# BUCHBESPRECHUNGEN / BOOK REVIEWS

*Karina Theurer/Wolfgang Kaleck (Eds.),* **Dekoloniale Rechtskritik und Rechtspraxis**, Nomos, Baden-Baden 2020, 374 pages, EUR 98.99, ISBN: 978-3-8487-6253-8.

For a long time, German colonialism played no role either in collective memory or in scholarly discussions. The reasons for this certainly lie in the focus on the National Socialist regime and its singular crimes. At least since the 1960s, they have dominated and continue to dominate public and scholarly debates relating to questions of collective identities in Germany. The population structure of the Federal Republic may be another reason for the silence on colonial undertakings of the German Reich. Although it is often overlooked, People of Color have lived on German territory for centuries.[1] Due to migration, however, the number has increased significantly in recent decades. This includes in particular immigrants from the former German colonies and their descendants. As a result, their discursive misrepresentation seem to be slowly changing. In German-language fiction, the colonial expansion of the German Empire is now encountered as a subject also, for example in Christian Krachts "Imperium" or Thomas von Steinaecker's "Schutzgebiet".[2]

In contrast, references to the comparatively small size of the colonies, the short duration of the colonial period, or the low number of inhabitants in the colonies were never convincing. But they may also have contributed to the widespread impression that German colonialism was of a kind of negligible quantity compared to the undertakings of other colonial powers, first and foremost the United Kingdom or France. If we look at German jurisprudence, and especially at constitutional theory, we find a lack of openness to postcolonial theories that derive primarily from the Anglo-Saxon world and are initially located in cultural studies.[3] This might be another reason why German colonialism is

1 For a relatively short period, but equally neglected in historical research: *Katharina Oguntoye*, Schwarze Wurzeln. Afro-deutsche Familiengeschichten von 1884-1950, Hamburg 2020. Besides historical research, isolated autobiographies pointed this out, e.g. *Theodor Michael*, Deutsch sein und schwarz dazu. Erinnerungen eines Afro-Deutschen, München 2015; *Hans J. Massaquoi*, »Neger, Neger, Schornsteinfeger!“« Meine Kindheit in Deutschland, München 2004.

2 However, the 1978 published novel "Morenga" by *Uwe Timm*, which is enriched with historical documents and reports, should not be overlooked here. Another form of German literature with a (post-)colonial reference is the individual travelogues of German writers published in the anthology "Der postkoloniale Blick" (2nd edition, Berlin 2015), edited by *Paul Michael Lützeler*.

3 German-language introductions to postcolonial theories are available from: *María do Mar Castro Varela/Nikita Dhawan*, Postcolonial Theory. Eine kritische Einführung, 3rd ed., Bielefeld 2020; *Ina Kerner*, Postkoloniale Theorien zur Einführung, 4th ed., Hamburg 2021. A recommendable introduction to "Postcolonial Legal Theory" is the essay of the same name by *Maxim Bönnemann/Maximilian Pichl*, in: Sonja Buckel/Ralph Christensen/Andreas Fischer-Lescano (eds.), Neue Theorien des Rechts, 3rd ed., Stuttgart 2020, p. 359. Besides these works, it is mainly smaller works that make postcolonial theories fruitful in the discussion of individual legal issues and thereby introduce, as it were *en passant*, essential theoretical elements into legal discourse. See, e.g.,

not mentioned in works on German constitutional history[4] and does not even appear in anniversary contributions on the 150th anniversary of the Reichsverfassung of 1871[5].[6]

The anthology "Decolonial Legal Criticism and Legal Practice", edited by *Karina Theurer* and *Wolfgang Kaleck*, represents an attempt to eliminate such blind spots. As the two editors write in their introduction, it is intended to "contribute to an increased visibility of and critical and constructive engagement with decolonial perspectives in the German-speaking world, as well as indirectly to the decolonization of law" (p. 11). The fact that one speaks of de- and not of postcolonial theories or perspectives is certainly no coincidence. Almost all contributions in the volume show that the colonial era is not over insofar as a wide variety of effects can still be observed in the former colonies as well as in the colonial centers. Persisting economic and political imbalances and dependencies, relatively rigid epistemic structures developed over centuries, and a law that continues to operate with concepts whose history is closely linked to colonial expansions are elements of what in colonialism research is subsumed under the term "informal colonialism"[7].

