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Book Review
Overcoming legal orientalism in context? Reflections on Eve Darian-Smith's *Laws and Societies in Global Contexts: Contemporary Approaches*

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I. Introduction

Legal orientalism, and ways to overcome it, is one of the central themes in *Laws and Societies in Global Contexts: Contemporary Approaches* by Eve Darian-Smith (2013). It will also be the focus of this essay. Recognising that much has been said and written about orientalism since the seminal work of Edward Said of the same title (Said, 2003),[1] there is an implication that there is little left to add. In her discussion on legal orientalism, Darian-Smith proves otherwise. While unpacking the role and influence of law in the emergence of legal orientalism, Darian-Smith (2013) does not stop at developing and problematising this subcategory,[2] whose 'racial and cultural biases continue to inform globally dominant legal concepts and assumptions of Western legal superiority' (p. 48). Rather, she actively calls on us to confront, transgress and overcome legal orientalism. In other words, we are urged to de-orientalise law. Based on such an understanding, this intervention endeavours to interrogate legal orientalism in the field of international human rights law. And, with verve similar to Darian-Smith's, this paper endeavours to show how legal orientalism is overcome in both our understandings of international human rights law and its everyday practice. To demonstrate the turn from legal orientalism towards global socio-legal approaches (Darien-Smith, 2013), the rights of indigenous peoples under international law is put into conversation with the Bedouin in the Israeli/Negev context. Here, in my judgment, we are witnessing jurisgenerative moments (Carpenter and Riley, 2014)[3] that transcend the colonialist and orientalist underpinnings of international law, edging our way towards a truly global imaginary as envisaged by Darian-Smith (2015).[4]

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1 In *Orientalism*, Said contends:

> 'a. Orientalism – a way of coming to terms with the Orient that is based on the Orient's special place in European Western experience. The Orient is not only adjacent to Europe; it is also the place of Europe's greatest and richest and oldest colonies, the source of its civilisation and languages, its cultural contestant and one of its deepest and most recurring images of the other. In addition, the Orient has helped to define Europe (or the West) as its contrasting image, idea, personality, experience' (Said, 2003, pp. 1–2).

2 This intervention recognises the multiple genres of orientalism. For example, another subcategory is 'reverse orientalism', which amounts to a recognition among the colonised 'that his people can survive only be being invisible to the Western gaze, a kind of self-imposed or reverse orientalism that reveals that authenticating power that the West can exert over the colonized' (Dean and Levi, 2003, p. 93).

3 'A jurisgenerative moment', as described by Kristen Carpenter and Angela Riley (2014, p. 173), amounts to 'a moment when both the concept and practice of human rights have the potential to become more capacious and reflect the ways that individuals and peoples around the globe live, and want to live, today'. Acknowledging the significance of pluralities, jurisgenerative moments, I argue, capture the ongoing processes, which highlight the potential for further transformations and developments.

4 In her presentation on 'Overlapping and Intersecting Legal Contexts', Eve Darian-Smith speaks of a 'global imaginary', which 'should be more encompassing than the transnational and the international, which are

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This essay is divided into four sections: the next section centres on legal orientalism; the third section focuses on overcoming legal orientalism; and the fourth section offers insight into the practice of the rights of indigenous peoples in international law and the dismantling of legal orientalism in context. To elaborate a little further, the following introductory section takes stock of the nexus between colonialism and international law and introduces the reader to legal orientalism. The third section brings us up to speed with contemporary conditions in international law, and explores the ways in which marginalised collectives, namely indigenous peoples, have set out to challenge and contest the logic and processes of colonialism and legal orientalism. Such indigenous jurisgenerative moments transpire in the international legal order, which sees Western perceptions and constructions of these (lawless) objects transform into (lawful and legally-minded) subjects in international law. These developments are clearly illustrated by the use and mobilisation of international law for claiming indigenous peoples' rights and seeking justice, which runs in parallel with transnational activism, networks and programmatic activities. The fourth, and final, section plots out a real-life scenario to show how a group endeavours to overcome legal orientalism in context. The Bedouin, as a marginalised minority in Israel, are, in my judgment, transgressing orientalist perceptions, representations and treatment, and have set in motion de-orientalising processes, which involves recasting knowledge production about them and generating a new legal subjectivity. The latter is illustrated by the ways in the international concept and category of 'indigenous peoples'[5] has been made active and effective in domestic and local settings (Nyhan, 2016).

