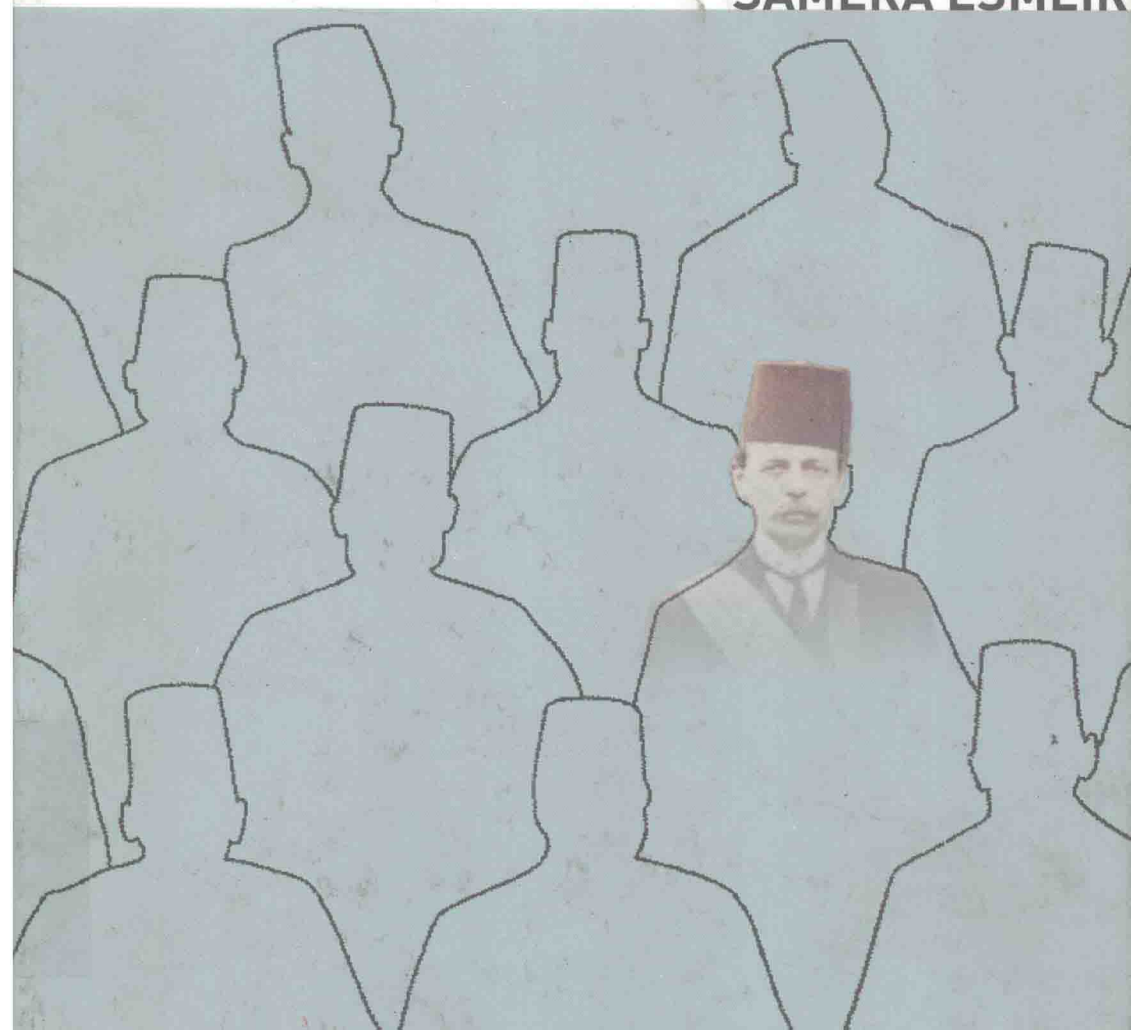


JURIDICAL HUMANITY

A Colonial History

SAMERA ESMEIR



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HUMANITY

A COLONIAL HISTORY

Samera Esmeir

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*To my parents, Mona and Nimer Esmeir
And in memory of my grandmother, Maryam Farhat*

