

INTERNATIONAL LAW AND THE INNER WORLDS OF OTHERS

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For Dr. K. N. Nayak

Surely one of the most distinctive features of our species is the need to create and ascribe meaning and value to the immutable experiences of human existence: the trauma of birth, the discovery of the self as separate from others, the formation of gender or sexual identity, procreation, the death of loved ones, one's own death, indeed, the mystery of it all. Each culture, in its unique context, records these experiences in ways that provide meaning, guidance and codes of rectitude that serve as compasses for the individual as he or she navigates the vicissitudes of life. These are the inner worlds, the inner reality each person inhabits.

The New Haven School of International Law designates this fashioning of an inner world of meaning and value in individual and collective life as the "rectitude process." "[R]ectitude refers to freedom of thought and religion, presumption of innocence, and freedom from *ex post facto* laws."¹ It is one of eight values,² or congeries of desired events, that human beings seek as scope values or try to manipulate as base values. The School has proposed policies with respect to preferred participation in the rectitude process, as well as its regulation by the larger constitutive process. For purposes of empirical research, the School has adapted intellectual procedures for articulating rectitude codes, many of which are not expressed formally, but are customary and implicit.

The notion of the "universality" of international human rights norms should not be confused with the rectitude processes in the inner worlds of the many cultures, groups and peoples of the world. Human

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1. Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 814 (1990) (reviewing LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE (1989)).

2. The eight categories of values are: "respect, power, enlightenment, well-being, wealth, skill, affection and rectitude." *Id.* at 814.

rights law seeks to establish norms that are universal and transcultural. It aspires to prescribe a single standard of protection for specific activities and sectors of the individual's life. One of the protected sectors is the rectitude process. But the point that is frequently misperceived is that, though the international human rights protection norms are uniform for all, the particular rectitude codes of each culture that are to be protected are and must be different. Heinrich Zimmer wrote:

Truth appears differently in different lands and ages according to the living materials out of which its symbols are hewn. Concepts and words are symbols, just as visions, rituals, and images are; so too are the manners and customs of daily life. Through all of these a transcendent reality is mirrored. . . . Each civilization, every age, must bring forth its own.³

These realities are expressed in sets of signs, symbols and practices of varying elaboration that, together, constitute comprehensive systems of rectitude for the culture concerned. Within each particular cultural system, each person, in turn, refracts those signs and symbols through his or her own experiences. They become key parts of the self, its identity, its matrix for past and future, its metric for the appraisal of events, indeed, its validation.

Cultural relativists in the international human rights field, in confronting the rectitude process, state a truism and then misapply it. Of course, cultural values with respect to the inner world will be different from group to group. The international human rights system is not concerned with securing a homogenized uniformity of inner worlds, in a kind of planetary lowest common denominator. Rather, it is concerned with protecting, for those who wish to maintain them, the integrity of the unique visions of these inner worlds, from appraisal and policing in terms of the cultural values of others.⁴ This must be, for these inner world cosmovisions or introcosms, are the central, vital part of the individuality of each of us. This is, to borrow Holmes' wonderful phrase, "where we live." Respect for the other requires, above all, respect for the other's inner world.

While many moral codes that are generally considered "superior"

3. HEINRICH ZIMMER, PHILOSOPHIES OF INDIA 1-2 (Joseph Campbell ed., 1951).

4. Cf. *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, *reh'g denied*, 496 U.S. 913 (1990) (holding that the Free Exercise Clause permits the state to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use). In this respect, the Court's ruling is inconsistent with the international standard as expressed in this article. Perhaps this explains why, several years later, the holding in this case was overturned by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994).

emphasize respect for the physical integrity of others, they show considerably less respect and less understanding; indeed, even tolerance for the inner worlds of others. Kumbale Narasimhah Nayak once wrote:

[P]eople nurtured in any culture which claims the validity of its frame on the questionable basis of faith, belief or religion, cannot escape the tyrannical assumption of the universal validity and superiority of their own culture and its frame. Through the prism of this subconscious *intracultural* assumption, other cultures look inferior and absurd or at best similar to the domestic culture.⁵

The historic and, in many ways, continuing clash between Christianity and Islam was based on the conviction of the adherents of each that theirs was the only valid inner world, and that those who subscribed to others were simply infidels. The political expansion of Europe throughout the world was driven as much by a belief in the superiority and inevitability of the European Christian inner world and its mandate to obliterate competing worlds and replicate itself everywhere, as it was by greed and lust for power. The *mission civilisatrice*—the self-ordained mission to civilize the world—like its latter day, domestic manifestation in countries such as China—“nation-building”—has always been a euphemism for the eradication, brutally if necessary, of the inner worlds of indigenous peoples and the imposition, in their places, of another supposedly superior and transcendent one. From the wide-scale melting of Mexican and Peruvian sacred golden objects into gold coins in the 16th century, through the systematic desecration and destruction of temples and holy places in Tibet today, efforts to destroy inner worlds have been systematic and often effective.