*Cengiz Barskanmaz*, The Headscarf as the Other: a necessary postcolonial critique of German legal discourse, in: Sabine Berghahn/Petra Rostock (eds.), Der Stoff, aus dem Konflikte sind, Bielefeld 2009, p. 361; *Cengiz Barskanmaz*, Rassismus, Postkolonialismus und Recht, Kritische Justiz 41 (2008), p. 296; *Alexander Peukert*, The Colonial Legacy of the International Copyright System, in: Uwe Röschenthaler/Mamadou Diawara (eds.), Copyright Africa. How intellectual property, media and markets transform cultural goods, Canon Pyon 2016, p. 37.

4 *Werner Frotscher*/*Bodo Pieroth*, Verfassungsgeschichte, 19th ed., München 2021, do not mention German colonialism. In his "Geschichte des öffentlichen Rechts in Deutschland," *Michael Stolleis* does mention the terms "Kolonialrecht" and "Schutzgebiete". However, this is only in the short biography of the constitutional lawyer *Georg Meyer* and only because *Meyer*, as a member of the Reichstag, participated in the colonial legislation and wrote a monograph on the constitutional status of the German protectorates, to which *Stolleis* refers in a footnote. See: *Michael Stolleis*, Geschichte des öffentlichen Rechts in Deutschland, vol. 2, München 1992, S. 351. An exception is *Dietmar Willoweit*, Deutsche Verfassungsgeschichte, 8th ed., München 2019, p. 298 f., who - albeit on less than one page - outlines the executive prerogative in colonial matters, mentions the 1900 Schutzgebietsgesetz, and refers to the subjection of the colonized to German administration and jurisdiction. In addition, there are further references to contemporary literature on legal questions of German colonialism as well as to current monographs on the subject.

5 See, e.g., *Bernhard Wegener*, Glanz und Elend der Reichsverfassung von 1871, Juristische Ausbildung 2021, p. 347; *Christian Waldhoff*, Staat und Verfassung, Juristische Schulung 2021, p. 289; *Christian Waldhoff*, Verfassungsjubiläen, Neue Juristische Wochenschrift 2019, p. 1553.

6 As far as jurisprudential monographs deal with German colonialism, we are, as the historian *Sebastian Conrad* has rightly observed, almost without exception witnessing a "festival of legal positivist immanence". As examples we may cite: *Hans-Jörg Fischer*, Die deutschen Kolonien, Berlin 2001; *Hansjörg Huber*, Koloniale Selbstverwaltung in Deutsch-Südwestafrika, Berlin 2000; *Klaus Richter*, Deutsches Kolonialrecht in Ostafrika 1885-1891, Berlin 2001; *Norbert Wagner*, Die deutschen Schutzgebiete, Baden Baden 2002. Clearly more sophisticated and directed at the constitutional-political situation as well as the theory of constitutional law in the colonial center: *Marc Grohmann*, Exotische Verfassung, Tübingen 2001.

7 In their introduction, the editors point out the change from "formal empires to informal empires" (p. 15). For details on the distinction between formal and informal empire, cf. *Jürgen Osterhammel*, Kolonialismus, 6th ed., München 2009, pp. 23 et seq.

Divided into two parts, the anthology is based on the 2018 symposium "(Post-)Colonial Injustice and Legal Interventions", organized in Berlin by the Akademie der Künste, the Bundeszentrale für politische Bildung, and the European Center for Constitutional and Human Rights as part of the series "Koloniales Erbe - Colonial percussions." While the first part ("Decolonial Readings of (International) Law") contains a total of eight "classics" of decolonial theories in law translated into German, the second part ("Decolonial Practice and the Transformation of Law") presents decolonial practices and transformations of law through interviews with activists. Both deserve unqualified approval.

