settler colonial studies

Review: Law and Politics in British Colonial Thought

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Shaunnagh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial Thought*, New York: Palgrave Macmillan, 2010 (276 pp.)

In 2009 a group of scholars with interests in the 'transposition' of European legal doctrines and practices onto 'colonial settings' held a symposium on the subject in the Monash Centre, Prato. Their foci were the processes by which territory was appropriated, indigenous people subdued and subjugated, and governance established. As most of the participants tended to be addressing British experiences, the editors of this volume selected largely those papers that had in common this attention to the 'political improvisations and innovations' in the governance of British frontier settlements and indigenous people.

Ian Hunter's lead essay asks and answers this question: Is it historically sound for post-colonialists to critique British jurists and colonial officials of the seventeenth, eighteenth and nineteenth centuries for applying an existing *jus naturae et gentium* that was Eurocentric, in the subjugation of indigenous peoples? He points out that Pufendorf's *De jure naturae et gentium* of 1672 offered no such justifications for ignoring indigenous rights, as Duncan Ivison argues as well of Immanuel Kant's *jus gentium* as it was crafted in such works as *Perpetual Peace* (1795) in the era of British colonial activity. (A significant problem with Ivison's observations, however, is that, unlike Hunter, Ivison offers no evidence that any British jurist or official paid any attention to what this philosopher was saying.)

Hunter attributes the British failure to apply with equanimity a relatively benign Law of Nations to Joseph Chitty who presented to

English readers a translated edition of Vattel's 1758 *Droit des gens* in 1834. Chitty drew attention to Vattel's stress on the legitimacy of treaties, and glossed the text with 'a dense mesh of comments, [English] authorities and case law'. This, Hunter argues, was sufficiently Eurocentric to be of use to British colonial authorities establishing state sovereignty, the rule of law, and agricultural, maritime, and commercial dominance.

One might read the contributions of Chris Tomlins and Mark Hickford with profit after Hunter's, inasmuch as they address the same issues. Tomlins (who with John McLaren represent the only essayists to focus on Britain's extensive American colonies) reviews the Spanish and English sixteenth-century exponents of the *jus gentium* and finds clear signs in the English Crown's letters patent that the New World, being non-Christian, was subject to conquest. He draws attention to the 'improvement' standard in early seventeenth-century English justifications of possession and title, quoting John Donne's sermon before the Virginia Company on the subject. He also notes the Avalon patent's reference (after the suppression in 1622 of the Rappahannock's attack upon the Jamestown settlement) to the conquest of 'Pirat[es] and Robbers', sanctioning their being put to death 'by the Lawe of war', echoing Gentili's 'common enemies' categorisation of those beyond *societas gentium*.

Hickford identifies an influential treatise with a different, but comparable, authority on the *jus gentium* – Joseph Story's *Commentaries on the Constitution of the United States* (1833), which was utilised by New Zealand Company officials like Henry Chapman to lay claim to the land of the Maori 'by discovery'. As had been the case in the American colonies and the United States, the customary laws to 'unsettled' places of the indigenous people were ignored by all but a small (but interesting) handful of English missionaries. And a 'language of claims' emerged, crafted by political decisions rather than judicial ones.

Mark Walters offers a fine example of how one can combine contextual- and ethno-historical approaches in his study of the meanings that British and Canadian First Nation people gave to the term 'father' in treaty-talk. The Anishinaabeg associated the 'Crown as father' relationship with notions of clan and kinship, whereas the British, associated it with common law notions of *parens patriae*, and

hence of sovereignty. Savvy culture brokers like Sir William Johnson would explain that 'no Nation of Indians have any word which can express, or convey the Idea of Subjection [...] They [...] acknowledge the [...] King to be "our Father"', but 'our People too readily adopt & insert a Word [sovereign] very different in signification, and never intended by the Indians'. Walters shows that over time Crown officials lost sight of that distinction.

Damen Ward's contribution concerns a related issue – the admissibility in court of the testimony of indigenous witnesses. A long-standing rule banned the acceptability of such testimony from one who did not appear to regard the act of taking an oath to be truthful on a bible with trepidation. Some colonial governors became advocates of alterations of the rule to allow such testimony; George Grey in New Zealand, Ward notes, urged magistrates to employ 'equity and good conscience' in resolving Pakeha-Maori disputes and lobbied for a formal change in the rule. Ward finds Grey's efforts to have been instrumental in securing the Colonial Evidence Act in 1843, authorising colonial ordinances that would render such testimony acceptable, and he shows how this was utilised in the Australasian colonies in different ways for different purposes.

