

Laws of the Postcolonial

Eve Darian-Smith, Peter Fitzpatrick (ed.)

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In 1926 the pioneering social anthropologist Bronislaw Malinowski wrote a short book called: *Crime and Custom in Savage Society*. In this book, he challenged the curiously paradoxical notions held by his contemporaries about law in tribal societies. On the one hand "savages" were thought of as lawless people unable to follow a rule. On the other they were conceived as robotic automata, "mechanically" following custom-hallowed norms. He went on to claim that the tribal "customs" he had observed functioned, to all intents and purposes, similarly to a modern legal system. While this identification of law with custom has been heavily criticized, it is the great merit of the text being reviewed here that it explains both the importance of Malinowski's insight and why it continues to be received so tepidly.

The theme addressed by the contributors to this edited volume is no less ambitious than the teasing out the relationship between law and the "postcolonial". The central argument, which

clearly owes much to the ideas of Edward Said and Homi Bhaba, is that the constitution of Western identity simultaneously proceeds through a process of differentiation from non-Western "others" and through a process of appropriation of the universal, by which Western identity is represented as standing for universal humanity as a whole. The latter process exists in continuous tension with the former, as in order to appear universal, the West must try to include the previously excluded "others." Thus the identity of the West is irresolute, continually hovering in between the two poles of a rigidly ethno-centric cultural identity and a fluid encompassment of what lies outside its borders. Law is one occupant of this "in between" space and plays an important role in making possible both the "othering" of "native customs" without which the West would be unable to define itself and the encompassment of the excluded other, who is imagined as the subject of globalised rules and universal human rights.

This argument appears convincing as it throws fresh light on dichotomous Western perceptions of non-Western "customs." The belief that "savages" rigidly follow traditional customs appears as the flip-side of a process of construction of Western

law as a modern and flexible tool for reasoning agents. And the view that "savages" are lawless is exposed as a perception which makes it possible for the West to encompass these "savages" as universal examples of humanity living in a Hobbesian state of nature. Thus the persistence into the present of Malinowski's "two views of custom" testifies to the continued importance of the "other" in defining the West, as well as the inherent instability of Western postcolonial identity, which cannot either wholeheartedly include or exclude the native "other."

If this analysis is correct, then it follows that a concept such as 'custom' should not be seen as a neutral descriptive term but as the photographic negative of (Western) 'law', which it defines through negating. Apart from explaining why Malinowski's conflation of custom with law should continue to sound wrong to modern ears, this approach also suggests that the custom/law opposition should best be viewed in terms of what Benedict Anderson has termed the "specter of comparison". By this expression, he sought to show how the implantation of modernity in Southeast Asia invariably disclosed the specter of Europe behind it, as if it constituted a relationship between an original

and its copy. In the same way, we would expect to find an inherent dualism within the vocabulary and institutional practices of post-colonial law, which simultaneously create a gap between the West and the Rest while hinting at the ghostly presence of Occidental prototypes within the manifestation of "otherness". This gap is the 'incommensurability' which forms the subject of Peter Fitzpatrick's article at the beginning of the volume and which he manages, developing the argument he made in *The Mythology of Modern Law*, to trace in the work of *philosophes* like Diderot.

One way to develop and assess this argument is to superimpose Western and non-Western evidence, to reveal hidden affinities and connections between Western law and its apparently alien counterparts. This is precisely what most of the contributors to this volume do, with varying degrees of success. Thus Paul Passavant has a brilliant paper in which he shows how John Stuart Mill's advocacy of free speech was closely related to his Orientalist politics, which pitted a West where 'discussion' prevailed against a despotic and anachronistic East. He was thus very clear that the right to free speech existed only in the West, framing his advocacy of liberty

within a more or less explicit "moral geography". The present significance of these arguments is brought out by showing how this moral geography is still evoked by US judges in their judgments.

