

Jurisprudence of National Identity

Kaleidoscopes of Imperialism
and Globalisation from
Aotearoa New Zealand

Nan Seuffert

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Aotearoa New Zealand

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ASHGATE

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JURISPRUDENCE OF NATIONAL IDENTITY

To my parents, with love

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4 Ibid.

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Chapter One

Interventions: Law, Postcoloniality, Nation, 'Race' and Gender

Scholarship and debate on nations, globalisation and postcoloniality has blossomed in recent years. Debate has ranged over the existence, definition and reach of globalisation, the relationship between globalisation and nations, the imbrication of the modern nation and imperialism and the role of law in globalisation, imperialism and nation-building. Situated analyses of both 'race' and gender in these debates have been rare. Internationally, claims for redress of historical racial injustices, often made using legal forms and language, have also spread. Using postcolonial theory and attentive to both nineteenth century colonisation and late twentieth century globalisation, this book analyses 'raced' and gendered stories of national and individual identity in law and policy. It intervenes in at least three international law, policy and scholarly debates. First, Aotearoa¹ New Zealand has been at the forefront of the recent movement for reparations for colonial injustices with a state-sponsored process of 'settling' claims by the indigenous Maori people for breaches of the Treaty of Waitangi 1840 (the 'Treaty'), signed between some Maori leaders and the Crown. This Treaty settlements process is a specific example of the more general international trend of claims for redress of historical racial injustices (e.g., Robinson, 2000; Bell, 1987; Matsuda, 1987; Tsosie, 2000; Yamamoto, 1998). The analysis of colonial law and history and of the 'raced' and gendered identity configurations produced by New Zealand's process of 'settling' colonial injustices highlights the ways in which the shapes and shifts in national identity limit these legal claims. These insights are crucial to analysing efforts to redress historical racial injustices more broadly.

Second, New Zealand is used as a case study to highlight connections and discontinuities between the free trade imperialism of the mid-nineteenth century and the neoliberal globalisation of the late twentieth century. New Zealand was colonised in the mid-to-late nineteenth century at the height of Britain's free trade imperialism; the third cycle of the accumulation of capital (Arrighi, 1994: 47–58, 159ff). It has been a world leader in implementing the law and policy reform, known as 'structural adjustment', Reaganomics and Thatcherism, of the fourth phase of neoliberal globalisation, which has been dominated by the United States (Kelsey, 1995). While there are rich bodies of literature analysing law, policy and national

1 'Aotearoa' is a Maori term for New Zealand. It is usually translated as 'land of the long white cloud'.

identity during these two periods, little of it traces connections between the two periods (but see Silver, 2003), analyses globalisation using postcolonial theory, or analyses the intersections of the operation of race and gender. The analyses in this book use postcolonial theory to highlight the repetition of colonial tactics in the two periods, in chapters one and five tracing the outlines of the 'good citizen' of free trade imperialism, and the 'global entrepreneur' of free trade globalisation, embodying and enacting law and policy reform and national identity. The positioning of these raced and gendered identities in crucibles of institutions of power, agency, resistance, mimicry, negotiation, coercion, complicity and compromise produces historically specific configurations: white male colonial citizen/subjects (momentarily) performing free trade imperialist citizenship; Maori men criminalised at the boundary of the nation; white women as leaders of a state feminised by the dispersal of national sovereignty into the global economic order; indigenous Maori men as global entrepreneurs, or 'corporate warriors' negotiating commercial deals to 'settle' colonial injustices; Maori women as bearers of a reconstructed traditional Maori culture, and 'hysterical' activists; and 'raced' immigrants paradoxically embodying both the boundary of a bicultural nation that recognises only Anglo-Europeans and indigenous Maori, and simultaneously dispersal of the nation into the global economic order.

Power, agency and identity, national or individual, are never shaped only through dynamics of 'race' or gender. The interdisciplinary analyses in this book respond to calls for situated analyses of *both* 'race' and gender that take account of legal colonial, national, economic and political contexts. While scholarship in areas such as anthropology, history and cultural studies has grown in response to these calls, scholars in law have responded much more slowly. Here the tools of critical and postcolonial theory are used to contribute to the project of filling this gap, from readings of nineteenth century marriage cases for stories of race, gender and nation to interrelationships of constructions of enemies outside and inside the nation in twenty-first century immigration policy and terrorism law. Scholarly ideas and debates concerning nations, postcolonial theory, race and gender, and globalisation are crucial to all these analyses.

