

## EDITORIAL

### Post-colonial Theories and Law

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#### I.

This special issue on „Post-colonial Theories and Law“ is the result of a cooperation between the journals „Kritische Justiz“ and „Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America“. Parallel issues of the two journals inquire into the implications of post-colonial theories for law and jurisprudence. These theories have their disciplinary roots mostly in the *Cultural Studies* of Anglo-Saxon countries, from whence they only recently and only slowly permeated into German science as a transdisciplinary field of literature, cultural studies, social sciences and history.<sup>1</sup> To date, however, they have received little attention in German legal scholarship. This special issue hopes to help rectify this situation.

#### II.

Considering the multiple disciplinary roots, the diversity of the authors and the heterogeneous theoretical approaches, generalizations inevitably give cause for concern. Notwithstanding, post-colonial theories have been shaped by a few central research questions: *Firstly*, post-colonial theories analyze the discourses which have accompanied, structured, and legitimized colonial expansion. These discourses are not seen as mere narrative accompaniment to economic, political, military or legal structures, but as independent, constitutive elements of colonial rule. Postcolonial approaches investigate the generation and

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<sup>1</sup> On the state of discussion in German social sciences: *Franzki/Aikins*, Postkoloniale Studien und kritische Sozialwissenschaft, in: PROKLA. Zeitschrift für kritische Sozialwissenschaft 40 (2010), p. 9; also the conference report by *Bruns*, Postkoloniale Gesellschaftswissenschaften. Eine Zwischenbilanz, 17.06.2011-18.06.2011, Berlin, in: H-Soz-u-Kult, 18.07.2011, <http://hsozkult.geschichte.hu-berlin.de/tagungsberichte/id=3720>. For historical studies see: *Conrad/Randeria* (eds.), *Jenseits des Eurozentrismus*, 2002; *Conrad/Osterhammel* (eds.), *Das Kaiserreich transnational*, 2004; *Zimmerer*, *Krieg, KZ und Völkermord in Südwest-Afrika*, in: *ders./Zeller* (eds.), *Der Kolonialkrieg (1904-1908) in Namibia und seine Folgen*, 2004, p. 45. A brief yet concise introduction to postcolonial theory in German provide: *Castro Varela/Dhawan*, *Postkoloniale Theorie*, 2005.

implication of colonial knowledge, and thus also the role sciences played in colonial expansion. Specifically, analysis focuses on the epistemology, philosophy, ethnology, geography, anthropology, linguistics and the jurisprudence which has developed around the colonial centre and which formed an integral part of colonial conquest and rule.

*Secondly*, post-colonial theories investigate the construction of individual and collective identities under conditions of colonial inequality. The “objects of investigation” are by no means only the colonized people, to whom the colonizers ascribe negative or exotic attributes. Particularly in colonial constellations, which by definition assume there are those who govern and those who are governed, attributions are always binary in structure. Thus, the colonizers always simultaneously define their own identity as the reverse characteristic when labelling the “others” as foreign (civilized/barbaric, hardworking/lazy, rational/emotional, feminine/masculine, progressive/primitive, cultivated/savage, developed/undeveloped etc.).

The attendant consequences for the self-perception of the colonial centre are the *third* focus of post-colonial theories. This focus is not confined to the construction of identities alone, but covers the general repercussions of colonialism on the colonial centre. As opposed to earlier approaches which concentrated on the dominating influence of colonizers over colonized people, colonialism is not understood as a „one-way street“, but as a process of interdependent relationships and mutual transformations which take place in the centre and on the periphery. *Fourthly* and finally, post-colonial theories not only look backwards to the past, but pay particular attention to the – seemingly innocuous – guise in which elements of colonial discourse and structures have outlived the formal end of colonial rule and continue to exert strong influence today in politics, culture, economics, art, science and law.

It is precisely here, in our opinion, that the emancipating potential of post-colonial theories in practice lies, as they provide a means of identifying and scandalizing forms of rule, influence, control, exploitation, exclusion, inequality or violence which obscure colonial structures, all the while enabling their continuing propagation and consolidation. If it is the case that, as *Michael Hardt* and *Antonio Negri* have written in their book *Empire*, the „geographical and racial lines of oppression and exploitation that were established during the era of colonialism and imperialism have in many respects not declined but instead increased exponentially“<sup>2</sup>, then there is currently an enormous need for analyzing post- or even neo-colonial mechanisms of rule and exclusion.

