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## Law, History and Postcolonial Theory and Method

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## Law, History and Postcolonial Theory and Method

### Abstract

This Special Issue of Law Text Culture, 'Making Law Visible: Past and Present Histories and Postcolonial Theory' originated with a one-day symposium at the University of Waikato titled 'Law, History and Postcolonial Theory and Method'. The symposium sought to recognise and stimulate multidisciplinary analyses through the lenses of postcolonial theory that made visible the operation of the law at the intersections of 'race', class and gender from colonial times to the present. The focus was on New Zealand, other white settler societies, and Pacific nations. We set out to address questions about what constitutes postcolonial research in law and history; whether specific methodological frameworks or theoretical challenges apply to this kind of work; and whether 'new' methodological or theoretical approaches have been developed and articulated. Our aims were to involve a group of people in a project that explores new methodological approaches to research around the questions we pose, and to create a multidisciplinary project across history and law that allows us to create new ways of seeing, discovering and investigating these intersections.

# **Law, History and Postcolonial Theory and Method**

**Nan Seuffert and Catharine Coleborne**

This Special Issue of *Law Text Culture*, ‘Making Law Visible: Past and Present Histories and Postcolonial Theory’ originated with a one-day symposium at the University of Waikato titled ‘Law, History and Postcolonial Theory and Method’. The symposium sought to recognise and stimulate multidisciplinary analyses through the lenses of postcolonial theory that made visible the operation of the law at the intersections of ‘race’, class and gender from colonial times to the present. The focus was on New Zealand, other white settler societies, and Pacific nations. We set out to address questions about what constitutes postcolonial research in law and history; whether specific methodological frameworks or theoretical challenges apply to this kind of work; and whether ‘new’ methodological or theoretical approaches have been developed and articulated. Our aims were to involve a group of people in a project that explores new methodological approaches to research around the questions we pose, and to create a multidisciplinary project across history and law that allows us to create new ways of seeing, discovering and investigating these intersections.

Postcolonial theory provides tools for analyses of the dynamics of colonial imperialism, in which law and history have been central. These dynamics include the transmission of gendered power through the formations of the modern nation-state and the control of colonised women, the emergence of global cultural knowledges, and the imperial command of commodity capital. However, we note, with Ann

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McClintock, that postcolonial theory, while critiquing the imperial idea of linear time and progress, integrates those very concepts within the term. The ambiguous placement of 'white' women within the colonial, barred from formal positions of power, and complicit both as colonised and coloniser, privileged and restricted, acted upon and acting, was of interest to us. The idea of progress beyond the colonial is particularly problematic in relation to women, who do two-thirds of the world's work, earn 10 per cent of the world's income, and own less than 1 per cent of the world's property (McClintock 1995). The goal of our symposium was to stimulate work that grappled with these ambiguities and contradictions, addressing the gap in analyses of law, history and postcolonial theory at the intersections of 'race' and gender in this part of the world.

Some of the invited keynote speakers present on that day are represented in this issue, including Giselle Byrnes (Wellington), Ian Duncanson and Judith Grbich (both of the Institute of Postcolonial Studies, University of Melbourne and Law, Griffith University). At the symposium, we also heard from Diane Kirkby (History, La Trobe University) and David Williams (Law, Auckland). Specific panel discussions focused on gender and inter-disciplinary work involving participants from Geography, Education and History at Waikato. This Special Issue has provided an opportunity to examine some of our ideas further and to involve a wider audience and new contributors to the wider project.

In this Special Issue, we are interested in analyses of the operation of the law at the intersections of 'race', class and gender from colonial times to the present through the lenses of postcolonial theory, including: the raced and gendered inscription of modern power into colonial practices of rule, at both the centres and margins; raced and gendered aspects of boundaries and boundary markers of colonial nations, including analyses of raced and gendered practices of migration and immigration; law's ambiguous placing of white women within colonisation; and the gendered promises of postcoloniality. It is a multidisciplinary field, and this is apparent in the range of our

contributors: legal scholars, historians, geographers, cultural theorists and a poet. Images are also included in this issue, reminding us that we wanted to ‘make visible’ the operations of law through the use of some visual materials.

