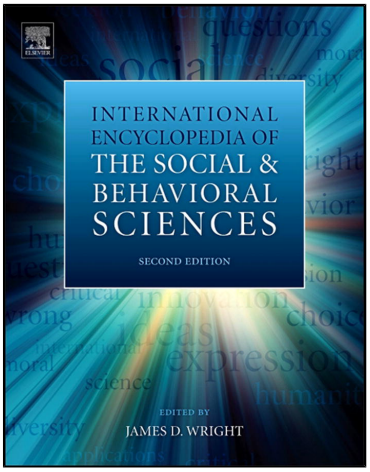

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Postcolonial Law

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Abstract

Postcolonialism and the problems associated with postcolonial law are today more widely recognized than ever before among scholars, political philosophers, and legal practitioners. However, the terms of the conversation have shifted since postcolonial theory first emerged as a new arena of critical scholarship. Today, postcolonial theory addresses the oppression of all communities historically treated as racially and ethnically inferior to Europeans, whether or not these communities self-identify as 'indigenous' or think of themselves as formerly colonized. This article explores the challenges presented by postcolonial law and related analyses of legal orientalism in the twenty-first century. Acknowledging the postcolonial dimensions of legal exchange between the global North and global South demands a rethinking of the prevailing Eurocentric, state-bound understanding of what constitutes law in the current global era.

Postcolonial Law in the Twenty-First Century

Postcolonialism and the problems associated with postcolonial law are today more widely recognized than ever before among scholars, political philosophers, and legal practitioners. However, the terms of the conversation have shifted to more aptly apply to current global geopolitical realities. Whereas the language of earlier postcolonial theorists focused on the dialectic between colonizing nations and the colonized, contemporary scholars talk in terms of the relations between what is commonly referred to as the global North and global South. This shift in terminology expands the lens of analysis from state-centered law in the context of specific national colonial enterprises to a more global post-westphalian worldview that takes into account transnational, regional, and state interrelations (Falk, 1998). It also opens up the conversation to include the oppression of all communities historically treated as racially and ethnically inferior to Europeans, whether or not these communities self-identify as 'indigenous' or think of themselves as formerly colonized.

Contemporary scholars of postcolonial law draw upon an intellectual legacy that traces back to postcolonial studies that emerged in the 1980s to talk about postcolonial law in a more encompassing way. These scholars are interested in the underlying orientalist assumptions in national and international law that affirm essentialized constructions of cultural difference (Ruskola, 2002; Falk, 2009; Pahuja, 2011), and inform many countries' flawed polices of multiculturalism (Bhandar, 2009; Marés, 2007). Importantly, what links the legacy of postcolonial studies to contemporary analyses of legal orientalism is a central focus on the endurance of historically structured racial and ethnic divides between Western and non-Western societies despite a growing appreciation of their respective interdependencies.

Postcolonial theory is largely associated with a rethinking of a dominant European historiography that places the West at the center of the world. Associated with South Asian scholarship, subaltern and literary studies as well as analyses of resistance, postcolonial theory emerged out of the global South in the 1980s and gained an increasing presence in Anglo-European universities (Prakash, 1990, 1992; O'Hanlon and Washbrook, 1992; Chakrabarty, 1992). With the proliferation of postcolonial research, there was, and remains, much debate over the meaning and scope of postcolonial terminology and its political agenda (see Williams and Chrisman, 1994; Schwarz and Ray, 2000; Loomba, 2005; Mongia, 2009). Despite these ongoing deliberations, it is helpful to turn to the most significant implications of a postcolonial perspective, which mark it as distinctly different from, yet complementary to, other critical investigations associated with critical race theory, critical legal theory, and poststructuralist and feminist theoretical perspectives. This process will help to flesh out the contours of postcolonial studies and, at the same time, underscore its intellectual lineage and relevance to contemporary legal analyses.

