Of Humanity and the Law

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Samera Esmeir, *Juridical Humanity*: *A Colonial History* (Stanford: Stanford University Press, 2012).

Through the spring of 2012, the Musée du Quai Branly in Paris hosted an exhibition entitled *Human Zoos: The Invention of the Savage*. It was a remarkable exploration of colonial constructions of racial difference through the phenomenon of the travelling human zoo. The various forms in which native 'specimens' were exhibited before voyeuristic Western audiences—circus carnivals, theatre productions, fairs, freak shows, zoos, parades, mock ethnic villages—spanned a period of almost five centuries, reaching their apogee in the late nineteenth century, and enduring until Europe's final colonial fair in 1958. With the colonial other—'the strange, the savage and the monster'—routinely showcased in enclosures and scenes alongside animals, even the most cursory analysis reveals a blurring of the lines between human and beast, between colonized person and creature. Prevailing theories of racial superiority were embedded, and conquest legitimized, through the act of 'exhibiting' the inferior genus in the form of spectacle.[1] Social, cultural and biological elements of the racial dynamic coalesced to narrate a story of the reduction of the colonized to a status less than human. This was the case in the representations of Aboriginal and American tribes, Asian and African savages;[2] it transcended traditional racial indicators to extend also to Irish itinerants.[3]

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[1] As the Quai Branly exhibition explains: "At a time when slavery gives place to imperialism, the world is divided between those who are exhibited and those who spectate."

[2] In the late nineteenth century, a mentally disabled African-American, purportedly 'caught in the Wilds of California' was labelled 'What is it?' by the Barnum circus company and put on display under the following banner: "Is it an Animal? Is it Human? Is it an Extraordinary Freak of Nature? or, is it a Legitimate Member of Nature's Works? Or is it the long sought for Link between Man and the Ourang-Outang?" In a similar vein, a performer named 'Krao' from Laos was advertised as "Darwin's missing link." In 1885, the Folies-Bergerès in Paris was the final venue for *Le Spectacle d'Aborigènes d'Australie*, a showcase of 'Male and Female Australian Cannibals' described as: "The first and only obtained colony of these strange, savage, disfigured and most brutal race ever lured from the remote interior wilds where they indulge in ceaseless bloody feuds and forays, to feast upon each other's flesh."

[3] Caricatures of the Irish as primates were common in nineteenth century English popular culture, with *Punch* magazine by no means alone in its depiction of the Irish as "the missing link between the gorilla and the Negro." *Punch* XIV (1849), at 54; *Punch* XXIV (1851), at 26, 231. See further, for example, Richard Ned Lebow, *White Britain and Black Ireland: The Influence of Stereotypes on Colonial Policy* (Philadelphia: Institute for the Study of Human Issues, 1976). The racial discourse in the Irish context serves to affirm a direct relationship between representation

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The colonized Arab other was also very much present in this story, but perhaps cast in a less overtly subhuman role. The "Egyptian Caravan" that spent two months in Paris in 1891, for instance, played on orientalist depictions of an exotic Arabia,[4] but arguably did not explicitly purport to dehumanize its troupe in the way that many other colonial performances did. While this is an opaque and unstated distinction, some visitors may have left the Quai Branly exposition with questions over the extent to which trajectories of racial discourse and constructed gradations of humanity varied across colonial time and space, and the reasons for such.

Samera Esmeir's *Juridical Humanity*,[5] a compelling account of the relationship between modern law and the human in colonial Egypt, points to a similar ambivalence in colonizer-colonized dynamics. At the same time as the "Egyptian Caravan" was traversing the metropoles of Europe, Britain was immersed in a process of wholesale legal reform in Egypt. Following the Urabi revolution and British military conquest of the country in 1882, the colonial state embarked upon a juridical venture aimed at overhauling the legal system inherited from the pre-colonial Khedive. The mission was to emancipate Egyptians from the arbitrary and inhumane cruelties of Khedival rule, and to elevate them to a status of humanity previously lacking. Positive law was the force of modernity that would generate a rupture from the arbitrary violence of the pre-colonial past. The book tells a story of how modern law engendered a concept of what the author terms 'juridical humanity' that was rooted in sensibilities of humaneness and operated to inscribe the native Egyptian within the colonial rule of law. Through this particular narrative, Esmeir probes the more general relationship between law and the human with regard to history, nature, sovereignty and violence.

Juridical Humanity is a pioneering piece of work. Prominent thinkers of Western modernity—Agamben, Arendt, Butler, Derrida, Foucault, Latour, and others—have of course extensively constructed and deconstructed the question of the 'human' and the dehumanizing designs of sovereign power (though rarely with direct reference to colonial paradigms).[6] Scholars writing

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of the other as 'biologically inferior' and the maintenance of political domination.

