A Proleptic Approach to Postcolonial Legal Studies? A Brief Look at the Relationship Between Legal Theory and Intellectual History

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Abstract

This paper tackles some troublesome issues and questions lurking behind the relatively innocuous moniker ‘postcolonial legal theory’, or if one prefers, ‘postcolonial legal studies’. Its general aim is to situate both the legal theorist and legal theory within context of earlier debates about (Western) postcolonial theory and the subject of ‘postcolonialism’. Specifically, it attempts to execute a shift that displaces the subject of “postcolonialism” and subjectivises the objects of both theory and the theorist. In order to carry out this shift, this paper develops in two movements. The first movement, after providing a short introduction to the history of postcolonial theory, identifies and delineates two proverbial postcolonial concerns - nomenclature and complicity - each of which raise questions about the role, purpose and possibilities of Occidental postcolonial theory. The second movement examines the implications these issues beget for the study and production of ‘postcolonial legal studies’. Following the second movement’s examination of the nature of postcolonial legal theory and its relationship to intellectual history, it is argued that postcolonial legal theory needs to adopt “proleptic approach” to its object of study.

Keywords: Colonialism, Complicity, Edward Said, Empire, Law, Legal, Legal History, Legal Theory, Postcolonialism, Occident, Postcolonial Legal Studies, Postcolonial Studies, Social Change

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1. Introduction

This paper will only very briefly tackle some troublesome issues and questions lurking behind the relatively innocuous moniker ‘postcolonial legal theory’, or if one prefers, ‘postcolonial legal studies’[1]. Its general aim is to situate both the legal theorist and legal theory within context of earlier debates about (Western) postcolonial theory and the subject of ‘postcolonialism’. Specifically, it attempts to execute a shift that displaces the subject of ‘postcolonialism’ and subjectivises the objects of both theory and the theorist[2]. In order to carry out this shift, this paper develops in two movements. The first movement, after providing a short introduction to the history of postcolonial theory, identifies and delineates two proverbial postcolonial concerns - nomenclature and complicity - each of which raise questions about the role, purpose and possibilities of Occidental postcolonial theory. The second movement examines the implications these issues beget for the study and production of ‘postcolonial legal studies’. Following the second movement’s examination of the nature of postcolonial legal theory and its relationship to intellectual history, it is argued that postcolonial legal theory needs to adopt “proleptic approach” to its object of study.
2. First Movement

2.1. An Exceptionally Brief History of Postcolonial Theory

It is widely believed that, for better or worse, Edward Said's Orientalism set in motion, in a way not previously done in the Western academy, a debate in the about the relationship between colonialism and the production of Occidental knowledge, especially knowledge of 'the Orient' [3]. That said, it would certainly be an exaggeration to claim that Said began postcolonial discourse in light of his numerous (relatively less-prominent) precursors, which include, among others, Franz Fanon, C L R James, Chinua Achebe, Anta Diop, W E B Du Bois, Romila Thapar, Aime Cesaire, not to mention the spate of 'Commonwealth literature' authors writing in the 1960s and 1970s [4]. Avoiding the daunting task of identifying the exact temporal pinpoint of postcolonial theory's ultimate beginnings [5] in the Western academy (assuming one such point can indeed be identified), this paper instead makes the less contentious observation that postcolonial theory and/or criticism as a accepted field or method arrived late in the Western academy [5] and was consolidated there only in the 1980s and early 1990s [6].

Postcolonial theory and literature during the 1980s and 1990s was said to be ground-breaking for Western scholarship in a number of ways, including inter alia: its bringing to the forefront the interconnection of issues of race, nation, empire, migration, ethnicity and culture; its investigation, comprehensively and methodically, of the links between modernism and imperialism; and its insistence upon, in the study of colonial discourse, an interdisciplinary approach to literature and knowledge such that history, politics and sociology, even art, ought to be read together as a part of a larger interwoven narrative on nation and power [7]. These and other contributions of postcolonial theory in the West, although important, have been to a certain extent destabilised by powerful critiques targeting the production, methodology and focus of Occidental postcolonial theory [8]. This paper will not survey the plethora of criticisms levied against the production of postcolonial theory, but rather will narrow in on two issues, namely those of nomenclature and complicity [9], which feature prominently in critiques of postcolonial theory and which, as will become clear shortly, are relevant to the production of postcolonial legal theory.

2.1.1 The Nomenclature Question: Post-colonialism, Neocolonialism or Colonialism?

Of the debates surrounding postcolonial studies, the [most] contentious of all has been (that about) the term 'post-colonialism' itself [10]. This 'nomenclature question' concerned how the postcolonial theorist ought to classify the state of modern social relations both inter- and intra-nationally vis-à-vis colonialism. Consequently, it had the effect of interrogating the political-historical significance of the term 'postcolonialism'. As was raised in numerous critiques of postcolonial studies, [11] it asked whether 'postcolonialism' (along with its attendant modes of the 'postcolonial', 'postcoloniality', 'postcolony') is or was meant to signify the end of a specific, temporarily-demarcated era i.e. colonialism. One implication flowing from this question was its politicisation of both the postcolonial critic or theorist's usage of hyphens (or dashes) [12] and her choice of prefixes. It queried, 'does 'post-dash-colonialism' imply a bright-line distinction between colonial and post-colonial eras, one which belies the continuities of imperial power?' [13] If so, was this distinction real or reified? [14] It further queried whether the 'better' moniker of this new theoretical field was the seemingly seamless 'postcolonialism' (one word, no dash), which implied that the theorist perceived a contiguous and continuous process to colonialism was taking place [15].

