

TRACKS AND TRACES OF THE LAW

*Roshan de Silva Wijeyeratne and John Strawson**

The impact of September 11 has perhaps made the 'post' in postcolonialism more problematic. The contributors to this issue engage with the scene of the postcolonial in various frameworks. Current conflicts (Palestine/Israel, Tibet), international financial institutions (the IMF), the character of the indigenous (Australia), imperial history (Britain in Sri Lanka, India and China) and Islam and Islamic law are all subjected to a rigorous analysis. Historical research rubs against contemporary questions and the political is rarely absent, if understated. The authors engage with a number of prominent theorists such as Edward Said, Homi Bhabha, Bruce Kapferer and Gayatri Spivak, who all share in common an insistence on the significance of the retrieval of knowledge that colonialism sought to repress and efface.

In the introduction to their rich collection *Laws of the Postcolonial*, Eve Darian-Smith and Peter Fitzpatrick remark that, 'postcolonialism may be the least attended "post"' compared with poststructuralism and postmodernism.¹ This special issue is inspired by their view that the postcolonial project can disrupt or fracture the West and its power. Post-September 11, that power has been on evident display. We are aware of the academy's limitations in the political realm; however, we are also conscious of the responsibility it holds for the production of 'knowledge' about the Other, both historically and in our contemporary times. As Peter Fitzpatrick's work has shown, the interrogation of law is an essential part of our responsibilities.² This collection brings together scholars working in Australia and Britain concerned with law both in its colonial and postcolonial condition. We hope this special issue will contribute to the growing literature on law and postcolonialism.³

The impact of September 11 has perhaps made the 'post' in postcolonialism more problematic. The contributors to this issue revisit the scene of the postcolonial in various frameworks. Current conflicts (Palestine/Israel, Tibet), international financial institutions (IMF), the character

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¹ Darian-Smith and Fitzpatrick (1999), p 1.

² See in particular Fitzpatrick (1992, 2001).

³ For example, see: Fitzpatrick (1992, 2001); Darian-Smith and Fitzpatrick (1999); Harris (2001); Mitchell (2002); Manjii (2000); Collins and Hanafin (2001); Backer (2002); Ruskola ((2002); Motha and Perin (2002); Pue (2003); Duncanson (2003); Tuitt and Fitzpatrick (2004)

of the indigenous (Australia), imperial history (Sri Lanka, India and China) and Islam and Islamic law all make their appearance. Historical research rubs against contemporary questions and the political is rarely absent — if understated.

Postcolonial theory is highly divergent. However, whether we are looking at Frantz Fanon, Edward Said, Homi Bhabha, Ashis Nandy or Gayatri Spivak, what they all have in common is an insistence on the significance of the retrieval of knowledge that colonialism sought to repress and efface. It is precisely this archival approach that is at the core of postcolonialism. The articles for this issue have been written in the year that marked 25 years since the publication of Edward Said's *Orientalism*.⁴ His death in September 2003 deprived us all of perhaps the most provocative committed public intellectual of the period. His unrelenting resolve to alert us to the importance of the 'gravity of history' ensured that his engagement with postmodernism was particularly complex. This was compounded by his effort to maintain an active political intervention. If dominant discourses and the discursive images that they circulate form power relations, then the duty of the intellectual is to resist. Postcolonial discourse theory is not just the process of uncovering the archive of imperial power and its subtle encodings, but can also offer a way of generating an agenda for resistance. Said's regular contribution to the popular media in the United States, Europe and the Middle East indicates the significance and possibility of communicating this agenda beyond the academy.⁵ For the debate on law and postcolonialism, Said has bequeathed to us work of immense significance. The attention he gave to literary and political texts is a sharp reminder of how large the unexplored legal archive is.