Note on Translation and Transliteration

I HAVE TRIED to make the book accessible to readers unfamiliar with the modern history of Egypt and with the Arabic language. All translations from Arabic, unless otherwise noted, are mine. In translating titles, key terms, and concepts, I have tried to keep the original Arabic words next to their English translation. The term “national courts,” rather than “native courts,” has been used to translate “Mahakim Ahliyya,” unless the cited text uses the term “native courts.” In transliterating Arabic words into the Latin alphabet, I have used common English forms where they are available and otherwise followed a simplified version of the standard system of transliteration based on the *International Journal of Middle East Studies*. Diacritical marks are given only to indicate the Arabic letters ‘ayn (‘) and hamza (’). A hamza appearing at the beginning of a word is normally dropped, as is the *ta marbouta* at the end of the word. For authors who published in English or French, alternate spellings of their names may occur, but the standard Arabic transliteration has been retained in the notes and bibliography for their Arabic works.

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Introduction

WHAT IS THE RELATIONSHIP between modern law and the human, and what was the colonial career of this relationship? How was the concept of the human cemented in the legal processes of colonizing projects? Did this concept signify a person bound by the chains of colonial law, or a subject who lived in the space of modern juridical power assumed to be able to abide by it or rebel against it? These questions guide the inquiry of this book, situated in Egypt under British occupation (1882–1936), when Egyptians were recruited to the production of cotton for British and other world markets, and when the technologies of colonial rule came to rely heavily on the new positive law and the new figure of the human. The “human” here is a concept/figure that stands for a specific species, a certain status, a particular form of life.¹ The significance of these questions stems from the fact that the concept of the human was at the center of a range of knowledge and modes of rule that are becoming all the more evident today.²

During the era of colonial rule, Ottoman Egypt suffered a rupture in its legal history. This rupture consisted in the introduction of a new legal system of positive law that replaced the Ottoman-khedival legal order grounded in the tradition of Islamic law—the *shari‘a*. This book investigates the thought, institutions, practice, and sensibilities of the modern colonial rule of law. It traces the novel relationship they cemented between the prevailing rule of law and the human, a relationship that engendered its own colonizing operations. This new relationship was part of what Talal Asad describes as colonialism’s “irreversible process of transmutation, in which old desires and ways of life were destroyed and new ones took their place—a story of change without historical precedent in its speed, global scope, and pervasiveness.”³

A central tenet of the anticolonial tradition locates the power of colonialism in the exclusion of the colonized from the realm of “universal humanity,” in their “thingification.” Aimé Césaire is one important figure

in this tradition.⁴ According to this position, the forces of colonialism unleash themselves against the colonized by dehumanizing them—equating them with, or reducing them to, animality or the nonhuman. The end of colonialism and the termination of its constellation of forces signal, in these accounts, the reentry of the colonized into “universal humanity.” Deploying a parallel argument, liberal accounts of the modern rule of law equate its ideals with protection of the human. These accounts maintain that exclusion from the law, or assignment to an extralegal status, results in dehumanization. When the rule of the law prevails upon the lives of the dehumanized, their entry into its domain occasions their rehumanization.

By these accounts, modern law and colonialism occupy the same space of humanity/nonhumanity, humanization/dehumanization: colonialism negates humanity and the modern rule of law, both of which stand united in their idealized form against colonial forces: colonialism dehumanizes; modern law recovers the human. The result of these accounts is to reinforce both the necessity and the superiority of the modern rule of law. It now appears as a place of refuge for the human, or more modestly, a place in which some forms of resistance against colonialism could unfold. But are such accounts the only story of modern law? To what extent do they reproduce its metanarrative? Does the colonial career of modern law complicate its presumptive protectiveness, and if so, how? Might a historical account of modern law’s operations reveal a system of juridical bondage that the law fashioned as it assumed for itself the identity of a site of refuge?

