The Mythology of Law:

Colonial and Anti-Colonial World-Making

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Genealogies destabilise representations, empowering us to interrogate the ideologies and relationships of power they sustain.[1] As Amia Srinivasan argues, historians are primarily concerned with the co-origination of representations with 'patterns of domination'.[2] What follows is world-making: the reshaping of reality by exploiting the constitutive connections between representations and the social world they inhabit. By dispelling the fictions underlying the representations we take for granted, we 'change what is true and what (and who) exists'.[3]

Drawing on Srinivasan's argument, this paper historicises law as a world-making instrument, emphasising its oppressive function when actuated by racial domination. I explore the use of law to legitimate imperialism and its fundamental logic of racial hierarchy. In the context of imperialism, law was imbued with mythical values of impartiality and fairness, which were diametrically opposed to the native's primitive and disordered world. I then contend in the second section that the invocation of the rule of law in the 1959 *Report of the Nyasaland Commission of Inquiry* exemplifies imperial world-making. The Report was penned by the Nyasaland Commission under the supervision of the English judge Sir Patrick Devlin, in response to the colonial government's exercise of emergency laws to suppress insurrection in the British protectorate of Nyasaland. The Report considered whether the rule of law equally operated to constrain law-makers in the colony as well as in Britain. However, the rule of law, as a distinctly English achievement, perpetuated colonial patterns of domination by cloaking imperial violence in legality.

[1] Bernard Williams, 'Why Philosophy Needs History' in *Essays and Reviews: 1959-2002* (Princeton University Press, 2014) 405, 406.
[2] Amia Srinivasan, 'VII—Genealogy, Epistemology and Worldmaking' (2019) 119(2) *Proceedings of the Aristotelian Society* 127, 142.
[3] Ibid 145.

Finally, I examine anti-colonial world-making in Nelson Mandela's 1964 speech, 'I Am Prepared to Die', delivered at the Rivonia Trial, where he answered to charges of fomenting a Communist revolution. In his speech, Mandela repudiated the dominant rhetoric of white supremacy and black inferiority, which manifested in the oppression of black Africans under South Africa's apartheid laws. The reality he envisaged was one in which every citizen could enjoy political rights no matter their race. Whereas Devlin's invocation of the rule of law presupposed the validity of emergency laws, Mandela's world-making – through a racially-bifurcated portrait of South African society – challenged the very legitimacy of oppressive, and therefore unjust, laws.

Sustaining and dismantling the mythology of law

European imperialism in the nineteenth and twentieth centuries was constituted by world-making, inaugurating an era of globality through violent domination.[4] Conquest and colonisation coincided with genocide, native dispossession, and the forced migration of twelve million enslaved Africans over three centuries.[5] As Karl Marx argued in 'The Communist Manifesto', domination is intrinsic to the logic of imperialism: 'the bourgeoisie draws even the most barbaric nations into civilisation and compels all nations to adopt its mode of production'.[6] In doing so, the bourgeoisie 'creates a world after its own image'.[7] The unified legal and political order which imperialism purported to construct demanded representational practices – law-making and the idea of white supremacy – to validate its existence.

This paper is interested in what law, as a representational system, *does:* which practices it emerges from and helps sustain, how it is mobilised by power, what (and whom) it brings into existence, and which possibilities it forecloses.[8] In the context of imperialism, the

[4] Adom Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton University Press, 2019) 3.
[5] Ibid.
[6] Karl Marx and Friedrich Engels, *The Communist Manifesto* (Penguin Classics, 2002) 915.
[7] Ibid.
[8] Srinivasan (n 2) 140.

construction of law as 'objective, neutral, rational and principled'[9] crucially sustained the hegemony of the ruling classes, both domestically and extraterritorially.[10] As an imperial export, the ostensible purpose of law was to elevate the 'people of Africa to a higher plane of civilisation'.[11] 'Civilised' law and its 'mythic forces' of universal potency, domination of nature, and domination of lesser orders – reflections of metropolitan self-understanding – were imported into the colonies.[12] Nasser Hussain has considered that the colonial world provided modern law with a 'constitutive negative', by contrasting 'law, nation, and civilisation' against 'custom, tribe, and savagery'.[13] Thus, the world that imperialism constructed, deeply pervaded, as it was, by racial hierarchy, could not have come into existence without the aid of law.