The moral geography of liberty can also be explored by locating oneself within a former colony and tracing the effects of colonial 'politics of difference' on the national legal system. This is what Roshan de Silva does for Sri Lanka, showing how the Constitutions internally produced since the 1970's have effectively marginalized the Tamils, reproducing the racist colonial historiography which glorified the great Sinhala civilization and deplored its subsequent contamination by Tamil invasions. John Strawson goes even further in this direction, documenting how English texts have represented and in the process constructed Islamic law over more than two hundred years. Legal Orientalism required that the Islamic legal system be represented as always somewhat deficient in relation to Western law and this had a clear impact on the framing of textbooks. Finally, Jeannine Purdy has an excellent paper in which she describes the situation faced by Aborigines in front of the Australian courts and police today. She claims that

Foucauldian approaches, which divert attention away from the punitive effects of law, are as irrelevant as the category of the postcolonial itself to account for the specific experiences of these people. Colonialism is a simpler and more accurate depiction.

Another approach which is represented in this volume focuses on International law, which certainly occupies the space 'in between' former colonizer and colonized. Antony Anghie shows how Francisco de Vitoria, one of the founding fathers of International law, envisaged a system which while apparently stressing the rights of (American) Indians and other 'barbarians' to be treated with respect, effectively removed their entitlement to protection against colonization. The proof of the pudding is in the eating and Annelise Riles and Dianne Otto both show how the international law system continues to discriminate against the formerly colonized. Annelise Riles documents how diplomats and international lawyers wield power by being able to inhabit a space which is simultaneously local and authoritatively global, shifting between these levels as the need arises. And Dianne Otto shows how inflexible the existing system of international law was to the efforts of the Group of 77 non-aligned nations to al-

ter it in their favour. Instead of relying on the inevitably biased systems of the modern state and international law, she pins her hopes on the development of alternative forms of organization which express the needs of the subaltern. In his paper, Colin Perrin provides additional proof of the problems encountered in relying on existing international systems. He observes that the Declaration on the Rights of Indigenous Peoples expresses an anxiety. This reflects the inability of the language of rights to cater for the needs of indigenous peoples in ways which adequately correspond to the ties of blood and land in terms of which they are defined.

The volume concludes with three papers, which intimate in different ways the possibility of escaping from the grip of various discursive oppositions which have so far constituted the 'language-game' of postcolonial law. Rolando Gaete targets the opposition between 'culture' and 'rights'. He highlights the analytical problems caused by trying to systematically uphold either strictly universalistic or culturally absolutist models of human rights, auguring that the impasse will be broken by the development of new kinds of human rights which open up a space for a cultural dialogue affirming dif-

ference. Alan Norrie focuses on the opposition between 'law' and 'informal justice', claiming that the actual function of the latter, as currently described, is to prop up the characterization of law by embodying the negative qualities which law must not possess. As a result of this opposition the procedures and structures present in the domain of informal justice are overlooked. Finally, Eve Darian-Smith shows how the process of European integration is beginning to create new forms of law and legal entitlement which bypass the traditional division between state law and international law.

Overall, it seems clear to me that this volume has various strengths, such as the fact that it is a very well-integrated collection of papers. The central theme is developed in a clear and persuasive way and the various case studies help the reader to maintain an empirical focus, which gives content to the sometimes excessively abstract theoretical jargon. Juxtaposing a theoretical investigation into the nature of law with a focus on the postcolonial helps the reader to move beyond formal legal analyses and also gives a sharp political edge to the book. While it is true that the volume does not comprehensively address the issue of law's specificity, it man-

ages to make a significant contribution to key debates in disciplines as far apart as anthropology, jurisprudence and Post-colonial studies. Moreover, in the light of the events of September 11th 2001 and the present controversy about the torture of Iraqi prisoners in American jails, this volume which was first published in 1999 appears strangely pro-

phetic. It must have been hard in the boom years of the 1990's to discern the tensions between the Western claims to simultaneously reject and encompass the "other". They are glaringly obvious now.

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