The compilation and translations of the texts in the first part are important because they were previously only accessible in scattered form. Now, interested parties can obtain a concentrated overview (without any possible existing or at least deterrent language barriers). They are also important because decolonial perspectives are gaining importance in legal studies. In addition to the discourse on international law, which is in any case more receptive for international theoretical developments[8], and questions of restitution with regard to the crimes committed during the German colonial period[9], the question is increasingly being asked not only what role the law and German lawyers played in the colonial undertakings of the German Empire[10], but also – an essential element of decolonial theories – the extent to which contemporary law and legal discourse are permeated by continuing relics of the colonial situation.[11]

In addition to two texts by *Antony Anghie* (Imperialism and the Theory of International Law [pp. 59-84], Legal Aspects of the New World Economic Order [pp. 263-284]), there are papers by *Bhupinder Chimni* (The Nature and Characteristics of Contemporary International Law: the Age of Global Imperialism (1985 to the Present) [pp. 85-120]), *Martti Koskenniemi* (Histories of International Law: Dealing with Eurocentrism [pp. 121-158]), *María Lugones* (Heterosexualism and the colonial/modern gender system [pp. 159-192]),

8 See on this: *Jochen von Bernstorff*, Die deutsche Völkerrechtswissenschaft und der "postcolonial-turn", Völkerrechts-blog, 9 September 2014; *Jörn Axel Kämmerer*, Das Völkerrecht des Kolonialismus: No peace between the lines, in: Stefan Talmon (ed.), Über Grenzen, Berlin 2012, p. 35; *Jörn Axel Kämmerer*, Das Völkerrecht des Kolonialismus, Verfassung und Recht in Übersee 39 (2006), p. 397; *Maxim Bönnemann*, Was ist postkoloniale Völkerrechtstheorie?, Forum Recht 2016, p. 133.

9 *Tania Fabricius*, Aufarbeitung von in Kolonialkriegen begangenem Unrecht, Berlin 2017; *Jörn Axel Kämmerer*/*Jörg Föh*, Das Völkerrecht als Instrument der Wiedergutmachung?, Archiv des Völkerrechts 42 (2004), p. 294; *Andreas von Arnauld*, Völkerrecht, 4th ed., Heidelberg 2019, pp. 333 et seq. See also the brief by *Matthias Goldmann*, Anachronisms as Risk and Opportunity: The Case of Rukoro et al. v. Germany, Kritische Justiz 52 (2019), p. 92, regarding a claim for compensation for crimes committed by Germans against the Herero and Nama in present-day Namibia that was brought before U.S. civil courts but has since been dismissed.

10 *Felix Hanschmann*, The Suspension of Constitutionalism in the Heart of Darkness, in: Kelly L. Grotke/Markus J. Prutsch (eds.), Constitutionalism, Legitimacy, and Power, Oxford 2014, p. 243.

11 In this context, reference should be made to an anthology that is currently being published, which is devoted to individual areas of law and legal issues in a large number of contributions: *Jochen von Bernstorff*/*Philipp Dann*/*Isabel Feichtner*, (Post-)Koloniale Rechtswissenschaft.

*Silvia Rivera Cusicanquiu* (Pachakuti: the historical horizons of internal colonialism [pp. 193-222]), *Makau Mutua* (The Role of Non-Governmental Organizations in Law-Making [pp. 223-262]), and *Anne Orford* (Food Security, Free Trade, and the Struggle for the State [pp. 285-314]). The titles of the contributions, generally[12] wisely selected by *Wolfgang Kaleck* and *Karina Theurer*, already signal the diversity of the topics. They reach from the colonial imprints of international law to the connections between colonial undertakings and the religiously grounded enforcement of monogamous ideas of relationships with heteronormative role distributions to the role of non-governmental organizations or questions about the postcolonial elements of a transnational economic order. The developmental steps of postcolonial theory are being presented and historically embedded, important authors are being named and references are being made to central works, essential theoretical elements are being introduced and references to other legal-theoretical approaches (feminist legal theory, Critical Legal Studies, TWAIL, critical-race or (neo-)Marxist theories) are being clarified.