Nations

Nations are imagined political communities (Anderson, 1991: 6), which need boundaries, and enemies. Law is integral to the construction and maintenance of these boundaries, and the identification of enemies. Nations are the stories that are told about collective identities, which also shape the stories available for individual identities (Anderson, 1991: 6; Bhaba, 1990: 1–8; Stychin, 1998: 1–8). A nation is *imagined* because no member can ever know all of those who make up the nation, and therefore each carries a fictional image of the nation. It is an imaged *community* in the sense that all members of the nation are imagined as part of a fraternity. This part of the fiction typically masks various forms of inequality, exclusion and exploitation (Stychin, 1998: 9–15). The nation is also imagined as a sovereign state,

territorially limited, internally united and free of interference from other nation-states (Anderson, 1991: 6–7).

Official versions of stories of collective political identities, or nations, are told in cases, legislation and policy (Anderson, 1991: 159–62). During periods of colonisation, when a colonising nation seeks to extend its boundaries, and those boundaries are contested, the reach and shape of the law and policy of the coloniser, and often of the colonised people, shape the colony and its boundaries. The stories of the colonised peoples may also be repressed and erased, and the law may identify colonised peoples as internal enemies of the nation, on their own land. The law may also embody and reflect the colony's struggle for independence and emergence into a modern nation, telling stories that create possibilities for national and individual identity and circumscribe those possibilities, especially the possibilities for women, 'raced' immigrants and colonised peoples. Phases of intense global economic or cultural expansion may be reflected in stories of collective identities as threats to a nation, as justification for shoring up a nation's boundaries, or as reflections of national identity.

The foundation stories of nations are particularly important as stories of inclusion and exclusion in collective identities. The foundation stories, and identity stories more broadly, may be contested, multiple and shifting, although one or some stories may be dominant. At any given time, the 'prevailing narrative of [a nation's] founding *is* its founding' (Flax, 1998: 6). The inclusion of some identities occurs at the expense of the exclusion of others, and identifying particular national identities serves to repress other possibilities for both national and individual identities, as well as collective and individual differences within the nation (Davies, 1996: 74–77). Chapter two analyses the dominant legal story of the founding of New Zealand, in which the indigenous Maori people cede sovereignty to the British in the English version of the Treaty of Waitangi 1840. This simple story represses another, more complex story, in which many Maori agreed only to the British coming into the country to govern the British, while Maori retained their traditional control over their land and people. The dominant foundation story requires the violent suppression of other stories and the exclusion, or construction as enemies, of Maori who enacted their understandings of the Treaty as a power sharing agreement. It facilitates the physical violence of colonisation, and the subjection of Maori to British law. This simple story of cession, with its violence and exclusions, is repeated throughout New Zealand's history at crucial moments when the illusion of unity of the nation state is challenged. These challenges provide ethical opportunities for rewriting the foundation story to be more inclusive, but in each instance examined, these opportunities are foregone in favour of re-enactment of the founding violence, and the illusion of unity.

Stories of national identity shape both privileged possibilities for individual identity, and possibilities for the identification of enemies of the nation state. National and individual identities participate in the Eurocentric logic of identity; nationality, race and gender are meaningful within a system of differences, in opposition to what they are not (Mohanram, 1999: 58). Chapter three works through the ways in which marriage law and jurisdiction in nineteenth century New Zealand participated in the

emergence and production of a raced and gendered modern nation. The extension and imposition of colonial marriage jurisdiction and law was a site of contestation at the physical boundaries of the nation, and at the boundaries of stories of collective identity, operating to create internal difference within the nation, and positioning some Maori men as criminals.

In late nineteenth century cases Maori marriage laws and customs were constructed as pre-modern and foreign through association with Orientalist terms such as concubinage and polygamy; the modern nation was defined in opposition as associated with progress and civilisation. Unpacking and contextualising ideas about nineteenth century Orientalist scholarship and other texts has been a central concern of recent developments in postcolonial theory.