Below I discuss some of the insights postcolonial theory brings to bear on an understanding of legal orientalism in contemporary legal processes. This is most notably achieved through the theoretical insights of Edward Said, who was a leading figure in postcolonial criticism and whose book *Orientalism* (1978) established a long trajectory of critical thinking about the subjugation of non-Western peoples. Specifically, postcolonial theory reveals the violence and the technologies of power involved in understanding concepts such as modernity and capitalism as well as contemporary state and trans-state nationalisms (Baxi, 2000; Spivak, 1999; Darian-Smith and Fitzpatrick, 1999; Comaroff and Comaroff, 2006). Moreover, postcolonial theory provides the intellectual bridge linking historical colonial injustices to contemporary global racial injustices and asymmetries of power between a global North and global South. In short, postcolonial theory provides the intellectual platform from which to identify, analyze, and assess what is encompassed in the wider geopolitical framing of the term 'postcolonial law' in the twenty-first century.

Defining a 'Postcolonial' Perspective

Postcolonial theory acknowledges and recovers the ongoing significance of colonized peoples in shaping the epistemologies, philosophies, practices, and shifting identities of dominant and taken-for-granted Western subjects and subjectivities (Santos, 2007). Postcolonial scholars bring to the foreground the cultural and psychological relations between the former

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colonized and colonizers, whom, they argue, cannot be understood except in conjunction with each other (Gandhi, 1998). Postcolonial theorists do not claim that colonialism was experienced in the same way under different regimes, just as they recognize that today colonialism operates in very different ways from its earlier configurations. Nonetheless, while paying attention to the details of specific contexts, postcolonial scholars agree that in order to understand all contemporary histories of peoples and places, irrespective of whether there historically existed in any given site an explicit colonial regime, it is important to remain aware of the enduring presence of discourses that posit 'civilized,' 'progressive,' and 'lawful' Europeans against 'barbaric,' 'static,' and 'lawless' native populations.

According to these scholars, colonial assumptions of Western superiority endure across time and undermine contemporary attempts to build more inclusive multicultural societies. This is because categories of racial difference were used to varying degrees by colonial governments to gain power and control over locally subjugated peoples (Stoler, 1989; Dirks, 1986). Today, despite claims of increasing acceptance of the concept of multiculturalism and cultural diversity, racial categories, and racialized differences continue to exist, though often in less overt manifestations (Goldberg, 2008; Lentin and Titley, 2011). Moreover, according to many postcolonial theorists, these boundaries of difference are insurmountable, because the psychological intersubjectivity between former colonizers and colonized people constantly invites re-representations of difference (see Fitzpatrick, 1999).

Drawing on a variety of theoretical perspectives – including an Hegelian master/slave dialectic, phenomenological essentialism, and psychoanalytical insights gleaned from Franz Fanon and Jacques Lacan – postcolonial theorists such as Homi Bhabha, Gayatri Spivak, and Benita Parry bring to the fore complex understandings of how oppressed peoples resist and seek empowerment. In recognizing processes of mutual desire and negation between the 'master' and 'slave,' postcolonial scholars have had to grapple with alternative historical narratives and identities other than those conventionally supplied by the West (Trivedi and Mukherjee, 1996). The irony is that the process of self-determination by peoples formerly colonized requires the adoption of European knowledge, including concepts such as 'progress,' 'development,' 'individualism,' and what it means to be human. It also means the use of Western forms of government, state-building, and perhaps most importantly of all, law. Thus, according to a postcolonial perspective, all assertions of freedom and self-awareness require elements of mimicry and voyeurism. As Douglas Robinson has noted:

> Postcolonial or subaltern scholars claim it is at once essential and impossible to forge a 'new' postcolonial identity: *essential*, because those colonial constructs were at once alien and negative, because they came from the outside and destroyed much of value in the indigenous cultures, and because an effective postcolonial politics requires the development of more positive indigenous visions: but also *impossible*, because colonial discourse continues to inform even these postcolonial attempts to break free of it, and tends to condition even the imagination of a 'new' (postcolonial) identity along 'old' (colonial) lines (Robinson, 1997: 19–20).

A prominent postcolonial theorist, Dipesh Chakrabarty, has responded to the ironies of alterity by calling for the 'provincializing,' or decentering, of Europe and European epistemological knowledge. Chakrabarty (and others) argue that non-Western knowledge has been historically ignored and precluded from historiographical accounts of humanist understanding and intellectual endeavor (Chakrabarty, 1992, 2000). In an effort to critique "the 'Europe' that modern imperialism and (third world) nationalism have, by their collaborative venture and violence, made universal," Chakrabarty urges scholars "to write into the history of modernity the ambivalences, contradictions, the use of force, and the tragedies and the ironies that attend it" (Chakrabarty, 1992: 20–21).