The strengths of decolonial perspectives become clear, for example, when traditional narratives of the history of international law are confronted with blind spots, legal concepts are questioned with regard to their colonial heritage, or it is shown how the legal vocabulary changes, but the Eurocentric telos essentially remains the same. For example, when the term "civilization" is replaced by terms such as "development", "modernization" or "progress" after decolonization, or when geographic and cultural connotations are uncovered in supposedly neutral or ostensibly purely technical terminologies. Readers also learn, on the one hand, how alternative notions of community and belonging have been displaced by the liberal concept of legal (individual) subject. On the other hand, how colonial coercion has homogenized inhabitants with colonial notions of "peoples" in the first place, constructing them as cohesive associations with an imposed collective identity. In such constructions, one encounters Christian, cultural, or racially based distinctions between Christians and heretics, civilized and savages, humans and non-humans, which are accompanied by a multitude of discriminatory classifications and categorizations in almost all areas of life that determine individual and collective patterns of behavior. The relations between the indigenous population and the colonizers are not described as a one-sided relationship of domination in which the colonized appear only as passive actors

12 An exception is *Makua Mutua's* nearly 40-page article on non-governmental organizations. One wonders why it was included in the anthology, at least at this length. The article contrasts the success story in which non-governmental organizations have been involved - informally and increasingly formally - in the creation, dissemination and enforcement of human rights, especially since the adoption of the Universal Declaration of Human Rights, with a critical decolonial perspective that points out that NGOs are regularly located in the metropolises of the Global North, have financial resources and proximity to centers of political power, their staff have attended Western universities in Europe, Great Britain or the USA, and move in a global, yet specific milieu, which is why they develop a certain habitus and share similar political-ideological ideas. Apart from this insight, which is not particularly surprising anyway, the article deals with general questions about NGOs for the most part.

and victims, but as a complex set of relations that oscillates between very different forms of resistance, acculturation or assimilation, from which cultural-religious mélanges as well as social practices can be observed over time until today.

Thus, we learn from *María Lugones* that it was not simply a matter of enforcing European gender roles in the colonies, if necessary, by force. Rather, the colonial situation produced entirely new systems of ascribed gender relations for all involved, in which gender was complexly interlocked with capitalist exploitation and racist attributions. We are reminded "that many First Nations in the Americas were matriarchal, recognized more than two genders, viewed "third" genders positively as well as homosexuality, and generally understood gender in egalitarian terms rather than as subordination as in the Eurocentric capitalism imposed on them" (p. 174). These are communities in which women are central to the community, and especially spiritually, which is why it was essential for colonial repression to "replace gynecocratic spiritual plurality with a single supreme male being, as is the case in Christianity" (p. 178). *Anne Orford* uses the example of the right of access to food to show the contradictions between an "invented tradition" of free trade, which presents itself as a struggle against national protectionism and for liberal governance practices, cosmopolitanism, and a more peaceful world, and the actual effects of global and regional trade agreements. She tells counter-hegemonic stories in which the U.S. and European Union member states exempt their domestic agricultural production from trade liberalization, but at the same time build massive pressure on countries in the Global South to deregulate their agricultural markets, roll back land reforms, reduce subsidies and price supports, or eliminate tariffs and import quotas in order to open their agricultural sectors to free trade. From a perspective that sharpens its focus beyond the (post-)colonial situation, international trade agreements prevent regulatory interventions (not only in the Global South) to protect the environment, animals, and consumers, oppose sustainable forms of agricultural production, and primarily serve the financial interests of global corporations from the Global North. Another essential element of decolonial theories emerges when *Orford* finally uses the example of the activities and influence of liberal thinkers since the 1930s to show how epistemic convictions prevail in which state support measures for agriculture, falling food prices and food surpluses are not seen as positive indications for achieving the goal of feeding the world's population, but represent problems that need to be eliminated in the interest of a free market.

