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DISCUSSION RESPONSE

Re: European Patients and African Remedies

RABIAT AKANDE — 21 January, 2015

A response to Stefan Salomon

The main question, presented by Stefan Salomon is this – "what might African customary laws have to do with the politics of international law and international law itself?" Salomon suggests two themes of international law and its politics, which may help in answering this question. The first is that international law "operates upon processes of "othering"". The second is that "international law globalized as language, spoken by a heterogeneous many in different vernaculars". These two themes are widely deployed by critical approaches to international law. What is striking is Salomon's illustration of how customary law in Africa may shed new light on these themes. I assert that customary law

(including its politics) indeed tells us something about the politics of international law and international law itself, even if it does so in a more abstruse manner than Salomon describes.

On International Law And Its Politics

Absence

As Salomon asserts, international law operates through processes of othering. He suggests that one of the processes of this othering is by the declaration of absence. Postcolonial writers have since shown how this need for the otherness of the non-European other was a prerequisite for defining the West. Achille Mbembe writes that it is due to the constructed otherness of Africa that Africa is only "understood through a negative interpretation – either Africa cannot possess things of a human nature or where it does, it is of a lesser quality or importance." Africa has therefore "assumed the figure of the strange" with "its speech considered as being untranslatable into human language." This inaccessibility flows not from untranslatability but from there being hardly any discourse about Africa itself. "In the very principle of its constitution; its language; and in its finalities, narrative about Africa is always a pretext for a comment about something else, some other place, some other people." Further, African social formations are categorized as "traditional" justified solely by myth and fable and arbitrariness of custom. A *fortiori*, these societies are considered as being incapable of uttering the universal. Mbembe therefore argues that in this regard, the otherness of Africa to the west is "not to be not like – it is to be nothing at all". This sanctions reifies Salomon's description of the theme of absence.

Language

Salomon asserts that the globalization of international law was in the form of a language, which was then received and processed in far flung vistas and reproduced in many different vernaculars. This is trite. Clearly the language of rights and the rule of law globalized post world war II. Evidence of this can be seen in the content of most post war constitutions. Even the globalization of constitutionalism or perhaps, its fetish is a post cold war development. For instance, at least 105 new constitutions have come into existence since 1989. It would therefore appear that the globalization of this form of international law is reflective of a broader globalization of a neo-liberal rights consciousness.

A pertinent inquiry arises from the above – if international law did globalize as a language how did the constrictions of vocabulary limit the possibilities of action (or, imagination) in different vistas? This is perhaps the area in which customary law sheds the most illuminating light on international law and its politics.

Customary Law and Its Similarities

Internal critiques of culture and customary law largely converge on one point – to the extent that it is recognized by international law, this recognition by international law is based on an essentialization, which rigidifies illiberal identities and prevents the contestation of internal structures of inequality.

Salomon argues that these structures of inequality (political and economic) are now being contested within the domain of customary law using the language of international law.

Certainly, the language of international law can be empowering through its repertoire: non discrimination, right to culture among others. I contend that international law can also be disempowering. For instance, international law limits the repertoire available to those who seek to wield it as a weapon to contest structures of inequality. One of the significations of international law as a language is that it considers itself to be the sole language of emancipation – without conceding to the emancipatory possibilities inherent in local customs. Karen Engle has demonstrated how the right to culture has largely failed to deliver on its promises to indigenous peoples.

Perhaps another construction of the intensified disputations over the customary in Africa is that they go beyond an assertion of the right to culture or difference, to an assertion of a form of sovereignty. In essence, as opposed to merely signifying the multiculturalism of African states, these new forms of disputations have perhaps become an indication of "policulturalism", to borrow the term from John Comaroff. In essence, what is being asserted on behalf of the customary in these struggles is not merely the right to difference, but also, the right to sovereignty over that difference. Even if the above plays out in a hyper-extended form in Africa, these processes clearly unravel far beyond the shores of Africa. The head-scarf cases in Europe are but one instance. What is at stake in these processes is not merely claims for accommodation within the state but more crucially, a challenge to the sole claim to sovereignty by the state.

What, therefore, do these processes tell us about euro-centric international law? As Jean and John Comaroff suggest, as opposed to mainstream notions, African modernity is not a "counterfeit of the euro-original" but

rather, exists sui generis and many in fact prefigure the trend in Europe. Hence, their assertion that increasingly, theory emerges from the global south. It is perhaps for this reason that Africa will cease to be viewed as the absent or at best, a mere site for the extraction of raw materials or petri-dish for testing euro-american theories but rather, will furnish the rest of the world with "grounded theory" to remedy (or at least understand) the malady of international law.

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