Anti-imperialism also deployed world-making strategies, its projects of nation-building and political independence culminating in the rejection of alien rule and, as Adom Getachew has argued, the reformation of juridical, political and economic institutions.[14] Beyond enabling the exploitation of inanimate resources, colonisation also transformed the lives of real people. This paper aligns anti-colonial world-making with decolonisation – a 'movement for social justice'[15] which promotes the freedom of not only the nation, but also of humanity. The concept of decolonisation as an aspirational discourse or emancipatory ideology becomes important to my analysis of Mandela's world-making. Mandela exploited the causal relationship between representation and reality, by subverting the colonial dynamic of black inferiority and white superiority, thus transforming the black South African into a rights-bearing subject both capable and deserving of self-determination.

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[9] David Kairys, 'Legal Reasoning' in *The Politics of Law: A Progressive Critique,* ed David Kairys (Pantheon Books, 1982) 13.
[10] See Upamanyu Pablo Mukherjee, *Crime and Empire: The Colony in Nineteenth-Century Fictions of Crime* (Oxford University Press, 2003).
[11] Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992) 107.
[12] Ibid.
[13] Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2003) 28.
[14] Getachew (n 4) 2.
[15] Prasenjit Duara, 'Introduction: the decolonization of Asia and Africa in the twentieth century' in *Decolonization: Perspectives from Now and Then,* ed Prasenjit Duara (Routledge, 2004) 2.

The role of rule of law in imperial world-making

As at the time the Commission penned its Report, the British protectorate of Nyasaland was one of three territories which comprised the Federation of Rhodesia and Nyasaland. The Nyasaland African Congress, an African nationalist party formed in 1944, opposed a scheme for federation and, by extension, the potential for Nyasaland's white settler population to implement apartheid, as had occurred in South Africa.[16] Congress decided, in January 1959, to adopt a policy of non-cooperation with and violent resistance to colonial authority. In response, on 3 March 1959, the Governor of Nyasaland, Sir Robert Armitage, declared an emergency in the protectorate. This allowed the government to cripple Congress by indefinitely detaining one of its leaders, Dr Banda, and his important supporters, holding them in custody outside the territory, and proscribing Congress as an illegal organisation.[17] The exercise of emergency powers entailed two distinct operations: firstly, the arrest and detention of Congress' 'hard core' members;[18] and secondly, 'tough and punitive' restoration of submission to governmental authority in disaffected areas.[19]

The Commission was to conduct a limited factual enquiry into the disturbances,[20] without considering Nyasaland's political future and the implications of African federation.[21] The Report concluded that not all casualties had been unavoidable, and that the Nyasaland government had authorised or condoned some 'inexplicable acts of aggression', including beatings, burnings and confiscation of property in disaffected areas.[22] The Report also suggested the government's response was disproportionate, in that it 'overestimated the extent to which the idea of violence had penetrated Congress'.[23]

[16] Brian Simpson, 'The Devlin Commission (1959): Colonialism: Emergencies, and the Rule of Law' (2002) 22(1) *Oxford Journal of Legal Studies* 17, 19.
[17] Ibid 21.
[18] Ibid 23.
[19] Ibid.
[20] Simpson (n 16) 24.
[21] Ibid.
[22] Simpson (n 16) 30.
[23] Ibid.

The Report set out two propositions which legitimated the Nyasaland government's 'benevolent despotism' and continued the process of imperial world-making. Firstly, imperial rule was justified on the basis that the governed 'wants what is best for him and [that] the Government knows what that is'.[24] This paternalism reflected a prevailing notion that Africans were 'incapable of making a reasoned and prudent decision on any question of policy'.[25] Secondly, colonial rule aimed to bestow law and order, and the impartial rule of law, on colonised peoples.[26] However, by framing the law as impartial, imperial actors could contrast their orderliness and rationality against the barbarity of colonial subjects, perpetuating their dominance in the racial hierarchy.