It was in *Orientalism* that Said recruited Foucault to the postcolonial project. What was of fundamental concern to Foucault was the genealogical nature of knowledge and the concept that knowledge itself was a discursive strategy. Taking his cue from Nietzsche, Foucault excavated the historicity and hence contingency of ideas, of modernity itself. Said understood that the legacy of Foucault's project could focus our attention on the manner in which the nexus between power and knowledge reproduced discourses of social, economic, political and legal life in the newly colonised world. Foucault himself never addressed the subject directly and it was Said whose suggestive use of his approach turned his work into a valuable resource. While colonisation was underpinned by the epistemic categories of the European Enlightenment by way of the denial of those categories to the colonised Other, the nationalist moment against the European colonial powers was at least in part organised around forms of knowledge that were essentially indigenous. However, the content of these resurrected forms of knowledge was thoroughly circumscribed by the colonial project of modernity, and by what Foucault described as the modern episteme.⁶ We see this most pertinently embodied in the nationalist movements against the European colonial powers.

⁴ Said (1978); see also Said (1993).

⁵ See Said (2001).

⁶ See Chatterjee (1986); Foucault (1970).

As a consequence, anti-colonial nationalism tended to be premised on highly fetishised and reified forms of knowledge about the nature of the pre-colonial. This domain had itself been rigorously constituted by the rise of colonial historiography in the shape of Orientalism, Indology, Sinology and Buddhist studies. This process constituted sub-regions of colonial historiography, disciplines which were to constitute within a particular epistemic and discursive frame the respective subjects of their inquiry, such as Islam, the caste system in India, China or Buddhism respectively. The framing of these respective topics was to have a profound impact not just on the anti-colonial nationalist movement, but also on the politics of the postcolonial, at both the domestic and international levels.

By interrogating the boundaries between the coloniser and the colonised, postcolonialism has opened up a space from which we can begin to locate the gaps, the interstices of knowledge that in reality were part of the colonial project. There is no need to repeat here the economics of imperialism that colonisation begat and the institutionalisation of European property forms that helped facilitate the process of surplus extraction.⁷ The story of exploitation is well known, but the story of cultural and legal transformation under the conditions of colonialism is one that is much newer. Fanon, for one, identified the fundamental ambivalence at the heart of the colonial project: that the very success of colonialism rendered colonisation itself obsolete. If colonial transformation was successful, then what need for the Europeans when the project could be continued by the local elites that Europe's Empires spawned?

One of the seminal moments for postcolonial theory is Frantz Fanon's *Black Skin, White Masks* (1986), which synthesised the work of Marx and Freud. Drawing on Marx's account of dialectical materialism and Freud's account of phantasy, Fanon wove a rich account of the centrality of *race* (as opposed to class) to the colonial condition. The idea of race was produced and reproduced in the dialectical relation between coloniser and colonised. For anyone who doubts this, the histories of the colonised world are testament to the essential truth of Fanon's account.⁸ Drawing on Sartre, he also drew attention to the ontological status of colonialism and its impact on the production of the subjectivities of both the coloniser and the colonised.⁹ By utilising Freud's clinical account of introjection and projection, Fanon was able to reveal that the identities produced under the conditions of colonialism were highly charged with phantasmatic assumptions about the colonised Other.

In nationalism, the gaze of the Other was returned to split the consciousness of the colonial state, a colonial state which itself was founded in a recurrent process of determination and negation and which itself, in Homi Bhabha's Lacanian inspired move, was already split.¹⁰ To the extent that phantasy marked out the colonial construction of the Other and hence rendered

⁷ See Rodney (1972).

⁸ On India, see Dirks (2001); and on Sri Lanka, see Obeyesekere and Gombrich (1988).

⁹ See Young (2001), pp 276–83

¹⁰ See Homi Bhabha (1994).

the Other a highly ambivalent figure — at a certain level almost the same as the coloniser and another level not quite the same — the epistemic foundations of the colonial project were always highly suspect. Following Fanon explicitly and Said implicitly, Bhabha reminds us that colonisation was also structured around the other scene of knowledge, the phantasmatic unconscious of epistemology. This is most directly revealed in, for example, the stories of the cunning or the excessively erotic colonial subject.