Expanding upon Darian-Smith's rebellious insight, this intervention shows that transgressing, resisting and dismantling legal orientalism unfolds across spatiotemporal realms that are simultaneously global, transnational, international, domestic and local (Darian-Smith, 2013; 2015; Merry, 2006). Although the title of this intervention replicates Darian-Smith to the letter, the inclusion of the question mark is not incidental. Rather, it serves to highlight that, despite the traction gained, efforts to overcome orientalism raise questions, which usually emanate from privileged sites that are often state-bounded. In other words, overcoming orientalism, specifically in the politico-legal sphere, is neither uncontested nor unambiguous and can be met with resistance on the domestic level. Moreover, owing to international law's colonial legacy, its role in creating and dismantling legal orientalism gives rise to paradoxes in practice. And yet, despite state-centric suspicion and practical paradoxes, ways to overcome legal orientalism, free from the constraints of Eurocentric legal praxis and Euro-American epistemologies, are gaining ground from below and are making a global imaginary seem not only possible, but also increasingly likely.

II. Legal orientalism and international law

Scholarship on the role of international law in colonialism was a topic left underexplored until relatively recently (Merry, 1991).[6] This omission has since been corrected with the evolution of post-colonial and cultural studies and by historians, specifically legal historians of empire and colonial/settler societies and early modern political thought (Anghie, 2007; Barcham, 2000). In

anchored primarily to the nation-state'. Darian-Smith adds that it is necessary to complicate how we see the global and that it should not be limited to geopolitics, but encompasses the local. The local and the global are mutually constitutive and are involved in a constant dynamic.

5 I insert the term in quotation marks in order to stress its questionable descriptive value and substantive content.

6 This paper interprets colonialism broadly, which 'is a relation between two or more groups of unequal power in which one not only controls and rules the other but also endeavors to impose its cultural order onto the subordinate group(s)' (Merry, 1991, p. 895).

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light of the growth of literature on the subject, paralleled by efforts to decolonise knowledge and to destabilise dominant legal paradigms and legal assumptions (Darian-Smith, 2013), international law is no longer immune from its privileged position in the international order. Hence, it is necessary to recast international law in a European colonial light. It is widely agreed that law and colonialism have acted in concert since the sixteenth century when the West set its sails eastwards to pursue its colonial and imperialist ambitions. Summing up law's role in the colonial enterprise, Chanock (1985, p. 4) observes how law has been 'the cutting edge of colonialism'. Owing to the perception of colonial supremacy, law was conceptualised as 'the gift we gave them', already hinting at the 'us' and 'them' in the colonial imagination that would later become enshrined in law (Fitzpatrick, 1989). S. James Anaya (2009, p. 49), legal scholar and former Special Rapporteur on the Rights of Indigenous Peoples, emphasises the significance of legal discourse and the decision-making processes, which 'developed historically to support the forces of colonisation and empire that have trampled the capacity of indigenous peoples to determine their own course under conditions of equality'. Preoccupied with the origins of international law, Anghie observes how international law began after the Spanish encountered the Indians and the issues that ensued as a result of this initial contact (Anghie, 2007). Elsewhere, Anghie (1999, p. 1) remarks that 'international law was principally a consequence of imperial expansion'. Unsurprisingly, international law as a distinct body of law, first known as the law of nations,[7] is not immune from responsibility in the colonial rationale and processes.