The articles we have selected engage us in an exploration of these themes in different ways. The first two articles, by Ian Duncanson and Judith Grbich, perform both analyses and descriptions of what ‘postcolonial’ scholarship in law and history might entail. Duncanson, in a piece lauded by one reviewer as ‘globally significant research’, brings his depth and expertise in the Law and Society movement and its scholarship to bear on the questions raised by the multidisciplinary aspired to in our symposium. Politics and ethics are central to law, and praxis requires that we focus on the political and ethical implications of both our theory and practice. The tools of postcolonial theory provide not new, but perhaps more sophisticated, methods for foregrounding the ethics of choice in historical representation. Both the ethics and perspectives of representation are central to feminism, which in its postcolonial incarnations, is sometimes primarily concerned with gender, subject and agency. Yet the still dominant, ‘black letter law’ approach to law and legal theory produces us as subject-effects, interpellated from the juridical site. The projects of postcolonialism and feminism suggest and require the related project of self-representation by the subjects of the law, reshaping the law’s representations of itself.

Judith Grbich also engages directly with the multidisciplinary of our themes. Her provocative piece draws together postcolonial and psychoanalytical theory to read some of the critical texts of colonialism and critique canonical texts of the Western tradition. Specifically, she extends Bhaba and Pietz’ analyses of Freudian fetish theory to legal aesthetics and histories of commercial credit practices to reveal the ‘fetishism of invisible commodities which has used the suffering of black skinned peoples to support the juridical logic of writing money as a practice worth the risking of life’. The *methods* of postcolonial theory, one of the foci of our symposium, make visible the genealogies of fetishism, providing hope for change in the lives of the suffering.

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Key areas for scholarly debate emerged among our contributors. In the second section, 'Law, Space and Place', Mark Harris and Renisa Mawani address understandings of 'place' and 'space', made problematic within a postcolonial framework, engaging with the 'boundary markers' of colonial nations in their work. Harris comments on the way that Australian land has been mapped and thus shaped through imperial/colonial discourses. His work resonates with the poetry of Tony Birch, also included in this issue, in that it emphasises that the 'experience of Indigenous Australians has been one of denial and dislocation'. Tracing the meanings of places including urban zones in Melbourne and Sydney, and Indigenous resistance within these spaces, Harris also reflects upon the meanings of historic markers or memorials of this dislocation in his discussion of monuments. He concludes that diverse, and increasingly shared, meanings of place and space have emerged in Australia over time.

Mawani's article similarly evokes the meanings of an urban space, this time in Vancouver, British Columbia: Stanley Park, a 'site of local and national contestation' between Aboriginal peoples, government and interest groups. Mawani argues that landscapes have shifting meanings; their construction as sites of colonisation and resistance to that colonisation is well established by postcolonial scholars including cultural geographers. Mawani's engagement with these themes brings her to a slightly different conclusion from that offered by Harris. But she agrees that the ambiguities, ambivalences and complexities of colonial narratives signal multiple histories and meanings of and for place.

The third section, 'Gender, "Race" and Laws', offers two pieces about the intersections between national discourses of identity, law, indigeneity and gender. Louise Falconer examines the 'Mother country' and her progeny. Feminist scholars including Catherine Hall (1998) and Ann McClintock (1995) have signalled that, as Falconer argues, the British Empire was an 'ideological space', a site for the production of the meanings of masculinity and femininity both at home and abroad. Falconer's article explores the fertility of white women in Australia around the turn of the century, engaging with the complex meanings of white

women's reproductive roles, immigration and empire, and the legal meanings around fertility and its control, using the case of Indecent Publications legislation and other laws. Comparisons with Canada provide a fresh perspective on this history. Historian Ann Curthoys has pointed out that it is useful to conceptualise Australia's history within a broader, transnational frame, in order to interrogate the meanings of ideas about 'imperial' or 'white' that are often applied in a narrow context (Curthoys 2002).

