

The Dark Side of Law's Humanity

JURIDICAL HUMANITY: A COLONIAL HISTORY. By Samera Esmeir. Palo Alto, CA: Stanford University Press. 2012. Pp. 363.

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Samera Esmeir, an Associate Professor of Rhetoric at the University of California, Berkeley, has written a dazzling book. It is a multi-disciplinary tour de force inquiry of the role of the law in society. It is descriptively thick, methodologically rich, stylistically clear and gripping, critical in its outlook, and normatively attractive. Taking the British colonial occupation of Egypt as her case study, Esmeir shows how the law was implicated in producing the “human” and constructing “humane” practices. Through a genealogy of the colonial career of the construction of the “human,” Esmeir convincingly argues that the production of the “human” was intertwined with violence, discipline, and dispossession. For that purpose, Esmeir assembles an impressive range of historical data, which she analyzes through the lens of sophisticated theoretical tools. The book’s rigor is exemplified by the fact that Esmeir rarely, if ever, cites a theoretician without compellingly criticizing his or her theory.

In this Review I offer one possible reading—my reading—of this rich book. Parts I and II summarize the book’s main arguments. Part I introduces the descriptive background for the concept “juridical humanity.” Part II shows how the book challenges both the liberal and anti-colonial accounts of law since they both presuppose “juridical humanity.” Part III situates the book within critical traditions and examines some of its primary themes.

I.

Esmeir challenges both liberalism and its critics. According to the liberal fairy tale, the rule of law—even under colonialism—is associated with progress, modernization, and the protection of human rights. In Egypt’s case, the British and some Egyptian legal scholars distinguished between the lawless, pre-colonial khedive’s rule and the rule of law under the British occupation. The former was characterized by violent, arbitrary whim of the “rule of men,” while the latter prided itself on the imposition of impersonal, general, abstract rules. The former imposed inhumane punishment, while the latter’s punishment was humane. Refuting these characterizations, Esmeir problematizes the distinction between colonial and pre-colonial law. The fairy tale is challenged by historical evidence that shows that the khedive’s rule was not as arbitrary and lawless as the British and some scholars claimed; that some cruel punishments had been canceled before the British occupation; and that sharia law under the khedive had been developed into a body of rules. It is also challenged by the fact that some cruel punishments persisted under British rule, and that zones of lawlessness persisted under colonial law in the private estates. Colonial law did not abolish violence; it merely redrew the lines of legally prescribed violence. The

difference between colonial and pre-colonial law, then, is not between the humane and inhumane, but rather between modes of inflicting suffering.

Furthermore, law can be seen as a story of progress only if one ignores the role of law in the advancement of the interests of the colonial rulers of Egypt. Unlike orthodox Marxist accounts that marginalize the role of law, Esmeir insists on the constitutive role of the law.¹ The “human” and “humane” were not mere cynical rhetorical gestures or ideological masks (pp. 90, 114). Unlike some liberal accounts of the law as an autonomous domain providing an apolitical background for social interaction, Esmeir scrutinizes the politics of the law and its effects in the colonial context. For Esmeir, the law contributed to the colonization of Egypt through the very construction of the “human.” This construction was part and parcel of political, criminal, and economic institutions and practices that were integral to the colonial occupation. It was a disciplinary power that not only justified colonial rule but also made it possible by molding the Egyptians as subjects. “Juridical humanity” is the name that Esmeir coins to describe this power and the practices of constituting the “human” via law. For “juridical humanity,” the “human” is simultaneously the law’s end and its grounds for violence and the infliction of pain on colonized subjects. Pain is defined—according to a definition of the “human”—and deployed for the sake of the “human” (p. 147). Juridical humanity is essentially a utilitarian concept in which pain or suffering is regulated and manipulated (p. 111) for the sake of abolishing excessive suffering, disproportional violence, and unproductive cruelty.

Juridical humanity deploys a specific mode of legal consciousness; a particular approach to—and understanding of—the law. Esmeir reads the work of Egyptian textbook writers in order to portray this consciousness, which presented legal reform as a break with the past and sought to erase the authoritative power of the pre-colonial tradition. This account helps Esmeir present a nuanced view of the reforms: unlike those who argue that the reforms were a colonial imposition, Esmeir shows that Egyptian legal elites—as evidenced by the textbook genre—supported this reform. Unlike those who argue that the reforms were solely an outcome of internal demands either to resist the British or to imitate European ideals, Esmeir shows that rising Egyptian legal elites endorsed the reforms because doing so allowed them to replace the declining pre-colonial legal elites.

