

1-1-2005

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Recommended Citation

Laura Nader, *Law and the Theory of Lack*, 28 HASTINGS INT'L & COMP. L. Rev. 191 (2005).

Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol28/iss2/2

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Law and the Theory of Lack

The 2005 Rudolf B. Schlesinger Lecture on International and Comparative Law

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I. Introduction

True, our system is wasteful, and fruitful of many small disputes. True, a large estate can be managed more economically than a small one. True, pasture farming yields higher profits than tillage. Nevertheless, master steward, our wasteful husbandry feeds many households where your economical methods would feed few. In our ill-arranged fields and scrubby commons most families hold a share, though it be but a few roods. In our unenclosed village there are few rich, but there are few destitute, save when God sends a bad harvest and we all starve together. We do not like your improvements which ruin half the honest men affected by them.¹

- Imagined statement from a manor jury to an estate steward

With all that has been written about comparative law it is remarkable how little notice has been taken of the cultural politics of law. This is in part attributable to the assumption that families of legal systems have developed in isolation from each other, and the

1. JOHN C. WEAVER, *Concepts of Economic Improvement and the Social Contradiction of Property Rights: Highlights from the English-speaking World*, in *DESPOTIC DOMINION*, (T. McLaren, A.R. Buck, and N.E. Wright, eds.) Vancouver: UCB Press, pp. 79-102, 2005.

belief that law is above politics. This omission of the politics of law is significant, for law was and is commonly constructed to justify, administer, and sanction conquest and plunder. While theoreticians of Euro-American imperialism recognize the uses of law discourse and practice that constitute keystones of the “civilizing process,” the dark side of the law is its imperial uses – historically and currently – a cultural project that merits empirical attention.

A Euro-American configuration of institutions and belief systems has normalized and powered a Euro-American use of “rule of law” and lack, an ideology key to the colonial and imperial project whether it was being exercised by the British, French, American, Belgian, Dutch, Portuguese, German, or Italian colonial interest in pursuit of their enrichment. In the contemporary period, the appropriation of resources and ideas belonging to other peoples are sometimes justified by notions of civilization, development, modernization, or alternative dispute resolution. Lack has been used to highlight positional superiority, an important mechanism for constructing and legitimizing conditions for plunder.

Rhetoric attendant to the rule of law or its lack has been used throughout Euro-American expansions and with repetitive frequency to camouflage the taking of land, water, minerals, and labor as happened in countless locales to native peoples under colonialism. An interesting question is *why* powerful nations or groups bother with legitimating devices such as the “rule of law” when history clearly shows that they can dispense with such legitimating devices. Another interesting question is *how* the process of implementing an uninvited law works. The claims of a developing nation against the inherited rights of the First Native Americans was decided in the United States by Chief Justice John Marshall in 1823. Accordingly, the Indians of the United States did not possess an unqualified sovereignty as independent nations. How is it that so many legal scholars can so easily dispense with such acts as U.S. allotment policies culmination in the Dawes Act of 1887? It’s the *how* that interests me in what follows.

When legal scholars or practicing lawyers speak publicly of law, they commonly refer to the purposeful functions of the law – a process for facilitating and protecting voluntary arrangements or as a process for resolving acute social conflicts, or as process necessary for orderly continuities. But Euro-American law cuts both ways. The not-so-nice functions of the law are adumbrated in the research on European colonialism, the work on legal orientalism, the work on law

and development as legal imperialism, or the work on states of exception as in the “War on Terror” in the foreign arena or the curtailment of the Bill of Rights on the domestic front. Ideas such as the promotion of the “rule of law” or its lack are key in American discourse on foreign policy. In fact, what Woodrow Wilson considered an obligation of the United States, the universal dissemination of the “rule of law,” has rarely been the object of public discussion because its positive connotation has always been taken for granted. Today, in the name of democracy and the rule of law, the American public has been persuaded of the moral acceptability of military aggression and occupation of a foreign country, Iraq, utilizing among others George Kennan’s “straight power doctrine” to protect our extractive and ideological needs, and once again utilizing ideas of lack to underscore positional superiority.