### III.

Law was and is a central instrument of colonial domination. At the same time, it is also an important means to combat re-colonization. Colonialism was not only inextricably linked to the concepts of race, gender, civilization or hygiene, whose understanding – shaped by the

<sup>2</sup> *Hardt/Negri*, *Empire*, 2001, p. 43.

colonial situation – is in turn reflected in jurisprudence, but colonialism also had a direct impact on legal terms such as sovereignty, legal personality, property, state and people.

The fact that post-colonial theories which have been the subject of intensive discussion in Anglo-Saxon countries for some time now have been poorly received to date particularly by the German jurisprudence, is doubtless due in part to the marginal role ascribed to German colonialism in Germany's collective consciousness. Germany's colonialism may indeed have been of „negligible quantity“<sup>3</sup> in comparison to other colonial powers, such as Portugal, Spain, Great Britain, France or the Netherlands. However, it does not seem wholly convincing to judge the significance of colonialism in political, social and scientific life solely on the basis of quantitative criteria, such as the size of the territory occupied by the colonizers or the number of people living there. Part of the reason for the low awareness may also be that German legal scholarship has a certain euro-centric fixation on western forms of law and concepts or justice, state, individuals or organizations.

Whatever the reasons for the low significance might be, our aim is to complement German perspectives by a less national and less westernized outlook and join the discussions which are ongoing elsewhere. Examples are plenty: The works of *Martti Koskenniemi*<sup>4</sup>, *Antony Anghie*<sup>5</sup> or the *Third World Approaches to International Law*<sup>6</sup> have the force to profoundly change the perception of international law. They have not only shown that ideas, concepts and categories of public international law were born within colonial constellations or were substantially shaped in reaction to colonial encounters. They have also intimated where continued colonial rule may be found in modern guise. Justification narratives typical of historic colonialism have been identified in appeals to protect the weak and oppressed, solicitous discourses on human rights or paternal offers of technical and economic cooperation. Particularly the figure of the subordinate woman is frequently con-

<sup>3</sup> For a convincing criticism of the marginalization of German colonialism, see: Gann, *Marginal Colonialism. The German Case*, in: Knoll/Gann (eds.), *Germans in the Tropics*, 1987, p. 1.

<sup>4</sup> *Koskenniemi*, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, 2002.

<sup>5</sup> *Anghie*, *Imperialism, Sovereignty and the Making of International Law*, 2005; *ders.*, *Francisco de Vitoria and the Colonial Origins of International Law*, *Social and Legal Studies* 5 (1996), p. 321; *ibid.*, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, *Harvard International Law Journal* 40 (1999), p. 1; *ibid.*, *Time Present and Time Past: Globalization, International Finance Institutions, and the Third World*, *NYU Journal of International Law* 32 (2000), p. 243.

<sup>6</sup> *Chimni*, *Third World Approaches to International Law: A Manifesto*, *International Community Law Review* 8 (2006), p. 3; *ibid.*, *International Institutions Today: An Imperial Global State in the Making*, *EJIL* 2004, p. 1; *Mutua*, *Critical Race Theory and International Law*, *Villanova Law Review* 2000, p. 841; *Benton*, *Law and Colonial Cultures. Legal Regimes in World History, 1400-1900*, 2002.

strued in these contexts as „the more victimized subject“<sup>7</sup> who must be protected, if necessary with military force. Also, human rights can be described in their specifically European context of origin and their individualized concept of subject is questioned.<sup>8</sup> They are called into question both because of their potential for being instrumentalized in political, economic and military interventions and their facilitation of individualized structural and systematic injustice, and criticized as the “Trojan horse of recolonization”<sup>9</sup>. Comparative law is doubtless a further example of the fertile fields of application for post-colonial approaches. Here, discussion of the significance and problems of legal transplants, diffusion of legal principles or simply the analysis of the modern forms of jurisprudence in post-colonial states has profited immensely from sensitivity towards colonial and post-colonial lines of tradition.<sup>10</sup>

In all this, Eurocentric perspectives are revealed, from which legal studies also naturally cannot claim to be free. The creation of terms, concepts, ideas, forms and criteria – which are supposedly universal, but might also be seen as particularistic due to their western bias – and the almost inevitably ensuing “realization” of the deficiencies of non-western countries was an additional central characteristic of colonialism. For this reason, the question of one’s own situatedness and the consideration of non-western perspectives assume particular importance in de-colonizing legal thinking.