At the risk of over-simplification, the nomenclature debate can be reduced to a debate about acceptance and denial. The 'post-dash' debate thrust the vital question of periodisation to the fore, asking theorists to indicate whether they accept that colonialism is, in some sense at least [16], over. Accepting that there may be different senses of the meaning of 'post': [17] determining in what sense colonialism is over - temporally [18], ideologically [19] epistemologically [20] - continues to be both a live and politicised question. What is clear from this debate however is that the prefix 'post' is fundamentally about a type of denial: 'postcolonialism' or 'post-colonialism' denies - at some level or in some important way - that colonialism persists [21].

In contrast, role of the prefix 'neo' in neocolonialism, although also raising the similar questions about periodisation and temporal boundaries (eg when the old ends and new begins), is fundamentally about acceptance. The concept of 'neocolonialism' not only suggests that its focus is upon the new and qualitatively different variant(s) of colonialism, it ostensibly accepts prima facie that colonialism, in some admittedly novel form, continues [22]. Neocolonialism then escapes the polemic raised by the assumption of a clear 'after' [23]. Finally, postcolonial theorists who decide that the nakedly un-prefixed 'colonialism' is really the right and proper term to describe their object of study assume a similar type of acceptance. By continuing to use 'colonialism' to describe contemporary social relations between groups or among nations, one had then accepted the continuance of colonialism as an unbroken, temporarily intact episode or event.

2.1.2 The Complicity Question: Nation, Theorists, and Social Change

The second far-reaching aspect of the critique of postcolonial studies involved the question of the extent to which both postcolonial theorists and postcolonial theory collude with the reproduction of 'relations of domination' [24]. Unquestionably, the most damning account of such complicity was made by Aijaz Ahmad in his much-cited work In Theory [25]. This paper will revisit only one aspect of his critique: the claim that postcolonial theorists (and postcolonial theory generally) reproduce both cultural and material inequities between the west and non-west [26]. This reproduction is done in several ways, three of which will be mentioned.

First, postcolonial theory by privileging the analytical unit of 'nation' in its analysis [27], overlooked and marginalised other salient analytical units of social relations, specifically that of class but also that of gender. This privileging obfuscated tensions and fissures plaguing the notion of nation, which are often brought to light by the application of such other analytical units, and which challenge the completeness of 'nation's explanatory potential. One consequence of the inability of 'nation' to be an all-encompassing explanatory tool is that postcolonial objects of study, eg the 'Orient', will inevitably be misrepresented [28], reinforcing the Occident's existing cultural upper hand. Postcolonial theory then contributes to a flawed understanding of the non-West. Second, as Ahmad's passage below asserts, postcolonial theorists benefit from the fetishisation of 'nation':

To the extent that both 'Third World Literature' and 'Colonial Discourse Analysis' privilege coloniality as the framing term of epochal experience, national identity is logically privileged as the main locus of meaning, analysis and (self-) representation, which is, in turn, particularly attractive to the growing number of 'Third World intellectuals' who are based in the metropolitan university. They can now materially represent the undifferentiated colonized Other - more recently and more fashionably, the post-colonial Other - without much examining of their own presence in that intuition, except perhaps in the
3.1.2. PLT’s Relationship to the Issues of Nomenclature and Complicity

To raise the question of what towards the justness of status quo social relations, and/or one which eschews reactionary neoliberal politics?

3. Second Movement

How and why are these preoccupations of postcolonial studies of the past relevant to postcolonial legal theorising? The second movement answers this question by investigating three corollary questions: first, what is the nature of ‘postcolonial legal theory’ and what approach does it offer to issues of nomenclature and complicity discussed above?; second does intellectual history matter to legal theory?; and finally, what approach to postcolonialism, if any, should legal theory take?

3.1. The Nature of Postcolonial Legal Theory

3.1.1. Postcolonial Legal Theory (PLT)

What is Postcolonial Legal Theory (hereinafter ‘PLT’)? Is it the same as or different from postcolonial theory, and if it is different, how and why is it different? Answers to these questions are far from clear, with the very transferability of the term ‘post-colonial’ across disciplines in question. Nevertheless, (implicit and explicit) accounts of ‘postcolonial legal studies’ exist. One description of postcolonial legal theory put forward is that it is the exploration, by legal scholars, of neglected questions about ‘law’s relation to the postcolonial’. This approach to PLT not only aims to fill a particular lacuna in legal literature, but also challenges certain manifestations of legal orthodoxy:

Engagements between law and postcolonialism have been infrequent if stunning. The lack of engagement is both astonishing and understandable. ‘Astonishing’ because postcolonialism is now the main mode in which the West’s relation to its ‘other’ is critically explored, and law has been to the forefront of this relation. Yet the lack is understandable because the engagement between law and postcolonialism would drastically disrupt legal academic renditions of the relation - disrupt not the persistent orthodoxy of law and development, but also the newly settled consensus around two... concerns... - legal globalization and international human rights discourse.