On the one hand, Bhabha articulates a psychoanalytic approach for the purposes of capturing the internal contradictions within Western systems of knowledge, in order to locate the interstices of colonial knowledge. On the other hand, Ranajit Guha and Gayatri Chakravorty Spivak, and those historians associated with the Subaltern Studies collective, have done much to excavate previously ignored forms of indigenous agency that resisted the hegemonic practices of the colonial state and by extension of the postcolonial state. While this project owes much to the archival approach of Foucault, it has also brought together a sophisticated post-Gramscian Marxism with a textual approach to cultural politics and law associated with the deconstructive metaphysics of Jacques Derrida and poststructuralism in general. So, finally, to the place that poststructuralism occupies in the body of postcolonialism.

At an ontological level, postcolonial theory represents an assault on the idea of 'sovereignty whose essence is always colonial'.¹¹ By analogy, Derrida's work also represents an interrogation of the sovereignty of the subject that is a central issue in the Western philosophical and legal tradition, a tradition which reaches its culmination in the political philosophy of Hegel.¹² While Hegel gives us the idealist tools for conceptualising the constitutional state and modern forms of citizenship, Hegel also represents the philosophy of exclusion, *par excellence*. In Hegel's philosophy we see a justification for colonisation, a genealogy of appropriation which stretches back to Aristotle's defense of slavery *vis-à-vis* citizenship.¹³ While exclusion in Hegel is ultimately paradoxical, Derrida brilliantly captures the political consequences of Hegel's idealist metaphysics when he notes that metaphysics is the 'white mythology which reassembles and reflects the culture of the West: the white man takes his own mythology, Indo-European mythology, his own *logos*, that is, the *mythos* of his reason, for the universal form of that he must still wish to call Reason'.¹⁴

This theme of sovereignty, of the relation between slavery and citizenship and the relation of subjection to the agencies of a neo-liberal vision of the global, is taken up by Justin Malbon and Richard Joyce respectively. Malbon dissects the uneasy relation that Anglo-Celtic Australia has to Indigenous

¹¹ Derrida (1978), pp 82, 297.

¹² We are guilty of a gross over-simplification here, for there is in reality no unity in the Western philosophical canon. See Young (2001), p 412. There are multiple traditions in the West, but for the purpose of this Introduction our simplification will suffice.

¹³ See Aristotle (1981).

¹⁴ Derrida (1982), p 213.

Australians. By invoking Aristotle's account of the slave/citizen distinction, Malbon unearths in the manner of the archivist a genealogy that stretches to the recent past in Australia. The history of legislation at both Commonwealth and state levels that deals with Aboriginal Australians reveals an anxious dynamic that can never quite situate the Indigenous as full citizens or slaves/quasi-slaves. Contra the dominant jurisprudential view that sovereignty represents the exception to the rule, Malbon develops a controversial argument in favour of limited sovereignty, a form of sovereignty that would work in defence of native title in Australia. Malbon teases out the highly performative nature of theories of sovereignty, thus undermining the transcendentalism that legal positivism has attributed to the concept of sovereignty.

This story of subjection by the force of an unlimited sovereignty is analysed in the field of international economic law by Richard Joyce, who focuses on the way the IMF has implicitly invoked a form of colonial governance to undermine popular expressions of political sovereignty within Cambodia by privileging a Eurocentric model of sovereignty that is amenable to the state intervention that the IMF has carried out in much of the decolonised world. By using Cambodia since the early 1990s as a case study, Joyce focuses on the manner in which the agents of globalisation have appropriated an absolutist account of sovereignty, and hence practise the postcolonial move of neo-colonialism. Joyce traces the way in which the idea of sovereignty becomes embodied in the European nation state and the emergent body of international law, which in turn becomes the foundation for the transfer of sovereignty in the colonies to the administrative and governmental elites produced by colonialism. He documents how the discourse of sovereignty has operated to limit Cambodia's own agency in an age in which — paradoxically — classical state sovereignty in the West is being undermined by the institutions of globalisation. Joyce reveals the manner in which the IMF uses the discourse of sovereignty in order to mask its own undemocratic practices.