In the second part of the anthology, under the heading "Decolonial Practice and Transformation of Law", readers find interviews with very different activists. Fortunately, the interviews do not follow a uniform list of questions but are oriented towards the respective backgrounds and concrete political struggles of the interviewees. They are *Tarcila Rivera Zea*, a Peruvian activist for indigenous rights and member of the United Nations Permanent Forum on Indigenous Issues; *Rupert Hambira* and *Kamutuua Hosea Kandorozou*, representing the Nama and Herero people, who speak about the colonial crimes committed by the German Empire in Namibia and their continuing consequences; *Simon Masodzi Chinyai*, who heads the Chinyai community based in southeastern Zimbabwe, and who

speaks about reclaiming land confiscated during British colonization; *Colin Gonsalves*, winner of the Right Livelihood Award and founder of the Indian human rights organization Human Rights Law Network, which works to enforce social and economic rights for marginalized and particularly vulnerable groups; and *Alejandra Ancheita*, a lawyer and founder of an NGO who advocates for the rights of indigenous communities and against structural discrimination against other particularly vulnerable groups. Based on political-practical experiences, the interviews tell of phenomena that have already been described to the readers in a scientific and thus, as it were, more abstract and less tangible language in the texts contained in the first part of the book. Above all, however, the interviews reveal, even more than the scholarly essays, the extremely complex and always contradictory situation of the postcolonial constellation, in which the effects of the exercise of violence, the robbery of resources and the appropriation of bodies of knowledge, the destruction of traditions and cultures, and the establishment of a dual social and legal system based on racist divisions continue to determine the lives of people in the colonized countries in many ways today.

Thus, in the interviews with *Tarcila Rivera Zea* or *Alejandra Ancheita*, one learns how discriminatory access to the educational and legal system in today's Peru and Mexico takes place through normative and institutional practices that are based on ethnic or socioeconomic attributions shaped in the colonial era. In a perfidious way that extends the colonial period into the present, these attributions continue to determine individual and collective identities. Because indigenous people, their stories, achievements and perspectives are not part of the school curriculum, indigenous students leave school in Peru, as *Tarcila Rivera Zea* describes, with the desire "to be someone we are not, we want to be like the boy from the reading primer Coquito, we want to be white, blond and beautiful in terms of physical characteristics, in line with Western ideas" (p. 319). In literally all areas of individual and social life, the postcolonial situation is precisely not one in which colonialism and its effects are over. Thus, there are pleas for the introduction of indigenous legal systems, which, contradictorily, are judged skeptically by indigenous women in part because these systems in comparison to the state legal system are dominated mainly by men (p. 327). It is described how Catholic missionaries have pushed women out of political and economic life on the basis of religious-patriarchal gender and family concepts and a dichotomy of public/private imported from Europe, so that they henceforth restrict themselves to the "private" sphere in families as wives and mothers dependent on men. Meanwhile, it is also observed how indigenous women, contrary to the expectations of international NGOs, do not demand women's rights in parliamentary hearings, but rather social and collective rights, which in turn can be read as the overcoming of a colonially imposed gendered social order of European provenance. The repercussions of colonialism in the colonial centers could arise, if one looks at developments in international law as well as current discussions on legal theo-

ry[13], especially in connection with those human rights of the second and third generation. *Colin Gonsalves* does not exclude the possibility that courts and jurisprudence in the former colonial states will be influenced by the more progressive jurisprudence of activist courts in the former colonies (p. 361 f.). A "decolonization of knowledge," according to *Gonsalves*, could lead to a "resignification of the concept of human rights and their defense - a resignification in which one takes leave of prefabricated concepts that are alien to the realities of the global South and listens to the voices of those who historically were victims of oppression" (p. 370).