[4] According to Pascal Blanchard, curator of the *Human Zoos* exhibition: "Men and women of the desert, camel drivers and camels (equipped with an *amshqeb* to carry the 'women of the harem'), Swahili warriors, Berber craftsmen, Arab horsemen (with their long daggers), Bedouins in their tents, musicians and artists from British Sudan, Tunisian women dressed in festive garments and jewellery – nothing was lacking from this 'Arab Caravan'." The travelling 'caravan' was seen by 780,000 spectators before continuing on the road to Copenhagen, Milan, Munich and Vienna. Blanchard also notes that Egypt enjoyed a particular appeal in the imperial metropoles, with reconstructions of 'a Cairo street' commonplace at universal exhibitions. Pascal Blanchard, 'The Egyptian Caravan' in Pascal Blanchard, Gilles Boëtsch & Nanette Jacomijn Snoep, *Human Zoos: The Invention of the Savage* (Paris: Actes Sud, 2012) at 106. For the research that spawned and informed the production of the Quai Branly exhibition, see Pascal Blanchard, *Human Zoos: Science and Spectacle in the Age of Empire* (Liverpool: Liverpool University Press, 2008).

[5] Samera Esmeir, *Juridical Humanity: A Colonial History* (Stanford: Stanford University Press, 2012) [*Juridical Humanity*].

[6] Drawing on Giorgio Agamben's notion of *homo sacer*, Judith Butler unpacks in more explicit terms the functioning of sovereign power "to derealize the humanity of subjects who might potentially belong to a community bound by commonly recognized laws." Agamben's

in the anti-colonial and postcolonial traditions, for their part, have trenchantly theorized the dehumanizing intentions of imperialism in the colony.[7] Esmeir navigates all of this literature and more, but plots her own distinctive course through the relatively unchartered waters of legal narratives in British Egypt.

The concept of juridical humanity both borrows from and departs from Hannah Arendt's articulation of the 'juridical person'.[8] Whereas in Arendt's account violence is a product of *exclusion* from the law (in the form of denationalization, or, *in extremis*, the camps' location outside of the 'normal' legal system), Esmeir's narration of Egypt's colonial story reads *inclusion* in the law as a hegemonic technique that facilitates its own brand of violence. In a similar vein to Arendt's portrait of exclusion, a common impulse of postcolonial scholarship is to frame the colonies as zones of lawlessness, defined by racialized power dynamics in which the native is expelled from the juridical order and excluded from humanity.[9] Colonization, on this reading, dehumanizes through a process of exclusion from the law. The project of juridical humanity described by Esmeir, in contrast, connotes a type of inscription within the law that purports to enable a process of humanization—as seen through a colonial lens—based on a liberal idealizing of the 'rule of law'. The effect of colonial law's humane reforms is a process of rendering the natives—hitherto dehumanized by their own despotism—human through the law.

But to what end? While the book "does not presume to be an explicit critique of juridical humanity",[10] Esmeir's analysis shows that this inclusivity is not driven by benevolent designs at emancipation and equality on the part of the colonial state. Rather, the cultivation of juridical humanity embodies a more nuanced technique of inscribing Egyptians within the law as "a

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paradigmatic state of exception, marked by conceptual binaries and zones of indistinction (inside/outside, norm/exception, public/private, zoē/bios), is defined as "an inclusive exclusion (which thus serves to include what is excluded)" that produces bare life through sovereign violence. This notion is applied by Michelle Farrell in her exploration of torture in Coetzee's *Waiting for the Barbarians*. The barbarian (the excluded) is civilized (included) through subjection to torture. The act of torture "signifies nothing other than the Empire's ability to render life bare and to inscribe the meaning of humanity upon the excluded body." See Judith Butler, *Precarious Life* (London: Verso, 2004) at 68; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life (1995)*, translated by Daniel Heller-Roazen (Stanford: Stanford University Press, 1998) at 21; Michelle Farrell, *On Torture* (Doctoral Thesis, National University of Ireland, Galway, 2011) [unpublished] at 284, forthcoming as *The Prohibition of Torture in Exceptional Circumstances* (Cambridge, UK: Cambridge University Press, 2013).

