

## Book review

### *(B)ordering Britain: Law, Race and Empire* by Nadine El-Enany

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In *(B)ordering Britain: Law, Race and Empire*\* Nadine El-Enany offers a quietly scathing account of the manner in which the legal order of imperial and post-imperial Britain has operated (and continues to operate) so as to lock in the injustice of empire – the gains of those who took, and the losses of those from whom it was taken. This review, written after the papers for the special issue of the *Northern Ireland Legal Quarterly* were already complete, operates as a conclusion to this special edition, using El-Enany's book – now surely the leading account of the way in which the law, including constitutional law, works both to manage and in fact to perpetuate the legacies of empire – in order to explore the limitations of the perspectives contained in those papers and possible lessons for future research in the field of post-imperial constitutional law.

An overview of the book gives some sense of the manner in which it builds a single and compelling thesis of imperial continuity via a chronological treatment of the various bodies of law relating most directly to the ability to enter, and remain in, the UK. That thesis, briefly stated, is as follows. Having enriched itself massively and unjustly through its imperial endeavours, Britain has throughout the twentieth century sought – and for the most part managed – to resist the efforts of its colonial subjects to so much as enter the imperial homeland, and certainly to share in the wealth accumulated via the extractive mechanisms of empire. Chapter 1 argues that British immigration law is a continuation of British imperial power – and the white supremacist project which it sustained – such that the 'categorisation of people into those with and without rights of entry and stay sustains and reproduces colonial practices of racial ordering' (17). Chapter 2 considers the subject/alien distinction – how it is created by law and how it was used and abused in service of the idea of the unity of the British Empire, in which all subjects were equal. This leads into a discussion of the racialised origins of the Aliens Act 1905. That statute, though it was not aimed at different intra-imperial racial groups, nevertheless prefigures later attempts to use apparently neutral legal categories in order to maintain a hierarchy that was, barely below the surface, very obviously reflective of racial categories and racial hierarchies.

The period within which legal attempts to manage race shattered the pretence of imperial unity is addressed in the long chapter 3, bookended as it was by two British Nationality Acts, that of 1948 and that of 1981. The former introduced the category of

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citizen of the UK and the colonies (CUKC) and, in doing so, set the stage for migration from the peripheral colonies to the UK, the imperial centre. In the meantime, the UK rushed, in the early 1960s and again at the tail end of the decade, to address the unintended effects of the legislation. Bit by bit it reduced the rights of those CUKCs who did not possess a suitably close link with the UK. These amendments not only progressively and substantially undermined the alleged unity of imperial citizenship but did so once more on grounds that must be understood, and indeed were often explained, as reflecting racist imperatives. The Immigration Act 1971, then, which brought to an end the right of Commonwealth and colonial citizens to enter Britain, set the stage for a crucial break, in the form of the British Nationality Act 1981. That statute replaced the category of CUKCs by one of British citizenship from which colonial subjects were mostly excluded. After hundreds of years of imperial efforts, a space of just a decade or so proved sufficient in order to redraw the law of the land to protect Britain from the undoing of its imperial deeds. Wealth had been taken from Britain's colonies, but very few of the people of those colonies would now be permitted to enter and to share in that wealth. The fourth chapter assesses the regime of asylum and immigration which resulted after the British Nationality Act 1981 created the new legal category of citizen specifically of the UK. Now, the book shows, those who had until very recently had a legal right to enter the UK were forced into processes which were discretionary and would enjoy – at best – statuses which were precarious. El-Enany critiques in particular the claim that these processes of migration were 'spontaneous', a claim, she shows, which serves to obscure the historical processes of exploitation and subjugation within the British Empire which made them in fact inevitable.

