Rethinking Private International Law Through the Lens of Colonialism



Last week (7 June 2025), I had this extraordinary opportunity to give a presentation at the 138th Annual Conference of the Japanese Association of Private International Law, which took place at Seinan Gakuin Daigaku, Fukuoka – Japan. The theme of my presentation was “Private International Law and Colonialism.” In this talk, I shared some preliminary thoughts on a topic that is both extraordinarily rich and complex. The following note offers some initial reflections based on that presentation (with a few adjustments) with the aim of contributing to ongoing discussion and encouraging deeper reflection.

Introduction

The relationship between colonialism and law has been the subject of active debate across various fields, including legal anthropology and comparative law. Key themes include the impact of colonial rule on legal systems in colonized regions, the inherently violent nature of colonialism, and the possibilities for

decolonization. This relationship has also received particular attention in the field of international law. Numerous studies have examined how colonialism shaped the very structure of the international legal order, as well as the theoretical justifications for its expansion into regions regarded as "non-Western" or "uncivilized." In contrast, the field of private international law (PIL) has, until now, rarely engaged directly with the theme of colonialism (see however the various previous posts on this blog). To be sure, some studies on the development of PIL in the 19th century or on the asymmetrical treatment of cross-border legal relationships do touch upon issues linked to colonialism. However, these works do not place the relationship between PIL and colonialism at the center of their analysis.

This note proposes to revisit PIL in light of its historical relationship with colonialism. It aims to explore the ways in which PIL was developed in a context shaped by deep legal and political inequalities, and to consider how this context informed both the theory and practice of the field. It also aims to highlight the complex role that PIL has played historically, not only as a framework that contributed to the stabilization of unequal relations, but also as an instrument that certain states used to affirm their legal and political autonomy.

I. Why Colonialism Matters to PIL

To begin with, it is important to understand why examining PIL in light of colonialism is both relevant and necessary.

1. Explanatory Value

First, studying the historical links between PIL and colonialism allows us to better understand how the field developed. As is commonly known, PIL claims to rest on the principles of equal sovereignty and neutral legal reasoning. However, this conventional understanding of PIL is incomplete. In reality, PIL particularly developed during a period when global relations were anything but equal. The nineteenth century, which saw the rapid expansion of colonial powers across Asia, Africa, and the Middle East, was also the period during which many of the foundational premises and principles of PIL took shape. Accordingly, while PIL

may appear neutral and universal in theory, its development was deeply embedded in a historical context shaped by colonial expansion and domination. This context was characterized, both in law and in practice, by profound asymmetries in power that underpinned the very structures of colonial rule. Understanding this historical backdrop sheds light on how PIL has developed to become the discipline that we know today.

2. Inclusiveness and Diversity in Legal Scholarship

Second, analyzing PIL through the lens of colonial history encourages a broader and more inclusive understanding of the field. Traditional narratives have privileged European (Western) legal thought, focusing on figures such as Huber, Story, Savigny, and many others. However, other regions also experienced legal developments that shaped their approaches to cross-border legal issues. It must be admitted that these developments have been often largely overlooked or simply dismissed. Paying attention to these neglected histories can open the way for a richer and more diverse understanding of what PIL is and can be.

3. Relevance for Contemporary Practice

Third, reflecting on these issues helps illuminate the traces of these historical patterns that may persist in current legal practices often in a hidden form under "universal" and/or "neutral" approaches. Even today, some assumptions embedded in PIL may reflect older hierarchies. For example, recent tendencies towards lex forism to the detriment of the law that is most closely connected to the case, or the expansive use of public policy or overriding mandatory rules may reproduce asymmetries that have long histories. In some areas, such as the regulation of transnational business and human rights, rules that appear neutral may obscure power relations rooted in earlier eras or based on old-fashioned conceptions. Rather than undermining PIL's relevance, recognizing the background of such dynamics enables a better adaptation of this field to present realities.