In addition to both explicating the law’s role in the West’s relation to its ‘other’ and disrupting legal renditions of (and consensus around) international human rights discourse and globalisation, ‘postcolonial legal studies’ has been described as an undertaking which focuses upon law as a (sometimes the) ‘tool of colonialism’ operating on both international and domestic levels. PLT may also involve descriptions law’s justificatory role vis-à-vis imperial (state) violence. In contrast, other accounts of PLT focus less upon how law advances colonialism, and more upon how colonial politics ‘affect legal rights’ or how colonisation ‘can alter the [putatively independent] concept of law itself’.

Admittedly, this paper’s attempt to identify the ‘essence’ of PLT is limited. The first of several limitations has to do with the dearth of PLT texts and material generally upon which this attempt relies (in contrast to the numerous postcolonial studies texts available). The paucity of writing in this area - specifically on the topic of what PLT is - prevents a comprehensive exposition of ‘postcolonial legal studies’ from emerging, here or elsewhere. The second limitation, one related to the first, has to do with the fact that as a theory both PLT’s manifesto and the identity of its chief inaugural authors are unclear. In the absence of either a seminal or canon text, or a single or collective prime-mover, delineating an PLT with imprimatur becomes at best speculative. Finally, if we can refer to it as body of scholarship, PLT appears to be comprised of disparate heterogeneous subject matters, advancing diverse programmes of interpretive action.

Apropos this latter point, if postcolonial legal studies is characterised by such diversity and heterogeneity - with respect to its disciplinary ambit and prescriptive ambition(s) - need postcolonial legal studies engage with postcoloniality at all? Are there limits to the reach of PLT? Perhaps, scholarship which simply engages with ‘law’ (or the ‘juridical’) suffice. Put another way, if postcolonialism - or even colonialism or neo-colonialism for that matter - aptly characterises the global backdrop against which law operates (or, if one prefers, is superimposed upon modern legal relations), will not any discussion of law necessarily invoke postcoloniality, coloniality, or neo-coloniality? If this is so, simply summoning law in scholarship may constitute a postcolonial undertaking. All this leads to the question what, if anything, does ‘postcoloniality’ add to law (or to legal theory)?

The spirit of the intellectual encounter between law and colonialism is of necessity interdisciplinary, diverse in perspective, and unbounded. Scholarship in the field does not - and should not - fit into overly-neat disciplinary or perspective-bound categories. Individuals drawn to postcolonial legal studies come to the enquiry with variety of motivations and an array of interests. Some seek primarily theoretical understanding, others encounter the postcolonial as a part of sustained historical research, and others still feel a compelling sense of urgency to develop practical strategies by which to confront the legacies of colonialism ‘on the ground’. Many pursue a more or less mixed method of enquiry and do so from multiple motivations.

To say that PLT should have an expansive disciplinary scope is less contentious than to argue its perspective should be circumscribed. Mindful of the desire to allow the very inchoate PLT every opportunity to flourish within the legal academy (and elsewhere), there may be good reasons for setting (normative) parameters around the PLT scholarly project. For example, should PLT be a critical theory, one with transformative aspirations, one which evinces scepticism towards the justness of status quo social relations, and/or one which eschews reactionary neoliberal politics? More generally, should one have any normative expectations of, guidelines for, or approaches to theory (legal or otherwise) and its performance and production?

These questions will be investigated shortly in the section on legal theory and intellectual history. What need only be noted here is the following observation: to raise the question of what PLT is, is to request clarification of its goals, aims, assumptions and directions. Until such clarification is provided, assessments of the value of PLT will be both premature and groundless. PLT scholars need both to clearly advance their particular conceptions of PLT, and also to answer whether PLT is or ought to be ‘normatively bounded’, and whether ‘the postcolonial’ adds anything new, different or desirable to legal studies simpliciter. There should be some attempt made to discern whether PLT has a raison d’etre and, if so, to sketch its theoretical contours.

3.1.2. PLT’s Relationship to the Issues of Nomenclature and Complicity
Opposite to the question of PLT's content is PLT's positonality with respect to the issues of nomenclature and complicity. Does PLT offer a response or approach to salient albeit antecedent postcolonial studies issues? On the issue of nomenclature, PLT appears to be repeating some of the questions and concerns raised by the criticisms of postcolonial theory discussed earlier. Conceding that the term 'postcolonialism' lends itself to multiple definitions, PLT theorists, like their postcolonial critic counterparts, question the wisdom of employing the term 'postcolonialism' to describe contemporary social relations:

Although the conceptual movement from the colonial to the postcolonial has been widely accepted in academic circles, it has not proved equally persuasive to others. In particular those who are the most marginalized because of their race/ethnicity and economic position seem most recalcitrant in the face of claims that we now occupy a postcolonial world.