The fifth chapter addresses the relationship of Britain to the EU, to which El-Enany extends her thesis. There are three imperial or post-imperial dimensions to this narrative. The first relates to British entry into the EU, which in this account was an attempt to protect or even extend Britain's international influence in the context of the decline of its Empire. It includes an illuminating account of the ways in which the UK worked to reassure other member states that those hailing from its various imperial possessions would not be able to avail themselves of freedom of movement rights. One element of this was the reform of immigration law in the run-up to accession, with the right of abode limited in order that it might serve as the marker of those who would thereafter be holders of rights under EU law. Not for nothing, we see, did the Immigration Act 1971 come into force on the same day as the European Communities Act 1972. The second dimension is the status of the EU itself – an 'appropriated continent' – to which the same basic thesis is extended. Much of the wealth of the EU is the stolen wealth of the colonies of its member states, people from which are unjustly excluded from the scope of EU law and denied access to the continent by what we now know as 'fortress Europe'. By making nationality of member states crucial to the enjoyment of EU citizenship, EU law too effects, indirectly, a racial preference.

At a high level of generality these claims are made out and are a useful corrective to accounts which tell the tale of the EU's origins in largely, or even uniquely, economic terms. As with the position of Northern Ireland to the UK, however – discussed below – there are elements in the modern history of the EU which do not sit easily within this framing. It would be useful, for example, to see the EU's expansion after 1995 incorporated explicitly into this analysis. The third dimension relates, of course, to the 2016 referendum, which should – it is argued – be 'understood as another in a long line of assertions of white entitlement to the spoils of colonialism' and which was conducted on terms that 'are symptomatic of a Britain struggling to conceive of its place in the world

post-Empire'. Similarly, the proposed, or even merely hypothetical, post-Brexit (re)turn to the Commonwealth, and the tension which exists between that project and Brexit, should be understood as a form of national liberation. Or, one might note, which would exist were it not assumed by its proponents that a reinvigorated Commonwealth would not see Britain as one state amongst many – a status it could not accept in the EU – but rather, as a reflection of or return to imperial patterns, with Britain *primus inter pares*.

In the final chapter, the book turns to possible solutions to the colonial trajectory on which Britain remains. Though the law of citizenship and immigration has been shown – compellingly – to represent the problem, it is made clear that any solution is not to be found there. Rather, the solution is a 'counter-pedagogy' to the law and classifications it imposes on the world: inside and out, subject and alien, lawful and unlawful immigrant and so on. Specifically, immigration – not 'irregular' but 'irregularised' – must be understood as an act of 'anti-colonial resistance'. This act involves the rejection norms whose alleged (racial) neutrality disguises that they serve the project of perpetuating the imperial project, excluding from its spoils those who were subjugated and exploited before that project was domesticated in the second half of the twentieth century. This line of argument avoids having to claim – as would be contrary to all that has gone before – that the historic injustices perpetuated by Britain (and other European states) might be undone by a greater willingness to allow those from its former colonies to enter the state and to facilitate their acquisition of citizenship. It is unthinkable that Britain would be willing to go far enough for such a route to have any significant impact. And any attempts to do so are likely to benefit disproportionately those within its former colonies who are already relatively wealthy, perhaps themselves the beneficiaries of other, more subtle, processes of exploitation.

But this anticolonial pedagogy can only be a first step, one which – by allowing, or perhaps forcing, us to see what is really at stake – sets the stage for an intervention that is not conceptual but material. What that material intervention might be cannot be easily answered by extrapolating from the analysis offered here. There is no suggestion, for example, that reparations might work to counteract (for they could surely never undo) the injustices of empire as they have accumulated over time. But without it we are left at an impasse, in which even if we can see the inheritance of empire in all its injustice, we cannot undo it. Nor can we even hope to envisage with any precision what the world might look like had a small number of countries not taken so much from so many others for so long. Those who have lived and still live on the wrong side of imperialism would be entitled to want more, and, if we are to conclude that it cannot be provided, then we must say so and consider what follows from that.