John Strawson and Qudsiya Mirza also take up the story of power and the articulation of varied networks of power in the construction of identity. Strawson turns to the legal archive to trace some key moments in the colonial narrative of Islamic law in colonial India. Mirza's concern is the more contemporary construction of Shari'a in relation to Muslim identity during the Rushdie affair in Britain in the late 1980s. Modern Islamic law is constituted within a particular discursive and epistemic frame. Strawson's focus is on how the authority of a text of Islamic jurisprudence is mobilised for colonial rule. The images that this process creates remain potent today. To the extent that Islam is facing a dual crisis — both a crisis of the Western imagination and a crisis of how Islam represents itself to itself — then both of these papers reveal the inherent modernity of the way in which this crisis has been framed. As opposed to Western essentialism, Mirza reveals Islam to be multivariied and lacking closure, a mirror of the interstices of modernity itself and hence possessing within itself the possibility of a community that is tolerant of difference.

It is the violence of the ontological that certainly influences and 'grounds' the work of Amy Kellam, David Thompson, Francesca Dominello and Bill Bowring. By utilising postmodern theory, Kellam shows that a dominant feature of both Chinese (Nationalist and Communist) and Western legal narratives *vis-à-vis* the relation to 'traditional' Tibet is the claim to universal rationality. This relation is not only violent at the level of the practical, but is also fundamentally incommensurable and reveals itself in the temporal disjuncture that these competing legal systems inhabit. On the one hand, we have modernity and the privileging of the temporal order of the present, and on the other we have the Buddhist legal system of Tibet and the double time that it inhabits: the temporal order of the cosmos and the temporal order of legal enunciation. In its universalising move, Chinese rule can never be universal enough, as it must constantly constitute itself against the mark of Tibetan difference, a difference which Tibetan rule can never quite consign to the past.

The past, which can never be consigned to the past, is also what concerns the essay by Dominello. She focuses on the relation between the Australian High Court and its British imperial origins in relation to the ambiguous place that native title occupies within the Australian legal system. The desire of the Australian High Court to establish an autochthonous foundation by virtue of the *Australia Act 1986* is destined to an ever-repeating failure. That failure is rooted in the skeleton of the English common law and the capacity of the Australian judicial process to repeat the ontological violence of the initial act of British colonisation. The judgment in *Mabo*, as Dominello shows, may have pried the system of colonial land allocation open when it recognised native title, but it remains closed to any acceptance of the tenets of Aboriginal law and custom as part of Australian law. Moreover, the shortcomings of the original decision seem to have increased rather than decreased over time, and for Indigenous peoples the tide of (white) history continues to erode their claims to native title. Here Dominello unpacks the violent metaphysics of recognition.

The papers by David Thompson and Bill Bowring also interrogate the ever-present violent indeterminacy of international law's colonial origins. Bowring highlights a much-ignored aspect of the postcolonial in his view of post-Soviet Central Asia. Here we have another version of the civilising mission in which the superior ethnic group, the Russians, become the bearers of the superior social system, socialism. This explicit alignment between race and socialism had ironically been exposed by the founder of the Soviet Union, Lenin, when he denounced the British Labour Party's attitude to imperialism as 'socialist colonial policy'. However, these attitudes are deeply embedded in Marxism, which saw the West as essentially progressive and the East as backward. It was Marx himself who saw the 'Asiatic mode of production' as the lowest form in his social Darwinist order. Equally, at the political and legal levels, Marxists were at one with Montesquieu that Eastern polities were pure Oriental despotism. Bowring's use of human rights discourse nicely disrupts both the Soviet and the colonial.

The Palestinians have in many ways been 'other' victims of September 11. The Israeli reoccupation of the West Bank has been dignified as

part of the 'war on terrorism'. Thompson returns our attention to the key issue that Palestinians remain living under a colonial regime which continues to expropriate their land while using extreme force to maintain rule. One aspect of this is the 200 checkpoints that Israel has created to regulate the movement of just over two million people — effectively cutting Palestine into 300 'security' zones. Using the imagery of the iron wall that revisionist Zionist Ze'ev Jabotinsky had said a Jewish state would need to live behind, Thompson demonstrates how law has contributed to boundaries being imposed upon the Palestinians. It is ironic that the International Court of Justice has been asked to rule on the legality of an actual wall that Israel has built in Palestine's occupied West Bank.