Evidently, the prickly question challenging postcolonial studies - 'for whom is colonialism a thing of the past?' re-emerges uncomfortably in PLT discourse. Syntax - as much a political quagmire for PLT as for general postcolonial theory - compels the theorist to decide (with a 'post' or non-'post') her positionalitity regarding the persistence, reinvention, and/or erasure of colonialism. Although some of the dangers associated with 'post'-ing colonialism are reiterated, how PLT would respond to specific suggestions to navigate the concept 'postcolonial' remains uncertain, leaving substantial scope for disagreement on ostensibly 'first principle' matters. Notwithstanding the absence of a coherent approach to postcolonial first principles, it is clear that the nomenclature debate lives on in PLT. As the features of this debate appear unchanged, it may also outlive PLT.

With respect to complicity, very little discussion in PLT appears, raising the prospect that this issue will be eclipsed altogether or raised after PLT reaches some unknown point of epistemic maturation. Alternately, its tabula rasa on the matter may bode well if Postcolonial Legal Theorists attempt to take seriously the indisputable relationship between theory, theorising, and power. Although PLT questions concerning complicity would likely resemble those raised by critics of postcolonial theory mentioned earlier, whether PLT can proffer different answers has yet to be decided. Will Postcolonial Legal Theory avoid the pitfalls of privileging the concept of nation, eg disguising the dynamics and operation of class (or gender, sexuality, etc...)? Do postcolonial legal theorists have personal stake in the conceptualisation of PLT they advance, or a responsibility to investigate the possibility that they do? Finally, is PLT disconnected from contemporary anti-colonial struggles (ought it to be connected?), and does it offer, even attempt to offer, anything at all in support of such struggles (eg pledges of political solidarity, subversive (re)interpretative instruments, legal roadmaps to further de-colonialisational and anti-colonialisation projects, and so on)? On this last point, if nothing is on offer, does PLT, like its predecessor of postcolonial studies, run the risk of ignoring 'the emancipatory desires of our epoch'? In sum, the nomenclature and complicity debates compel PLT to distinguish itself from 'mere' postcolonial theory, or risk theoretical duplication and irrelevance.

3.2. Legal Theory and Intellectual History

On one level, this paper queries the nature of the Postcolonial Legal Theory, advocating that its parameters, content, history and raison d'être be both interrogated and disambiguated. As PLT is still very much up for grabs - its tenets, methodology, scope and politics perceptibly underdeveloped - this interrogation may seem somewhat premature. Notwithstanding this conclusion, it is argued here that it is not too hasty to inquire into whether and how intellectual history matters to legal theory. That is to say, notwithstanding PLT's infancy, it is important to situate the legal theorist and legal theory vis-à-vis earlier debates about Occidental postcolonial theory and 'postcolonialism'. That is, this paper takes the position that it is indeed worthwhile for PLT to examine and ingest its theoretical and intellectual avatars, its tacit development and borrowing of the works, tools and thoughts of postcolonial theorists, their standpoints, their assumptions. The project and production of postcolonial legal theory - not just its object of study (postcolonialism) - needs to be historicized. As postcolonialism invokes history, so too does postcolonial legal theorizing.

There are two reasons buttressing the need to historicise postcolonial legal theory. The first emanates from the relationship between history, theory, and the intellectual. The second, from the need to derail legal theory's colonising tendencies. Why does the relationship between theory, history, and the intellectual require historicisation of PLT? The simple answer is because intellectuals are a part of history, historical struggles, and the creation of historical meaning of these struggles. Intellectuals represent historical struggles, create meaning, and are not neutral:

As intellectuals cannot be situated either outside of the historical struggles which are their subject matter or the processes of representing such struggles (i.e. the creation of historical meaning), they are required to explain how they view their role vis-à-vis intellectual history - to historicise their theoretical project - and thus expose their perspective on the purposes and practices of theorizing. Such examinations of intellectual history uncover theoretical prescriptions, how theorists view social change, and how they demarcate the possible and the impossible.

It is true that Postcolonial Legal Theorists have already begun making such demarcations, and are therefore already 'binding' the normative character of PLT. Even the 'unbounded' approach to PLT described above concedes it is desirable for PLT to adopt specific normative goals (i.e. to pursue social transformation), arguing it is 'a fitting aspiration for postcolonial legal studies everywhere' for it 'to move beyond postcolonial theory as forms of fatalism and impossibility to theory as success and the possibility of transformation'. Another account, answers the question of what is the intellectual's role when confronted with 'empire's lawlessness'. In addition to overturning the Law's liberal values, the intellectual must re-think (in contrast to re-make) law, and to recognise that its claim to universality is grounded in force and (even violence). Finally, the intellectual must interrogate his/her own political commitments, and not allow their perspective to be embedded in 'relations of domination'. A third view which attempts to assess the 'lessons for those engaged in struggles for social justice' in various postcolonial compositions, concludes that 'theoricians will never provide the nuts and bolts of struggle or even detailed explanations of the links and relationships which make up our universe'. Despite such a focus upon the limitations of postcolonial legal theorising, the intellectual may nevertheless articulate a historicized legal theory attentive to its deficiencies, collusive tendencies, and interest in prospects of human solidarity.

Although, as evinced above, PLT theorists are (albeit in a piecemeal way) articulating their theoretical prescriptions for PLT, if PLT is historicized, PLT theorists will have to contend more directly and in a more sustained manner with the complicity issue raised by postcolonial studies. Thus the historicisation of PLT will
force legal theory to answer whether the issue of complicity takes on a different hue in the context of legal theorising, and if not, then what. Moreover, it forces PLT to confront one of the possible pitfalls of postcolonial theorising 'ahead of time'.