As this summary hopefully reflects, a key strength of the book – what makes it distinctive amongst post-imperial and critical race writing on contemporary Britain – is the close attention to the precise origins and effects of specific rules of law. Sometimes that is case law, as with the critique in chapter 4 of three cases relating to the legal position of those seeking asylum in the UK. More often, however, the subject is statutory rules whose formulation offers the modern reader no hint at the underlying policy, with that policy being reconstructed here from a range of parliamentary and other material. If nothing else, for present purposes the argument that emerges from that approach is for a more widespread focus upon the details of citizenship law, which is not – it would seem – usually taught as part of constitutional law, notwithstanding that it is the key task of constitutional law not only to define the polity but also to say who belongs to it and, conversely, who does not. Given the relative stability of citizenship law for the last four decades, it seems likely that it has been allowed to fade into the background, not part of

the day-to-day material of those who do not specialise in it. So too is the case for immigration law, which far from being stable, is subject to incessant tinkering. In this regard, El-Enany discusses the *Windrush* scandal and its lessons, but the use of the deprivation of citizenship as a tool of national security might also turn out in the long term to be a strategic error by the state if – as seems possible – it draws attention to the manner in which citizenship law inscribes questions of race into one's legal rights and liabilities.

Similarly, events in Hong Kong will likely draw further attention to the various legal statuses possessed by people around the world which create a link between them and the UK but which reflect the logic of empire in falling far short of citizenship. Before the 1997 deadline, many Hongkongers registered as British nationals (overseas), which gives them a right to a British passport but no right of abode. Those who did not and had no other nationality became British overseas citizens. They joined in that category those who had been CUKCs before the British Nationality Act 1981 but did not become either a UK citizen or a British overseas territory citizen on its entry into force. There exist too the neglected categories of British subjects (without citizenship) and British protected persons. As the Hong Kong example shows, it cannot be assumed that the tactic of deploying these distinct (and inferior) categories in order to manage the legacy of empire will succeed in keeping them permanently out of the public mind. Those who work outside of the critical tradition to which this book belongs would do well to study carefully the manner in which it carefully explores both the origins of specific legal rules but also the manner in which their effects ripple out into the wider world. A consideration of these origins and implications, which are not separate from or outside of the law, are not incompatible with the doctrinal study of law but a large part of what makes such study worth doing in the first place.

Writing the history of British citizenship and immigration law through a racial lens – and showing the racist motivations, and effects, which were present at every stage – is very welcome. There are though occasional hints in the book at issues which are similarly neglected in the legal literature but which cannot most fruitfully be addressed in racial terms – or at least not the same racial terms that El-Enany relies upon here. One is Northern Ireland. So, for example, right at the beginning of her book, El-Enany says that she is referring to 'Britain' rather than to the 'UK' because she wants her readers to imagine Britain ('if you possibly can') as it appears on the book's cover: that is, 'without its colonies'. The implication is that Northern Ireland is one of those colonies. That Ireland was colonised by England is no doubt correct, though there is a question as to whether it remained a colony after 1800 and indeed up until the creation of the Irish Free State. This speaks, in turn, to the question of whether Northern Ireland – which is what exists in the gap between the concepts of Great Britain and the UK – is in the here and now a colony rather than, say, as Colm O'Cinneide asked at the 'Constitutional Legacies of Empire' workshop, a 'fragment of Empire'.

If we take the latter view, then much of El-Enany's analysis does not account for it: Northern Ireland has been on the inside rather than the outside of all of the legal distinctions and categories which are herein discussed. The Good Friday Agreement guarantees to those born there more rather than fewer rights than are those born in the Britain to which analysis is confined in the book. To point to Northern Ireland, of course, is to neither assert nor deny the utility of viewing it through the lens of empire. Nor is it to suggest that the case of Northern Ireland invalidates or even undermines in any way the argument of this book. It may, in fact, do nothing more than emphasise what any observer of the constitution should know by now. Northern Ireland is an anomaly within

the UK. Constitutional lawyers have often chosen to ignore it rather than attempt to explicitly incorporate it into analysis of the UK and put at risk the complacent generalisations with which the very existence of Northern Ireland, never mind the manner in which it has been governed in the last century, is incompatible.