Postcolonial Law

Nowhere in the histories of modernity has the 'use of force, and the tragedies and the ironies that attend it' been as obvious as they are in the context of legal engagement. European law, in a variety of ways, was the formal mechanism and institutional frame through which colonial governments oppressed and controlled indigenous peoples. Of course, there are many varieties of imposition and reception of law, a few even categorized as voluntary. In some cases, such as in Africa (Mamdani, 1996), this involved co-opting native chiefs and traditional procedures of arbitration and dispute resolution. In other cases, such as Australia, the British declared the continent *terra nullius* or vacant, and on the basis that native populations were thought to be less than human, they were deemed to have no law at all (Behrendt, 2003). As a result, traditional local methods of peacekeeping were often overlooked or deliberately obliterated. Law – emblematic of European rationalism, individual property rights, and sovereign state authority – provided the justification for domination and exploitation based on racial, ethnic, or religious inferiority.

It is impossible to separate colonial from postcolonial law because each developed in collaboration and conjunction against and through each other (Merry, 2004; Darian-Smith, 1996). Hence it can be said that nineteenth century metropolises such as New York, Paris, and London were always connected with and influenced by their nation's colonial peripheries, be these geographically distanced outposts beyond state boundaries or socially and politically isolated enclaves (such as native reservations) within it. Similarly, colonial outposts were intimately connected back to their colonizing oppressors. In short, colonies emerged over time as intricately entangled hybrid societies incorporating European and non-European sensibilities. Hence the decolonized countries of the post-1945 era – such as India, Algeria, South Africa, and the Philippines – could not entirely excise their Euro-American colonial legacies. Moreover, these newly independent nations had little choice but to adopt European forms of state building and the institutions, bureaucracies, and constitutions of their former masters. Such formalities were necessary in order for new states to declare themselves 'liberal' and 'modern' and to participate in national and international political and economic organizations such as the United Nations. The rule of law exemplifies the postcolonial dilemma that required – and still requires – self-

determining nations to mimic and adopt Euro-American legal concepts and structures.

Globalization and Postcolonial Law

Prevailing discussions about law and globalization epitomize the ironies presented by postcolonial law. For instance, The United Nations, World Bank, International Monetary Fund, and other international legal arrangements all require that in order for a country to participate in the global political economy, it must demonstrate commitment to, and adherence with, the foundational values of Western law (Halliday and Osinky, 2006: 455–456). In a postcolonial world, just as in the colonial situation, there are always ongoing modifications and appropriations between all interacting communities. One only has to think of human rights to appreciate the extent to which its apparently universal application has to be constantly translated and modified to fit the social, political, and economic values of particular peoples living in localized places (Merry, 2006; Sarat, 2001). Similarly, Euro-American law is not entirely impervious to the influence of laws emanating from the global South, as illustrated by the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007. That being said, the global dominance of Euro-American law in the early decades of the twenty-first century is not easily destabilized. And as a result, Euro-American law structurally institutionalizes the enduring asymmetries of power between the global South and global North and pervasively fashions and legitimates certain legal practices, meanings, and imaginations that have their origins in the global North (Darian-Smith, 2000).

Within much scholarship there lingers a deeply embedded assumption of the global North's legal superiority vis-à-vis the rest of the world (Darian-Smith, 2013). This is evidenced by a majority of United States and European scholars continuing to treat the rule of law as a discrete entity and not as a dynamic product of historically contested and culturally informed colonial–postcolonial interactions. Thus well into the twenty-first century, in arguments both for and against the enduring significance of the nation-state in the increasing context of globalization, the dominance of Western legalism is taken as a given. As a result, analysts of law tend to look only at the privileged domains of legal interaction among lawyers, judges, businesspeople, and entrepreneurs, and to ignore the perspectives of ordinary people whose culturally informed normative understandings of law may be very different (Ewick and Silbey, 1998). In short, scholars should not ignore the 'contribution of the masses' (Rajagopal, 2003: 402). We need to be concerned with how globalization affects peoples in different ways, and studies should include both the small, cosmopolitan, plane-hopping legal elite *and* the millions of peoples from various classes, cultures, ethnicities, and religions whose understanding of law may appear to those embedded in a Western legal heritage as 'traditional' or 'backward.'