A second reason why one should require the historicisation of PLT has to do with the need to derail legal theory's colonising tendencies. Is there any harm in PLT's resurrection of issues that previously preoccupied postcolonial theory? The answer to this question depends upon whether this resurrection offers something qualitatively more, or different than that offered in the previous debates. Arguably, the issues of nomenclature and complicity may have a degree of intractability to them, which makes their reappearance in PLT forgivable. However the question remains, does the 'legal' in the 'postcolonial legal studies' moniker make any theoretical difference to the manner and outcome of the reinvestigating these issues? Put another way, in the performance and production of postcolonial legal theory, does 'law' or 'legal theory' lay claim to an authentic [68] discursive or material terrain, or is legal theory merely re-colonizing terrain tthread once before, without more? By requiring legal theory to historicise its project, it is more likely to broach this question.

3.3. What approach should PLT take?

Is there any particular way for Postcolonial Legal Theory to address and account for its historical underpinnings, to historicise its object of inquiry? One answer - one of no doubt many possible answers - is that PLT adopt a 'proleptic' approach to postcolonial legal theorising. Prolepsis was used by the Greeks as a rhetorical tool in speech that involved the anticipation and answering of possible objections to one's argument. A 'proleptic' approach to PLT then involves the anticipation and answering of possible objections not simply in rhetorical speech, but in theoretical speech [69].

Applied to postcolonial legal theory, a proleptic approach is an exercise in both foresight and hindsight: on the one hand, it attempts to foresee possible objections to the nomenclature and the dilemmas facing (and likely to face) postcolonial legal theorising; on the other, it addresses important objections to postcolonial theorising which spring from antecedent debates and which could be easily be applied to contemporary postcolonial legal theorising. A proleptic approach to postcolonial legal theorising involves, inter alia, the following features or attributes: the demonstration of a general awareness of historical debates surrounding postcolonial theory; a deliberate positioning with respect to the controversies around pertinent issues confronting theory (and minimally, those of nomenclature and complicity); and finally, a discussion of whether 'legal theorising' is inimicable (and if so, how so) and/or of whether 'postcolonial legal theory' is at all distinctive - substantively or methodologically - as a typology of theory, postcolonial or otherwise. Such an janus-faced approach, both forward and backward looking is needed to rebalance what appears to be a forward looking bent of PLT. Intellectual history, or 'the history of theory' cannot be neglected if theory is expected move beyond repetition, and away from recolonisation.

4. Conclusion

It is important to ask whether Postcolonial Legal Theory (PLT) functions to replicate or re-colonise postcolonial theory? If not, what questions would one put to a green and underdeveloped PLT? What, if anything, should legal scholars ask of or demand from 'postcolonial legal studies'? These questions are intended elicit answers by whetting the appetite and provoking the imagination of PLT theorists, and by inviting them (although not requiring them) to practice prolepsis when performing PLT. It is hoped that by displacing the object of 'postcolonialism' and focusing instead on the aims and ambit of 'postcolonial theorising', postcolonial legal theorists will be better situated to articulate a theory which is not simply historicised, but exceptional.

Endnotes

[1] This paper is concerned solely with the production of postcolonial legal studies in the Western academe, and likewise concerns itself with criticisms of the production of postcolonial theory in the West.

[2] This shift is not a novel one nor does it claim to be. It is, rather, a shift encouraged by several texts and authors, discussed shortly, to deal with the principal shortcomings of postcolonial theory and criticism.

[3] It is perhaps no exaggeration to say that Edward Said's Orientalism, published in 1978, single-handedly inaugurates a new era of academic inquiry: colonial discourse, also referred to as colonial discourse theory or colonial discourse analysis.' Williams, Patrick and Chrisman, Laura (1993) Colonial Discourse and Postcolonial Theory (New York: Columbia University Press), p 5. See also: Leela Gandi (1998) Postcolonial Theory: A Critical Introduction (Edinburgh: Edinburgh University Press), 25: "...the publication of Said's Orientalism in 1978 is commonly regarded as the principle catalyst and reference point for postcolonial theory...'; Neil Larson, 'Imperialism, Colonialism, Postcolonialism' (2000), in Sangeeta Ray and Henry Swartz (eds) In Theory: Classes, Nations, Literature (New York, Verso) at 13: 'Said's oeuvre is by far the most magisterial, the most influential,... Orientalism is, undoubtedly the entire career of literary theory, the grandest of all narratives of the connection of Western knowledge and Western power'. See also Edward Said, by Bill Ashcroft and Pal Ahluwalia (1999) (London: Routledge), p 8: 'In a nutshell, Orientalism demonstrates how power operates in knowledge: the processes by which the West 'knows' the Orient have been a way of exerting power over it.'