In omitted passages, Devlin expounded theoretical limits to the government's use of emergency laws to suppress rebellion in the colonies. Firstly, a law-maker must always strike a 'just balance' between powers that should be granted to government and freedoms that should be left to individuals.[27] Devlin warned that despotism could ensue from treating emergency laws as a 'servant' – an 'inexhaustible arsenal' from which the government may 'requisition weapons' at whim – rather than a 'mentor' which binds the ruler and the ruled. These juxtaposed allegories of 'servant' and 'mentor' suggested a need to recalibrate the relationship between government and governed. Secondly, the law-maker must be most scrupulous when exercising 'sweeping powers of legislation'.[28] By envisaging a government bound by fixed, universally applicable rules, Devlin evoked the rule of law and its associated political ideals of justice, freedom and individual dignity.[29]

Devlin's argument was inspired by the English jurist, Henry de Bracton, who defined the ruler's power as 'a power of laws, not of lawlessness': 'the King should use his power to do right as the vicar and servant of God on earth, for that done is the power of God, while

[24] *Report of the Nyasaland Commission of Inquiry* (23 July 1959) para 32.
[25] Ibid.
[26] Simpson (n 16) 35.
[27] *Report of the Nyasaland Commission of Inquiry* (n 24) para 289.
[28] Ibid.
[29] Joseph Raz, 'The Rule of Law and Its Virtue' in *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 210-11.

the power to do wrong is from the Devil and not from God'.[30] Yet, the rule of law has an extensive pedigree in English jurisprudence. Sir Edward Coke, alongside Bracton, formulated the first statement of the rule of law in English law. When advising King James I on whether the King could adjudicate any case in his own person, Coke cited Bracton in opining 'that the King should not be under man, but under God and the Law'.[31] The nineteenth-century constitutionalist, Albert Venn Dicey, conceptualised the rule of law as a tripartite political and institutional ideal: firstly, the exclusion of governmental 'arbitrariness', 'prerogative' and 'wide discretionary authority'; secondly, 'equal subjection' of every citizen to the 'ordinary law of the land'; and thirdly, the enforcement of individual rights by the courts through decisions of precedential value.[32]

Bracton, Coke, Dicey and Devlin sought ways to hold the exercise of political power accountable, but did not challenge the validity of laws in and of themselves. This eschews a significant jurisprudential question about the legitimacy of disobedience as a rational response to an inherently unjust colonial regime. And the validity of emergency laws ought to have been interrogated, given the British Empire's proliferation by means of 'military conquest, racial subjection, economic exploitation and territorial expansion' contradicted metropolitan norms of liberty, equality and the rule of law.[33]

Whilst, in theory, the rule of law serves to mitigate absolute power,[34] the appearance of legality can obscure the law's legitimation of colonial violence and the project of imperial world-making.[35] As the English lawyer and judge, Sir James Fitzjames Stephen, insisted: '[English] law is in fact the sum and substance of what we have to teach them. It is, so to speak, the gospel of the English, and it is a compulsory gospel which admits of no dissent

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[30] Henry de Bracton, *De Legibus et consuetudinibus Angliae* ('On the Laws and Customs of England') (c. 1235), f. 107b, cited in Simpson (n 16) 36.

[31] Augusto Zimmermann, 'Sir Edward Coke and the Sovereignty of the Law' (2017) 17 *Macquarie Law Journal* 127, 128.

[32] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1893) 202-203.

[33] David Armitage, *The Ideological Origins of the British Empire* (Cambridge University Press, 2010) 3.

[34] Keally McBride, *Mr. Mothercountry: The Man Who Made the Rule of Law* (Oxford University Press, 2016) 12.

[35] Peter Fitzpatrick, 'Terminal Legality: Imperialism and the (De)composition of Law' in *Law, History, and Colonialism: The Reach of Empire*, ed Diane Kirkby and Catharine Coleborne (University of Manchester Press, 2011) 19.

and no disobedience'.[36] Stephen infused colonial law with infallible moral righteousness – a substitute for a democratic mechanism, such as an electoral process, by which to signify the consent of the governed.[37] Consequently, the Empire encompassed non-British people who had been incorporated into its sphere of authority by conquest, but who were ruled without representation.[38] Thus, the rule of law supplied legality which, in place of consent, signified state legitimacy and 'civilisation', whilst imbuing British political control over the colonies with a semblance of moral force.[39]