[7] Frantz Fanon, however, acknowledges the *attempts* of colonial discourse to confiscate the humanity of the native but refuses to accept that such rhetoric is performative or that the colonial subject can be stripped of its agency (the native 'knows that he is not an animal … he is treated as an inferior but is not convinced of his inferiority'). That is, humanity is not something that can be juridically given or taken away. See Frantz Fanon, *The Wretched of the Earth (1961)* (New York: Grove Press, 1963). In this regard, Esmeir takes a different tack, but acknowledges her indebtedness to Fanon's work on the human and colonialism nonetheless.

[8] Hannah Arendt, *The Origins of Totalitarianism* (New York: Meridian, 1958) at 447-55.

[9] See Aimé Césaire, *Discourse on Colonialism (1955)* (London: Monthly Press, 1972); Achille Mbembe, *On the Postcolony* (Berkeley: University of California Press, 2001).

[10] *Juridical Humanity, supra* note 5 at 286.

technology of colonial rule and a modern relationship of bondage."[11] Esmeir chronicles the humanizing reforms that included the attempted elimination of torture, the abolition of the use of the *curbash* (whip), as well as decrees for more humane treatment of criminals, prisoners and animals. Here, she says, "the project of juridical humanity put pain and suffering to use."[12] While colonial law's humanitarian intervention was effected through the reduction of suffering, Egypt was the subject of parallel thought processes of modernity that produced a domain of lawful, utilitarian, *humane* violence: "Humanity is truly universalized when, in the colonies, pain is properly measured, administered, and instrumentalised. Only pain that serves an end is admitted. Useless, non-instrumental pain is rejected."[13]

Under the imperial gaze, therefore, the inhumanity of pre-colonial violence lies not in the violence itself, but in its alleged arbitrariness. Juridical humanity, in Esmeir's reckoning, did not seek to prevent pain and suffering per se, but to eliminate the prescription of disproportionate or unproductive pain. Such instrumental suffering would often (though not always) assume the form of less overt modes of wounding than torture and whipping. Here, Esmeir's analysis of British reforms in Egypt takes its cue from Michel Foucault's theorization of certain features of liberal modernity—the abolition of public torture, criminal justice reforms, the architecture of the panopticon—as new technologies of (bio)power directed more at the mind than the body. Like Foucault, Esmeir is unconvinced and unsettled by law's instrumental means-end logic, and the distinction between arbitrary cruelty and calculated productive humane violence. The impossibility of that distinction, in her final analysis, "reveals all of the law's violence as arbitrary" and signals a "collapse of ends into means."[14] Esmeir's extensive reading of the British-Egyptian colonial archive does convincingly demonstrate the thrust of juridical humanity as an attempt to frame the liberalism of colonial governance in juxtaposition to the violence of pre-colonial despotism. The form that this took—British officials ordering the cessation of torture and insisting on humane treatment of prisoners—did surpass more vacuous 'rule of law' platitudes propounded elsewhere, and subverted the narrative of empire as dehumanizing. As noted, Esmeir counters persuasively that the pre-colonial/colonial distinction is not one that holds neatly. Her account does not offer clarification, however, as to the rationale underlying the pretensions and performance of humane reforms in the Egyptian case, while in colonies elsewhere—Kenya, for instance—brutal violence against natives in detention camps would continue to be an institutionally (if not openly) prescribed practice much later into the imperial story.[15] Did colonial policy in Egypt differ on account of its arguably distinct

[11] *Ibid* at 285.
[12] *Ibid* at 111.
[13] *Ibid* at 142.
[14] *Ibid* at 288-89.
[15] See Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (London: Pimlico, 2005); David Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire,* (London: Weidenfeld & Nicolson, 2005); *Mutua and others v The Foreign and*

status—protectorate as opposed to colony; occupied rather than colonized? Or did perceptions of a richer history of civilization and a different racial dynamic come into play? Esmeir describes race as "significant to the colonial encounter" in Egypt. She opts not to elaborate on what she understands as the content of that significance, but implies contours in Egypt somewhat distinct from the standard civilized/savage binaries that define much of European imperialism's relationship with the colony. Here, like the visitor to the Quai Branly exhibition, the reader may be left wanting further explanation.