Thus, the European roots of the colonial project were tied to a theory of lack – a theory that justified taking property from those deemed lacking the ability to exploit resources around them. Other peoples lacked law – a provider of order, beneficial to the public good. Steeped in 19th century unilineal evolution – whereby human society progressed from savagery, to barbarism, to civilization as exemplified by Europe – Western countries identified themselves as being civilized because they were governed by the rule of law, no matter what the actual history of a present situation might be. Such identity was acquired by knowledge of and false comparison with other peoples, those who were said to lack the rule of law, such as indigenous people, or in reference to China, Japan, India or the Islamic world more generally. In addition, today the Third World developing countries lack further, the minimal institutional system necessary for the unfolding of an efficient market, one that serves, today as in the past, to further the construction of Western superiority. Of course, the Other is often aware that “lack” is about the building of a universal rule of law that, while ethnocentric, is capable of facilitating efficient transfers of property rights from whoever values them less to whoever values them more, such that global rule makers claim sovereignty over local politics.

II. The Beginning

Property rights long engaged philosophers and perhaps most famously John Locke whose justification for entitlements through

improvements led to alterations in law and administrative practices. When Swiss philosopher and statesman Emrich de Vattel published his book *The Law of Nations* in 1758, he had a ready audience amongst the colonizing nations of Europe then located in North America. His arguments about land were congenial to the colonizing nations of the 18th century because he gave legal justification for the colonial appropriations of lands, thereby lending moral authority to what First North American Peoples might describe as theft. In his words:

The earth belongs to all mankind . . . All men have a natural right to inhabit it . . . All men have an equal right to things which have not yet come into the possession of anyone. When, therefore a Nation finds a country uninhabited and without an owner, it may lawfully take possession of it. In connection with the discovery of the New World, it is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small number cannot populate the whole country . . . we are not departing from the intentions of nature when we restrict savages within narrower bounds. (quoted in Williams 1986: 127-29)

These were sweet words and not the only such words written to justify the legal taking of land in the New World. *Terra Nullius* – vacant land – an untouched wilderness; the fact that most of the land was occupied by indigenous nations was brushed aside since as “pagan and uncivilized people” Native Americans lacked: they were not capable of holding territorial title, property rights, or jurisdiction over their land. So when the British Crown assumed sovereignty over all American territory they asserted full title and complete jurisdiction as if it were a vacant country. Although the British Crown made a practice of entering into treaties with some Indian groups for purposes of “purchasing” lands, such did not involve recognition of their land rights. The doctrine of legal vacuum was popular even though not unchallenged, or at least rethought – a more sophisticated version of the doctrine of legal vacuum appeared later when Chief Justice Marshall elaborated the principle of discovery – recognizing the relations between the discoverer and the natives, then moving late on and finally to the rights of conquest.

It is important to note that the imperial side of American law was present long before neo-liberalism. It was present before the American Revolution of 1776. It was already present in doctrinal

thinking when British colonists arrived in North America and encountered Native American communities, Inherent in the philosophy of John Locke's 1689 *Treatises of Government* was the idea that Native American properties could be appropriated by command of the Christian god – "As much land as a Man Tills, Plants, Improves, Cultivates and can use . . ."

III. Law and Development

Law and Development is but a continuation of the "need" for progress and the "need" to improve others who lacked something we could provide. American legal assistance to the Third World was crafted by American lawyers and supported by both private foundations and government developed assistance programs. Legal missionaries, as James Gardner called them, were sent to Asia and Africa in the 1950s and to Latin America in the 1960s. The purpose, according to many writers, was to include lawyerly aid in the foreign aid process, to encourage development along capitalist and liberal democratic lines as opposed to possible communist penetration in these areas. The rule of law would facilitate democratic reforms and economic development and nation building. And, of course, there were human rights that needed to be protected. What they lacked we could provide – legal engineers and a vision of law as an instrument of development policies. And, of course, this meant the transfer of American models of what it means to educate an American lawyer and what purposes law might serve. There was little doubt that American legal models would benefit Latin America and the Third World more generally. It would bring democracy to authoritarian states. There was optimism and excitement among these legal missionaries even though they often could not speak the language nor did they carry any knowledge of the peoples and places to which they were sent.