If we agree that colonialism and international law have been closely entwined, we can proceed to situate legal orientalism within this matrix. If orientalism created the 'Other', then *legal* orientalism constructed the *legal* 'Other'. The fundamental question for understanding legal orientalism is: who has law and who gets to decide who has law? (Ruskola, 2013). Arguably, the converse question is equally valid: who doesn't have law and who doesn't get to decide who has law? It is important to remember from the outset that orientalism, which is subject to change in each context, serves to demarcate between those who fit into the Western-civilised fold and those who do not. It does this by drawing labels, binaries and biases, and imposing hierarchies and boundaries. To illustrate this point, the historical labelling of indigenous peoples as the 'Other' (Said, 2003), as shown by the stereotypes of Western thought over the centuries, served the colonialists for conquering lands and peoples. Hence, the term 'indigenous', and other variations of the word such as 'noble', 'ignoble', 'savages' and 'barbarians' (Pagden, 1992; Venne, 1998; Anaya, 2004), has been viewed as a linguistic measure to 'mark the boundaries of a space and a time for the West to inhabit' (Tennant, 1994, p. 6). Consequently, European colonisers and colonialists employed such terminology in order to keep the colonised in a specific space, separate from the dominating powers not only physically, but also discursively and legally. Similarly, legal orientalism is preoccupied with creating legal categories and concepts in order to define law's insiders, who can be characterised by their Western, modern, civilised and enlightened qualities, against those who are situated outside law. Darian-Smith (2013, p. 49) adds that Europeans 'had law and were lawfully minded' in contrast to non-Europeans, who were considered lawless and without legal acumen. Darian-Smith (2013, p. 48) further argues that law can be seen as 'an important material means by which the West constructed the East, providing an ideological and conceptual frame through which Euro-American orientalist discourses about the Other's inferiority became manifest'. International law, according to Kennedy (1997, p. 748), amounts to 'a distinction between the West and the rest of the world, and the role of that distinction in the generation of doctrines, institutions and state practices'. In short, colonialism and hegemony have relied on international law for their creation, implementation and legitimation, making legal orientalism a

7 The law of the nations can be traced to Emmerich de Vattel and his publication of *Le droit des gens* in 1758.

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significant instrument in the toolkit of these projects. An important take-away from these general remarks is that international law has been instrumental in shaping the legal 'Other' and some argue that it can cause 'the denial of recognition' (Tourme-Jouannet, 2013, p. 668).

III. Overcoming legal orientalism and international law

Without minimising or de-stigmatising its colonial legacy or current hegemony, international law has another side, which is considered benevolent. Arguably, international law's goodwill helps detract attention from its colonial and orientalist origins but, in my judgment, it points to the inherent paradoxical nature of international law, which will be unpacked in the last section. Exposing both its gentle and brutal features, Thornberry (2002, p. 428) highlights how the interface between the colonised and the colonisers has ended up situating indigenous peoples 'in the drama of international law', according to which 'there was always recognition of sorts, even if not as completely equal to the colonizing powers'. It was within this asymmetrical recognition that legal pluralism emerged with separate legal systems and adjudicating processes. In colonial situations, it was often the case that laws and legal institutions were transferred from one society to another and, once done, a dual legal system emerged: one legal system for the colonisers and one for the colonised (Hooker, 1975). Merry (1991) points out that such transfer and duality of legal systems caused irreversible change to the indigenous culture, mindset and consciousness.

Against the backdrop of separate and unequal legal systems, Merry (1991) observes how law has also created sites for contestation, where the colonised and oppressed have used law to destabilise, resist and mobilise. Although an unequal contest owing to the power imbalance between the two groups, the legal 'Other' was able to challenge and resist the coloniser in the courtrooms where he made claims and filed complaints (Merry, 1991). Somewhat similarly, contemporary international law creates spaces for opposition, transgression and contestation, where new constructions of legal meaning, subjectivities and recognition are formulated in de-territorialised sites that are detached from orientalist or Eurocentric epistemologies. As well as reshaping legal culture and affecting a global imaginary inclusive of the legal 'Other', international law's jurisgenerative qualities help generate new concepts and categories in international settings that are appropriated and translated in domestic and local settings by a range of actors, including non-state actors (Merry, 2006).