[4] Moore-Gilbert, Bart (1997) Postcolonial Theory: Contexts, Practices, Politics (London: Verso), p 5. See also McLeod, John (2000) Beginning Postcolonialism (Manchester: Manchester University Press), p 23: "It would be grossly reductive to assert that Edward Said is the instigator of postcolonialism, not least because this would ignore the important anti-colonial critiques prior to 1978 of Fanon, Ngugi and others...' Said would likely also agree that this claim would be an exaggeration: See Edward Said (1985) Orientalism Revisited'; in Francis Barker, Peter Hulme, Margaret Iverson, and Diana Loxley, (eds), Europe and Its Others, vol 1 (Colchester: University of Essex), p 17, where he claims that what he said in Orientalism was said before him.

[68]
notion - as signalled in terms such as post-modernism, postmarxism, poststructuralism, or post-theory - of an intellectual moment that ensues after the
proclaim the demise of colonialism'. Loomba, Annia (1998)

The second implication which critics of the term have found contestable: if the inequities of colonial rule have not been erased, it is perhaps premature to

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event, of?cially stamped with dates' (emphasis in original). See also: Appiah, Anthony (1991) 'Is the 'Post' in Postmodernism the Post- in Postcolonialism?'

genre of posts -

beyond a speci?c point in history, that of colonialism and Third World nationalist struggles. In that sense the pre?x

outmoded philosophical, aesthetic, and political theories, the post-colonial implies both going beyond anti-colonial nationalist theory as well as a movement

Manchester University Press), p 5: 'So, let us be clear from the start… we will

colonial effects 'across the barrier between colonial rule and independence'. McLeod, John (2002)

signi?cance of the hyphen. For example, for Mcleod, the virtue of an unhyphenated 'postcolonialism' is that, unlike the hyphenated version, it captures

postcolonial theorists have come to prefer one version to the other because they ascribe different, and in some cases diametrically opposed, meanings to the

Mohanty, Chandra Talpade, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses', Boundary 2 12.3/13.1, Spring/Fall, 1984, pp 333-58; Aljaz

Critiques of postcolonial studies have ranged from analyses of individual critics and theorists to interrogations of the concept of postcoloniality itself; the latter have ranged from questions about postcolonialism's usefulness as a category of literary study to charges of its complicity with the very discourses of Western colonialism and neo-colonial domination that it purports to critique.' Lopez, Alfred J (2001) Posts and Pasts: A Theory of Postcolonialism (Albany, SUNY Press), p 8.

See McClintock, A (1994) 'The Angel of Progress: Pitfalls of the Term 'Post-Colonialism''' Colonial Discourse and Postcolonial Theory (New York: Columbia University Press), p 291-294: '...the historical rupture suggested by the preposition 'post-' belies both the continuities and discontinuities of power that have shaped the legacies of the formal European and British colonial empires…'

As Alfred Lopez puts it, was the 'postcolonial' essentially 'a misnomer, whose very invocation prematurely announces the demise of imperialism and elides the continued domination of subject peoples in every part of the word'. Lopez, A (2001) Posts and Pasts: A Theory of Postcolonialism (Albany: State University of New York Press), p 10.

The debate over whether a hyphenated 'post-colonialism' is to be preferred to a non-hyphenated 'postcolonialism' not only remains unresolved, but postcolonial theorists have come to prefer one version to the other because they ascribe different, and in some cases diametrically opposed, meanings to the significance of the hyphen. For example, for McLeod, the virtue of an unhyphenated 'postcolonialism' is that, unlike the hyphenated version, it captures colonial effects 'across the barrier between colonial rule and independence'. McLeod, John (2002) Beginning Postcolonialism, John McLeod (Manchester, Manchester University Press), p 5: 'So, let us be clear from the start... we will not use the hyphen but spell the term as a single word: 'postcolonialism'. There is a particular reason for this choice of spelling and it concerns the different meanings of 'post-colonial' and 'postcolonial'. The hyphenated term 'post-colonial' seems more appropriate to denote a particular historical period or epoch, like those suggested by phrases 'after colonialism', 'after independence' or 'after the end of Empire'. However, for much of this book, we will be thinking about postcolonialism not just in terms of strict historical periodisation, but as referring to disparate forms of representations, reading practices, and values. These can circulate across the barrier between colonial rule and national independence. Postcolonialism is not contained by the tidy categories of historical periods or dates, although it remains firmly bound up with historical experiences.' In sharp contrast to McLeod, Ashcroft, Griffiths and Tiffin argue that the hyphenated term is more appropriate as it capably captures the effects of colonialism 'both during and after colonial rule': 'Although we might refine our definition so that the 'post-colonial' refer to all that cultural production which engages, in one way or another, with the enduring reality of colonial power (including its newer manifestations), 'post-colonial' is still best employed, as it was in the first edition to refer to post-colonialism This is a process in which colonised societies participate over a long period, through different phases and modes of engagement with the colonising power, during and after the actual direct period of colonial rule.[at 195] They continue, 'In recent times the hyphen in 'post-colonial' has come to represent an increasingly diversifying set of assumptions, emphases, strategies and practices in reading and writing. The use of the hyphen seemed to us, then and now, to put an emphasis on the discursive and material effects of the historical fact of colonialism, resisting an increasingly indiscriminate attention to cultural difference and marginality of all kinds. Some recent usage of the term 'postcolonialism' seems to have left the material fact of colonialisation and its effect out altogether', pp 197 – 198.

