The Closeted Comparative Lawyer: On How to Pass for Human Rights Material

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The Harvard Human Rights Program ("HRP") was kind enough to accept me as a visiting fellow over four years ago. While thrilled by the opportunity and deeply grateful for it, my move to Cambridge was coupled with quietly simmering concerns over my human rights credentials, concerns which I did my best to hide back then. It is now time to fess up: I arrived at HRP secretly suspecting that I was a trespasser there, a party crasher of the most conniving sorts—someone intellectually drawn to human rights law, but fully lacking in the stock pedigree of activist experience and largely unexcited by the field's standard professional engagements. You see, it was as a comparative lawyer that I first became interested in human rights law, and it was as a comparative lawyer that I first feared betraying it. Straddling these two disciplines is far from an obvious exercise, and I wondered how long it would be before my cover was blown and the "real" human rights fellows exposed me for what I was: a comparative lawyer interloping in their field.

A week into the fall semester, I sat at the HRP lunch table, surrounded by the warm and welcoming faces of Henry Steiner and Peter Rosenblum, as well as an impressive set of visiting fellows from across the world. On the table were sandwiches from Au Bon Pain in meat and vegetarian varieties, and soft drinks in a red plastic bowl full of ice. Small talk ensued, speculations over the weather and stories of settling in, smiles all around. Yet I knew the dreaded moment would come when we would go around the table and introduce ourselves, each volunteering some short and coherent line about our educational background, professional experiences, and the kind of research and writing that we intended to pursue while at Harvard.

And what was I going to say?

My law school transcripts from the eight years of studying between Cairo and Cambridge were curiously free of a single human rights course. For two summers, I worked as a corporate law associate, and I spent my third summer at Harvard preparing for the New York bar exam. I eventually joined a big firm as a securities lawyer, and when I began to fantasize about exits from my corporate existence, these fantasies concentrated on a career in academia as someone who writes on "comparative law" and teaches it to interested students. That was more or less the extent of it.

Only one CV item gave my background the veneer of human rights material. Before taking up this fellowship, I had quit the firm and moved to Ramallah. For two years I taught at Birzeit University, worked on setting

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up a legal aid clinic there, and served as a legal advisor to the Palestinian team in the permanent status peace negotiations with Israel. Yet barely three weeks into living in Ramallah, the Second Intifada started. The Israeli Defense Forces began with "incursions" into the Palestinian "autonomous" areas, then stepped those up to "targeted assassinations" of Palestinian "terrorists," and ultimately conducted all out military operations in the occupied territories. Checkpoints mushroomed all around Ramallah and curfews averaging three weeks became the norm. The legal aid clinic never stood a chance to open its doors, and the "peace process" failed to produce "peace" and could no longer tenably be called a "process." And for those scattered odd weeks, when students, faculty, and staff managed to make it to Birzeit University where classes were held, what did I teach then? Well, contracts, law and development, and of course comparative law. Human rights material? Not really.

The visiting fellows' introductions started from the opposite end of the lunch table and for another fifteen minutes I was spared from revealing the above. The first to speak was an Israeli lecturer from Hebrew University who intended to "draft a bill that protects members of minorities from the formation of stereotyped images in commercials." Next to him was the Kenyan chair of the board of the Kenya Human Rights Commission, on a one year fellowship to help him "design human rights programs that can influence the ongoing social reform movement." I was surprised to hear that the next fellow was a Deputy Judge Advocate General/Operations for the Canadian Forces, though his participation in the program made sense once he explained that he planned to explore "the ability of the law to provide a realistic governance framework for controlling participation and providing meaningful protection for participants in armed conflict."

"And what are you planning to work on at HRP?" The question came cheerfully from the Chinese lawyer sitting next to me. She had founded a pioneering legal clinic to assist migrant workers. She wanted to get back to her job after one semester. She missed it.

"I'm working on a comparative law project—with human rights implications," I slowly began the line rehearsed in private an hour earlier. "I'm comparing the governance of deviant sexuality under Islamic law, British colonial reforms, and the postcolonial regime in Egypt today. Prostitution, adultery, and sodomy in particular. I'm hoping to turn it into an article." I did not add, ". . . for the American Journal of Comparative Law."

She smiled back and asked engagingly, "There was a mass arrest of gay men in Egypt last year. How does your project help with the human rights violations there?"

The truth of the matter is that how to help human rights was not the first question I asked myself when I originally became interested in that project. Of course, the arrests she referred to were partially responsible for stimulating my interest in researching the law on sexual deviance. But my

goal in comparing Islamic, British, and postcolonial law on sodomy was not to develop a litigation strategy that would help the arrested men, nor was it to rethink Islamic law and codify it into a tolerant sexuality governance regime. Rather, I was simply interested in understanding how the arrested men may have fared under Egyptian law in the past, before the European transplant of a civilian legal system in the late nineteenth century, and before wide sweeping legal reforms had scrapped the Islamic law of crimes and evidence and replaced it with a modern criminal code.

My earlier pangs of disciplinary-anxiety were thus confirmed: mine was not a human rights project. I would still have to present my research in a talk to the other visiting fellows some months later, but there was time to deal with my apparent praxis-deficiency as confirmed over the HRP lunch. The question nagged: comparative law and human rights? What relation, if any, do they have?