In order to illustrate this project of legally-prescribed humanization via the regulation of suffering in colonial Egypt, Esmeir focuses on law’s attitude to peasants, laborers, prisoners, rebels, bandits, animals, and insects. Esmeir recounts in elaborate detail how colonial officials sought through legal reforms and legal enactments to impose a self-declared “humane” treatment of peasants, laborers, prisoners, bandits, and rebels. She also shows that this humanity is reflected in the penalization of certain practices towards animals and insects and in the sanctioning of other practices.

¹ Many Marxist writers rejected this orthodox approach and developed accounts of the role of law that reject both the instrumentalist view and the autonomy of law. See, e.g., Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 L. & SOC. REV. 571 (1977). Nevertheless, see a discussion of “the problem of law as constitutive” for Marxist analysis of the law in Mark V. Tushnet, *Marxism as Metaphor*, 68 CORNELL L. REV. 281, 281, 285-87 (1983) (reviewing HUGH COLLINS, *MARXISM AND LAW* (1982)).

In all of these, colonial officials sought, on the one hand, to distinguish between their rule and the pre-colonial rule, and, on the other hand, to govern Egypt and advance their interests.

The British declared the abolition of forced labor, which was one of the allegedly inhumane practices of the pre-colonial rule. But, in fact, colonial law allowed state-mandated forced labor in cases of plagues or Nile floods. Thus, an inhumane practice persisted under colonial rule given state interests. In addition, at the same time colonial law freed labor it refrained from intervening in cruelty and violence against laborers in the private estates. It hence created a bifurcated system of public freedom and private unfreedom. For instance, the ban on corporal punishment using the whip applied only to state officials. Hence the inhumane practice persisted in the domain of private property. The law's role was not merely one of passive non-intervention. In the first place, state law was implicated in the production of the laborers' class. Land confiscation, land tax, and the sanctioning of moneylending transactions—including a state-established bank—led to the loss of land and the transformation of peasants and small landowners into laborers (pp. 154, 162-63, 212, 216). Moreover, the state itself sold its lands to wealthy private owners (p. 211). Then, state law transferred its responsibility for the fate of these laborers to the estate owners and their managers. In Legal Realist Morris Cohen's words, the state delegated its sovereignty to the owners of private property.² Esmeir collapses the public/private distinction:³ private estates were endowed with public regulatory powers. Private power was indebted to state law's lack of intervention, and state law was indebted to private regulation and ordering that relieved it of the need to supervise and discipline estates' laborers (p. 225). Colonial law is thus implicated in the exploitation, and the dreadful working conditions, of these laborers. Esmeir recovers evidence for the abuse of laborers and their abandonment by state law through murder investigations in which laborers killed their managers. These conditions show that private estates were zones of lawlessness under the rule of law. They further show that the law's silence facilitated vengeance, which became a form of dispute resolution in the absence of estate courts (p. 234). It thus seems that the rule of law produced suffering at the time it claimed to reduce suffering (p. 239).

Prison reforms sought to introduce humane treatment of prisoners by preventing excessive suffering; but their focus was on the prisoner's body and biological life. Similarly, the British rejected the execution of the leaders of the Urabi rebellion and considered exile to be a humane punishment. The rebels were thus expelled from the political community and the state cared only for their biological life and physical needs. Exile was also the preferred humane punishment of bandits. Hence in these three cases—prisoners, rebels, and bandits—the state reduced the moral agent to an

² MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* (1933).

³ Collapsing a distinction does not imply sameness. It only means that the difference between A and B is one of degree, rather than kind because elements of A are found in B and elements of B are found in A.

animal-like condition (i.e. reduced to a body) at the very time it claimed to humanize him.

On the other hand, colonial criminal law sought to humanize and discipline Egyptians through regulating their treatment of animals by penalizing inhumane practices. However, other modes of violence and cruelty against animals—like vivisection—were legally permitted. Some were even coerced by law as an act of humanization through freedom from—and mastery over—nature. Colonial law identified cotton worms as an enemy that threatened the cotton industry, which was crucial to the British Empire's position in the global economy and to Egypt's ability to repay its debts. Hence it forced the peasants—including children—to manually destroy these insects and prosecuted those who did not remove them. It also forced peasants to destroy some plants—okra and hemp—that were a breeding ground for the cotton worms, and were less profitable than cotton. The effect of these measures was to conceal coercion. Formally, colonial law freed labor by abolishing forced labor, but it sanctioned it within private property and through criminalization (p. 190). Formally, it humanized the Egyptians, but effectively it harbored the very inhumane aspects it claimed to reject.