It is hard to deny that the 'post' prefix involves no measure of temporality, as it seems to suggest that something has elapsed, something has moved beyond, something is different than before.

The prefix 'post' complicates matters because it implies an 'aftermath' in two senses - temporal, as in coming after, and ideological, as in supplanting. It is the second implication which critics of the term have found contestable: if the inequities of colonial rule have not been erased, it is perhaps premature to proclaim the demise of colonialism'. Loomba, Anni (1998) Colonialism/Postcolonialism (London, Routledge), p 7.

Shohat, Ella (2000) 'Notes on the Post-Colonial', in Fawzia Afzal-Khan, and Kalpana Seshadri-Crooks (eds) The Pre-Ocupation of Postcolonial Studies (Durham: Duke University Press), p 128 'The prefix 'post', the aligns post-colonialism with a series of other posts - poststructuralism, postmodernism, post-marxism, post-feminism, post-deconstructionism - all sharing the notion of a movement beyond. Yet while these posts refer largely to the supercession of outdated philosophical, aesthetic, and political theories, the post-colonial implies both going beyond anti-colonial nationalist theory as well as a movement beyond a specific point in history, that of colonialism and Third World nationalist struggles. In that sense the prefix post aligns the 'post-colonial' with another genre of posts - post-war, post-cold war, post-independence, post-revolution - all of which underline a passage into a new period and a closure of a certain age or event, officially stamped with dates (emphasis in original). See also: Appiah, Anthony (1991) 'Is the 'Post' in Postmodernism the Post- in Postcolonialism?' Critical Inquiry 17, pp 336-357.

'key concepts in literary theory', (Edinburgh: Edinburgh University Press), p 66: "'Post'- The notion - as signalled in terms such as post-modernism, postmarxism, poststructuralism, or post-theory - of an intellectual moment that ensues after the
occurrence of a paradigm shift of epistemological transition of sorts. In addition to denoting the pastness of a given intellectual or cultural epoch, ‘post’ suggests the persistence of enduring philosophical quandaries and discoveries associated with such historical or theoretical moments, which the notion of ‘post-ism’ hints are not, in fact, over but which haunt or disturb the progressivist sense of having moved beyond particular modes of inquiry.

[21] Ahmad’s work inquired whether postcolonialist theory, as manifest by Said, represented ‘a politically disabling shift of attention from the facts of neocolonialism to the less contentious area of fictions produced in an era of formal imperialism now safely past’. Bart Moore-Gilbert, p 19.

[22] Framed as a question about statehood, neocolonialism explores the difference between the form and substance of state independence (eg. has a state decolonised formally, but not effectively?) As E. San Juan notes: ‘Neocolonialism designates then the persistence of economic ascendancy and cultural hegemony underneath the mask of political independence, demarcating the real democratic right of the people to exercise self-determination (which is effectively undermined by built-in mechanisms) from the formal or nominally procedural right.’ (San Juan, Jr, E (1998) Beyond Postcolonial Theory (New York: St. Martins Press), p 24. San Juan continues: ‘But instead of the rubric ‘neocolonial’ to describe the discrepancy between, and paradoxical imbrication of, formal independence and real subservience, the spectre of the ‘postcolonial state’ now revives to fabricate the illusion that we have gone beyond the neocolonial stage.’ Ibid.

[23] Shohat, Ella. ‘Notes on the Post-Colonial’, in The Pre-Occupation of Postcolonial Studies, ibid, p 131: ‘Since on one level, the post signifies ‘after’, it potentially inhibits forceful articulations of what one might call neocolonialism.’ [emphasis in original]

[24] The phrase ‘relations of domination’ is borrowed from Susan Marks’ examination of ideology in The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology. Put simply, the phrase ‘relations of domination’ refers to social relations which are structured in ways that entail differential levels of access to collective resources (social opportunities, economic goods, etc.) and in turn, inequalities of ‘power’. Marks, S (2000) The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology (Oxford: Oxford University Press), p 11. Moreover, Marks notes that these relations correspond to historical group cleavages including, inter alia, those based on class, sex, ethnicity and nation. Ibid.

[25] Among all the critiques of the politics of postcolonial studies, however, the most acerbic is Aijaz Ahmad’s In Theory: Classes, Nations, Literatures: Gaurav Desai, ‘Rethinking English: Postcolonial English Studies’, in A Companion to Postcolonial Studies, p 534.

[26] See Ahmad, ‘Introduction: Literature Among the Signs of Our Times’. In Theory, p 7. Moore-Gilbert, Bart, ibid, p 18: ‘Ahmad goes so far as to suggest that postcolonial theory is simply one more medium through which the authority of the West over the formerly imperialised parts of the globe is currently being reinscribed within a neo-colonial ‘new world order’ and is best understood as a new expression of the West’s historical will to power over the rest of the world.’

[27] This argument was made forcefully by Aijaz Ahmad (1987) in ‘Jameson’s Rhetoric of Otherness and the ‘National Allegory’ Social Text 17 (Fall).

[28] Ibid.


[30] For example, Atif Dirlik, argues that ‘post-coloniality’ is designed to avoid making sense of the current crisis, and in the process to cover up the origins of post-colonial intellectuals in a Global Capitalism of which they are not so much victims as beneficiaries. Dirlik, Atif (1997) The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism (Oxford: Westview Press) p 74.