II. Scope of Analyses

The focus here is on the traditional form of conflict-of-law issues that arise between "sovereign" states, even though these relations were often marked by legal inequality, as reflected in the structure of colonial domination. It does not deal with the classical question of "colonial conflict of laws" in the strict sense, that is, legal conflicts arising from the coexistence of multiple legal orders within a single political entity composed of the metropole and its colonized territories. Such a "conflict" arose as a result of annexation (such as the annexation of Algeria by France or the acquisition of Taiwan and Korea by Japan) or direct occupation (such as the French occupation of Indochina, or the Dutch occupation of Indonesia). This type of conflicts, despite the similarity they may have with the classical conflict of laws, are more appropriately understood as belonging to the domain of "interpersonal law" or "internal (quasi-)private international law", or what was sometimes referred to as "inter-racial conflict of laws".

III. The Paradox: Legal Equality vs. Colonial Hierarchy

To understand the relationship between PIL and colonialism, we need to briefly consider their respective characteristics and foundational premises.

PIL, as a legal discipline, is concerned with cross-border private legal relations. It deals with matters such as the jurisdiction of courts, the applicable law in transnational disputes, and the recognition and enforcement of foreign judgments. Its theoretical foundation lies in the idea of sovereign equality and legal neutrality. In this respect, PIL has long been regarded as a technical and neutral discipline providing the rules and mechanisms for resolving private legal disputes involving foreign elements. For much of its development, PIL has maintained an image of formal objectivity and universality, seemingly detached from the political considerations and ideological battles that have shaped other areas of legal thought, although contemporary developments show that this has not always been the case.

Colonialism, on the other hand, rests on the very denial of sovereign equality. Colonialism, broadly defined, refers to systemic domination by one power over another, encompassing political, legal, economic, and cultural dimensions. It creates and institutionalizes structural inequalities between dominating and

dominated societies. Colonialism comes in many forms: annexation (e.g., Algeria by France), protectorates (e.g., Tunisia), or semi-colonial arrangements (e.g., Japan, Thailand, Ottman Empire or China under unequal treaties). In this sense, at its core, colonialism was a system of unilateral domination through discourses of civilizational superiority in which one power imposed its authority over another.

Therefore, the fact that PIL, which rests on the idea of sovereign equality, was particularly developed in a colonial context marked inequality and domination, gives rise to a key question: How did PIL, which is premised on equality, coexist with, and arguably help sustain, a global colonial world order defined by legal inequality?

IV. The Pre-Colonial Period – From Personality of Law to Legal Hierarchy:

As mentioned above, PIL was shaped and disseminated during the height of colonial expansion in the 19th century. However, before this colonial period, it is worth noting that, in societies with limited external legal interaction (e.g., Tokugawa Japan), PIL was largely absent. In contrast, regions like China or the Ottoman Empire, and even in Europe had systems based on personality of law, where legal norms were tied to an individual's religion or ethnicity, and disputes involving foreign subjects (usually foreign merchants) administered through forms of consular jurisdiction.

Later, while European countries succeeded in replacing this system with one based on PIL mechanism, the dynamics were quite different under colonial conditions. In places like Japan, the old system of personality of law based on the idea of "extraterritoriality" and "consular jurisdiction" was introduced under foreign pressure, when Japan was effectively forced to abandon its policy of isolation and open up to international commerce within the framework or unequal treaties imposed by Western powers. In regions like the Ottoman Empire and China, this system was not only preserved but exacerbated leading to serious encroachments on legal sovereignty and increasing the dominance of foreign powers over domestic legal and commercial affairs. In all regions, this system was institutionalized by the conclusion of the so-called "capitulations" or "unequal treaties" giving extraterritorial legal and jurisdictional privileges to Western

colonial powers, which in some countries has developed to the introduction of foreign courts (e.g. French courts in Tunisia) or mixed courts (e.g. Egypt).

Such an evolution raises an important question: why did European countries, having replaced the system of consular jurisdiction with a PIL-based system among themselves, choose not to apply the same model in their legal dealings with "non-European" countries?

V. The "Civilized vs. Uncivilized" Divide

1. The Role of PIL in the Formation of the Modern International Order – Asymmetrical treatment based on the notion of "civilization"

In the 19th century, as colonial powers expanded their reach, they also laid the foundations of what became the modern system of international law. Within this framework, the concept of the "family of civilized nations" was used to determine which states could participate in international legal relations on an equal footing, including the application of "private" international law. Legal systems that were seen as having met the standard of "civilization" were granted full recognition under the newly emerged international system. Other states were either excluded or subjected to hierarchical arrangements.