II.

Esmeir challenges the liberal discursive move defending the rule of law. According to this move, one should distinguish between the ideal of the rule of law and the abuses of this ideal by human actors such as the colonial officials in Egypt. However, colonial officials understood themselves as advancing the rule of law and as humane. They did not necessarily think they were abusing the rule of law or deliberately violating it. It is the very hybrid distinction between the ideal and the factual that facilitated colonial rule (p. 243). It allowed the justificatory apparatus that distanced the rule of law from unsavory practices, whether by conceiving of them as exceptional measures (martial law, military tribunals, and special commissions) or by attributing them to Egyptian misconduct. The colonial division of labor between the British and the Egyptian government allowed the British to both criticize the Egyptians for the failure of their practices to reach the ideals of rule of law and to present British excessive practices as exceptional responses to the Egyptians' failure to maintain order. Therefore, excessive measures were not understood or presented as a violation of the ideal but rather as an attempt to restore and defend the ideal. The law unleashed its violence in the name of the ideal and the ideal in return justified the law's violence. Juridical humanity, then, cannot be separated from both the ideal and violence (pp. 282-83, 287).

In this light, Esmeir's arguments expose many of the anti-colonial criticisms of liberal law as simplistic and insufficient. The problem is not, as some critics have argued, the suspension of the law in a "state of exception." Rather, it is the presence of law and the kind of arrangements it sought to advance. Some critics have argued that colonial law dehumanized the colonized by excluding them from the law's protection. However, Esmeir's book convincingly shows that colonial law sought to humanize the Egyptians by imposing on them certain definitions of what is humane.

Colonial practices cannot merely be described as the legal exclusion of the natives; rather it is often the inclusion in the law that led to their dispossession and disenfranchisement. Humanization itself can be just as colonial or harmful to the natives as dehumanization. More important, this form of anti-colonial argument merely reproduces the paradigm that underpins the colonial perception. According to this paradigm, the law humanizes and its absence dehumanizes. The difference between colonial law and its critics becomes merely the question of which law humanizes and which does not. In this way, the juridical is inscribed into the human and becomes her defining attribute. Without her endowment with rights, the human ceases to be human.

But there is no reason to see the human as a juridical construct whose humanity the law giveth or taketh away. If one understands the disciplinary power that the law unleashes on its subjects by constructing the human, one also sees the relationship of bondage that the law imposes on the very subjects it constructs. This bondage is politically and normatively objectionable. Politically it limits human potentialities and freedom by binding the human to the law and the state that constantly threatens to dehumanize. Normatively, defining the human in juridical ways obscures and marginalizes alternative ways of conceiving of the human. The law's monopoly on defining the human means no less than the "loss of the human to modern law" (p. 5). One is able to think of alternative ways of conceiving the "human" because, notwithstanding modern law's monopoly, Egypt's history contains some traces of a non-juridical human and hence the loss is incomplete. Esmeir uncovers mystical Sufi voices that indicate the possibility of a different understanding of the human and her relationship to history and nature. In addition, juridical humanity is troubling because violence seems inescapable. The law's violence highlights the need for non-violence (p. 288). Esmeir sees her book as an attempt to open "a space for rebellion and struggle" (p. 17). She advocates for a different kind of politics in which multiple versions of the human compete and the human is freed from the law's chains. Despite the law's claim to universality, the juridical human that modern law universalizes is only one version of the possible "humans" that individuals and communities can envisage. The law impoverishes our human conditions when it restricts our practices and imagination to one version of the human to which violence is so central.

Ultimately, Esmeir affirms the possibility of resistance despite the law's monopoly and violence. Since the law is man (and woman) made, juridical humanity is a self-inflicted incapacity that need not be binding. Clearly, the centrality of juridical humanity inhibits our ability to change it, but Esmeir's work directs us towards destabilizing this centrality in order to undermine unfreedom and hierarchy and expose suffering, exploitation, and dispossession. As such, this book is an important contribution to the study of Egypt's legal history, to the study of colonialism, and to the examination of the role of law. Above all, however, it is an exemplary critical scholarship and an outstanding contribution to the legal left.

III.