#### IV.

With this in mind, our collection of articles endeavors to broaden the perspectives of German jurisprudence and open up new avenues of discourse of post-colonial theories. The articles deal with jurisprudence under colonial and post-colonial circumstances in India<sup>11</sup>, Iran<sup>12</sup>, Bolivia and Ecuador<sup>13</sup>, in Kenya and Tansania<sup>14</sup>, Ghana<sup>15</sup> and Germany<sup>16</sup>; they

<sup>7</sup> *Kapur*, The Tragedy of Victimization Rhetoric: Resurrecting the „Native“ Subject in International/Post-Colonial Feminist Legal Politics, in: Harvard Human Rights Journal, 15 (2010), p. 1 (2).

<sup>8</sup> *Douzinas*, Human Rights and Empire: The Political Philosophy of Cosmopolitanism, London 2007; Kennedy, The Dark Sides of Virtue. Reassessing International Humanitarianism, 2005.

<sup>9</sup> *Merz*, Das trojanische Pferd der Rekolonialisierung? Eine postkoloniale Kritik universeller Menschenrechte, in: Forum Recht 3/2011, p. 88.

<sup>10</sup> See only *Baxi*, The Colonial Heritage, in: Legrand/ Munday (eds.), Comparative Legal Studies: Traditions and Transitions, 2001, p. 46.

<sup>11</sup> *Mitra*, The dialectic of politics and law and the resilience of India’s post-colonial governance (in this volume).

<sup>12</sup> *Tohidipur*, Iran und die Narrative west-östlicher Begegnung (in the parallel issue of Kritische Justiz).

<sup>13</sup> *Sousa Santos*, Plurinationaler Konstitutionalismus und experimenteller Staat in Bolivien und Ecuador. Perspektiven aus einer Epistemologie des Südens (in the parallel issue of Kritische Justiz).

develop elements of a post-colonial legal theory and provide a survey of the post-colonial approaches, in particular in constitutional law<sup>17</sup>; they seek ways to study public international law from the perspective of the Global South<sup>18</sup> and – last but not least – they refer to further studies in this field in the form of book reviews.<sup>19</sup> In our view, all articles demonstrate tellingly the necessity and the promise of adopting post-colonial theories in legal scholarship.

- <sup>14</sup> *Engelmann*, Taking a Break from Postcolonialism...? Versuch einer Freud'schen Lesart verschiedener Elemente der Verfassungen von Kenia und Tansania (in the parallel issue of *Kritische Justiz*).
- <sup>15</sup> *Prempeh*, Neither 'timorous souls' nor 'bold spirits': The courts and the politics of judicial review in postcolonial Africa (in this volume).
- <sup>16</sup> *Hanschmann*, Die Suspendierung des Konstitutionalismus im Herz der Finsternis. Recht, Rechtswissenschaft und koloniale Expansion des Deutschen Reiches (in the parallel issue of *Kritische Justiz*).
- <sup>17</sup> Next to the individual contributions, namely *Baxi*, Postcolonial legality (in this volume); *Pichl*, Die Verrechtlichung der Welt – Ansätze einer postkolonialen Rechtstheorie (in the parallel issue of *Kritische Justiz*).
- <sup>18</sup> *Eslava/Pahuja*, Beyond the (post)colonial: TWAIL and the everyday life of international law; v. *Engelhardt*, Die Völkerrechtswissenschaft und der Umgang mit Failed States; *Riegner*, How universal are international law and development? (all in this volume).
- <sup>19</sup> Book reviews by *Godt* on Graber/Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, 2008; by *Schacherreiter* on Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*, 2011 (both in the parallel issue of *Kritische Justiz*); and by *Melnikow* on Twining, *Human Rights, Southern Voices: Francis Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi*, 2009 (in this volume).