It is important to stress that such developments in international law have unfolded slowly.[8] Prior to this, state delegations representing their governments drafted legal instruments on behalf of indigenous peoples.[9] This can be traced to the centrality of the nation state in international law, which was considered the only legitimate body with the capacity to make and enact international

8 However, it should be noted that the subject of indigenous peoples as well as indigenous peoples' involvement in international law has a longer history. The bilateral agreements between indigenous peoples and the European settlers – e.g. The *Treaty* of *Waitangi* between Tāngata Whenua and the British Crown – formalised relations between them. Churches and civil society organisations were also actively involved with indigenous peoples, which set the stage for indigenous peoples' participation in the international forum in the early twentieth century. As early as 1923, Cayuga Chief Deskaheh attempted to meet with the League of Nations as the representative of the Six Nations of the Iroquois. In his petition, which sought to challenge the Canadian encroachment onto Iroquois territory, Deskaheh stated:

> 'We have exhausted every other resource for gaining protection of our sovereignty by peaceful means before making this appeal to secure protection through the League of Nations. It this effort on our part shall fail we shall be compelled to resist by defensive action upon our part this British invasion of our Home-land for we are determined to love the free people that were born.'

Chief Deskaheh, *Petition to the League of Nations from the Six Nations of the Grand River*, communicated by the government of the Netherlands, C.500.1923.VII, 7 August 1923, p. 3.

9 The International Labor Organisation (ILO) has passed two conventions, which reflect the state-centric legal approach to indigenous, tribal and semi-tribal groups: the Indigenous and Tribal Populations Convention,

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legislation (Aponte Miranda, 2010).[10] This has since changed.[11] The indigenous peoples' movement that commenced in 1960s brought about global activism and saw indigenous peoples' participation at the UN, the growth of indigenous transnational networks, and local and global programmatic activity. Indigenous peoples are now involved in constructing legal subjectivities, norm-building and standard-setting (Aponte Miranda, 2010). Through a bottom-up approach that simultaneously draws on and challenges the traditional top-down approach in legislating international law, indigenous peoples have 'employed a multi-layered approach to international human rights lawmaking that included participation in both informal mechanisms of knowledge production and norm-production as well as more formal decision-making structures' (Aponte Miranda, 2010, p. 213).[12] An example of this law-making revolution is the drafting of the UN Declaration on the Rights of Indigenous People (the 'Declaration' or the 'UNDRIP'), which began in the early 1980s and reached a highpoint in 2007, with the adoption of the Declaration by the UN General Assembly. Because of the participation of indigenous peoples in the drafting process, the declaration can be set apart from previous multilateral treaties governing indigenous peoples. Nevertheless, the negotiating process was a challenge; for instance, the declaration is without an official definition, suggesting the 1986 UN working definition of indigenous peoples is satisfactory. From a state perspective, the absence of a formal definition is problematic. Indigenous peoples take a different view and argue that it is for the group to self-identify as indigenous. Because the declaration is without a definition, this adds to the conceptual and definitional controversy surrounding the question of who is indigenous in international law.[13]

Despite these challenges and controversies, the emergence of international law guaranteeing the rights of indigenous peoples and imposing duties on states attests to the significance of indigenous peoples in international legal order. It can also be viewed as part of the effort to overcome legal orientalism. In short, collectives who were subjugated to colonialism and orientalism, often with international law as an aid, are now empowered to use and mobilise the rights of indigenous peoples in international law as a legal tool and strategy. In many respects, this development can be viewed as part of the global agenda put forward by Darian-Smith (2013, p. 51) 'to dilute the negative stereotypes that undermine international law and are preventing sincere global dialogue and creative legal collaboration'.

