Law's Empire and Empire's Lawlessness: Beyond the Anglo-American Law

by

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Law's Empire[*] has been irreversibly shattered by the Empire's lawlessness of which the recent invasion and occupation of Iraq was the highest and most cynical expression. The outrage created by the invasion cut across the globe as it hurt every human sensitivity. Thought was ridiculed, conscience was wounded, and traditions of humanity mocked.

There was a sense of despair and hopelessness. But human spirit is indomitable. Millions, of all ages, marched the streets in 650 cities, simultaneously, with one voice: 'No Blood for Oil.' In this the peoples of the world showed their common humanity bound by blood against imperial barbarism thirsty for oil.

I had originally accepted the invitation to this Conference on 'Re-making Law in Africa' and also one in Coimbra, Portugal on 'Law and Justice in the XXIst Century'. After witnessing the devastating destruction in Iraq, I couldn't simply bring myself to sit and write a paper on the re-making of law and justice when all of this had been ruthlessly 'massacred' in this invasion. I declined to attend as a small, perhaps insignificant, statement of protest. Instead, from afar, I share a few thoughts with you as an expression of solidarity.

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For those of us who come from Africa, the hypocrisy and the double standards of the Western Establishment are not new. We have got accustomed to it. Yet, barring

[*] This is the title of Ronald Dworkin's book, *Law's Empire*, Fontana, 1986.

intellectual sceptics and political opportunists, the admirers, nay believers, in values of Enlightenment and the virtues of Rule of Law have been many and not far between. The Nkrumahs and the Nyereres, the Mandelas and the Mondlanes were all steeped in Western liberal values and crafted the demands of their people's independence in the language of law and rights. When accused of liberalism by left students in the 1960s, the author of Socialism and Self-reliance, Julius Nyerere, quipped: 'I am a bourgeois democrat at heart!'

The nationalist critique of the Western legal, moral, and political order, which, in any case, the African leaders adopted in their countries, was from within. It was a critique, which highlighted the divergence between the ideal and the real, between theory and practice, between the desirable and the achievable. The fundamental premises of the Western legal thought and its world outlook, however, remained, by and large, unchallenged.

Some of us, who adopted more radical approaches, albeit still within Western traditions, did not perhaps subscribe wholly to Thompson's thesis that the rule of law was an 'unqualified good'. Yet we, too, saw in bourgeois law and legality, space for struggle to advance the social project of human liberation and emancipation. Law, we argued, 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 legal discourse, whether liberal or radical, thus remained rooted in Western values, exalting the *Law's Empire*.

To be sure, in my part of the world, the law faculty and students went beyond the confines of legal discourse. 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. Imperialism was on the defensive.

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. We were

enraged. We were equally enraged as we read how the industrial revolution in Britain was built on the backs of child labour and American development rose from the genocide of the indigenous 'Indian' population and the enslavement of our brothers and sisters. In disgust, we learnt that while the pundits of capitalism glorified competition, the textile houses of Lancashire conspired to have the hands of Indian craftsmen chopped off so as to destroy India's textile industry. Although all this was history, we were outraged because imperialism continued to be with us and showed its most brutal and ugly 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. In much of the rest of Africa the cold war continued to be fought by the superpowers through their proxies leaving the dead, the maimed and the malnourished in its wake.

Eventually the Lilliputian Vietnam demolished, morally and militarily, giant America. David defeated Goliath. The backward Portuguese empire collapsed. We were inspired. Imperialism was demoralised. Then came the restoration.

The Berlin wall fell. Imperialism rode on the triumphalist wave to rehabilitate itself. Douglas Hurd, the then British Secretary of State for Foreign Affairs, heaved a sigh of relief: 'we are slowly putting behind us a period of history when the West was unable to express a legitimate interest in the developing world without being accused of "neo-colonialism".[1]' The moral rehabilitation of imperialism was first and foremost ideological which in turn was constructed on neo-liberal economic precepts - "free" market, privatisation, liberalisation, etc. - the so-called Washington consensus. Human rights, NGOs, good governance, multiparty democracy, and rule of law were all rolled together with privatisation and liberalisation, never mind that they were utterly incompatible.

The “new” comeback of rule of law had little to do with the original Enlightenment values, which underlay it. This time around it came as both a farce and a tragedy. Farce because the law was not being made by the representatives of the people.

[1] Quoted in Furredi, F. *The New Ideology of Imperialism*, London: Pluto, 1994.

International Financial Institutions (IFIs) and their consultants dictated it. Tragedy because the national sovereignty won by the colonised people was all but lost except in name, and this time around, as John Pilger says somewhere, without a gunboat in sight. But guns were never out of sight. Witness Panama. Witness Sudan. Witness Somalia and Iraq and Iraq again.

Globalisation, through the laws of privatisation and liberalisation, struck at the heart of the democratic legislative process. Then, lo! Behold, came nine-eleven. Mr. Bush picked up his 'phone to receive pre-arranged messages of support from African leaders, one after another. Everyone was told to fall in line. 'You are either with us or with terrorists.' No African leader could dare say anything even remotely close to what the Iranian leader said: 'We're neither with you nor with the terrorists!'. Iran was promptly included in the axis of evil.