The madness, indeed self-destructive implications of this enterprise, simply boggles the mind, for every culture, its language and recititude system, is a repository of unique human experience. As George Steiner would say, it is an “expression of articulate being.”⁶ In addition to the agony of the victims, the collective humanistic loss suffered in the destruction of the inner worlds of others is enormous. Entire visions of past and future, complex ways of looking at the world and the self, and repositories of rich experience are obliterated. It is as if the minions of a dogmatic allopathic medicine were to set out to level the tropical rain forests, because they were founts of “non-scientific”

5. K. N. NAYAK, *CULTURAL RELATIVITY: A UNIFIED THEORY OF KNOWLEDGE* 10-11 (1982).

6. GEORGE STEINER, *AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION* 51 (1975).

approaches to healing.

The scope of the destruction that has been wrought in North America is staggering. For example, Red Thunder Cloud, of the Catawba nation, the last speaker of Catawba, died on January 8, 1996, and took that language with him to the grave.⁷ Professor Carl Teeter of Harvard has observed that “[t]here were once about 500 languages in North America. About a hundred are still spoken, and half of them are spoken by older people.”⁸ The problem, however, is not only confined to this continent. George Steiner has observed:

Four to five thousand languages are thought to be in current use. This figure is almost certainly on the low side. We have, until now, no language atlas which can claim to be anywhere near exhaustive. Furthermore, the four to five thousand living languages are themselves the remnant of a much larger number spoken in the past. Each year so-called rare languages, tongues spoken by isolated or moribund ethnic communities, become extinct. Today entire families of language survive only in the halting remembrance of aged, individual informants (who, by virtue of their singularity are difficult to cross-check) or in the limbo of tape-recordings. Almost at every moment in time, notably in the sphere of American Indian speech, some ancient and rich expression of articulate being is lapsing into irretrievable silence. One can only guess at the extent of lost languages.⁹

It is fashionable now to condemn the cultural imperialism or moral indifference that enforced these extinctions. But the mindset that made it possible—the network of unexamined premises and emotional defenses raised against confronting and understanding other inner worlds and rectitude systems—continues. One need only look at our own practices, where interest in the inner worlds of other cultures wax and wane and, from time to time, become quite trendy. Unfortunately, the exercise is often little more than an opportunity to engage in narcissism because the inner systems of other cultures are taken as primitive antecedents to our own “higher” levels. We look to their art, which expresses their cosmovisions, for certain “universal” features often described as “form.” This results in a characterization which es-

7. David Stout, *Red Thunder Cloud, 76, Dies, and the Catawba Tongue With Him*, N.Y. TIMES, Jan. 14, 1996, at L33.

8. *Id.*

9. STEINER, *supra* note 6. Conjectures regarding the number of languages currently in use around the world continue to be revised upward. There are 6,528 living tongues listed by the Summer Institute of Linguistics in Britain. *A Golden Age of Discovery*, THE ECONOMIST, Dec. 23, 1995, at 56, 58.

entially decontextualizes and denies authentic meaning to those features of other cultures that are observed.

In 1984, the Museum of Modern Art in New York City, installed an exhibit called "Primitivism." As Eleanor Heartney wrote:

The Modern's show sought out "affinities" between undated and presumably "timeless" examples of African tribal art and the pioneering 20th-century works by modernists such as Picasso, Miró and Klee. . . . In the flashy, heavily promoted "Primitivism" exhibition, African art was treated primarily as raw material for the inventions of Western modernists.¹⁰

Obviously, this perspective on the symbolic expressions of other cultures is little more than an artifactual mirror in which the observer, purporting to admire the creations of others, sees nothing but himself.

A related distortion of the symbolic and spiritual expressions of other cultures was reflected in the remarkable exhibit at the National Gallery of Art in Washington, D.C., in 1992. The Gallery undertook to provide a sense of the inner worlds of the great civilizations of 1492 in its exhibit entitled "Circa 1492." What a splendid idea: the inner worlds, as viewed through the prism of the artistic creations of the peoples of the world, at the very outset of an age of "discovery" that would irrevocably change all of them. The execution of the idea, however, reflected a lamentably familiar cultural bias. Most of the exhibit dealt with "Europe in the Mediterranean World." A relatively smaller section dealt with Japan, Korea and China. The smallest section dealt with the peoples of the Americas. In its implementation, J. Carter Brown's wish to create "an exhibition that for once goes horizontally through space rather than vertically through time"¹¹ was very much a replication of the good old Grand Tour through European space.