Postcolonial theory

Postcolonial theory arises with the fall of grand theory and the destabilisation of history as monolithic truth (Hall, 1992: 1). These disintegrations create space for theorising the dynamics and intersections of law, nations, histories of colonisation, 'race' and gender. In this study the term 'postcolonial' does not refer to a period after colonisation, nor does it embrace a necessarily linear conception of time. A more productive conceptualisation of the term, and the theory, uses it to engage with the effects and imprints of colonisation, unpacking the colonial circulating through, and repeating in, the present. Postcolonial theory and studies include analysing the repetition and re-shaping of colonial imaginaries, tactics and struggles, or colonial *tropes*, in current political, law and policy developments. Used in this way, it highlights engagement with the colonial that recognises and theorises its contradictions and multiplicity, as well as the agency of the colonised. The term 'postcolonial' therefore refers to the identification of colonial tropes in the present and throughout the geographical and cultural areas impacted by the ideas of Western imperialism (McClintock, 1995: 9–17). 'Writing back' to the empire and against colonisation, making visible the ways in which colonisation shapes both geographical centres and margins, and mapping the persistence of the colonial, are all integral to postcolonial theory (Scott, 1999: 10–15). In this sense postcolonial theory is concerned with analysing and unpacking the raced and gendered configurations of the emergence of the modern nation, and with the specificities of particular nations, as well as with mapping the repetition of colonial tropes as they travel across national boundaries.

One strand of postcolonial theory, famously identified and developed by Edward Said, is the analysis and critique of 'Orientalist' scholarship, or scholarship and other discourses about the Orient (Said, 1979, 1983), which create or produce the Orient for the reader. This scholarship may be reflected in law and policy, and these documents and texts may create their own stories of the Orient. It is Orientalism in this sense, stories invoking and reflecting notions of the Orient, including the prevalence and shapes of concepts such as concubinage and polygamy, that is reflected in late nineteenth century marriage cases involving Maori, referred to above.

Two seemingly distinct areas of nineteenth century law and policy in New Zealand are analysed through the lenses of Orientalism in chapter four. In immigration law and policy, the fanatical insistence on a 'whiter than white' policy is permeated with Orientalist inflections. In the parliamentary debates on immigration laws Asians, and particularly Chinese, were demonised and characterised as backwards, servile, lazy and diseased in language that contributed to and mimicked Orientalist discourses. Exclusion of the Chinese symbolically excluded the traits associated with them from the nation, contributing to the production of stories of a modern, forward-looking democratic nation aspired to by politicians and others. The Chinese were said to be incapable of participation in the modern democracy embodying independent thinking, civil participation, cleanliness and hard work for individual gain.

The second Orientalist discourse positioned the indigenous Maori people as 'Aryan', tracing their lineage back to the same Oriental (and Orientalist) origins as the British Aryans, and identifying them as siblings of the colonising British. While at first blush this characterisation seems admiring, unpacking it reveals assumptions integral to Orientalism; Maori were constructed as pre-modern siblings of the British. Intersecting with another colonial trope, the justification of imperialism based on the assumption that the civilising project required 'clearing inferior races off the earth' (Mamdani, 2003: 133–34), these pre-modern Maori siblings were assumed to be 'dying out' as they were replaced by the modern British. Colonisation was legitimated by the assumption that natural tendencies to explore and conquer were traits shared by both sets of siblings, while Maori were inevitably destined to give way to the British. The fantasy of this imagined community is highlighted by contrast during the same period with the agency of Maori employing sophisticated tactics of passive resistance to land confiscation. The response of the colonial government in criminalising these acts positioned Maori at the boundaries of the nation, as internal enemies. The juxtaposition of these two tactics of colonisation, or colonial tropes, one seemingly benign and the other clearly violent, illustrates both continuities and disjunctures in projects of colonisation. Chapter eight analyses an early twenty-first century positioning of Maori as public enemies within the state, placing accusations about a 'militant Maori underbelly' in the Muslim community in the context of the 'war on terror'.

'Race' and gender

Modern stories of nations and national identities are deeply imbricated in notions of empire and colonisation. Modern conceptions of 'race' emerged with the advent of European colonisation of the 'New World' and the scientific idea that race was a biological concept, and that races could be categorised and ranked in a hierarchy. These ideas were integral and crucial to European imperialism and justifications for colonisation in the eighteenth and nineteenth centuries (Omi, 1994: 61–64).² The

2 It has been argued that scientific empiricism developed as a tool of imperialism and operated in the nineteenth century to legitimate and buttress colonisation (Harding, 1998).

invention and deployment of the category of 'race' has therefore been crucial to stories of nation, shaping the emergence of the modern industrial nation and building notions of domination into concepts such as progress, evolution, modernity and development (McClintock, 1995: 1–5; Spoonley, 1993: 1–11; Omi, 1994: 53–76). In raced colonial hierarchies of domination, these notions were inflected with meaning in opposition to ideas such as primitive, barbaric, static and backwards.