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, and right of appeal were all dispensed with. The definitions of terrorism are so wide that these laws are worse then some of the draconian statutes legislated during the one-party authoritarian rule. Opposition to anti-terrorist law was ruthlessly suppressed. In my country, the President devoted the whole of his monthly speech reprimanding the opponents of the anti-terrorist law.

If privatisation 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 it was - rhetoric. As elsewhere, the Americans are now in the saddle training our police in anti-terrorism. They will soon establish a regional school to train spies, of course, to spy on us, the people: the supposed beneficiaries of human rights, due process, and the rule of law.

This is only a beginning though. The trends are clear. On the West Coast of Africa, the American multinationals are striking roots to control oil resources while on the Eastern board, from Djibouti to, eventually, perhaps, Zanzibar, the Marines are establishing military bases. Who rules Africa today?

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One could multiply examples to prove the point. But it is not necessary. The point is that 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. So what remains of the *'majesty'* of law?

The exercise of authority (coercion) without legitimacy (consensus) is part of the definition of fascism. If Iraq demonstrates anything clearly, it is that American imperialism is tending towards fascism. And when this fascism is combined with barbarism on the scale and cynicism witnessed in Iraq, the consequences for the whole of humanity are likely to be too devastating to contemplate.

What is then the role and responsibility of the intellectual in this situation? I want to suggest a few pointers.

First, I want to suggest that the Empire's lawlessness in the sense described here 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. The Law and its premises, the liberal values underlying law, the *Law's Empire* itself needs to be interrogated and overturned. In other words, fascism is not an aberration, it is the logical consequence of imperialism, and when imperialism runs amok, you get 'Iraq'.

Second, whatever the achievements of Western bourgeois civilisation, these are now exhausted. We are on the threshold of reconstructing a new civilisation, a more universal, a 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 the Anglo-American law as unproblematic. The very premises of law need to be interrogated. We cannot continue accepting the 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.

Third, this can only be done if we think globally and humanly. While, for a long time to come, we may still have to act locally, there is no reason why we cannot think globally, all the time. The massive anti-war demonstrations happening simultaneously on the same day are a pointer in this direction. The anti-globalisation and anti-capitalist demonstrations at the conferences of the rich is another example of re-thinking the very basis of the Western, imperial civilisation.

Fourthly, as always, we as intellectuals have to interrogate our own commitment. We cannot simply allow ourselves to be 'embedded'. In a message to the World Congress of Intellectuals, Albert Einstein could say:

> We have learned that rational thinking does not suffice to solve the problems of our social life … We scientists, whose tragic destiny it has been to help make the methods of annihilation even more gruesome and more effective, must consider it our solemn and transcendent duty to do all in our power in preventing these weapons from being used for the brutal purpose for which they were invented. What task could possibly be more important to us? What social aim could be closer to our hearts?

Can we say the same? Before even some intellectuals as journalists embedded themselves in the military to *mis*-report on the war, how many more intellectuals as scientists, as advisors and consultants and spokespersons and speech-writers, were embedded in the Establishment to produce cluster bombs and in justifying and rationalising their use? And since the invasion, how many more are getting embedded in lending legitimacy to the so-called "reconstruction" - read, 'continued occupation and exploitation'.

Some forty years ago, Georg Lukács warned his fellow intellectuals of their responsibility. It is as relevant today as it was then. Let Luckás remind us of our responsibility in the present situation and our attitude towards imperialism.

> This new stage in the development of imperialism will quite probably not be called fascism. And concealed behind the new nomenclature lies a new ideological problem: the 'hungry' imperialism of the German brought forth a nihilistic cynicism, which openly broke with all traditions of humanity. The fascist tendencies arising today in the U.S.A. work with the method of a nihilistic hypocrisy. They carry out the suppression and exploitation of the masses in the name of humanity and culture.
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> Let us look at an example. It was necessary for Hitler, supported by Gobineau and Chamberlain, to formulate a special theory of races in order to mobilize demagogically his masses for the extermination of democracy and progress, humanism and culture. The imperialists of the U.S.A. have it easier. They need only universalize and systematize their old practices concerning the Negroes. And since these practices have up to now been 'reconcilable' with the ideology portraying the U.S.A. as a champion of democracy and humanism, there can be no reason why such a *Weltanschauung* of nihilist hypocrisy could not arise there, which by demagogic means, could become dominant.

Has Georg Luckás been proved right after 40 years?

It behoves upon us not to let this pass. I believe it was Eisenhower who said: What is good for General Motors is good for America. Bush is saying: What is good for America is good for the whole world. We should say: Nothing is good enough unless it is good for the entire humanity.

Dar es Salaam,
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Epilogue May, 2004: It is exactly a year since I wrote this piece. What has happened in Iraq since has been worse … Humanity has been a witness to unbelievable acts of barbarism, the despicable treatment of Iraqi prisoners by the American and British shoulders that we have graphically seen in our media being the latest. It is not only the values underlying rule of law that have been mutilated, the occupation has refused dogmatically to live even by rule by law.

In this epilogue, I can only repeat what I said a year ago. Bourgeois civilisation has virtually exhausted all it potential. We have to rethink. *A better world is indeed possible but we will have to conceive an alternative* ***World View***. Neo-liberalism has utterly failed to provide such a world view and intellectuals who continue to pay it lip-service can only do so at the expense of integrity and honesty.

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