As Falconer suggests, fears about 'racial integrity' led to the surveillance of women's maternal bodies within the context of Imperial claims to 'whiteness'. Nan Seuffert also uses the work of feminist scholars and other critical theorists to show how the raced, embodied identities of women and men, particularly Maori, were central to the shaping of the modern nation through legislation that regulated their behaviour; specifically, Seuffert examines colonial marriage law in Aotearoa New Zealand. Again, as marriage law was created in this context, it was shaped by Imperial notions of gender and 'whiteness'. 'Successive Marriage Acts,' argues Seuffert, 'positioned Maori marriage at the boundaries of the nation.' Seuffert draws upon specific cases to demonstrate this. As a legal scholar Seuffert's rich work demonstrates novel ways in which case law might be used in legal-historical scholarship to illuminate the 'gendered promise' of postcoloniality.

The final section, 'Indigenous and "Alien": Land Rights and Immigration Discourses' explores both land rights claims in New Zealand and Australia, and immigration discourses in Australia, using current problems and case studies to identify the ways in which postcolonial theory and method might be able to shed light on highly contested public issues. The work of catriona elder focuses upon the imagining of 'white Australia' through forms of 'paranoid nationalism', as evidenced in debates about asylum seekers or 'unauthorised immigrants'. This article theorises, and historicises, exclusion and inclusion from the nation. Following the work of Falconer and Seuffert, elder engages with a cultural studies approach to her problem: how have Australians managed their borders and boundaries, and transgressions of these, from

the moment of Federation in 1901? Her sources include literary texts and visual images. Together with other authors in this issue, elder notes the ambivalence inherent in discursive constructions of national boundaries and the state of belonging to the nation.

Turning to New Zealand, Giselle Byrnes provides a case study of the postcoloniality of the published legal-historical narratives of the Waitangi Tribunal, demonstrating both their progressive political potential and their limitations. The Tribunal histories are aimed at interrogating and destabilising colonial practices of rule with the presentist, postcolonial, goal of redressing colonial damage to the dignity and integrity of Maori people, institutions, practices and values. Yet these narratives, and the legal and historical methods by which they are produced, also present continuities with colonisation, and consequently disquiet with the potential to leave colonisation in the past. Byrnes suggests that the potential for transformation may be in the processes of participation and performance of the production of multiple histories.

One significant contribution of postcolonial theory has been its analysis of the complexities of such dichotomies as coloniser/colonised and agent/victim (Bhabha 1994). Both postcolonial theory and a multidisciplinary methodology focusing on colonial practices of rule assist Thalia Anthony in her intervention into Australia's dichotomised debate regarding whether Aboriginal labourers on northern cattle stations in the nineteenth century were 'free' or 'forced'. She interrogates the distribution of power through jurisdiction conferred by land rights based in feudal systems. Differential rights to land, combined with pastoralists' demand for labour, resulted in relationships between pastoral colonisers, the Crown and Aborigines that allowed some realisation of the land interests of each. Anthony's analysis of the complex web of relationships that the feudal land system sustained highlights the inadequacy of analyses adopting fixed categories such as agent/victim and free/forced.

Poetry by Tony Birch engages with the problem of the archive. Historians and postcolonial theorists have begun to interrogate the way in which imperial and colonial archives were 'technologies of rule',

embodying, among their many productions of colonial identities, ‘documents of exclusions’ (Stoler 2002: 83–5). Birch, who also writes history, has also contributed a poem about the way the state of Victoria, Australia, once a place belonging to Koorie people, has become centred on a casino where its history is further erased as ‘the coloniser rests in a catatonic dribble’.

We hope these pieces will further stimulate scholarship in this area and lead to more special meetings between legal scholars, historians and others interested in pursuing the possibilities in postcolonial theory and methodology.

Many thanks to the enthusiastic speakers and participants in the ‘Law, History and Postcolonial Theory and Method’ symposium, without whom this volume would not have been possible. We are also grateful to the authors who sent in manuscripts in reply to our call for papers; this is an exciting collection and all of the authors have been a joy to work with. The time and effort of the referees in providing useful, stimulating and supportive comments, in a period when the stress of academic life is constantly on this rise, is also greatly appreciated. The editorial board of *Law Text Culture* generously provided the opportunity to edit this Special Issue, and special thanks are due to Rick Mohr, the Managing Editor, for his patience and helpful advice. Finally, and importantly, Dawn Koester provided professional, cheerful production assistance that made the editorial process painless.

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