The critique provided by James Gardner's *Legal Imperialism* book cut to the core – American legal assistance was a product of hubris. More importantly, the movement did not carry abroad the most enduring and basic instruments of American law: the Constitution, the Bill of Rights. Instead, there were legal transfer mechanisms – visiting American law professors, fellowships for study in the U.S., conferences on law and development, legal assistance grants and institutional supports between American and foreign law

schools. Receptivity was found among lawyers anxious to modernize antiquated systems, to rid themselves of formalistic traditions, those more pragmatic, people training to be “legal engineers” of development and the “technicians of democracy.” The consequences were frequently unanticipated – some recipients were technicians of regressive change, and Gardner notes some were technicians of repressive change, apologists for one or another military dictatorship. Put in its simplest form, Gardner notes that those all too ready to embrace American legal models served to diminish the legal profession as a source of opposition to state policies. What started out as a desire to help the little people changed and the “legal missionaries” returned home to begin a new field of inquiry, one that required them to look in the mirror, at the flaws in the models they were taking abroad – an interest that was reflected in new movements here – legal services for the poor, public interest law, and law reform. In the end legal missionaries concluded that it was we who lacked. But they were few in number, and outnumbered by powerful institutions whose hubris was even greater and continuous.

There had been public pronouncements by various presidents of the ABA. I will only quote one so that you have a flavor of deeply held ideas that continue to this day:

A new and magnificent duty now rests with the legal profession . . . it is the especial duty of lawyers to establish and maintain lawful order for the world, because they are the ministers of law . . . Because of the strength and position of America, we, the lawyers of America, face an opportunity to take a decisive part in reshaping the future of the world. (Robert Wilkin, 1961)

American legal structures and ideas were neither invited to their law and development schemes abroad nor did they have the power to impose the law in the usual sense, and thus American law could not be exported directly. *Indirect* and infused export meant introducing paradigms and values of legal education models, “rule of law” and “case law” jurisprudence, and the idea of legal engineers as architects of a free society. For the legal missionaries law was a “nicely adjusted piece of legal machinery.” Others disagreed and thought that law was inseparable from its origin, not “socially easy.” And also there was competition with French and English exports. But whether it be European or American the hubris was there. Latin American legal education was thought to be *defective*; Africa was thought not to have

law since customary law was not really law. They lacked . . . what we had, and what we have they should also have.

A. The Chinese Lack Law

The same paradigm of lack is also applied to the other extant civilizations. Even today, we hear repeatedly that China lacked and lacks law, or was and is averse to law. Such statements are often accompanied by arguments as to the difficulty of bringing the rule of law to China. One American lawyer unself-consciously states that “Basically the ban must be invented as a profession without any guidance from Chinese tradition, or China’s recent history.” (Lubman 200: 158) Beyond lacking law, the Chinese are now charged with ignoring the law they had! Erasure had become part of the policy. What has buttressed the hegemonic scope of law is now an internal cultural logic based on lack or emptiness, a logic that has had lasting power over centuries of Euro-American dominance, even though perceptions of what they lack may change. In the context of the rise of law and economics strategies, this lack theory has today been fully rationalized as a lack of efficiency.

Legal ethnocentrism has recently been classed as a form of Legal Orientalism. In one article that appeared in the *Michigan Law Review* (Ruskola, Oct. 2002) we can see why. The author observes that

. . . by considering Legal Orientalism as an ongoing cultural tradition we can understand better why, even today, claims about the status of Chinese law are so relentlessly normative . . . because . . . they support an overly idealized self-image of the American legal subject and an unduly negative view of the Chinese (non)legal (non)subject. Chinese are ruled by morality, American by law, Chinese are lemmings, Americans individuals, Chinese are despotic, Americans democratic; China is changeless, America dynamic . . .

Ruskola wishes to challenge the historic claim made by many Western observers that China lacks an indigenous tradition of “law,” while doing more to understand how the West “has come to understand itself through law.” After all China boasts dynastic legal codes going back to the Tang dynasty. Yet, Western scholars have

constructed their cultural legal identity against China, and despite vigorous efforts to debunk the view of China as lacking in law, we still have scholars such as Thomas Stephens (1992) arguing that Chinese law is not even worthy of the phrase “jurisprudence.” The task, Ruskola argues, may be to “provincialize Europe” and by doing so renew European traditions “from and for the margins.”