This same pattern of defending one's own cosmovisions by resisting the acknowledgement of the inner worlds of others occurs within our own civilization when we encounter innovative cultural creations. Consider how critics deprived the greatest of modern artists of the spirituality they were seeking to express in their work by recasting their search. The notebooks of Kandinsky, Kupka, Malevich and Mondrian, for example, indicate not a concern with pure "form," as a subsequent generation of critics insisted, but a search for the spiritual.¹² Few crit-

10. Eleanor Heartney, *Recontextualizing African Altars*, ART IN AMERICA, Dec. 1994, at 58.

11. J. Carter Brown, *Foreword to CIRCA 1492: ART IN THE AGE OF EXPLORATION* 9 (Jay A. Levenson ed., 1991).

12. For an example of a relatively recent art exhibition that placed a radically revised spin

ics and commentators were able to see that Jackson Pollack's composition, "Guardians of the Secret," was, according to Rushing, his "most dramatic and successful visual statement about the Shamanic potential of [Southwestern] Indian art and the unconscious mind."¹³ Consider, as well, the continuing disparagement of new translations of the Bible. The translations are done in the authentic vernacular of a sub-culture, in order to resonate to the inner world of the members of that culture and to facilitate the meditation useful for many as a means for reflection or behavior and the refinement of personal codes of rectitude.

With the belated attention now being given to the remnants of indigenous peoples and their cultures, a new legal perspective is developing. Article 13 of the United Nations Draft Declaration on the Rights of Indigenous Peoples, for which representatives of indigenous peoples participated in its preparation, provides in language that is slightly disparaging that "[i]ndigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects"¹⁴ Article 14 provides, in relevant part, that "[i]ndigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures"¹⁵ It remains to be seen whether the words in these noble instruments will be transformed into effective practice or will simply serve as handsome contemporary display vessels for collecting the alligator tears that have been shed for centuries for the victims of cultural imperialisms. More is required than a mere change in attitude. Much will depend on searching dominant cultures, for self-reflection. For those members of the dominant cultures the practical intellectual and moral question will be how to encounter and understand the inner worlds and rectitude systems of others—not simply indigenous peoples, but everyone.

on depictions of the expansion of the United States, see *THE WEST AS AMERICA: REINTERPRETING IMAGES OF THE FRONTIER, 1820-1920*, at vii-viii (William H. Truettner ed., 1991).

13. W. Jackson Rushing, *Ritual and Myth: Native American Culture and Abstract Expressionism*, in *THE SPIRITUAL IN ART: ABSTRACT PAINTING, 1890-1985*, at 273, 285 (Maurice Tuchman ed., 1986).

14. United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities: Draft United Nations Declaration on the Rights of Indigenous Peoples, Oct. 28, 1994, 34 I.L.M. 541, 550 (adopted Aug. 26, 1994) (reproduced in its entirety in this Symposium issue).

15. *Id.* at 550.

We urgently need a methodology that permits us, as observers, to identify and then suspend the operation of our own cultural conditioning so that we can be open to the inner world of each other. This task is not easily accomplished, for the ideas and emotions we must identify in ourselves are often held at levels of consciousness so deep that we are unaware of them. At the same time, they exercise profound influence over what we see, how we see, and how we react. The result is a "tyrannical assumption of the universal validity and superiority" of one's own cultural assumptions.¹⁶ I have previously recommended that the responsible legal scholar and lawyer develop, as a continuing intellectual exercise, techniques for an ongoing, lifelong self-scrutiny.¹⁷ This process would allow individuals to test deeply held assumptions about themselves and others, ideological conditioning and the various perspectives that are associated with enculturation in subgroups. Through such introspection, personal value choices could be appraised as critically as we appraise those of others. Many techniques are available in our civilization and in others for these continuing, intellectual tasks, appraisals and disclosures.

Certain common practices are particularly inimical to an understanding of the inner world of the other. One incorporates a linear conception of teaching (*I teach you* to be like me) rather than accepting a circular conception of teaching (that each of us is a unique, never to be repeated entity and that each of us must learn from the other). Another practice, which is current in the academy, is the "you're like me" fallacy. This approach, which is the general assumption of the Law and Economics movement, holds that the "rational-actor model of human behavior" can be applied to ancient and non-Western societies.¹⁸ Without gainsaying or minimizing the powerful analytical tools that Law and Economics has taken and applied to law, the problem with these assumptions is that, rather than expanding the focus of inquiry to include one's own cultural conditioning and opening the self to the other, one ignores the other with the blithe assumption that he or she is just like "us," i.e., me!

Another critical intellectual task involves the accurate depiction of

16. See generally W. M. Reisman, *The Tormented Conscience: Applying and Appraising Unauthorized Coercion*, 32 EMORY L.J. 499, 520-21 (1983).

17. See *id.* at 537. See also Michael Reisman, *A Jurisprudence From the Perspective of the "Political Superior,"* 23 N. KY. L. REV. 605, 613 (1996).