These accounts of the law and the human grant law the power of decision over the human without interrogating that power. When modern law endows itself with the power of humanization, and declares that its absence signals dehumanization, modern law effectively binds the living to the powers of the state. The human is chained to the power of modern state law, not simply because the state’s laws are imposed on the human, but because they decide its status as human. What assumptions about the human enable this magical effect, effectively binding it in a compulsory fashion to the power of the law? How does modern law make possible and activate the moment of decision over the human? Might this decision be precisely what is at stake in the colonality of modern law? Could this decision, in attempting to mold a human that is always chained to the law,

be part of a legal technology that functions to prevent revolution against the law and to assert state power?

This study is a historical and theoretical account of how the human, in colonial Egypt, arose as it was simultaneously inscribed into the body of modern positive law. In the juridical field of colonial Egypt, the human came into being as the teleology of modern positive law: its absence, law asserted, indicated a state of dehumanization or indeed inhumanity, that is, a state of cruelty, instrumentalization, and depravity.⁵ No longer a condition of birth, humanity began to emerge as a juridical category; the human became the effect of the work of the law, that which was to be animated by this work. This animation took place in the life of the individual. Modern law, which took on the government of the living, thus took upon itself the task of this animation. The new, modern legal system instituted in Egypt in 1883 began to interpellate Egyptians and to attempt to recruit them into the position of the human. In this interpellation, the law allocated to itself the power to make decisions as to the presence or absence of the human. The law also decided on the empirical meanings of the human and all that seemed to threaten it. This book theorizes this particular emergence of the human as part of the rise of “juridical humanity.”

Juridical Humanity is an examination of this emergence of the human that challenges the protective, determinative role of modern law, along with the assumed relationships among law, colonialism, and humanity. Partially a work on Egyptian legal history but mainly a study of the powers of modern law in colonial Egypt, this book situates modern law, historically and theoretically, at the heart of the colonial enterprise and as one of its constitutive powers. Colonialism emerges as a constellation of forces, and modern law as one of its strategies of conquest and rule for binding the living to the state. Unlike what some studies of colonialism suggest, colonial Egypt was not a zone of lawlessness, of the suspension of juridicality and of exclusionary measures.⁶ Further, this book unpacks the meanings of the human as modern law interpellated it, the colonial efficacy of this concept of the human, and the sensibilities of humanness the law attempted to fashion. The book also considers the ethical meanings and political operations of the newly awakened human in relation to history, violence, and nature. At issue is not only the rise of juridical humanity but also the accompanying rise of the new

operations of power—ethical and political—that were central to the colonization of Egypt and to the reproduction of the power of the colonial state.

This, then, is a study of how modern colonial law came to engender a juridical concept of humanity, practice its production, and include Egyptians in its realm. The colonial legal reforms of the late nineteenth and early twentieth centuries claimed to elevate Egyptians to the status of humans and to liberate them from the inhuman conditions prescribed by their “native” rulers. By so doing, legal reform constituted a colonial governmental force that inscribed the human as the teleology of modern law. This inscription, in turn, was directed at prescribing new, modern sensibilities toward pain and at delineating the sphere of useful, legal, and acceptable violence. Prescriptions also included a historical distancing from the past of the khedival state and a renewed relationship with nature, either as a hostile force to be fought or, alternatively, as a site for humanization. The figure of the human and its concomitant sensibilities with respect to violence, history, and nature became a creation of the modern colonial rule of law.

Unlike other studies of colonialism, *Juridical Humanity* does not locate the power and force of colonialism in the dehumanization of Egyptians and the transformation of Egypt into a colony of lawlessness. Nor does the book investigate the dynamics of racialization in Egypt, which was also significant to the colonial encounter.⁷ Rather, it investigates colonialism as a constellation of secular modern powers aiming precisely to humanize Egyptians by declaring them subjects of the rule of law. In Egypt, this association between the human and the law would ultimately prove to be the cornerstone of Egypt’s colonization.⁸