B. Islam Lacks Rational Law

Legal Orientalism has been receiving a good deal of attention of late, especially with the American invasion of Iraq. Jedidiah Kroncke’s article on “The Flexible Orientalism of Islamic Law” (2005) begins with a quote from John Strawson’s *Islamic Law and English Texts*: “English texts do not merely present Islamic law, they construct it” (1995). Not far into his paper Kroncke has a section titled “Weber’s Taxonomy and Islamic Law.” He begins not by quoting Max Weber but Supreme Court Justice Felix Frankfurter, who had habitually read Weber (the father of Legal Orientalism): “(the Supreme Court) is not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.”

Kroncke, who is studying Chinese law, summarizes ideas of Max Weber as published in his book *Economy and Society* in order to understand why Weberian legal orientalism remains entrenched, in spite of empirical research to the contrary. Weber focuses on several historical legal traditions, including Islam. Weber uses the term “kadi” to describe a system of justice which is not focused on a formally rational law, but on the ethical, religious postulates of a substantively legal systems with two dimensions: formal/substantive and rational/irrational thereby generating four categories. For Weber, Western continental law fits into the ideal type of “formal rationality.” In contrast, Islamic law was one of substantive rationality concerned with the implications of Islam’s religious norms: “The dominance of law that has been stereotyped by religion constitutes one of the most significant limitations to the rationalization of the legal order” (1968: 657). Weber defines the groundwork of subsequent Legal Orientalism in making the distinction between the substantive rationality of Islamic law and its substantively irrational administration of justice. As he puts it, “a typical feature of the patrimonial state . . . is the juxtaposition of traditional prescription and arbitrary decision-making, the latter

serving as a substitute for a regime of rational rules" (ibid: 1041).

Weber rejects the possibility of an Islamic jurisprudence. Kadi opinions may be authoritative, but they vary from person to person, and are given without any statement of rational reasons. While Weber's analysis has been called into question by a number of scholars that is Kroncke's point, nor mine. We are concerned with the relatively undisturbed aspect of Weber's characterization of Islamic law. People like Bryan Turner (1978) continue the stereotype with essentialized comments such as "Islamic law provided society with a tight, normative structure which . . . cannot change rationally to meet new contingencies." Wolfgang Schluchter (1999) writes that Islamic "legal development was paralyzed." Patricia Crone (1999) reiterates the "impossibility of Islamic law as an effective legal system because of its substantive grounding." The work of critics Moosa (1988) and Hanif (1999) does not make a dent in Weber's pejorative representation of Islamic law.

Kroncke moves to examine the major work on Islamic law by the influential scholar Joseph Schacht (1950) and by American anthropologist Lawrence Rosen (1984) (2000). For Schacht (1950) (1964), Islamic legal theory is rote and mechanical, Islam is "only arbitrary opinion." . . . "a formidable obstacle to every innovation, and in order to discredit anything it was, and still is, enough to call it an innovation (1950: 129), a "jurist's law," concerned with its own internal logic and nothing with social reality, and suffering from an inherent rigidity . . . disinterested in any notion of justice, the "letter rather than the spirit of the law" (ibid: 72), a concern with appearances. Irrationality and unreality are the common themes. While there may be a growing mistrust of Schacht's assumptions (see Haim Gerber's *Islamic Law and Culture*), the continuing stereotyping of Islamic law gives full expression to the negative implications of Weber's work for representing "the anarchy of the Arab way of life" (1964: 23), a position that feeds into 21st century global politics.

When Kroncke (2005) examines the work of Lawrence Rosen things don't get better, even though Rosen is an anthropologist. Rosen revives Weber's characterization of the capricious kadi thereby reaffirming the basic structure of Islamic legal orientalism. In his books, *The Anthropology of Justice* (1989) and *The Justice of Islam* (2000), Rosen uses the concept of totalizing subjectivity as well as the metaphor of the bazaar to describe an essentialized Muslim society, a world of premonitory chaos, one in which Arabs lack an appreciation for regularity and tangibility of space and time. In his neo-Weberian

view of kadi justice, Rosen explains that part of the trauma of colonialism for Muslims was the fact that European powers tried to introduce specific legal codes, troubling in a world where truth and veracity are not motivating concerns!

