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What the Rest Think of the West - Legal Dimensions†

By LAURA NADER*

I. Introduction

The notion of others observing “Us,” before there was such a thing as anthropology, was brought to my attention by Carleton Coon’s *Reader in Anthropology*. Coon made a break with previous anthropological selections by including what other peoples had to say about the West in addition to what anthropologists have said about other cultures. He introduced me to the Chinese Buddhist who went to India in 600 A.D. and wrote about - among other things - manners, the administration of law, and trials by ordeals; and to Ibn Fadlan, who in traveling from Baghdad to the Volga left us with the earliest known texts describing what we now call human rights violations among the Scandinavian traders in early Russia, there to reap the rich overland trade from India and China. That graduate experience has stayed with me.

II. Orientalism, Occidentalism and Control

As an anthropologist, I have written about comparative

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thinking. Even though one may not see oneself as a comparativist, thinking comparatively is probably universal. When we look at others objectively, we cannot help but at least implicitly be comparing what we see with what we already know. In the 1980s, I wrote about comparative consciousness arguing that without making explicit our implicit comparisons the validity of our work was diminished. I used as illustrations what the West notices about the conditions (legal and otherwise) of Islamic women and what Islam may observe about women in the West.¹ I recognized "the mutuality" of the gaze - each seeing the other as repressive - legally and otherwise. For example, Western legal observers see plural marriage as impinging on women's status, while Islamic legal scholars might argue that such arrangements come with legal responsibilities while having mistresses in Europe does not.

My interests led to teaching a graduate seminar about the diplomats, adventurers, religious missionaries, lawyers and others who traveled to the West - mostly members of the literate elite. My work in progress, titled *WHAT THE REST THINK OF THE WEST - 600 A.D. TO 2010*, will include selections from various historical periods of extant civilizations - Japan, China, India and Islam - during first contact, the colonial era, independence, and the contemporary period. The early first contact writings are most interesting, especially because European intellectual, cultural and commercial life was relatively stagnate during the early medieval period, a time when Asia was a flourishing wellspring of science, philosophy, and religion, as the book title *When Asia was the World* reminds us.² Orientalism was not yet pervasive.

In this brief talk three examples of commentary on western law will suffice. They are, Mirza Abu Taleb Khan - who wrote of his travels from 1799 to 1803, from India to Europe (mainly to England); Abd al-Rahman Al-Jabarti who wrote during the same period - 1798 to 1803 covering the Napoleonic invasion of Egypt (al-Jabarti being probably the most respected Arab historian of any period) and a more recent twenty-first century observer - Issa Shivji, Professor of Law at the University of Dar es Salaam in Tanzania.

1. Laura Nader, *Orientalism, Occidentalism and the Control of Women*, in 2 *CULTURAL DYNAMICS* 323 (1989).

2. See generally, STEWART GORDON, *WHEN ASIA WAS THE WORLD* (2008).

III. Mirza Abu-Taleb Khan, 1799-1803

From the establishment of the East India Company in the early seventeenth century, India's exposure to Britain had been primarily through the Company's monopoly of trade East of the Cape of Good Hope and across to Cape Horn, that is Indian and Pacific ocean trade. Mirza Abu Taleb Khan was raised in a relatively mobile Turkish/Persian family. He was born in Lucknow in northern India in 1752, settled in Bengal and was exposed to the East India Company as a mediator between English officers and the Indian portsmen. Through his friendship with a Captain Richardson, Abu-Taleb visits London and leaves us with a detailed description of the "exotic" European world.³

Most engaging among Abu Taleb's observations and of relevance to my topic here are his comparisons between Indian and European liberties, both juridico-legal and gendered. He is unconvinced by the "boasted palladium of English liberty," and finds it is difficult to defend the corruption of the British courts as evidenced by Abu-Taleb's unlucky exchanges with the tailor who had swindled him by taking advantage of a bureaucratic legal system comprised of exorbitant court costs, extended lawyer charges and the absolute dictates of an overworked judge. To Abu Taleb's credit he is nonetheless able to value English judges with a charitable eye as "above all temptation to act unjustly."⁴

His position as a Muslim Indian permits him to observe the unique circumstances surrounding a non-native embroiled in unpredictable legal games in which he is at the whim of translators and lawyers. However, his critique is not unidirectional. After discussing the "terrors" of the British legal system, he draws a comparison with Calcutta courts by invoking familiar Indian procedures in which witnesses accused of being liars are sent home without remuneration, and by recalling a local anecdote in which a woman outwits a judge who has some measure of sovereignty in the court. But his critique is ultimately constructive as he recommends that lawyers, like judges, be paid by public funds in order to eliminate incentives for financially interested delays.