This relates to a second point. Though the basic narrative of imperial extraction here is compelling, it is only the background to rather than the substance of the book's main claims. But the riches plundered were not – as the author would no doubt accept – evenly distributed within the metropolis. That inequality is surely also reflected in legal rules which – like those of nationality and immigration – are facially neutral. Unlike those bodies of law, however, rules which distribute within the metropolis (rather than policing the boundary between inside and out) could not have reflected – at least in the first place – the logic of race. Which leads to a second question: what of those who made it to Britain despite the many and varied obstacles thrown up by the law of citizenship and immigration? They were, we know, hardly allowed to share in the spoils. So, for example, we hear about the *Windrush* generation, and how the changing law and modern 'hostile environment' has impacted upon it, but there would seem to be scope for further discussion of the manner in which the law ensured the continuity of the imperial project within the state, and even in relation to those who became permanent residents or citizens. And who else – not colonial subjects – did the law exclude from sharing in the stolen wealth of empire, and how? To ask these questions is not to suggest that a critical race analysis should be replaced, or even augmented by, an analysis based on class, but rather to suggest that the book provides a model of analysis that might be extended forward. It might also, however, be extended backwards, in order to show how specific legal doctrines, enacted by Parliament or formulated by the courts, gave effect to and managed the process of imperial extraction which stands behind the substance of this book.

(B)ordering Britain captures exceptionally well that the UK as it exists today is an artefact of empire and that the legacies of empire are the legacies of the extraction of wealth which was always and everywhere the central animating logic of imperial projects. As the British Empire collapsed, the cruel racialised (and often openly racist) interaction of citizenship law and immigration law prevented those who had been colonial subjects from sharing in the enjoyment of the (to them, no doubt bitter) fruits of empire. In recent years we have seen the same logic, turned not only against those from former colonies but also from those from certain parts of the EU. One question that the book prompts is how long this logic might continue to do in future the work it has undoubtedly done in the past. Britain, that is, for all its historic exploitation of other peoples, is not as rich as it thinks it is. And yet the same imperial arrogance which allows one country to steal from another and then respond with indignation when that other asks for that fact to be recognised prevents an open acknowledgment of Britain's true position in the world. In order to maintain its relative wealth, then, one might argue that Britain has had to go far beyond simply keeping out its former colonial subjects to include, for example, the promotion of systems of international co-operation which systematically privileges countries which are already wealthy over those which are not.

Some question therefore emerge. First, what other aspects of the contemporary UK, both legal and not, are part of the same project described here, of resisting the recognition of imperial injustice while perpetuating at least some of its effects? Second, following from that, what would it mean for the UK to recognise its post-imperial status, not only for the law of citizenship and immigration, but in all of its internal politics and external relations? How else might the country understand itself? One possibility is that there is no other way; that an appreciation of the extent of the imperial extraction and

the manner in which the law has been used to protect that wealth since the end of the British Empire leads inexorably – for those not minded to defend the imperial project – to the realisation that that is all the UK was, and is.

Finally, what are the broader lessons of the book for the study of constitutional law? The first is that it is necessary to historicise, to understand legal disputes and legal rules in the context not (or not only) of their predecessors and successors, but to understand the specific practical contexts in which they arose and operated. There could be no better lesson of the way in which apparently neutral, often technical, rules often fail to reflect clearly the policy considerations which stand behind them, and the effect which they are intended to achieve. The second lesson is that it is necessary to criticise. *(B)ordering Britain* is a book about law: it offers a detailed and compelling assessment of British immigration law (broadly conceived) through the twentieth century and beyond. It is also though a book about race and draws on literatures which are likely unfamiliar to those who write about constitutional law in the pages of our leading law journals – literatures which may confuse, or even intimidate, such people. And yet the result is such as to make more barely doctrinal work seem arid, or perhaps anaemic. The lesson is not to replicate the approach, but to learn from it: to be willing to adopt a thickly normative perspective and to deploy that with enthusiasm, and even – where it is justified – with anger. Anyone who knows any significant amount about the British constitution knows that there is much to dislike, even despise, in it. It is deeply refreshing to see Nadine El-Enany willing and able to say so in terms which legal scholars cannot (or at least should not) dismiss as the work of somebody involved in a different project.