Perhaps Esmeir's book should be read as a contribution to the intellectual strand that conceives of freedom as a *liberation of nature* as opposed to *liberation from nature*. Although these strands are at times intertwined, Charles Taylor distinguishes between them and suggests that the former is characteristic of the left whereas the latter has often served Fascist and Futurist orientations.⁴ Liberation of nature is a critique of the pretensions of autonomous subjectivity, regimented desire, political domination, alienation, capitalism, and bureaucratic power. It seeks empowerment by removing disempowering and disciplining practices and institutions. Liberation from nature, on the other hand, is the creative power to impose an artificial order without natural constraints. Juridical humanity violently imposes on human beings an arbitrary, manipulative, selective, and artificial humanization. It seeks to impose a "human nature" on them. It originates in the conception of the human as a fabricator and master of the social and natural world. By unmasking juridical humanity and its dark side, Esmeir is implying a return to an un-manipulated human nature. It is thus a critique of liberation from nature and a call for the liberation of nature.

This call is evident in the emphasis on the constitutive role of the law as an integral part of juridical humanity. Through this emphasis Esmeir, contributes to critical scholarship that addresses the constitutive role of law. An important contributor to this scholarship is Critical Legal Studies, which blurred the distinction between law and society and showed that they are "inextricably mixed."⁵ For these scholars, law is constitutive of social relations and of our consciousness.⁶ But emphasizing the constitutive role of the law can be risky if it is not accompanied with the notion of indeterminacy. Esmeir comes close to a totalizing conception of modern law at the end of the book. On the one hand, she writes: "Inscribed in the text of the law, the juridical human had no place to flee. The threat of dehumanization came into being" (p. 285). On the other hand, she suggests that the difficulty of change originates in the limited possibility of critique given the fact that modern law itself provides us with critical tools. Modern law already contains the possibility of criticism (p. 289). The law thus implies that it need not be transcended because law itself allows us to improve and modify our conditions. For Esmeir these critical tools are insufficient because humans are still chained to the law. The choices that the law offers are limited to exile rather than execution, to proportional violence rather than excessive suffering.

This totalizing conception is reminiscent of Foucault's own "totalizing scheme,"⁷ which inspired the conceptualization of juridical humanity as a disciplinary power

⁴ Charles Taylor, *Review, Logics of Disintegration*, 170 NEW LEFT REV. 110 (July/August 1988) (reviewing PETER DEWS, LOGICS OF DISINTEGRATION: POST-STRUCTURALIST THOUGHT AND THE CLAIMS OF CRITICAL THEORY (1987)).

⁵ Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 102, 107 (1984).

⁶ *Id.* at 109-113.

⁷ Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. FORUM 327, 353 (1991). See also Edward W. Said, *Travelling Theory*, in THE WORLD, THE TEXT, AND THE CRITIC 242-247 (1983) (referring to Foucault's "theoretical overtotalization [of social reality]"),

and technology of rule. However, an emphasis on law's indeterminacy—as in the works of the Legal Realists and the Critical Legal Studies movement—might have tempered the totalizing orientation. Esmeir recounts some of the British disagreements about the preferred legal arrangements, and the way their conceptions of the humane changed over time. This should direct us toward the potential indeterminacy of modern law in its interpretation and application. Esmeir's invocation of indeterminacy is limited, however. She attributes the “contradictory formation” of the law to the split between the ideal and factual, the British and the Egyptian:

[L]aw's violence and exceptions came to be relegated to factuality and humanity to ideality. Both the law and the world were purified from their condition of hybridity and were *split* along these lines, thereby engendering a *contradictory formation*. The chapter follows the course of historical events that contributed to the making, collapse, and the recovery of this distinction, or the splitting of the world, facilitated by the splitting of the law. Different historical periods within the colonial era and their respective legal orders emerge as productive of particular relationships between law's idealized humanity and factualized violent measures. The splitting of the law was parallel to a corresponding split between the British normative legal gaze and Egyptian factual operations of the law. British legal action inhabited the realized world of ideals, claimed the sphere of guidance, and positioned Egyptians under colonial normative gaze. Crucially, the idealized stance (a technique of purification) enabled the British to turn law's ideals of humanity into violent weapons aimed at protecting their purified ideals (a new technique of hybridization). The resort to exceptional measures enabled, in turn, purified ideals of humanity (p. 243, emphasis in original).