This legal stratification had practical effects. Among "civilized" nations, the principles of PIL (including the applicability of foreign law) applied. But with regard to other nations, these principles were either weakened or suspended. Courts in Europe often refused to recognize laws from countries deemed "non-civilized," sometimes on grounds such as the rules applicable in the "non-civilized" country could not be categorized as "law" for the purpose of PIL, or its incompatibility with public policy. In this way, PIL developed a dual structure: one that applied fully among recognized sovereigns, and another – if any at all – that applied toward others.

2. Extraterritoriality in Practice in "non-Civilized" Countries and the Exclusion of PIL

Outside Europe, one notable feature of legal practice in so-called “non-civilized” countries during the colonial period was the system of extraterritoriality. In these jurisdictions, Western powers maintained consular jurisdiction, which allowed their nationals to be governed not by local law but by their own national legal systems. This arrangement was grounded in the principle of the personality of law and institutionalized through the capitulations in the Middle East and North Africa (MENA) region, and through unequal treaties in Asia.

While the precise structure and operation of these regimes varied from one country to another, they shared a fundamental feature: legal disputes involving Western nationals were handled, entirely or partially, under Western laws. Rules of PIL were effectively bypassed.

Moreover, originally, consular jurisdiction was limited to citizens and nationals of Western countries. However, over time, it was extended to cover *protégés* (local individuals granted protection by foreign powers) as well as *assimilés* (non-European nationals who were treated as European for the purpose of legal protection). This extension further curtailed the jurisdiction of local courts, such as religious, customary, or national courts of the colonized states, which became confined to resolving disputes between locals with no international dimension. By contrast, cases involving Western nationals or their protégés were routinely referred to consular courts, or where existed, to foreign courts (e.g. French courts in Tunisia) and mixed courts (such as those in Egypt).

The inequality embedded in this system was particularly evident in the enforcement of judgments: rulings issued by local courts required exequatur in order to have effect before consular or foreign courts. Meanwhile, judgments rendered by foreign courts, notably those of the colonizing power, were typically recognized and enforced without the need for any such procedure.

VI. PIL as a tool for emancipation from colonial chains

Interestingly, in the 20th century, as formerly colonized countries sought to assert their sovereignty, PIL became a means to achieve legal and political recognition. To be accepted as equal members of the international community, these states had to show that their legal systems conformed to the standards expected of “civilized” nations. This included establishing reliable legal institutions, codifying

laws, and—crucially—adopting PIL statutes.

Japan's experience in the late nineteenth century is illustrative. Faced with unequal treaties that limited its sovereignty and imposed extraterritoriality, Japan undertook a sweeping legal reform. In 1898, it adopted a modern PIL statute (the *Horei*), which played a key role in demonstrating its legal capacity and led to the renegotiation of those treaties. A comparable process took place in Egypt, where the Treaty of Montreux (1937) marked the beginning of a twelve-year transitional period leading to the abolition of consular and mixed jurisdictions. During this time (1937–1949), Egypt undertook major legal reforms aimed at restoring full judicial sovereignty. It was in this context that both the Egyptian Civil Code and the Code of Civil and Commercial Procedure were drafted and promulgated in 1949. These codifications included not only substantive and procedural rules, but also incorporated provisions on choice of law, international jurisdiction, and the enforcement of foreign judgments.

Conclusion: A Dual Legacy

As the foregoing demonstrates, PIL played a complex and at times contradictory role. It was shaped in a context of inequality, and it often served to justify and perpetuate hierarchical legal relations. Yet it also provided a framework through which some states could engage with and eventually reshape the global legal order. In this dual capacity, PIL reflects both the challenges and possibilities of legal systems operating in a world marked by deep historical asymmetries.

Today, PIL is regarded as a universal framework, taught and applied in jurisdictions around the world. But its history reminds us that legal universality often rests on specific historical and political conditions. By examining how these conditions influenced the formation and application of PIL, we gain a clearer understanding of the discipline and can begin to identify paths toward a more genuinely inclusive and balanced legal system.

Understanding this past is not about assigning blame, but about gaining clarity. By exploring how PIL has operated across different times and contexts, we equip ourselves to improve its capacity to serve all legal systems and individuals fairly. That, in the end, is what will make PIL truly universal.