3. ABU TALEB KHAN, TRAVELS OF MIRZA ABU TALEB KHAN IN ASIA, AFRICA, AND EUROPE, DURING THE YEARS 1799, 1800, 1801, 1802, AND 1803 (Charles Stewart, trans., vol. 2, 1814).

4. *Id.* at 6.

In addition to his critique of English legal liberties, he draws comparisons between the liberties of Indian and British women in an attempt to vindicate perceptions of Asian women. The parallels between his time and the contemporary period are unmistakable: Asian women are described as isolated from the public sphere, victims of polygamous arrangements, unable to initiate divorce, etc. Not only does he refute notions of an oppressed Asiatic woman, he proposes a bolder claim - that they actually have more liberties compared to the European woman.

Finally, although his is a book about his travels, he says that he "cannot pass over this opportunity of freely expressing [his] sentiments with respect to the establishment of British courts of law, which [he] contend[s], are converted to the very worst of purposes."⁵ He points to some of the problems that arise when an English way of life is translated into an Indian context. Because most Indians are "unacquainted with the English laws and customs, unsavory crooks and cheats are able to take advantage of them and thus turn the legal system into a joke." Khan takes a supposedly universal principal, "law" and shows how it can be utilized in a way that is not universally beneficial, indicating that it is untenable to impose one way of life onto another without causing major disruptions.

IV. Abd al-Rahman Al-Jabarti, 1798-18036

Al-Jabarti recorded Napoleon's invasion of Egypt in 1798 through observations and detailed accounts of the invasion. It is a story told by a Muslim scholar to a Muslim audience using a methodology of utmost contemporary sophistication. He denounces French rhetoric of liberation as a justification for their invasion of Egypt, and exposes the inconsistencies between their words and their actions. Napoleon's proclamation to the Egyptian people seems accommodating: he comes to Egypt not to abolish their religion but rather "to restore their rights from the hands of the oppressors." As al-Jabarti recounts, this friendly Bonaparte not only failed to free the Egyptians from oppression, but also just changed the faces of the oppressors from the Mamluks to the French. The

5. *Id.* at 9.

6. Abd al-Rahman Al-Jabarti, *Napoleon in Egypt: Al-Jabarti's Chronicle of the French Occupation, 1798* (S. Moreh, trans., Princeton Markus Weiner Pub. 1993).

Egyptians faced many indignities under this regime change including the imposition of heavy taxes, the loss of property and goods, and even the destruction of their mosques. Napoleon had proclaimed that the foundation of liberty and equality that France was founded on would extend to the Egyptian people. The beneficiaries are supposed to be those being invaded, but Al-Jabarti points to the reality that belies the claim.

Napoleon brought his own historian with him - Louis de Bourrienne - whose account of Napoleon's invasion could not be more different than Al-Jabarti's. De Bourrienne's account reveals that the French believed in their own magnanimity: "No conqueror, perhaps, ever enjoyed a victory so much as Bonaparte, and yet no one was ever less inclined to abuse his triumphs." Compared to Al-Jabarti, de Bourrienne never sees any conflict beyond that of native rebellion.

Al-Jabarti is not taken in by the propaganda. He analyzes the geostrategic French interest that would benefit from French occupation, particularly the French rivalry with England over control of trade from the Indian subcontinent. The local notables note that the ideology of local rule in the Proclamation is a lie, and that the rulers are not carrying out their obligations. Preventing chaos eventually falls back to the locals, while the new rulers occupy themselves with writing new laws and creating new procedures that result in the expropriation of property. In sum, creating the new rules belongs to the occupiers, preventing chaos to the locals. Al-Jabarti notes that the French fail to pay civil servants as promised and the people finally riot in disobedience to the new rulers. The reaction of the French is reminiscent of Iraq today - surprise at the resentment, and the riots then become justification for further hostile military actions.

French claims that all people are equal is opposite of the practice that Al-Jabarti notices: The French may have proclaimed their intention to bring republican ideology to rule the Egyptians, but they do not introduce actual republican rule.

For al-Jabarti, the civilizing mission was at the hands of the godless, neither Christian nor Muslim. He does not identify the French with Christianity. The French, he argues, are ruthless hypocrites, confessing allegiances to religious traditions yet murdering Catholic priests and Muslim inhabitants, destroying European churches and Egyptian mosques. He disparages French

revolutionary ideals of equality and liberty. Yet, al-Jabarti's own historical practices of equality are in sharp contrast to French claims of equality.

**V. Issa G. Shivji - Professor of Law,
University of Dar es Salaam, 2003**

When the United States invaded Iraq in 2003 Professor Shivji cancelled his attendance at a conference in Britain and in protest and anguish wrote the following forward-looking critique. His own words capture the moment better than any summary I could provide.