Legal Orientalism and Postcolonial Law

Postcolonial law requires that scholars and practitioners come to terms with the fact that there is no universal legal code and no such thing as pure legal objectivity, but rather a complex overlapping plurality of legal systems and legal meanings. If this view was to take hold, the naturalized centrality and superiority of a Euro-American legal perspective would be dislodged and, borrowing Chakrabarty's terminology discussed above, would become necessarily 'provincialized.' However, given the relations between law, capitalism, and a global political economy, it is perhaps not surprising that Western legal scholarship has largely ignored (some would argue deliberately) the challenging presence of postcolonial law. In an attempt to move beyond this deadlock, some scholars are coming at the problem of legal plurality by talking about the issue of legal orientalism. These scholars take a long historical view in arguing that legal orientalism has shaped the development of modern Euro-American law from the sixteenth century to the present (Ruskola, 2002; Anghie, 2006; Falk, 2009: 39–54). This argument forces us to think about how racial and cultural biases continue to inform globally dominant legal concepts and assumptions of Western legal superiority, and may in turn open up ways to challenge or resist these dominant legal understandings of the world (Santos and Rodriguez-Gavarito, 2005).

What is legal orientalism? As mentioned above, the concept of legal orientalism draws expressly upon the work of Edward Said, a leading figure in postcolonial theory. Said coined the word 'orientalism' to refer to the ways European societies throughout the nineteenth century constructed their identity and self-understanding through imagining their difference from the Arab and Muslim world (Said, 1978, 1993). Essential in this process was the West's stereotyping of the Orient, which included a range of Eastern cultures that included the Middle East as well as China, Japan, and South Asia. Orientalist discourses emanating from Europe were not exactly the same as those emanating from the United States because they were usually directed toward the Middle East and China, while in the United States orientalist rhetoric was usually directed to the Philippines and targets closer to home (Little, 2008; Brody, 2010; Francavigilia, 2011). These differences typically correlated with a country's imperial and colonial interests and often changed over time. However, what united these various forms of orientalist rhetoric and material practice was the assumed oppositional relations between an exoticized Orient and a civilized Occident.

Typically nineteenth century orientalist discourses about the East were negative and reinforced a presumed hierarchy of Western superiority and Eastern inferiority. However, this was not always the case, as seventeenth and eighteenth centuries Enlightenment philosophers and missionary Jesuits often praised Chinese people for their ingenuity and skill (see Gregory, 2003; Mungello, 2009). However, by the nineteenth century European attitudes about Asian peoples had crystallized into derogatory stereotypes (Ruskola, 2002). Europeans promoted themselves as modern, rational, moral, and lawful in contrast to a projection of Eastern societies as premodern, irrational, immoral, and lawless. Hence, at the same time that commentators such as Alexis de Toqueville were remarking upon the emphasis given to law in the United States in the 1830s, historians and social theorists were pointing to the lack of law in countries such as China, which was essentially viewed as a backward, 'stagnant' society in which lawlessness reigned

(Ruskola, 2002: 181–187, 213–215). But as insisted upon by Said, this did not mean that the "Orient was essentially an idea, or a creation with no corresponding reality" (Said, 1978: 5). Rather, "The Orient is an integral part of European *material* civilization and culture … with supporting institutions, vocabulary, scholarship, imagery, doctrines, even colonial bureaucracies and colonial styles" (Said, 1978: 2).

Legal orientalism served a variety of purposes. The most obvious of these was that it helped confirm on the world stage the marginality of the East and the centrality of the imperial West. European and American scholars argued that Eastern jurisprudential traditions were based on custom, ritual, and religion in contrast to the so-called rational and scientific legal systems of modern Western nations. Declaring non-Western legal systems inferior helped to justify European law and culture as a superior civilization, worthy of world leadership and dominance. Orientalist rhetoric also provided the rationale for Western nations to marginalize Asian peoples within their domestic jurisdictions. For instance, in the United States orientalist rhetoric provided the basis for the Chinese Exclusion Act (1882). This act suspended Chinese immigration into the country and prevented those Chinese people already living in the United States from ever being granted citizenship. Under the act, it was argued that Chinese people were nonlegal subjects because they were incapable of understanding American law and so deserved to be excluded from the new republic (Park, 2004; Ruskola, 2002: 215–217).