[31] This criticism may also be levied at those who prefer to describe modern colonial social relations as ‘neocolonial’ rather than ‘post-colonial’ in so far as the former may imply that colonised peoples lack agency to terminate modern modes of colonialism: ‘Rather than referring only to the cultural and social production of the period after independence (post-independence), such an insistence on the continuity of preoccupations from the colonial period to the post-independence period draws attention to the degree to which independence in itself did not eradicate the influence of the colonising powers. In other words, it insists on the power of what Kwame Nkrumah called ‘neo-colonialism’ (1962). Such a broad definition, of course, lays itself open to the charge that post-colonialism refuses to acknowledge that the colonised can ever entirely free themselves from colonial influences. This is only true in so far as we never entirely discard any part of our history, but we may appropriate and transform it in infinite ways, and the recuperation and re-acknowledgement of the pre-colonial is part of such a transformation.’ Ashcroft, Bill, Griffiths, Gareth and Tiffin, Helen (2002) The Empire Writes Back: Theory and Practice in Post-Colonial Literatures, 2nd Edition (London: Routledge) p 195.


[34] It must be emphasised here that in contrast to examinations of ‘law’s relation to the postcolonial’, this paper is concerned with legal theorists’ and legal theory’s relation to questions concerning postcoloniality.

[35] The very question of the term’s ‘post-colonial’ transferability across disciplines is in question: ‘In addition, many other disciplines have adopted the idea, or at least the term ‘post-colonial’, to characterise concerns in fields ranging from politics and sociology to anthropology and economic theory (eg Chatterjee 1991; Darby 1997; Castellino 2000). In fact, the term has been adopted by so many fields and in so many different ways that we are in danger of altogether losing sight of its actual provenance and intellectual history. Not all of these influences have been positive or accepting of the concept.Ashcroft, Bill, Griffiths, Gareth and Tiffin, Helen (2002) The Empire Writes Back: Theory and Practice in Post-Colonial Literatures, 2nd Edition (London: Routledge), p 194. See also McLeod, John (2002) Beginning Postcolonialism (Manchester, Manchester University Press), p 5: ‘As we will see, these terms [postcolonial and postcolonialism] have attracted much debate among scholars who often use them in contrary and confusing ways, and this makes it difficult to fix the meaning of these terms.’

[36] Defined broadly as scholars with an interest in the subject of law, legality or the juridical.
It has been argued that ‘post-colonial studies’ originated to fill a need not met by European theory: ‘The idea of ‘post-colonial literary theory’ emerges from the inability of European theory to deal adequately with the complexities and varied cultural provenance of post-colonial writing. European theories themselves emerge from particular cultural traditions which are hidden by false notions of ‘the universal’. Theories of style and genre, assumptions about the universal features of language, epistemologies, and value systems are all radically questioned by the practices of post-colonial writing. Post-colonial theory has proceeded from the need to address this different practice.’


It is not EuroAmerican colonialism is already over either an actuality or legacy (on which question postcolonial critics would seem to be divided), it is important to all, with the centrality of law to all this.’


For example, Ella Shohat, in Notes on the ‘Post-Colonial’, p 138, suggests that: ‘In sum, the concept postcolonial must be interrogated and contextualised...


Obvious examples of such PLT candidates could the include basic texts on international law, human rights law, international public law, and international economic law. The challenge would be to find a legal text which would not implicate a colonial or postcolonial context, subject, or topic. Or ‘colonial’ or ‘neo-colonial’, depending on one’s perspective.

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Stephan Selmon has described how ‘post-colonialism’ is used in various fields, to mean a heterogeneous group of things: ‘It has been used as a way of ordering critique of a totality of Western historicism; as a portmanteau term for a retooled notion of ‘class’, as a subset of both postmodernism and post-structuralism (and conversely as the condition from which those two structures of cultural logic and cultural critique themselves are seen to emerge); as a name for a condition of nativist longing in post-independence national groupings; as a cultural marker of non-residency for a Third World intellectual cadre; as the inevitable underside of a fractured and ambivalent discourse of colonial power; as an oppositional form of ‘reading practice’; and - and this was my first encounter with the term - as a name for the category of ‘literary’ activity which sprang from a new and welcome political energy going on within what used to be ‘Commonwealth’ literary studies.’ Selmon, Stephen (1994) ‘The Scramble for post-colonialism’ in Tiffin, C and Lawson, A (eds) *De-scribing Empire: Postcolonialism and Textuality* (London: Routledge), pp 16-17. Postcolonial legal theorists tend to agree. Upendra Baxi has acknowledges this conception of the term at p 540: ‘Postcolonialism is a troubled continent of contested conceptions.’


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References


Introduction. Postcolonialism or postcolonial studies is the academic study of the cultural legacy of colonialism and imperialism, focusing on the human consequences of the control and exploitation of colonized people and their lands. The name postcolonialism is modeled on postmodernism, with which it shares certain concepts and methods, and may be thought of as a reaction to or departure from colonialism in the same way postmodernism is a reaction to modernism. The ambiguous term colonialism may refer either to a...