Gender power dynamics were also fundamental to the success of the imperial enterprise (McClintock, 1995: 7). From the justification of colonisation as a civilising project, supposedly modernising indigenous cultures' sexist treatment of women (white men saving brown women from brown men) (Spivak, 1988: 299), to the construction of white women as bearers of the 'Motherland's' culture into the colonised wilderness (Yuval-Davis, 1997: 43–45), gender was integral to the organisation, power hierarchies and legitimating tactics of colonisation. White women occupied multiple, sometimes contradictory, positions in imperial projects, including wielding power as 'civilisers' and 'domesticators' of colonised women, sometimes resistant to imperial projects, and often symbolising the colonising nation's identity and honour (Yuval-Davis, 1997: 45).

Colonial imaginaries, tactics and struggles, in which 'race' and gender come into existence relationally, and *in and through* each other, are reflected in the particular shapes and limits of societies, relations of domination and imaginary horizons across both the West and areas impacted by imperialism (Stoler, 1997). These colonial tropes travelled throughout the colonies of European states, taking particular forms in response to complex geographical and historical locations, and facilitating relationships of domination integral to imperialism (Stoler, 1997: 11–18; Numbers, 1999).

Reading the law, policy and media documents of Aotearoa New Zealand's 1990s Treaty of Waitangi settlements process for stories of national identity reveals the reiteration of several historical racial and gender configurations. Chapter six analyses reproduction of the colonial trope of encouraging self-entrepreneurship among colonised men (Merry, 2000: 46), in the government-driven Treaty settlements process, assimilating some Maori men to a new strand of national identity as global entrepreneurs. At the symbolic level, the settlements process reproduced the more general racial configuration of alliances of men across race, necessary to the dominant group when the legitimacy of stories of national unity is challenged (Flax, 1998: 125; Merry, 2000: 12–13).

The government-controlled Treaty settlements process also largely ignored the varied roles of Maori women as leaders at local and regional levels in Maori society, and as activists for full political self-determination (Mikaere, 1997; Milroy, 2000). Chapter six reads stories of national identity beyond the formal law and policy process, revealing the erasure of this leadership, as well as of the political activism and claims for self-determination of Maori women, and the lack of recognition

as serious political subjects (Flax, 1998: 50).³ In a repetition of another colonial trope, the settlements process may be seen as alliances of men across race that bring progress as enterprise, 'saving' Maori women from the sexism of 'brown' men and 'traditional' cultures (Spivak, 1988: 299; Merry, 2000: 21; Mohanram, 1999: 61–64).

Globalisation

Current debates about globalisation include: contests over what exactly constitutes globalisation; whether nations are declining and giving way to globalisation (Smith, 1998: 1); whether globalisation is produced by and results in significant changes to states (Held, 1999); and whether there has been a resurgence in nationalism or a shoring up of national boundaries in response to globalisation (Stychin, 1998: 4–8). Also debated is whether British imperialist expansion can be equated with the current period of globalisation (Ward, 2003: 52–53). Giovanni Arrighi argues in *The Long Twentieth Century* that there have been four systemic cycles of the accumulation of capital, dominated by the Genoese in the fifteenth century, the Dutch in the seventeenth century, the English in the late nineteenth century and the United States in the late twentieth century (Arrighi, 1994: 9, 23–24).⁴ These cycles of accumulation are phases of growth of the capitalist world economy along a continuous path, which are interspersed with phases of discontinuity (Arrighi, 1994: 9). For the purposes of this analysis the important point is the economic, cultural, legal and political iterations, or repetitions with a difference, between the third and fourth cycles, or phases, of globalisation. The third cycle of accumulation, led and dominated by the British, is labelled free trade imperialism. The domination of the English imperial enterprise, combined with a growing hegemony of liberal economic free trade policies and ideas, the growth of settler colonisation based on the private initiative of settlers occupying new territory, and the emergence of the modern nation, produced a new synthesis of capitalism and territorialism that resulted in the accumulation of monetary surpluses in colonial and interstate commerce and economic nationalism (Arrighi, 1994: 48–58). Aspects of globalisation as the spread of ideas in the third phase of free trade imperialism can be seen here in the travelling of tactics of colonisation, or colonial tropes, discussed above. Another example is the spread of immigration laws; New Zealand's late nineteenth century laws restricting Chinese immigration were discussed at colonial conferences held in Australia, and

3 See Mikaere, 1997: 454 (the New Zealand settlements are a cheap pay-out to silence Maori protest in the short term; 'full and final' settlements present strong barriers to future Treaty claims).