The association between the human and the law was not unique to Egypt. It belonged to a broader modern historical dynamic that positivized and secularized the law. Whereas the French Declaration of the Rights of Man and of the Citizen of 1789 clearly linked the human (“man”) to the law, the rise of secular positive law introduced the terms of this bond. With positive law, the human became the “author” of the law and one of its distinctly recognized “persons.” However, this association also brought with it the threat of loss. Once the human became the subject/end of modern secular law, the absence, withdrawal, or suspension of the law gave rise to arguments about dehumanization. Modern law’s authorizing assumption

was indeed that those who have been abandoned to the “state of nature” must be rescued through inclusion in the empire protected by modern liberal law. But is it not possible to conceive of a human who lives outside the protection of the law and in the midst of violence? What way is left to conceptualize those who live outside the law or under threats of violence? How does the liberal equation between modern law and the protection of the human block the possibility of other conceptions of the human? What are the political operations and ethical sensibilities that this equation produces? Finally, what are the characteristics of the modern regime of liberal law that assigned itself this power of earthly humanization?

Juridical Humanity sets out to address these questions and to provide a more critical analysis of the presuppositions underlying the liberal entanglement of law and humanity. This study draws from archival research in Cairo and London. The archival material includes jurisprudence textbooks; writings of Egyptian intellectuals and of British diplomats, travelers, and officials; memoirs; court rulings and court records; legislation and policies; correspondence, colonial reports, and the proceedings of commissions; and journal and newspaper articles. In addition to archival sources, the texts under examination include Western legal and political theorists whose writings circulated in colonial Egypt. The colonial career of their writings and the sensibilities they introduced prove significant to the rise of juridical humanity. My concern, to be sure, is not whether these theorists justified or opposed colonialism, but how their thought, articulated irrespective of colonialism, intersected with and contributed to colonial technologies of rule.

Juridical Humanity is also a historical and theoretical tale about loss. This loss is double: the historical loss of the *shari'a* system of law, of a different relation to the human and another experience of nature, history, and violence; together with the loss of the human to modern law, when the law laid claim to a monopoly over the power to declare the presence of the human. Both of these losses, however, are incomplete. While this book is first and foremost an account of the powers of modern colonial law, it is also evident in many chapters that these powers never secured themselves entirely. Far from indicating a failure, this incompleteness provides at once an occasion to intensify these powers and a space for competing

ones. The various chapters of this book either point to the crisis of modern colonial law, its paradoxes, or to the persistence of other articulations of the human and other images of the law. Crucially, however, this book does not address the question of whether Egyptians, in general, abided by or fashioned themselves according to the powers of the law. This would be an important and significant inquiry, but it exceeds the scope of this work, which aims to historicize and theorize the powers of modern law as they unleashed themselves and attempted to activate a particular concept of the human.

For any work on the human and colonialism, Frantz Fanon must provide some inspiration, or at least a starting point. He does so here precisely in his refusal to defend the argument that colonialism could confiscate the humanity of the colonized. By this refusal, he also rejects the more general thesis that humanity is a status that can be taken away or given back. This thesis is essentially the one that modern colonial law put forward in colonial Egypt; the only difference is that colonial law in Egypt claimed to humanize, not dehumanize, the Egyptians. Both claims, however, of humanization and of dehumanization, belong to the same understanding of the human—one that takes it as a status capable of being conferred or confiscated by the powers of the colonial state. In both cases, the colonial state emerges strengthened.

In the chapter “Concerning Violence” in *The Wretched of the Earth*, Fanon argues that “decolonization is quite simply the replacing of a certain ‘species’ of men by another species of men.” The assumption here is that man, or the human, always already exists and is not the product of any historical force, including that of violent decolonization. Further, he adds: “Without any period of transition, there is a total, complete, and absolute substitution.”⁹ This instantaneous transition is then opposed to a historical process of gradual transformation. There is no discourse of “transition to”; instead, there is a shift—the destruction of the old and the birth of the new. This “new” consists of “new men, and with it a new language and a new humanity.” In Fanon’s analysis, decolonization is “the veritable creation of new men.”¹⁰

At this point in Fanon’s text, the new man is opposed, in a Hegelian fashion, to the “thing,” or to the old man: “the ‘thing’ which has been