Kroncke concludes:

Rosen and Schacht both exhibit the same inability to make reference to Western law in anything but the most idealized representations. Western law becomes the evaluative standard and both are oblivious to peoples who have been radically impacted by colonialism, all of which plays into the hands of those uncritical thinkers planning U.S. foreign policy in these Eastern lands, people who only hear irrationality, illegitimate, unchanging, immorality. The legacy of colonialism continues and expands to include those who self-colonize thereby affirming Weber's caricatures and uncritical idealizations of Westernization and law or even to idealizations of Islamic law.

Idealizations have been of concern for as long as there has been anthropological fieldwork resulting in ethnographies, or because of the use of idealizations as a form of hegemony or even counter-hegemonies (Nader and Ou, 1998). With regard to the study of law anthropologists are not the only professionals who worry about idealizations as an impediment to understanding how law works, indeed what law is. The concern of legal scholars can be found in earlier work by Judith Shklar (1964), who observes the tendency among legal scholars who are caught by "the ideal purposes of law to govern one's thinking about law in general. It means thinking of law only as it ought to be – as legalism wants it to be, not as it actually is" (Shklar, 1964: 31). For Shklar, this means a legal system that meets the formal qualifications of being "self-regulating, immune from the unpredictable pressures of politicians and moralists, manned by a judiciary that at least tries to maintain justice's celebrated blindness" (Shklar, 1964: 31). We are all limited by the belief systems and thought structures of our own cultures and disciplinary paradigms. And different versions of this problematic of an internalist perspective dominating the investigatory capacities and theorists of law appear in the work of legal theorists such as H.L. Hart, but not apparently in the work of Max Weber and his heirs. Needless to say, nowhere are such issues more salient than under colonial or imperialist conditions as in present-day Iraq where such legal

ideologies are normalized.

IV. Iraq – Direct Imposition of Law, Uninvited

An illustration of the continuities of imperialism and a powerful example is the case of Iraq during the contemporary occupation by American and British forces. A non-elected L. Paul Bremer III and the Committee of the Iraqi Governing Council passed edicts, closed newspapers under the “rule of law,” ordered curfews, and wrote and spoke about what one journalist called Phantom Sovereignty. Paul Bremer used military force to back these moves and more importantly, a military force that allowed the total disorganization of competing legal controls in Iraq, customary, Islamic, and state.

According to the U.S. press, the first months of occupation of Iraq were about bringing the rule of law to Iraq as part of democracy promotion measures. There were eye-catching headlines in U.S. newspapers and magazines. A few excerpts give a flavor of how systems targeted as lacking work for the more powerful.

San Francisco Chronicle, 4-11-03, “Iraq’s Judicial System Lacks Practitioners, Scholars Say,” by Reynolds Holding

The article reports that Iraq’s current legal system derives from the nation’s 1924 constitution, which credited a parliamentary monarchy similar to the one that rules Jordan and contained certain basic guarantees of human rights indicative of an influence from France’s Napoleonic Code. The article also notes that in the 1960s, Iraq adopted a new set of codes; a 1968 Baath Party established a council that circumvented existing laws, by means of courts, their version of the Patriot Act, allowing people to be tortured or killed. The trick today, the experts argue, is to strip the system of all the laws and special courts established by the revolutionary command council. Legal specialists suggest taking the existing system, and using what there is in a more modern context. Such a policy means not changing the substantive law, but changing the procedures to ensure that they are fair and efficient. William Alford’s observations bear repeating (2003: 74): we “approach legal reform in other societies as if the past were little more than an incumbrance, that the clear-minded should be only too ready to discard for a future remarkably akin to ours.”

Wall Street Journal, 4-19-03, "Team to Rebuild Iraq's Courts Includes Three federal Judges" . . . members of the team, which includes federal prosecutors, public defenders, court administrators, and a state judge have signed on . . . to assess the condition of Iraq's judicial system . . . 13 member . . . to develop an independent judiciary so that Iraqi people will have confidence in their courts." . . . "Legal experts say Iraq had been developing a sophisticated justice system prior to 1968 when the Baath Party took power. Khaled Abou El Fadl warned they are not writing on a clean slate . . . (watch) mucking around with the tribal courts and customary law."

