

Law and Politics in British Colonial Thought: Transpositions of Empire

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Law and Politics in British Colonial Thought, as its titles implies, covers a vast area of historical interest. While the editors do not call their collection systematic, they do hope to present new ways of thinking to a wide audience; a task in which they succeed, both in terms of approaching localised issues and addressing overarching theoretical and geographical frameworks.

The 13 chapters in this book are mainly concerned with British law as it developed in settler colonies. Early chapters on North America and on more miscellaneous topics, such as the international legal context for the founding of the Congo Free State, give way to a large number of chapters on Australia and New Zealand. As an historian of South Asia and of the operation of English laws in crown settlements such as the City of Bombay, I would have welcomed coverage of other, not predominantly Anglophone, settlements.

The authors certainly make no claim to be comprehensive, and what the book may lack in geographical range, it more than makes up for in sheer volume of fresh insights into the operation of the law in an imperial context. Most chapters use different local contexts to explore the interplay between the growth of empire, the waning of natural law and the rise of modern international law in the 19th century. While the book is arranged in four thematic sections, such is the variety and richness of the material that I shall offer a brief description of each chapter.

The contributions to this volume reflect the expansion of the intellectual history of empire into questions of legal title in natural law. They also build upon more recent research on the connexion between the evolution of international law and the zenith of the European empires.⁽¹⁾ As the editors of the book acknowledge, the parameters for such studies have been greatly increased by authors such as James Tully (endorsements of the highest order from Armitage and Tully appear on the book's back cover).

Such research has been a response to the demand for more historically-situated analyses. It represents a departure from the kinds of works on European imperialism inspired by post-colonial theory and the work of Edward Said. Publications in this emerging tradition, like those in this volume, typically combine a search for precise contexts with a study of ambiguity in the imperial enterprise; for example between imperial

governors as agents of the crown, and colonial judges as upholders of a common law tradition. That said, the mix of approaches in this volume prove that the new, closely contextual, analysis of imperialism is not simply about the rejection of Said-inspired theories. Rather than adhering to a single interpretation of how law and empire have interacted, the various contributors to this volume share an awareness of that interaction and its implications. Indeed, the first two chapters set out what could be described as the two ends of the spectrum of theories that inform research on colonial law and politics.

In the first chapter, Ian Hunter argues that the concept of public law as the expression of the ideal of universal justice ignores the ways in which laws reflect the norms of the society that enacts them at a given time, and are therefore historically and culturally constructed. With more erudition and skill than this short summary can convey, Hunter shows that this ideal of justice is essentially a European construct. The slightly mischievous (albeit ably argued) conclusion is that those who invoke universal standards of justice to judge European colonisation of non-European societies are in fact making use of a European construct.

In a companion essay, with equal rigour, Duncan Ivison argues that there is a normative universal justice that can be applied to imperial experience. Relying mainly on Kant, Ivison offers a philosophico-legal justification for this view (and an excellent appraisal of possible objections to it). In doing so, Ivison sets himself the question, 'How does empire become transposed onto justice?' Ivison's multi-faceted answer has meaningful implications not only for historians of European empires but also for study of the 'new Imperialism' of the United States since 1945. More generally, Ivison gives a solid foundation for philosopho-historical approaches to empire such as those based in the postcolonial tradition.

Speaking as an historian rather than a legal scholar, I felt that this pair of essays provided new and fertile ground for a much older debate stemming from the publication in 1978 of Said's *Orientalism*. They add much needed complexity to this continuing debate by reminding us that the new forms of closely contextual intellectual history of empire do not necessarily preclude Saidian orientalism and the works it has inspired.

In a study that moves from Henry Cabot's first voyages in the early 16th century, to the eve of the American Revolution, Christopher Tomlins' chapter locates the legal justifications of British territorial expansion in North America less in the concept of *terra nullus* and more in the Roman law concept of just title through war. Yet, as Tomlins points out such an implicit acceptance of the sovereignty of North American Indians eventually succumbed to the pressures of population growth. The charter for the state of Georgia, written in 1732, gave British colonisers the task of claiming and improving uncultivated land and defending the territory from 'Indian enemies' (p. 65) The land rights of the USA in continental America would subsequently be confirmed by the constitution and a number of Supreme Court judgements.

The mutability of the rule of law in colonial contexts is explored by John McLaren. As he points out, the model of the rule of law laid down by A. V. Dicey in the late 19th century belies what was in fact a 'net of processes' that changed over time and in different colonial contexts. This fluidity was due in part to the lack of uniformity of imperial jurisdictions. Trinidad, for example, continued to be administered under Spanish Law after its annexation in 1809 (p. 80). In part it was also due to the political nature of judicial appointments to Crown colonies. The interpretation of the rule of law therefore becomes the site of struggles for political power between local assemblies, the political operators in the colonial office and crown judges and the British colonial office.

