013). Concerns for the rule of law run like a leitmotif through the essays in Asanga Welikala, ed., *Constitutional Reform and Crisis in Sri Lanka* (Colombo, [2019]).

[83] Thompson, *Whigs and Hunters*, 266.

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Our century is perhaps only more dangerous than the one in which Thompson wrote. His warning remains, as does his example of how to proceed: by appreciating the historical complexity of the things we value and still need in our own world. Understanding and maintaining a court's supremacy in English law's persistent empire involves a persistent historical consciousness: not defined narrowly by precedents for using certain writs, but understood broadly, as duties to stand between imperial subject or postcolonial citizen and the state when it might err.

Historians must be deeply engaged in understanding this consciousness, over the long haul, and thereby help to reveal all its possibilities and limitations.[84] Otherwise, lawyers and judges might try to do this on their own, and as citizens and scholars, we may not like the results. This is certainly so in the United States, where law's seeking after historical consciousness is particularly intense, if also particularly odd and methodologically vexed.[85] Here, court watchers have noted the sharp increase over the past two decades of historians offering their expertise in amicus briefs to US courts.[86] Those contributions have mattered in major decisions, in issues ranging from national security detentions to the regulation of firearms and immigration.[87]

History continues to matter across the globe as well, wherever the *custos morum* appears. In its endless mutations, English law's global history shows us an ongoing transformation in law's technical aspects as we bring to it our transcendent desires, configured as rights claims. That history is one of constant assertion, of constant failure. Those failures are precisely why we must continue to do what we do: as historians, attempting to improve the world we inhabit by trying to apprehend the world others once inhabited. The fact that supremacy—the rule of law—has been, remains, and always will be a chimera demands that we must continue to search for the *custos morum*.

[84] For a critique of "short-termism" generally, and a discussion of the need to think long term about the many problems one encounters in the world, see Jo Guldi and David Armitage, *The History Manifesto* (Cambridge, 2014), esp. introduction and chaps. 1 and 2.

[85] This is not the place to explore the extensive commentary on the many kinds of originalism and the degree to which they are historical. For a recent discussion, see Jack M. Balkin, "Lawyers and Historians Argue about the Constitution," *Constitutional Commentary* 35, no. 3 (2020): 345–400.

[86] Sam Erman and Nathan Perl-Rosenthal, "Historians' Amicus Briefs: Practice and Prospect," in Dubber and Tomlins, *Oxford Handbook of Legal History*, 1095–1114; Joshua Stein, "Historians before the Bench: Friends of the Court, Foes of Originalism," *Yale Journal of Law and the Humanities* 25, no. 2 (2013): 359–89.

[87] For the involvement of historians of English law, see Brief of Legal Historians as Amici Curiae in Support of Petitioner, in *Lakhdar Boumediene, et al.* v. *George W. Bush, et al.* (2008); Brief of Amici Curiae Jack Rakove et al. in Support of Petitioners, in *District of Columbia, et al.* v. *Dick Anthony Heller* (2008); Brief of Legal Historians as Amici Curiae in Support of Respondent, in *Department of Homeland Security, et al*., v. *Vijayakumar Thuraissigiam* (2020); Brief for Amici Curiae Professors of History and Law in Support of Respondents, in *New York State Rifle & Pistol Association* v. *Bruen* (2021).

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