Anti-colonial world-making in apartheid South Africa

After South Africa, then a white-ruled self-governing colony, left the British Commonwealth in 1961, Nelson Mandela formed uMhkonto we Sizwe, the armed wing of the African National Congress. Two years later, Mandela was arrested and tried on several charges, including instigating revolution and conspiring with Communists. At the Rivonia Trial, rather than testify as a witness and submit to cross-examination, Mandela delivered a speech, 'I Am Prepared to Die', in which he laid bare the injustices of South Africa's legal system. The uMhkonto we Sizwe, he explained, initially echoed the Congress' tradition of resolving political disputes through non-violence and negotiation. However, the political situation rapidly disintegrated into civil war; a culmination of the prolonged 'tyranny, exploitation, and oppression' suffered by black South Africans at the hands of a white administration.[40] The uMhkonto we Sizwe manifesto made clear that violence was needed to overturn government policy: 'we have no choice but to hit back by all means in defence of our people, our future, and our freedom'.[41]

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[36] James Fitzjames Stephen, *Life of the Earl of Mayo: Vol 2,* ed William Hunter (1875) 168-169.
[37] Hussain (n 13) 4.
[38] P.J. Marshall, 'Empire and Authority in the Later Eighteenth Century' (1987) 25(2) *Journal of Imperial and Commonwealth History* 105, 115.
[39] Hussain (n 13) 4.
[40] Nelson Mandela, 'I Am Prepared to Die: Nelson Mandela's Statement from the Dock at the Opening of the Defence Case in the Riviona Trial, 1964' <http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS010&txtstr=prepared%20to%20die>.
[41] Ibid.

When Devlin argued that the rule of law equally constrained the exercise of legislative power in the colonies and in Britain, he presupposed that imperialism had established a unified legal order. Contrastingly, Mandela's anti-colonial world-making squarely confronts the duality of South Africa under apartheid. In doing so, he ignited a critical conversation about the illegitimacy of an oppressive legal system, and in turn, the legitimacy of disobedience of that system. In making this argument, Mandela echoed a proposition of natural law: 'unjust laws are not laws'. As such, he subverted imperial representational practices by reconceptualising both South Africa as a nation which promotes equality, and black South Africans as self-determining citizens.

Mandela's portrait of a bifurcated society, splintered along racial lines, reframed the legitimacy of disobedience. The question is not whether a colonial government is justified in suppressing rebellion, but whether the governed are justified in disobeying colonial authority. The segregated world Mandela vividly described in his speech reflects the logic of racial hierarchy intrinsic to imperialism; a form of domination entrenched in and perpetuated by the law: '[A]ll lawful modes of expressing opposition to white supremacy', Mandela explained, 'had been closed by legislation'.[42] The African National Congress was formed in 1912 to agitate for African people's political rights. Such rights were curtailed by the *South Africa Act* of 1909, which disenfranchised black South Africans, and the *Native Land Act* of 1913, which restricted black South Africans' access to resources by reserving most land for exclusive use by the white minority. The government denied Congress' demands, resolutions and attempts at peaceful discussion, and declared protests illegal. Thus, the imperial representational practice of white supremacy foreclosed the possibility of political and economic independence for black South Africans.

When a referendum was held in 1960 proposing the establishment of a Republic, black South Africans were not entitled to vote, nor were they consulted about constitutional changes. Fearing for the future of black South Africans under a white Republic, the Congress resolved to hold an All-In African Conference to call for a National Convention, and arranged for non-violent mass demonstrations to occur on the eve of the Republic if its demand was not met. This approach paralleled the paradigm of Mahatma Gandhi's Indian

[42] Ibid.

National Congress: *satyagraha*, or 'truth force', denoting non-violent resistance towards 'error in the shape of unjust laws'.[43] In response, the Government 'rule[d] by force'[44]: national stay-at-home demonstrations were suppressed by laws 'designed to intimidate the people' through the presence of armed forces and vehicles.