Indeterminacy in this account originates in the instability of the split and in the critical power of ideals (p. 286). I find this account convincing but incomplete. The contradiction, according to Critical Legal Studies scholars, goes deeper and is more subversive. It is manifested in the ideals and principles themselves (even when they are not hybrid in Esmeir's sense, i.e. they are not contaminated with factuality). Furthermore, it is evident in the normal operation of the law and not only in those legal measures deemed exceptional to purify the ideal. A major way to examine this contradiction is through the judicial law-making that deploys these ideals. But the book rarely discusses this aspect of colonial rule. Such an examination would have strengthened the book's aforementioned attack on the liberal defense mechanism (attributing bad practices to the “abuse of the rule of law” or mistakes in its application). The examination might have revealed that juridical humanity is not merely intertwined with violence and inseparable from the ideal; but also that it is itself contradictory and incoherent. The possibility of criticism then emerges not only because ideals are “recruited to criticize the violence of the law” (p. 286), but also because “ideals of humanity” are themselves contradictory. These contradictions, and their potential critical power, may or may not carry subversive potentialities.

and to his conception of power as “overblown”); Elia Zurick, *Theoretical and Methodological Considerations for the Study of Palestinian Society*, 23 COMP. STUD. S. ASIA, AFRICA & MIDDLE E. 3, 5-6 (2003) (summarizing criticisms of Foucault's marginalization of agency and resistance).

Whether these subversions occur becomes a contextual inquiry. The possibility that subversions will be lacking is contingent on different factors, such as the reality of power relations and the willingness of legal agents to do the necessary work to destabilize determinate legal categories or to stabilize indeterminate ones.⁸ This is a different argument than the one the book suggests by seeking the answer in the form of modern law. The difference between these arguments is analogous to the difference between two kinds of ideology critique: “form determination”—which regards ideological content as an inescapable effect of the very form of law—and “concrete determination”—which finds ideological content in particular legal pronouncements that emerge given specific power relations and struggles.⁹

The potential indeterminacy is important because Esmeir seeks to generalize her thesis to non-colonial contexts (p. 286) where indeterminacy might be more consequential. The relationship between law’s humanity and bondage or disciplinary power is not necessarily fixed or preordained. Esmeir argues that “a juridical human may never be an antistate rebel” (p. 284). The possibility of resistance lies, then, outside the law and appears as a negation of juridical humanity. However, modern law is neither inherently “progressive,” nor inherently “conservative.” That is, modern law is not inherently favorable to goals associated with either left-of-center or right-of-center political camps. It is not inherently status-quo-destabilizing nor status-quo-affirming. It is likely to play the latter role in many contexts, perhaps especially in a colonial context. But “likely” does not imply an inherent feature of the law.

It is insufficient to point out the coercive element of the law in order to escalate the argument towards the form of law. Coercion—i.e. unfreedom—is central to law but not all coercion is violence. A coercive element is likely to exist in legal arrangements that influence social relations (as in the bargaining power of different social agents acting in these situations under the shadow of background legal rules¹⁰) and hence in conceptions of the human that underpin these arrangements. Additionally, even in the absence of state law (as in anarchist conceptions of the social order), social structures can be just as coercive, and a particular conception of the human might dominate. Thus, non-juridical conceptions of the human can be coercive or overwhelmingly dominant in ways that eradicate the plurality of human conceptions. They can also be violent (consider, for example, the practice of sacrificing young virgins to the gods). Like juridical humanity, then, non-juridical conceptions may be coercive, violent, and monopolistic. It follows that coercion, violence, and monopoly are not distinctive to law and may be troubling in other conceptualizations of the human.

We need to distinguish between differing non-juridical conceptions and assess particular conceptions as normatively desirable or objectionable. Admittedly, this will be a contested distinction and should admit a family of conceptions of the human

⁸ See DUNCAN KENNEDY, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, in LEGAL REASONING: COLLECTED ESSAYS 11 (2008).

⁹ Alan Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 L. & SOC. REV. 11, 23 (1985).

¹⁰ See KENNEDY, *supra* note 8.

without reducing it to one “universal” conception. But it is insufficient to argue for “openness” and “plurality” (p. 285) because some conceptions may be no less oppressive than the rejected juridical conception. Clearly, this openness and plurality is limited (few today would defend a conception of the human that required sacrificing young virgins). A legal left perspective cannot be satisfied with demanding openness because then it may admit conceptions of the human that are inconsistent with the goals of the liberation of nature. The need to demarcate the acceptable limits of openness and plurality is inescapable. Esmeir’s book provides us with a first remarkable step towards envisaging such a project by clarifying the conceptual field and illustrating the potential negative normative effects of juridical humanity. For that, Esmeir should be highly commended.