In my mind, it is impossible to opine in any grand theoretical manner on whether comparative law insights "help" or "hurt" the human rights project. More specifically, if the tired poles of "universalism" and "relativism" still constitute the single most enduring binary in international human rights law debates, an equally enduring binary of "similarity" versus "difference" informs all comparative law scholarship at its core. The more comparatists lean towards finding similarities across legal systems today, the more we might expect their (our) discipline to help the universalist stream in human rights discourse. In that sense, we can imagine the Universal Declaration of Human Rights as a highly successful instance of comparative law draftsmanship for a common normative order shared across humanity. By contrast, the more comparative lawyers veer towards an emphasis on difference between legal systems, the more we can imagine comparatists intervening on the side of relativism. Just as different stages of economic development call for different antitrust regimes across the third world, so may different legal cultures call for different visions of humanity and its rights across civilizations. In short, comparative law is neither friend nor foe to human rights discourse per se—the connection between the two disciplines largely depends on which perspective one adopts in each.

I became hooked on researching the laws of deviant sexuality, not out of a desire to "help human rights," but largely because I wanted to imagine an alternative approach to comparative law. More specifically, comparative law is a discipline that operates by classifying legal systems across the world as belonging to either the civil law or the common law traditions. A set of basic characteristics are then assigned to each system. For example, judges in France rely on codes and adopt an inquisitorial criminal procedure system, while U.S. judges base their decisions on case law and rely on adversarial rules of procedure. Comparatists typically deploy this classificatory scheme through a functionalist methodology that seeks to avoid vulgar generalizations and facile stereotypes about the "other" legal system. By and

large, comparative law scholarship has produced far more instances of similarity than difference across the civil/common law divide in Western legal systems.

However, when it comes to describing the legal systems of the Arab world, and particularly that of Egypt, comparative law scholarship has long suffered from a state of labeling disarray. On the one hand, comparatists generally find it reasonable to classify Arab legal systems as predominantly belonging to the civil law tradition, much like those of Latin America: both systems rely on codes of civilian origin transplanted during the colonial encounter with European powers, thereafter developing the distinct indigenous identity of other postcolonial regimes, but still keeping within the familiar contours of their European derivation. On the other hand, one finds a pronounced reluctance in comparative law scholarship to simply box Arab legal systems into the civil law tradition. After all, Arab states were governed by an Islamic legal system before the colonial encounter, and this Islamic heritage influences their normative structure today. The concern is that a blanket civil law label for Arab legal systems might flatten their hybrid postcolonial identity and risk discounting the continued relevance of Islamic law norms to both contemporary judicial applications and debates over future legal reform across the region.

So instead of comparing *between* civil and common law systems, I wanted to compare the various layers *within* a single legal system across a defined period of history. More specifically, I wanted to re-imagine comparative law as an exercise in legal genealogy, and through it trace the similarities and differences within the various regimes governing deviant sexuality in Egypt over the past century or so.

The article that I finally presented to my fellow colleagues at HRP made three arguments. First, the Islamic law regime applied in Egypt in the late nineteenth century was composed of four schools of Sunni Islamic law, all agreeing on the criminalization of sodomy, yet widely differing in the definition of the crime and in the prescription for punishment, thus making it impossible to speak of a univocal "Islamic Law" with one and only one right legal answer to offer. Second, these norms of Islamic criminal law were coupled with background rules of evidence and privacy that pose nearly insurmountable barriers to conviction and effectively suspend the application of the foreground criminal norms. Third, I argued that this multi-vocal legal regime contrasts sharply with its codified successors in the postcolonial present, as well as with the rights-centric focus of modern criminal law.

"So, if Egyptian courts apply the evidence and privacy rules of Islamic law, this would provide for stricter procedural barriers to conviction in sodomy cases—maybe stricter than the French law transplanted in Egypt? Can this be turned into a litigation strategy?" The question came enthusiastically from the Chinese visiting fellow, but my answer was less enthusiastic.

"Not really. . . . The rules of evidence and privacy in Egypt are secular. Islamic law is not applied in procedural matters."

"Well," Henry Steiner intervened helpfully, "Islamic law can be brought in for legal reforms in the future, perhaps?"

"Again, not really. My argument is that Islamic law is so different that we can't return back to its application without a complete overhaul of the current legal system."

"What about debates on reforming Islamic law itself?"

"Even the most progressive reinterpretations of Islamic law do not touch on sexual deviance. Besides, this is not my project. I'd rather have a secular regime."

"So what's the use then of studying Islamic law and comparing it with the current legal regime?"

Silence.

I never finished the paper that I presented at HRP. Serious comparative lawyers study the civil/common law divide in Western legal systems, and since I wanted a career in academia as a comparatist, then it seemed writing on law in France and the U.S. was a safer bet to demonstrate my scholarly mettle.

The article remained untouched on my hard-drive for another four years—until I got back to working on it two months ago. Professionally more secure as an assistant professor today, I decided to revisit the project again and was surprised to feel less anxious about its human rights implications than I did back during my time at HRP. In my mind, the article's utility might be as an intervention in domestic Egyptian debates over the identity of its postcolonial legal system: Is it Islamic or secular? More specifically, the article may assist Egyptian human rights activists in complicating the conservative nostalgia for a return to Islamic law by making two simple arguments. First, current attempts to draft an Islamic Criminal Code should take into account the different legal opinions of the four schools of medieval Islamic Law, which make it practically impossible to flatten Islamic criminal norms into univocal articles boxed into a civilian-style code. Second, the diversity of Islamic law opinions on criminalizing sexual deviance comes as part of a much larger legal system that includes very stringent rules of evidence and privacy. The latter, if applied with any measure of due process, would practically suspend all conceivable application of Islamic criminal law across the four schools of Sunni jurisprudence.

Perhaps these two comparative law arguments do not fit squarely into the human rights practitioner's standard agenda. But their utility is clear: comparing the Islamic, colonial, and postcolonial layers of the Egyptian legal system might not yield an immediate plan of attack for the human rights activist, but it certainly allows for a broader understanding of the legal system in which she operates. And in postcolonial contexts, it is this

hybrid relation between the different historical layers of a legal system that might provide alternative tools of engagement with human rights.