Perhaps the only weakness of the anthology (at least for the interviews in its second part) is the lack of introductory explanations on the background and the history of the political struggles as well as on the socioeconomic situation in the respective countries of the activists. For example, the so-called reconciliation agreement, which Namibia reached with the Federal Republic of Germany last year after six years of negotiations, plays an important role in the interview with *Rupert Hambira* and *Kamutuua Hosea Kandorozou*. However, one searches in vain for more detailed information on its genesis, its contents and the actors involved, as well as on the reasons for the criticism of the agreement, which comes mainly from Namibia. Before the interview with *Simon Masodzi Chinyai*, which deals with the struggles of indigenous peoples to reclaim land confiscated in the course of British colonization in Zimbabwe, it is mentioned that redistribution in independent Zimbabwe is hampered by national constitutional principles. However, the reference to the entanglements of these struggles with international law, important for a book on decolonial theories of law, appears later and then only briefly. In the context of an introduction or even a stronger compatibility between the scholarly contributions in the first part of the book and the interviews in the second part, it could have been pointed out here, for example, that land ownership by companies based very predominantly in the Global North is not only defended before national courts by invoking national (constitutional) law. Of at least equal importance is the ISCID-Convention (International Centre for Settlement of Investment Disputes) and international arbitration proceedings in which companies claim against states that they have violated regulations contained in investment protection agreements. However, these agreements and arbitration proceedings are not only said to have a structurally conditioned investor privilege.[14] As a rule, they are embedded in massive economic imbalances, which are only weakly concealed by the reciprocity between former

13 On the legal-theoretical discussions: *Andreas Gutmann*, Hybrid Legal Subjectivity. The Rights of "Nature or Pacha Mama" in the Ecuadorian Constitution, Baden Baden 2021; *Andreas Fischer-Lescano*, Nature as Legal Person, Constellations of Substitution in Law, Zeitschrift für Umweltrecht 2018, p. 205.

14 For an institutional analysis confirming this suspicion, see: *Gus van Harten*, TWAIL and the Dabhol Arbitration, Trade, Law and Development 3 (2011), p. 131. On the origins of today's international investment law, which lie not at all in the 1950s and 1960s but in the era of colonialism: *Kate Miles*, The Origins of International Investment Law, Cambridge 2013; *Asha Kaushal*, Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime, Harvard International Law Journal 50-2 (2009), p. 491; *Ibironke Odumosu*, The Law and

colonizing and colonized states formally recognized in the treaties.[15] In other words, they can (also) be interpreted as instruments of continued colonialism.[16]

Notwithstanding this rather marginal criticism, "Dekoloniale Rechtskritik und Rechtspraxis" is an important book. It offers a broad insight into the discussion of decolonial theories in legal discourse and it shows the variety of legal fields and questions in which these theories can function as an instrument of legal criticism.

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Politics of Engaging Resistance in Investment Dispute Settlement, Penn State International Law Review 26 (2007), p. 251.

15 *Matthias Kumm*, Ein Weltreich des Kapitals? Leviathan 43 (2015), p. 464, who analyzes "arbitration procedures for the settlement of investment disputes between foreign investors and host states as a project of empire" and understands "investment protection as a continuation of Western imperialism under new conditions" (op. cit., p. 470).

16 The omission of these aspects is also surprising because the ECCHR, for which the two editors work, was involved in the arbitration proceedings that are the subject of the interview. Indigenous communities asserting claims to land stolen during the colonial period by the British South Africa Company with a royal mandate, which is now owned by a German-Swiss company, had tried unsuccessfully with the help of ECCHR to obtain recognition as a third party in the arbitration proceedings. See: *Friends of the Earth Europe and International, the Transnational Institute (TNI)/Corporate Europe Observatory (CEO)*, Red Carpet Courts, June 2019, pp. 39 et seq.; *Stefan Naegeli/Barbara Thalmann*, The Exclusive Right to Human Rights, Die Wochenzeitung No. 26/2019 of 27 June 2019.