4 'The main purpose of the concept of systemic cycles of accumulation is to describe and elucidate the formation, consolidation, and disintegration of the successive regimes through which the capitalist world-economy has expanded from its late medieval sub-systemic embryo to its present global dimension' (Arrighi, 1994: 9–10).

like the laws of Australia and elsewhere, were modelled on laws implemented in Natal and California (Murphy, 1996).

The fourth, current phase of the expansion of global capital is known as neoliberal globalisation (Silver, 2003: 325). In the period since the late 1970s the United States has dominated the liberalisation of international trade and investment using its economic, military and other powers in negotiating bilateral and multilateral 'free trade' agreements while maintaining protections for its own economy (Silver, 2003: 340). This approach contrasts with Britain's free trade imperialism, in which it unilaterally opened its markets to free trade (Silver, 2003: 30–31). As discussed further in chapter five, in the 1980s New Zealand unilaterally adopted many free trade measures, deregulating its financial markets and opening other markets to international competition. Rejecting a dichotomous analysis that would require concluding that either the nation is declining and giving way to this phase of globalisation or that nationalism is strengthening in the face of globalisation, in chapter five it is argued that New Zealand's law and policy reform in recent decades has contributed to reshaping national economic identity in the image of globalisation, in attempts to position New Zealand and New Zealanders as globally competitive and as global entrepreneurs. It is argued in chapter seven that the combination of 'structural adjustment', including deregulation and privatisation, with the instability created by a change in the electoral system in response to dissatisfaction with structural adjustment and the loss of some domestic lawmaking powers as a consequence of international free trade agreements, an icon of globalisation, may have resulted in a temporary regendering of the position of prime minister to the feminine.

Rather than formally equating aspects of current neoliberal globalisation with free trade imperialism, this analysis seeks to trace iterations, or repetitions of colonial tropes with a difference, in the two periods. The unpacking of immigration law and policy at the turn of the twentieth and twenty-first centuries, discussed in chapters four and eight, reveals a site of pronounced iterations. Laws enacted in the early twenty-first century bear a striking resemblance to those enacted at the height of New Zealand's fanatical insistence on race purity at the turn of the twentieth century. The discourses supporting and legitimising these laws are also strikingly resonant.

The ideals of citizenship, or individual identities made possible through stories of nation in the two periods, are also revealing. The dominant foundation story of cession of sovereignty by Maori in the English version of the Treaty, mentioned above and discussed in chapter two, was achieved through a deceptive translation of that document into a Maori version that did not cede sovereignty. The English version then became the official or dominant version. Chapter two reveals how this translation, or 'appropriative' mistranslation, was the performance of an ideal of citizenship in which the individual self-interest of the translators, or the private initiative of settlers, and the interests of building a modern nation coincided. The translators, as well as the imperial nation, stood to gain much from the deception. In the fourth, current period of globalisation, one strand of national identity was reshaped from an emphasis on 'taking care of each other', to one embracing global and individual competitiveness. Chapter five discusses how in this identity

configuration the national interest is also served by the pursuit of individual interest; ideally global entrepreneurs within the nation assist the nation's growth and increase its wealth through the production of jobs, export of goods and services, and payment of taxes. The possibilities for individual identity for the Maori negotiators of the Treaty 'settlements' were shaped within this crucible of national identity.

Iterations, repetitions

Iterations, or repetitions with a difference, are a central theme of this book. The iteration of legal and economic policies and productions of national and individual identity occurring during the late nineteenth and twentieth century periods of globalisation reveal the persistence of colonial tropes in the modern nation, notions of progress, and the rule of law. The iterations and repetitions of colonial tactics in the present, in attempts to redress historical racial injustices, in immigration, and more generally in raced and gendered configurations of the nation contained in law and policy, demonstrate the embeddedness of the violence, power dynamics, images and fantasies of colonisation. This recognition profoundly challenges easy assumptions regarding progress generally, and any progress beyond colonisation suggested by the term 'postcolonial' in particular. Transformation of the colonial to reconfigure race and gender dynamics and hierarchies requires constant attention to these historical dynamics, as well as to the raced and gendered dynamics of modern nations. It also requires attention to the difference in the iteration of colonial tropes; each repetition provides an ethical moment, a chance for change, and movement beyond the familiar tropes into unknown territory.