The chapters by Lisa Ford, John McLaren, and Mark Finnane concern the colonial courts themselves. Ford recounts the trial in 1795 of three New South Wales Corps soldiers for assault. One had killed a pig in the street, and its infuriated owner had insulted the man who thereupon responded violently. The soldier maintained that he was acting in accord with the maintenance of 'The King's Peace' as directed by an order from his 'Commander in Chief' (a Major Grose, the Lieutenant Governor) to shoot any unyoked pig at large. The aggrieved plaintiff maintained that whatever the order may have been, it did not entitle the soldier to engage in violent police action without further measures, such as a reading of the Riot Act by a magistrate, and that the assault was itself a violation of 'The King's Peace'. This view was essentially the one adopted by the court, a step, Ford offers, symbolic of the flexibility of local legal and executive authorities in this penal colony to adjust metropolitan constitutional standards to suit a convict-related polity and economy.

John McLaren also notes the importance of judicial rulings in shaping constitutional limits on Crown authority and colonial

governance, but he also notes that for decades colonial jurists lacked the independence of their counterparts in the mother country. They tended to act as loyal subordinates of colonial governors in some colonies, as in Lower Canada in the early nineteenth century, but not as supinely in others, as in Upper Canada in the same era, or British Guiana in the 1860s. In those domains jurists did seek to impose the rule of law despite opposition, sometimes resulting in their being amoved.

Mark Finnane's contribution is a fine example of the 'Law & Society' approach – in that it tracks a rule found in a 'leading case' into the future to see how scrupulously it was observed by trial judges and magistrates. He reminds us that *Rex v Jack Congo Murrell*, a decision of the New South Wales Supreme Court in 1836, is said to have brought to an end the application of indigenous law and customs in trials of Aboriginal people. Finnane found that Aboriginal customary law was revived in northern Queensland and the Northern Territory in the twentieth century. Law officers there were distressed at the ways local white juries were acting with bias in cases involving Aboriginal and white defendants charged with criminal assaults on Aboriginal people. They lobbied for and secured the abolition of trial by jury there in all but capital offenses in 1921. They secured an amendment in 1934 to the Crimes Ordinance sanctioning the introduction of evidence of 'relevant native law or custom' in the sentencing phase of trials. And they obtained an ordinance in 1937 protecting the 'consorts' of Aboriginal men from being compelled to give testimony. The Howard Government blocked these measures in 2007 with a statute abolishing the 'customary law defence', but one wonders with Finnane whether the tires on this legislation may blow out in time.

P. G. McHugh, Andrew Sharp, and Shaunnagh Dorsett offer chapters on individuals active in the Antipodes. Sharp's is a sound revision of the standard views of the Rev. Samuel Marsden, who may have been hard on the transported souls in New South Wales, but was a concerned Protector of the Maori from European colonisation schemes. McHugh provides a nuanced study of William Pember Reeves, Kiwi social democrat and proto-Fabian. His *State Experiments in Australia and New Zealand* (1902) celebrated the social legislation of the Antipodes and led to his being embraced by Fabian Britain.

Dorsett compares George Cornewall Lewis and Henry Chapman, two advocates of Crown sovereignty over indigenous people in colonial lands. Lewis, an admirer of John Austin, penned *Government of Dependencies* (1841), and emphasised the supremacy of 'the King-in-Parliament'. Chapman, who plays a role in Hickford's chapter, was a New Zealand Company patron before his appointment to the New Zealand Supreme Court. He bitterly criticised the Colonial Office's view that the Crown had not acquired sovereignty there before the Treaty of Waitangi, as that would render the Company's claims and purchases suspect or void.

Along with Ivison's, Andrew Fitzmaurice's contribution seems a less than perfect fit with the rest of the collection, but its rich detail and peripheral relevance offer redemption. Fitzmaurice tells us of Sir Travers Twiss's paid legal justifications for King Leopold's rape of the Congo by Leopold's 'International African Association'. He argues that Twiss altered his view regarding the incapacity of private companies. He had argued in *The Oregon Question Examined* (1846) that Astor's American Fur Company in the Pacific Northwest could not serve as grounds for establishing an American claim to sovereignty there, but agued the opposite once in the service of Leopold. But it is worth pointing out that his argument in *The Oregon Question* could also be characterised as a lawyer's brief for a client, in that it supported British claims to the Oregon territory against those of the United States.

Law and Politics achieves its editors' objectives; its contents are rich and worthy contributions to the literature on settler colonial law and societies. My only regrets were that there were not more chapters that dealt with the American colonies, that there were none dealing with British India or British Africa, and that there were none dealing with the 'Law and Anthropology' approach – that is, that there were none addressing the tension between formal law and popular norms.

BIOGRAPHICAL NOTE

Peter Karsten is Professor of History at the University of Pittsburgh, and the author of *Law, Soldiers and Combat* (Greenwood Press, 1978), *Heart versus Head: Judge-Made Law in 19th Century America* (University of North Carolina Press, 1997),

Between Law and Custom: 'High' and 'Low' Legal Cultures in the Lands of the British Diaspora, 1600-1900 (Cambridge University Press, 2003), (with Kermit Hall) *The Magic Mirror: Law in American History* (2nd ed., Cambridge University Press, 2009), several other books not related to legal history, and editor-in-chief of *The Encyclopedia of War and American Society* (3 vols., Sage, 2008).