The interplay of different cultural concepts of sovereignty is explored in Mark Walters' account of relations between the British government and indigenous peoples of Canada. Walter's central concern is with how the actors involved understood the expression 'Crown as father' and, by extension, how they interpreted imperial sovereignty. One of the most interesting and useful aspects of this chapter is Walters' self-conscious combination of ethno-history with the intellectual historical methods of Quentin Skinner and John Pocock. One suspects this mixed methodological approach will become more widespread, and Walters offers a good template for further research along these lines.

Andrew Fitzmaurice provides a lively account of the English barrister Travers Twiss' role in proving the international legal legitimacy of the Congo Free State on the grounds that a Company could own a sovereign entity. Fitzmaurice is quick to note the grim irony of the story. Twiss's personal journey from public scandal in England to pre-eminence as a Chair of the international law society, benefited from his successful support of King Leopold's right to establish the Congo Free State. Yet, Twiss' triumph, which depended on him contradicting his own earlier published writings on the issues, paved the way for one of the most brutal regimes in modern imperial history.

Andrew Sharp's account of Samuel Marsden, the Anglican cleric and missionary, draws attention to a relatively neglected problem in the study of imperial lives. He asks us how we can slot together an individual's seemingly inconsistent reputations from different colonial settings: Samuel Marsden is the 'flogging parson' of Australian history, but has a better reputation in New Zealand. By looking at the contexts that account for how Marsden operated, Sharp explains those acts that have given Marsden his reputation (notably for the brutal floggings), and shows how continuities in Marsden's own life can explain his different actions and reputation in Australia and New Zealand.

Mark Finnane undermines the assumption that the jurisdictional amenability of aborigines had been firmly established in the *R v Murrell* case of 1836. The case involved the alleged murder of one aboriginal by another and is commonly seen to have established jurisdiction of the court in New South Wales in such cases. Finnane explores subsequent cases which show that the precedent was by no means firmly established. The overall effect of Finnane's work is to question the history and extent of the accommodation of aborigines in Australian law.

The transposition of a key concept in legal governance to a different imperial setting is considered in Lisa Ford's chapter on the construction of 'The King's Peace' in colonial New South Wales. Ford considers how military honour on the one hand and the priorities of a community of merchant settlers on the other can make different demands on legal concepts such as the King's Peace. As Ford's chapter reminds us, it is often crises and flashpoints rather than routine activities that call for the clarification of concepts and therefore reveal how truly strained or multi-layered those concepts become when transposed to colonial societies.

Paul McHugh offers a different take on transpositions of empire by comparing three utopian political fictions written about New Zealand. The role of this genre in the intellectual history of the British empire in the 19th and 20th centuries remains under-researched. McHugh demonstrates the value of such studies for understanding the aspirations and assumptions that informed the political positions of particular eras.

Shaunnagh Dorsett considers how sovereignty was understood in a range of British imperial intellectual contexts. Focusing on the management of colonial relations, she compares the writings of the New Zealand Supreme Court Judge Samuel Chapman and the imperial theorist and statesman Sir George Cornewall Lewis. Dorsett's choice allows for an examination of the interplay between the common law approach of the one and the positive law invocation of singular sovereignty of the other. As the article's short title, 'sovereignty as governance', suggests, the demands of colonial government led to different combinations of legal instruments being used to meet the political exigencies of the moment.

Damen Ward examines how courts in South Australia and New Zealand treated aboriginal testimonies in the 1840s. In Ward's hands, the issue of the capacity of aboriginal witnesses offers compelling examples of how the administrative powers of lower level courts challenged principles laid down at a higher level. As Ward observes, the varied reception and implementation of the Colonial Evidence Act demonstrates how the structure and practices of imperial governance were different from colony to colony in ways that call for closer examination of procedures and processes. As with so many chapters in this work, it challenges the historian to look at how government operates on a number of levels.

Mark Hickford's chapter explores the limits of colonial common law and public law as sites for negotiations

over M?ori rights and entitlements. Such legal vocabularies were used to provide M?oris with property rights that could be recognised by New Zealand's Anglophone court system. Yet as Hickford demonstrates, such efforts were ultimately undermined by political exigencies (that is by the deals struck between M?ori tribes and colonial agents).

As the editors make clear, the chapters in this volume are responses to new demands made by 'the turn to history' in the study of imperialism and law. The question of how legal and other governmental structures are transposed to different localities must always be a complex one. The kind of interdisciplinary approach offered by this work will give invaluable guidance on how future research can continue to examine the intricate interplay between the operational life of empire and those theories and instruments of government that are assumed to underpin it. As an intellectual historian of empire, I sincerely hope that the efforts to tackle the socio-legal issues covered in this volume (like the 2009 conference that begat it) are a sign of things to come.

Notes

1. David Armitage, *The Ideological Origins of the British Empire* (Cambridge, 2000); *The Global Order: Empire and International Relations in Nineteenth Century Political Thought*, ed. Duncan Bell (Cambridge, 2007).[Back to \(1\)](#)

The editors are happy to accept this review and do not wish to comment further.

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