Mandela rebuked two 'hallmarks of African life in South Africa' which were entrenched in legislation: poverty and lack of human dignity. White South Africans enjoyed the highest standard of living in the world, whereas black Africans languished in poverty as labourers subsisting on 'drought-stricken reserves'. His portrait of a dual society recalls Frantz Fanon who, reacting to French settler-colonialism in Algeria in the mid-twentieth century, similarly wrote of a 'Manichean' world 'divided into compartments'.[45] By this, Fanon referred to the duality of humanity – an 'alienation' between white and black – compelling a desire for a 'disalienated' world, 'to touch the other, to feel the other, to explain the other to myself'.[46] Thus, while Devlin, from his metropolitan perspective, represented the imperial legal order as homogeneous, Mandela's bifurcated redescription constituted his own world-making. By diagnosing the oppressive symptoms of an apartheid regime, Mandela precipitated its dismantling and replacement with a system which promotes equality.

Mandela denounced the injustice of colonial law even when exercised in accordance with the rule of law. But what new reality did Mandela hope to bring about through a transformation of the apartheid regime's representational practices? He denied that Congress' sabotage was actuated by any personal ties to the Communist Party, but conceded that 'some form of socialism' was vital if Africans were to 'overcome their legacy of extreme poverty'.[47] Mandela also greatly admired the impartial, independent and democratic nature of British and American political institutions. Rather, Mandela's world-making was principally informed by African Nationalism: 'the concept of freedom and

[43] Mahatma Gandhi, 'Evidence Before Disorders Inquiry Committee' in *Gandhi: Selected Political Writings,* ed Dennis Dalton (Hackett Publishing, 1966) 61.
[44] Mandela (n 40).
[45] Frantz Fanon, 'Concerning Violence' in *The Wretched of the Earth,* tr Constance Farrington (Grove Press, 1963) 41-51.
[46] Fanon, *Black Skin, White Masks*, tr Charles Markmann (Grove Press, 1967) 231.
[47] Mandela (n 40).

fulfilment for the African people in their own land'.[48] Thus, the Freedom Charter called for the redistribution, but not nationalisation, of land; the nationalisation of mines, banks, and monopolies, which were 'owned by one race only'; and the eradication of racial discrimination. Congress' telos, Mandela assured, was not to dissolve capitalism, but to harmonise class distinctions. Ultimately, he aspired to inaugurate a world in which democratic rights could be secured for all South Africans, white and black.

Colonisation not only asserted the Empire's control over native resources, but also dehumanised colonial subjects, denying them the status of the rights-bearing, self-determining subject. Mandela's national vision could only be realised by subverting the dominant 'policy of white supremacy' embedded in apartheid South Africa's legal institutions, and rectifying the 'lack of human dignity'[49] with which black South Africans were regarded. Mandela impassionedly redeemed the humanity of black South Africans, and thus their entitlement to political rights and institutions that would promote their freedom: they had families 'to sustain and educate', they 'f[e]ll in love' as 'white people d[id]' and they wanted physical safety. Above all, they desired a 'just share in the whole of South Africa'.[50] Mandela's world-making exposed the causal dependence of the segregated state upon white domination. He destabilised the mythical values thought to be associated with imperial law – impartiality and fairness – which were ultimately irreconcilable with colonial violence, oppression and injustice. In so doing, he reconstituted black identities from inferior sub-human to human citizen, entitled to rights of democratic participation and self-determination.

Concluding remarks: the utility of world-making

By comparing colonial and anti-colonial representational systems, this paper has conducted a critical genealogy of law as an instrument of world-making. Mandela's world-making raises an intriguing question about the legitimacy of disobedience, contrasting Devlin, who, presupposing the legitimacy of emergency powers, focused on the legitimacy of its exercise

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[48] Ibid.
[49] Ibid.
[50] Ibid.

in accordance with the rule of law. This question reverberates in modern society, the 'origins and identity' of which, as Fitzpatrick has argued, are still fictitiously described in divisive terms: 'us and them', and 'culture and nature'.[51] It resonates powerfully in the contemporary context, providing us with the vocabulary, very much inspired by natural law theories, to query the legitimacy of protests and riots which decry racial injustice embedded in the legal system, such as those spurred by the Black Lives Matter movement. Here it is apropos to echo Srinivasan: the transformation of our representational practices generates world-making possibilities.

[51] Fitzpatrick (n 11) ix.

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