IV. Overcoming legal orientalism, international law and the Bedouin in Israel

Having grasped the main tenets of legal orientalism in international law and ways to overcome it, this section reverts to the everyday practice of international law in context. Here, we learn about a concrete case to overcome orientalism, including legal orientalism, through the rights of

1957 (No. 107) ('Convention No. 107') and the Indigenous and Tribal Peoples Convention, 1989 (No. 169) ('Convention No. 169').

10 The two principal ways for states to produce international law is through either consent or agreement.

11 Arguably, indigenous peoples may be the latest actors to join the international law-making arena, but the continued primacy of the nation state in generating and implementing international law has not radically changed.

12 Miranda goes on to explain the reasons for this indigenous-led law-making trend, which, she contends, can be contributed to four key factors, which include: (1) an ideological change in the concept of indigeneity, (2) the emergence of globalisation, (3) the emergence of participatory democracy and (4) national and international advocacy and lobbying by indigenous peoples (Aponte Miranda, 2010).

13 The preamble of the declaration, however, makes reference to certain characteristics normally attributed to indigenous peoples, such as their distinctiveness, dispossession of lands, territories and natural resources; historical and pre-colonial presence in certain territories; cultural and linguistic characteristics; and political and legal marginalisation.

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indigenous peoples in international law. Given the paradoxical nature of international law, which has simultaneously created and dismantled legal orientalism, this begs the question as to why groups, like the Bedouin in the Negev desert in southern Israel, have turned to international law in the first place. This move is even more curious in the case of the Bedouin when we take into account that they were historically situated beyond the formal legal frameworks of the Ottoman Empire (1519–1917) and British Mandate (1917–47), and governed themselves according to Bedouin codes and traditions. The events of 1948 marked a turning point in the Bedouin way of life, when the Israeli state apparatus sought to bring the Bedouin collective under a Western-crafted legal order (Nyhan, 2016). Following Israel's establishment and during early nation-state building, Middle East anthropologists and historians, who often had a military background, studied Bedouin as nomadic, desert dwellers (Marx, 1967). Orientalist historiography viewed the Bedouin as a collective remaining largely unaffected by changes in the outside world, not unlike Europe's noble savage or biblical shepherds (Ratcliffe *et al.*, 2014). In short, the Bedouin were considered to live in a 'world without time', which produced an orientalist gaze that froze them in a static time and space (Goering, 1997). This body of literature tended to downplay the political and ideological forces at work and curtailed the agency of the Bedouin. In addition to this, the government's modernisation plan to urbanise and sedentarise the Bedouin in the 1960s 'manifested in a binary contrast between "progressive modernity" and a "traditional backward culture"; the binary Otherness of orientalism was rearticulated through a dichotomy of traditional *versus* modern and Bedouin *versus* Israeli society' (Ratcliffe *et al.*, 2014, pp. 9–10). However, recent years have seen the incremental politicisation and polarisation of Bedouin-related issues, especially concerning land ownership. Scholars have begun to critically interrogate the tension in Israeli/Bedouin relations, emphasising the territorial and spatial features of the fractured relationship (Yiftachel, 2006) and countering the orientalist representations of the Bedouin in the literature (Amara *et al.*, 2013; Ratcliffe *et al.*, 2014).

In practice, the new millennium has witnessed an attempt to locate the Bedouin within an internationally crafted legality that has entailed a redefinition of their legal status and rights. Crucial to this reinvention, or redefinition, are the concept and category of indigenous peoples in international law. Since the mid-2000s, the Bedouin in concert with civil society have recognised the international leverage of this internationally created status and rights. While the Bedouin have been recognised as an indigenous people in international settings, primarily at the UN,[14] this recognition in no way reflects a general consensus on the question of their indigenous status (Nyhan, 2016). Domestic definitions define the Bedouin as anything other than indigenous (Maddrell, 1990; Shamir, 1996). Moreover, the application of the UNDRIP to the Bedouin was recently ruled out by the Israeli judiciary, which denied the Bedouin claimants indigenous recognition of their lands.[15]