For those of us who come from Africa, the hypocrisy and double standards of the Western Establishment are not new The admirers and believers, in values of Enlightenment and the virtues of the Rule of Law have been many. The Nkrumahs and the Nyereres, the Mandalas and Mondlanes were all steeped in Western liberal values and crafted their people's independence in the language of law and rights⁷

African critiques of the Western legal order, before and after independence, were a critique which highlighted the divergence between the ideal and the real, between theory and practice.

Some of us . . . saw in bourgeois law and legality, space for struggle to advance the social project of human liberation and emancipation. Law . . . was a terrain of struggle; that rule of law, while expressing and reinforcing the rule of the bourgeoisie, did also represent the achievement of the working classes; that even though bourgeois democracy was a limited class project, it was an advance over authoritarian orders and ought to be defended

The sixties and seventies saw an upsurge in interdisciplinary approaches to law. We crafted new courses like 'law and development', read theories of imperialism and demonstrated against the war in Vietnam

We studied history and political economy. We discovered and recorded the crimes of imperialism against our people. We came to know how our continent was depopulated and its social fabric devastated by the slave trade and then colonialism Although this was history . . . imperialism continued to be with us and

7. Issa G. Shivji, Commentary, *Law's Empire and Empire's Lawlessness: Beyond the Anglo-American Law*, L. SOC. JUST. & GLOBAL DEV. J. (2003), http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/shivji2/shivji2.rtf.

showed its most brutal and fully face as it napalmed Vietnam. Apartheid South Africa, with the connivance of imperialism, armed RENAMO creating havoc in the newly liberated Mozambique. American multinationals continued to rape the resources of the then Zaire, now the Democratic Republic of Congo

The Berlin wall fell. Imperialism rode on the triumphalist wave to rehabilitate itself . . . The moral rehabilitation of imperialism was first and foremost ideological, constructed on neo-liberal economic precepts - "free" market, privatization, liberalization, etc - the so-called Washington consensus. Human rights, NGO's, good governance, multiparty democracy, and rule of law were all rolled together with privatization and liberalization, never mind that they were utterly incompatible

The "new" comeback of rule of law had little to do with the original Enlightenment values. This time it came as both a farce and a tragedy. *Farce* because the law was not being made by the representatives of the people. International Financial Institutions (IFIs) and their consultants dictated it. *Tragedy* because the national sovereignty won by the colonized people was all but lost except in name Witness Panama. Witness Sudan. Witness Somalia and Iraq and Iraq again

One after another, African countries enacted similar anti-terrorism statutes, contrary to their own constitutions which had provided for bill of rights. The anti-terrorist laws made no pretence of rule of law. Due process, integrity and certainty of rules, open trials, principles of natural justice, right of appeal were all dispensed with. The definitions of terrorism are so wide that these laws are worse then some of the draconian statues legislated during the one-party authoritarian rule. Opposition to anti-terrorist law was ruthlessly suppressed. In my county, the President devoted the whole of his monthly speech reprimanding the opponents of the anti-terrorist law.

If privatization laws stabbed the heart of the legislative process, the anti-terrorism laws tore the artery of the judicial process. The rhetoric of the rule of law was exposed to be what is was - a rhetoric

The Empire's lawlessness does not lie simply in acting against the rules of law but in violating the underlying values which constitute the legitimacy of law The exercise of authority (coercion) without legitimacy (consensus) is part of the definition of fascism

What is then the role and responsibility of the intellectual in this situation? Empire's lawlessness can no longer be explained in terms of the divergence between the ideal and the real. It is no more a question of double standards or not matching deeds with words. Rather the very "word" is wanting Whatever the achievements of Western bourgeois civilisation, these are now exhausted. We are on the threshold of reconstructing a new civilisation, a more universal, more humane, civilisation. And that cannot be done without defeating and destroying imperialism on all fronts. On the legal front, we have to *re-think* law and its future rather than simply talk in terms of re-making it. I do not know how, but I do know how not. We cannot continue to accept the value-system underlying Anglo-American law as unproblematic. The very premises of law need to be interrogated. We cannot continue accepting Western civilisation's claim to universality. Its universalization owes much to the argument of force rather than the force of argument. We have to rediscover other civilisations and weave together a new tapestry borrowing from different cultures and peoples.⁸

VI. Conclusion

Words and deeds, access to legal authority, arbitrary judgment, hypocrisy, legitimacy, and legacy are what the Rest notice when they observe Western laws in practice. We *do* need to rethink the premises of Western law practice to augment argument rather than force and rhetoric in the light of what makes a rule of law in fact possible. Global political realism requires us to look in the mirror because exercise of law (authority without legitimacy) cannot be referred to as a democratic law that might be a new basis for planet security and prosperity.

8. *Id.*