The paper by de Silva Wijeyeratne is also very much concerned with the issue of foundations. The foundations that his paper addresses are not those that have their origin in a highly ambivalent colonial modernity, although the modern emergence of ethno-religious identity in Sri Lanka is one that he does address. The foundations that concern him are those located in the cosmic order of Sinhalese Buddhism. In a move that is influenced by phenomenology, his account of the genealogy of the devolution debate in postcolonial Sri Lanka draws on the explanatory resources of Buddhism. The ethnic crisis in Sri Lanka is fundamentally a crisis of the postcolonial state. The Sinhalese nationalist assertion that Sri Lanka has always been a centralised unitary state is itself undoubtedly a product of Sri Lanka's own incorporation into British constitutional practices. By drawing on a body of anthropological literature, he uncovers an alternative history of administrative practices in the island which reveals at a certain ontological level the highly diffused dynamics of the Buddhist cosmos. He goes on to provide a Buddhist justification for the decentralisation of power and a reordering of the contemporary Sinhalese Buddhist state.

The poststructural core of much of postcolonial theory then reveals the desire to rewrite that history of colonisation and at the same time give voice to the political implications of poststructuralism. Robert Young has observed that, while poststructuralism has its genealogy in the anti-metaphysical project of Nietzsche and Heidegger to the extent that it may be said to have a moment of historical origin, that moment is 'probably not May 1968 but rather the Algerian War of Independence — no doubt itself both a symptom and a product'.¹⁵ The liberation struggle in Algeria was not only a war against the French colonial state, but also an 'insurrection against the calm philosophical and political certainties of the metropolis'.¹⁶ It is ironic that many of the key French contributors to the poststructuralist move were either born in Algeria, or were associated with the liberation war.¹⁷ It is, however, significant that most seminal contributions to postcolonialism have come from intellectuals

¹⁵ Young (1990), p 1.

¹⁶ Young (2001), p 412.

¹⁷ Fanon, although born in French Martinique, went to Algeria to join the independence movement. Derrida, like Cixous and Althusser, was born in Algeria. Derrida was born into a Sephardic Jewish background.

from the sites of colonialism — Said, Spivak, Bhabha and Fanon. Indeed, it is through their work that we can come to understand the possibilities of poststructuralism.

Much of Derrida's work — from his early writing on Husserl, Nietzsche and Heidegger to his more recent turn towards questions of the ethical and the religious — are a meditation on the ontological violence of much of the Western canon, a canon which has always sought to efface the Other. In the history of the twentieth century, this moment of effacement is most strikingly captured in the Holocaust against European Jewry.¹⁸ The violence of colonial policies as well as the violence of representation that characterised the colonial state saw ontological violence reach new levels, as brilliantly documented by Fanon in *Black Skin, White Masks*. Deconstruction has always been 'directed at the identity of the ontological violence that sustains the western metaphysical and ideological systems with the force and actual violence that has sustained the western nations in their colonial and imperial policies'.¹⁹ In order to overturn the structural relations of power at both the global and domestic level, deconstruction has set itself the task of first locating the illusory nature of their foundations.

The events of September 11 have transformed the way in which we see the world order. Whether this order has itself been recast, or a new light has been shone on it, can only be decided later. For the present, the world scene appears troublingly different from that on 10 September 2001. This special issue takes up one aspect of this difference, the impact on the postcolonial analysis of law. The US administration has ensured that international law has been pushed to the front-line of world politics.²⁰ From the United Nations Security Council resolutions immediately after the attacks through the war in Afghanistan, the prisoners at Guantanamo Bay, the war on Iraq and the rhetoric against the International Criminal Court, the Bush administration has instigated a popular debate about the role of law in international society. The articles here ground this debate firmly in historical and theoretical contexts. Together they offer a stark reminder that international legal cultures are embedded in the contours of world order — and the discourses of Great Powers. They address how we might rethink this new world order that is emerging by interrogating, at both the domestic and the international levels, the highly ambivalent grounds of knowledge. It is this ambivalence which provides the grounds for resisting the imperial past that hovers over the new pretensions of Empire.

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¹⁸ The poststructuralist move is arguably an attempt to rethink the nature of the ethical and the political in the shadow of the Holocaust.

¹⁹ Young (2000), p 416.

²⁰ See Fitzpatrick (2003).

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