New York Times, 5-11-03, "American Will Advise Iraqis on Writing New Constitution," by Jennifer Lee. "Noah Feldman . . . will try to blend American ideas of democracy with Islamic traditions." "Looking for common ground between Islam and American democracy."

What Western ideals? Whose model of democracy? Why democracy? In whose interests? The experience of trying to shape others, as we can see, inevitably shapes us as well (Nader 2003).

Early on after the invasion of Iraq, the distinguished Islamic scholar, Khaled Abou El Fadl, a law professor at UCLA, wrote an opinion piece for the *Wall Street Journal* titled "Rebuilding the Law." In this piece Abou El Fadl maintains that Iraq had a rich and long jurisprudential tradition long before Saddam Hussein came to power. He noted that after gaining independence from Britain in 1930, Iraq, like most Arab countries, adopted Civil and Criminal Law Codes from the French and Germanic legal systems. Iraq's personal law, however, continued to be based primary on Islamic law.

The Iraqi Civil Code of 1953 was one of the most innovative and meticulously systematic codes of the Middle East. Iraqi jurists, working with the assistance of the famous Egyptian jurist Abd Al-Razzaq Al-Sanhuri, drafted a code that balanced and merged elements of Islamic and French law in one of the most successful attempts to preserve the best of both legal systems. In 1959 Iraq promulgated the Code of Personal Status, which on issues of family and testamentary law was at the time the most progress Muslim code of law. Importantly, for our purposes now, this code merged elements of Sunni and Shiite law to grant women greater rights in

marriage, divorce, and inheritance.

According to Abou El Fadl when the Baath Party came to power in 1968, Saddam involved Iraq in a series of wars that enabled him to declare a constant state of national emergency and to rule mostly by executive order. Iraq became one of the few countries that legally sanctioned the use of torture in pre-trial investigations, as a punitive measure, and the death sentence was prescribed for a large variety of offenses. Law became contingent on the will of the party and the president. After the Gulf War of 1991 Saddam announced that he would implement Islamic law in Iraq, a theatrical move the point of which was public spectacle. Abou El Fadl concludes his opinion piece by recommending that: "American policy makers must understand that Iraq's legal and ethical history did not start with the overthrow of Saddam." (WSJ, April 21, 2003). They do not lack.

The 100 Orders enacted by Paul Bremer who was head of the now defunct Coalition Provisional Authority (CPA) were apparently meant to fill a lack – the minimal reform necessary for the unfolding of an efficient neoliberal market. Thus, Bremer's Orders give preference to U.S. corporations over the development of Iraqi economy intended to change Iraq from a centrally planned economy to a market economy, and Order #39 does not shrink from openly asserting such a goal, allowing for the privatization of Iraq's 200 state-owned enterprises. Order #40 changes the banking sector from a state-run system to a market-driven system. And Order #81 prohibits Iraqis from saving seeds; they only plant seed for their food from licensed, authorized U.S. distributors. And one Iraqi is quoted as saying, "the day will come, sooner rather than later, when the Iraqis will shred Bremer's law, soak them in water and offer them to Bremer to drink."

A. A Time for a New Paradigm

I recently heard a Zapatista speaking on a radio program. His words resonate: "Our crime is in being who we are; in being different, not what power wants us to be. We wish for a world where many worlds exist."

And there have been times when many worlds existed, amidst lively trade and contact. In her book *Before European Hegemony* (1989), Janet Abou-Lughod described the world system of the 13th

century, a time in which a wide variety of culture systems co-existed. Christianity, Buddhism, Confucianism, Islam – all seem to have permitted and facilitated lively commerce, production, and exchange. Nor were underlying bases for economic activities uniform. Weber was wrong about Eastern cultures providing inhospitable environment for merchant accumulators and industrial developers. What they lacked were free resources as that flow from the Americas to Europe. A restructuring of the Eurocentric modern world system might provide a new energy, new creativities, and inspire a rule of law with a humanitarian impulse.