Postcolonial legal scholars argue that the oppositional rhetoric between Eastern and Western legal traditions was essential for the development of modern Euro-American law. In other words, European law emerged historically through a perceived difference from non-Western legal concepts. According to the sociolegal scholar Duncan Kennedy, international law must be understood in relation to "a distinction between the West and the rest of the world, and the role of that distinction in the generation of doctrines, institutions and state practices" (Kennedy, 1997: 748). This perceived difference helped shape the international legal system, which required the 'invention of legal primitivism' to legitimate the West's universal aspirations (Gathii, 1998; Bowden, 2005; Anghie, 2006; Wilf, 2009).

If one accepts this argument, then it follows that Western law has orientalist assumptions historically built into its language, structure, and procedures. This suggests that contemporary Euro-American law, and the international legal system on which it is built, remains to this day intrinsically and pervasively cultural and racially biased (see Pahuja, 2011; Westra, 2011). In short, legal orientalism endures in twenty-first century international law and global legal relations (see Otto, 1996; Falk, 2009; Haldar, 2007). Legal orientalism continues to fuel assumptions about the global North's legal superiority over the global South and has been deployed in a range of national and international legal forums such as asylum and refugee claims (Akram, 2000). Moreover, legal orientalism is evident in the ways the global North interprets law in the Middle East, particularly in the wake of the events of 9/11, and how Western nations view law in China, Africa, and Latin America. However, as the international legal scholar Teemu Ruskola remarks, the point of recognizing the presence of contemporary legal orientalism is not to overcome our cultural biases – an impossible task – but rather to ask why certain orientalist images of law developed, why they continue to resonate in the contemporary world, and what can be done to dilute these negative stereotypes that undermine international law and prevent sincere global dialogue and creative legal collaboration (Ruskola, 2002: 222).

One thing that is certain – whether one frames asymmetrical power relations in terms of postcolonial law or legal orientalism – is the need to move past a modernist hierarchy of legal authority based on simplistic binaries of rational versus nonrational and civilized versus uncivilized legal systems. De-orientalizing the twenty-first century's normative global order and stereotyped legal divides is seen, by some scholars and analysts at least, as ultimately necessary for the stability and peace of global, international, national, regional, and local relations (Santos, 2007; Onuma, 2010). As the Nigerian legal scholar Ikechi Mgbeoji has eloquently stated, "the North and South are mutually vulnerable, sharing a common destiny, which cannot be realized unless notions of a civilized self and barbaric other are abandoned" (Mgbeoji, 2008: 152).

Postcolonial insights offer some insights as to how to get past historically structured racialized divides between peoples and communities. The political theorist Duncan Ivison in his book *Postcolonial Liberalism* (2002) argues for the need to create a "genuine 'multilogue' not just between the state and indigenous peoples, but between them and other cultural and national groups as well" (Ivison, 2002: 163). In his arguing that indigenous peoples can make considerable contributions in the thinking of how to build more inclusive societies, Ivison notes that this will take time and a firm commitment to "the ideal of a political order in which different national groups, with different modes of belonging and different conceptions of the good and the right, nevertheless share a willingness to live under political arrangements that reflect this plurality" (Ivison, 2002: 166). Ivison's argument underscores the political challenge of a postcolonial perspective with respect to law. In order for there to be "a context-sensitive and embedded form of public dialogue and deliberation" (Ivison, 2002: 163), we must first rethink the prevailing Eurocentric, state-bound understanding of what constitutes law. In other words, embracing postcolonial law and coming to terms with its deeply problematic histories of colonial oppression is perhaps the first step in a process toward building a global legal future that is more inclusive, responsible, and equitable.

See also: Law and Development; Modernity: History of the Concept; Modernity; Nationalism, Historical Aspects of: Africa; Nationalism, Historical Aspects of: South Asia; Nationalism, Historical Aspects of: The West; Nationalism: General; Orientalism; Postcoloniality.

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