The text, however, consciously directs its focus elsewhere and emerges as an exceptional piece of scholarship from the points of view of both legal history and legal theory. It was, the author informs us, a decade in the making, and the magnitude of her undertaking is laid bare by the depth of historical research and richness of analysis permeating the manuscript. Although not situated explicitly or exclusively on the terrain of international law, the subject matter of *Juridical Humanity* resonates with third world approaches to international law (TWAIL) scholarship and may have benefited from further engagement with that field. While touching upon one particular aspect of Antony Anghie's work on the temporalities of legal positivism and coloniality,[16] Esmeir does not delve any further into the expanding body of TWAIL literature.[17] Readers familiar with that literature will ponder the extent to which Esmeir sees her conception of juridical humanity mirroring Anghie's own work on Vitoria and Spanish colonization of the Americas in the sixteenth century. In contrast to other contemporaneous European jurists who "characterised the Indians as heathens, and animals", Vitoria recognized their humanity. This "recognition of the humanity of the Indians has ambiguous consequences because it serves in effect to bind them to a natural law which, despite its claims to universality, appears derived from an idealised European view of the world."[18] Falling short of the European standard of civilization required to administer a legitimate state, the 'Indians' would violate this law by virtue of their very existence, identity and cultural practices. On the basis of such violation, Spanish travel, trade, conquest and sovereignty is justified. Thus, perhaps akin to Britain's legal reforms in Egypt, Vitoria's humanizing legal doctrine is one that inscribes to deprive, that includes to exclude.

Esmeir's historical deconstruction of law as a surface of contestation in a transformed political environment certainly chimes with contemporary debates around the fluid, and severely strained, revolutionary process in

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Commonwealth Office, [2012] EWHC 2678 (QB).

[16] *Juridical Humanity, supra* note 5 at 34-35.

[17] In addition to Anghie, the work on colonialism and international legal doctrine of scholars such as R.P. Anand, C.H. Alexandrowicz, Bhupinder Chimni, James Gathii and Makau Mutua carries resonance with Esmeir's field of inquiry. In the specific context of modern Egyptian legal history, Amr Shalakany's work bears noting here.

[18] Antony Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities" (2006) 27:5 Third World Q 739 at 743. See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2005) at 13-31.

Egypt. Legal reform has arisen as central to that process, with post-Mubarak political forces having chosen "law as the privileged form through which to bargain with each other"; no sooner had the public space opened up for the political to re-emerge as an autonomous sphere "than that sphere became annexed by the legal."[19] While Esmeir acknowledges law's counter-revolutionary impulses in the form of "legal technology that functions to prevent revolution against the law and to assert state power",[20] her characterization of juridical humanity performing itself while at the same time producing its own critique points to law's repression/resistance double move: "[t]his is why modern law has become such a powerful technology of government *and* a tool of emancipatory struggles."[21] The structural contradictions within the law are thus revealed. The final chapter of *Juridical Humanity* elucidates the 'exceptional legalities'—martial law, military tribunals, special commissions—of British rule that produced a hybrid colonial liberal legal regime, split between its ideals of humanity and its factual violence. The Mubarak regime's thirty years of authoritarian rule were grounded in a state of emergency paradigm descended from Britain's legal ordering of modern Egypt. Where juridical humanity is a process that chains the human to the law and to the state, it takes, Esmeir tells us, "a particular kind of rebellion, not just any rebellion, to break these chains."[22] The Tahrir intifada shook the post-colonial state out of a stupor that was rooted in a prosaic and "endless"[23] emergency. Itself a central target of the protestors' demands, the state of emergency was extended by the Supreme Council of the Armed Forces in 2011, ended by Parliament in 2012, and partly reinstated by President Morsi in January 2013. Legal contestations will continue. It remains to be seen whether Egypt's revolutionary protest movements will ultimately be remembered as (the beginnings of) what Walter Benjamin envisaged as a "real state of emergency" aimed at decisive rupture from permanent normalized emergency, rather than its mere regulation and containment.[24] For this, clearly, has been the aim; to borrow Esmeir's language, the protests "affirm a subject who rejects the system of bondage with the state and the law."[25] They seek, that is, to reclaim humanity from juridicality.

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[19] Lama Abu Odeh, "Of Law and the Revolution" *Georgetown Law Faculty Publications and Other Works* (2012), Paper 1047, online: <http://scholarship.law.georgetown.edu/facpub/1047>.
[20] *Juridical Humanity, supra* note 5 at 3.
[21] *Ibid* at 289 [emphasis added].
[22] *Ibid* at 11.
[23] Sadiq Reza, "Endless Emergency: The Case of Egypt" (2007) 10:4 New Crim L Rev 532 at 532-53.
[24] Walter Benjamin, "On the Concept of History," in Howard Eiland & Michael W Jennings, *Walter Benjamin: Selected Writings, Vol 4: 1938–1940* (Cambridge, MA: Harvard University Press, 2003) at 389, 392. See also John Reynolds, "The Political Economy of States of Emergency" (2012) 14:1 Or Rev Int'l L 85 at 128-30.
[25] *Juridical Humanity, supra* note 9 at 291.