Extraterritorial mixed courts: crossing borders to enforce borders
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I love Wikipedia. It's the most high-impact venue for knowledge creation on topics familiar and obscure. Contributing to it is a great way to insinuate material into the linked data universe, which (for example in non-Western legal history) produces positive feedback effects by expanding a field's empirical footprint. But interacting with other editors also produces some negative feedback effects. This was my experience last year, when I added the Mixed Courts of Egypt, which figure centrally in the book I'm writing, to Wikipedia's list of "International Courts." I was promptly put in my place by a user named Zntrip, who deleted my entry: "mixed courts are not international courts."

I left that one alone—the internet is not won in a day—but this curt dismissal got me thinking about border-crossing legal institutions. The modern world has produced surprisingly few of them. I assumed that they all belonged in the same basket. But now I must admit that Zntrip has a point.

It is a common assumption about international law, and a part of its legitimating discourse, that it is a universal regime transcending borders. Realist analysis, of course, reveal the uneven application of universalism.[1] This failing can be cast as a disjuncture between theory and practice. But Zntrip's pedantic distinction revealed something more to me. Mixed courts differ from international courts in two crucial respects: they have no universal territorial aspirations, and they are founded as ad hoc rather than permanent institutions. The institutions are frank about these limitations in a way that international courts are not. As a result, the mixed courts help us to see how international legal regimes entrench borders by crossing them, and in order to cross them.

Certain regimes endorse borders and insist upon them (e.g., political citizenship, taxation); others transgress or deny borders (e.g., elite mobility, global banking). I am interested in a legal regime—extraterritoriality—that endorses borders in order to transgress them. The irony of this position is of course a familiar theme in histories of empire and colonialism. But its particular form as I discuss it here—the form of mixed courts—offers some insight into the border operations of international law writ large.

What is a mixed court? As I mentioned, it is an ad hoc institution, and is best understood by reference to historical examples. The most sophisticated instance of these courts was Egypt's Mixed Tribunals, which operated from 1876 to 1949. It assumed jurisdiction over civil and commercial cases involving parties of foreign nationality, cases that were (since the 16th century) exempt from local territorial jurisdiction due to the Ottoman capitulations. Until 1876, the consular court of each capitulatory power competed for jurisdiction over such cases; these sixteen-odd powers and Egypt agreed by treaty to assign all such cases to the Mixed Tribunals. A multinational bench, a purpose-written hybrid set of codes, and (most importantly) a steady stream of decisions—hundreds of thousands of them—formed the core of this institution.

During the age of high imperialism there were also Mixed Courts in Shanghia and Tangier. Less formal institutions operated in Constantinople, Beirut, and a good number of other port cities, though these

1 And, as Anthea Roberts demonstrates, the content of international law curricula in different states reveals that there are international law*s*, rather than a unitary international law. *Is International Law International?* New York: Oxford University Press, 2017.

dwindled as global legal practice formalized in the last third of the nineteenth century. Atlantic powers experimented with a handful of "Mixed Commission Courts" in the early nineteenth century (Havana, Suriname, Rio de Janeiro, Sierra Leone).[2]

We can consider mixed courts along four dimensions. First, they are territorial. They hold jurisdiction over a defined, bounded region. But that region is by definition extraterritorial, i.e., peripheral to some metropolitan legal center, some far-off domestic sphere. So in Egypt, the Mixed Tribunals had jurisdiction over only those commercial and civil operations of non-nationals *that took place in Egyptian territory*. Dislocation is the nature of extraterritorial law, of course, but what is different with mixed courts regimes is that the extraterritorial domain is itself a bounded territory.

Second, they are personal. By this I mean that the subjecthood or nationality status of the real and fictive persons who are parties to the actions of these courts is an essential ingredient to their jurisdiction. In order to be liable to mixed courts, a person had to hold the right status (non-national status) and the action concerned had to take place in the right territory (the territory away from the metropole where foreign subjects had special rights). In the case of the Egyptian courts, non-national status was initially restricted to subjects of the capitulatory treaty powers. Over time, through developing jurisprudence, it was extended to most other foreign subjecthoods.[3]

Third, the mixed courts were sites of doctrine production. Their major work was the generation of authority, of legitimation, of power, of visibility. The ceremonial trappings and credentialism of late imperialism formed a conspicuous part of their culture. The institutions were largely self-authorizing, because they were detatched from the sovereignty of the territory of their jurisdiction, as well as from the sovereignty of any single imperial power. They produced doctrine and jurisprudence in order to assert their legitimacy—the weakness of which can be inferred by the fierceness of the effort to assert it.

Fourth, and in a related point, the mixed courts produced a distinct set of personnel (and were produced by it). I have been using the tools of prosopography in my current research to figure out the profile of this personnel. What is clear is that a certain kind of cosmopolitics was necessary for effective service to these institutions. Dezalay and Garth's classic ethnography of international investment arbitration offers many tools to understand this category of personnel.[4] However, the mixed courts emerged before the educational, professional, and associational infrastructure that bolsters the authority of modern arbitrators. So the generation of authority by Mixed Tribunals personnel is particularly interesting.

International courts are—even more than international law as a whole—the product of necessity, designed to solve problems that domestic legal regimes cannot manage. And so they must, in some sense, transgress or at least cross borders—but they do so at the behest of the domestic requirements of strong states. This is even more true of mixed courts, which were always ad hoc fixes for territorially bounded blockages. So whereas (at least in theory) international courts are meant to be implemented

2 Mixed justice remains an attractive notion for "transitional justice" (i.e., tutelage) in the present day in particularly complex settings like Sierra Leone, Cambodia, and Lebanon.