Arguably, by choosing an indigenous peoples' status and rights formulated in international law, this amounts to a very bold, and arguably risky, move. On one hand, it enables the Bedouin to rethink and redefine themselves and enables them to access international arenas and audiences; on the other, it shifts their legal status and rights from the domestic law setting. However, such redefinition, or

14 James Anaya, the previous UN Special Rapporteur on the Rights of Indigenous People, concluded that the Bedouin are entitled to international protection and entitlements as indigenous people. Acknowledging 'the State of Israel does not accept the classification of its Bedouin citizens as an indigenous people', the Special Rapporteur, however, considered the rights of Bedouin to fall under the purview of his mandate. *Report by the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*, A/HRC/18/35/Add.1, 22 August 2011, para. 21.

15 HCJ 4220/12 *Sulieman Mahmud Salaam El-Uqbi v. State of Israel.* The full decision of the Supreme Court of Israel is available at: ‹http://elyon1.court.gov.il/files/12/200/042/v29/12042200.v29.htm› (accessed 14 November 2017).

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process of becoming indigenous (Clifford, 2013), is not unproblematic. By appropriating the indigenous peoples' rights in international law, the Bedouin encounter the 'grammar of rights', which are described as 'the formal and informal mechanisms constructed and maintained by the colonial power to accord or withhold rights' (Shalhoub-Kevorkian, 2012, p. 106). This 'grammar of rights' is not limited to the domestic setting. In the international setting, Shalhoub-Kevorkian (2012) further argues that the 'grammar of rights' is created under the auspices of democracy, equality, neutrality and rule of law, which is then converted into bureaucracy, formalism and legalism. Tying into the grammar of rights, the 'paradox of rights' is also at play. Cowan *et al.* (2001, p. 11) demonstrate the extent to which 'not only national but also international legal regimes, including the rights regime, dictate the contours and content of claims and even identities' and point to the 'intriguing ... dialectic between the discourses and practices – one might say, the culture – of human rights and those of the groups that appeal to them'. Commenting on the complexities, Cowan *et al.* (2001, p. 11) note 'the ways in which rights discourse can be both enabling and constraining' represents a paradox – 'a paradox of rights'. Within this general enabling and constraining mechanism of international human rights law, the Bedouin seek indigenous recognition and rights.

To conclude, the case-study reveals that the Bedouin experience the grammar and paradox of rights when taking up an internationally created status and rights. And yet this enables the Bedouin to avail of international pathways and align themselves with the international human rights movement. The grammar and paradox of rights highlight what is at stake when a group adopts and utilises an international framework that is inherently incoherent, contradictory and unstable, and whose origins are hard to detach from its colonialist origins. Hence, international human rights law can be characterised by its limitations, tensions and frictions, while also generating new possibilities, subjectivities and discourses, and political dynamics that challenge and offer alternatives to Eurocentric assemblages of power, law-making and knowledge production. The rights of indigenous peoples in international law are no different. Having created a self-reflective moment in international law, Darian-Smith emboldens us

> 'to ask why certain Orientalist images of law developed and were accepted why they continue to resonate in the contemporary worlds, and what could be done to dilute these negative stereotypes that undermine international law and are preventing sincere global dialogue and creative legal collaboration.' (Darian-Smith, 2013, p. 50)

Hence, Darian-Smith has advertently created momentum to pursue a global socio-legal agenda that moves us away from the Western boundaries and binaries and decentres our legal and analytical concepts and categories, which have been anchored in Western legal traditions. If we are to overcome legal orientalism, Darian-Smith's (2015) call for 'collective ambition for rebellion and transgression' radically widens the context for our legal imagination that allows counter-hegemonic moments and alternative ways of doing things, as illustrated by the Bedouin in the Negev and their turn to international law for recognition.

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