3 The status of Ottoman subjects and former Ottoman subjects was particuarly contentious, as Egypt remained part of the Ottoman empire until 1914, and the Ottoman capitulations remained in effect for Egypt even after the Ottoman empire disappeared.

4 Yves Dezalay and Bryant G. Garth. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. Language and Legal Discourse. Chicago: University of Chicago Press, 1996.

into the domestic sphere of acceding member states, this was not the case for mixed courts. In these cases, extraterritoriality meant that the institution and the judges and lawyers involved were always set apart, always doing something that they could only do outside of their own states of subjecthood. Extraterritoriality creates a borderland space different from both metropolitan domestic jurisdictions and (imagined) universal jurisdiction.

Border crossing therefore played a special role in the field formation of these legal experts. The mystique and linguistic expertise of modern day arbitrators, of course, features to some extent. But its lines were not yet established in the nineteenth century. The mixed courts were part of transnational colonial culture, similar to other colonial legal institutions (like consular and imperial courts), using similar tools. But unlike these imperial courts, they were not unipolar. (In this sense they prefigured the justice administration of the League of Nations and associated Permanent Courts.)

What got mixed at mixed courts? In an earlier epoch, mixed merchant courts in Mediterranean cities called on both legal experts and technical experts, combining their skill for more successful dispute resolution. In the mixed courts I am studying, however, mixed nationality status, not expertise. Mixity was pursued for the political legitimacy of the court. A skilled bench was desirable, but less necessary than a multinational bench. International law is a great endorser of borders and domestic spheres. There is no greater transgression, in the eyes of the international community, than incursion on borders. And so the independent selection of judges for this purpose meant different things in different states.

Who were the people suited for Mixed Tribunals positions? Each state party to a mixed court nominated its own judges, and for this purpose they needed individuals with certain forms of cultural capital. For American and British judges, the requisite qualifications were command of French and of civil (continental) law. This narrowed the field considerably. North Europe tended to send individuals from the legal advising offices of their foreign ministries. Greece and Italy nominated judges with local residence and expertise, who had been consular judges in Egypt and the Ottoman domains. The Egyptian state, meanwhile, sent men to the bench who could bear being treated as inferiors.

All of these men were legal experts, but not of the sort that rose to the highest rank in their domestic legal spheres. They invented or discovered another path in the international or transnational domain that offered them prestige and wealth. But that prestige was visible within that liminal domain and not much beyond it—hence their relative absence from national chronicles of legal titans and precedent makers. In their careers, and in their jurisprudence, they occupied a liminal space, between the domestic sphere and the global. This was the space of extraterritoriality, a legal borderland different from the bounded national spaces surrounding it.[5]

It is no surprise, then, that the question of domicile became a predominant issue in Egypt's Mixed Court. Domicile—like extraterritoriality, like mixed justice, like mixed interest—is a legal fiction meant to solve practical problems. It is contrasted to residence, which has a plain meaning that reconciles personal and territorial jurisdiction. Domicile, on the other hand, is border-straddling belonging. It describes a way of being in two places at once: physical (or financial) presence in Egypt, legal belonging at "home."

5 The classic typology from Jeremy Adelman and Stephen Aron. "From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between in North American History." *American Historical Review* 104, no. 3 (1999): 814–41.

Just as certain questions, such as domicile, predominated in mixed courts, certain fields of law thrived more than others in this extraterritorial borderland. The Mixed Tribunals of Egypt, when incepted in the 1870s, promised a comprehensive adjudication mechanism for all of the territory, then carved out exceptions to that rule. The "natives" were excluded, because they were never meant to be visible to this system. “Personal status”—i.e., the set of laws derived from religion (largely) that govern marriage, divorce, inheritance, and the like—was assigned to tribunals competent to each individual's religion or nationality. What was left was civil, commercial, and criminal law. Litigation about money was quickly and effectively clarified after 1876. The key step was the development of a theory of "mixed interest," which said that any case involving even a penny of foreign capital was in the jurisdiction of the Mixed Tribunals. But the criminal jurisdiction promised in the 1870s negotiations never arrived. The aim of ending impunity produced by extraterritoriality was delayed—for 75 years. It seems that the solution was only pressing enough to overcome precedent where money was concerned.

This field priorty recalls the standing of commercial arbitration in the present day vis-a-vis international criminal law. Here too the most elaborate, high priced ad hoc legal institutions are reserved not for the greatest human harm across borders, but for the most exotic questions of cross-border investment. The procedings are wholly obscured from the view of the domestic political sphere of the countries involved. Instead, they are assigned to a cosmopolitan coterie of experts, whose sublime qualities offer a guarantee to litigtants (if not citizens) of settlement of extraordinary disputes that cannot be managed under existing permanent systems.

Cosmopolitans require borders more than anyone else. Borders must stop most flows in order for cosompolitan transcendence of the border be remarked. The Greek, the Jew, the Levantine, the non-Arab pilgrim[6] crossed borders like the cosmopolitans, but without sure legal title to some domestic territory in the metropole that would make their crossing visible. Visibility was the privilege of the Mixed Courts and its legal personnel, but they have not yet found their place in the historiography of international law. For now, I continue to weave these men into Wikipedia, and especially into Wikidata.[7] A prosopography of these border crossing actors describes a history for the frequent flier class of modern day international lawyers (even if Zntrip might disagree).

6 Lâle Can, *Spiritual Subjects: Central Asian Pilgrims and the Ottoman Hajj at the End of Empire*. Stanford, California: Stanford University Press, 2020.

7 Wikidata’s linked data model offers a revolutionary path for post-national history production, but that’s a topic for another day.