18. See Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TULANE L. REV. 235 (1986). But cf. KARL POLANYI, *THE LIVELIHOOD OF MAN* (1977); UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (1987).

the context in which others operate. Such contexts include the ecological and social envelope in which those observed live, the power process which influences them and, of course, their legal system. The legal system must be conceived in a functional rather than organic sense, lest the inquirer simply look for analogues to his or her own legal experience and, like some anthropologists, conclude that law in the culture under observation was primitive or non-existent. It is particularly important to resist the historicist model, with its roots in Vico, according to which there are ineluctable stages in human and social development through which, in a rigid and unvarying causal sequence, each group must pass. The problem with this approach is that the observer relies on the theory rather than examining the actual practices of the people under observation.¹⁹

We require a set of tools that can enable us to see other cultures in their contexts, lest we create, as Nayak puts it, "phantoms of absurdity and barbarism in contemporary sister cultures."²⁰ Nayak further stated:

The distortions in explications relating to ideas and institutions of non-Christian cultures by "post-Christian" (or simply Western) scholars, extend to explications of every non-Christian culture, including those of pre-Christian Europe. . . . When ideas and institutions of cultures having frames fundamentally dissimilar to Christian culture are cast into the mold of a Christian cultural frame these explications become totally distorted. In light of the new reference frame thus acquired, they lose their original significance and consequently cannot provide any real comparison or contrast to Western ideas and institutions.²¹

The New Haven School is concerned about propensity for distortion in cross-cultural inquiry and proposes the use of a six-phased heuristic, asking the following empirical questions:

- Who are the participants?
- What are their perspectives, i.e., their identifications, matter-of-fact expectations of past, of future, and their value demands?
- What are the situations in which they are interacting?
- What values do they use as bases of influence or power?
- In what strategic modalities do they manipulate their base values?
- What are the aggregate value outcomes, in terms of production and distribution, of the process?

19. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURE* (1973).

20. NAYAK, *supra* note 5, at 12.

21. *Id.* at 11-12.

We believe that the systematic use of a tool of this sort, along with rigorous self-scrutiny, can help control the biases so frequent in cross-cultural inquiry.

Even with the tools of social science, confronting the context of the other, especially the context of the inner world, remains particularly difficult because of what Lasswell and Kaplan call "index instability."²² They stated:

The chemist using the term "carbon" knows that his spectroscope will record certain wave bands whether he uses the instrument in New England or Mexico. But the social scientist studying anger cannot specify for it a simple index applicable in both places. Not only are the patterns on the basis of which anger is inferable different in the two cultures; there are also variations among income groups and other social stratifications. Moreover, the indices may acquire different significance with time-Mexico, for example, may progressively assimilate "Anglo-Saxon" standards of reticence.²³

Hence, Lasswell and Kaplan propose a principal of "situational reference" which seeks to state relations between variables assuming different magnitudes in different social contexts rather than trying to state universal invariances.

The importance of reconstructing the context in which the other lives and observes phenomena is indispensable to the study of sacred art and rectitude systems. If this is not done, one commences with a heuristic that is essentially one's own religion and looks for analogues. When Europeans seized the goldwork of the indigenous peoples of America and transmitted it to Europe, they examined it in the interiors of their homes; we now study it in the interior of museums. Gerardo Reichel-Dolmatoff, in his brilliant "Goldwork and Shamanism," notes that:

Pre-Colombian goldware was obviously meant to be looked at in tropical sunlight, in flickering firelight, or in the uncertain glow of the kind of torches used to illuminate interiors. Hence, the perception involved was quite different from our present perception of brightness, brilliance and reflection. In the Old World the attraction of antique jewellery [sic] lies in its secret glint and the interplay of light and shade, in addition to the sparkle of its precious stones. In Colombia, fierce sunlight would reflect all the blinding bright-

22. HAROLD D. LASSWELL & ABRAHAM KAPLAN, POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY xx (1950).

23. *Id.*

ness of gold far afield.²⁴

The point of emphasis is that events take their meaning by reference to context. A theory of perception or interpretation that does not take explicit account of context will, inevitably, slip in its own context and misconstrue the other.

The last intellectual task to be discussed is judgment. The social scientist may defer it, and I understand why and with what intensity Native American scholars and intellectuals have come to suspect and resent it. However, judgment is quintessential to the role of the international human rights lawyer. Encountering the other in an open-minded and tolerant way does not discharge the international human rights lawyer from judgment any more than the claim of "domestic jurisdiction" insulates national practices from international human rights review. But the judgment I refer to is not the self-serving exercise of the past. The point of judgment here is not to try to show, like some silly adolescent iconoclast, that certain beliefs are "wrong." It would be as arrogant and preposterous to undertake to "disprove" Shamanic flight to the Yuko of the Sierra de Perijá as it would be to "disprove" to orthodox Jews the crossing of the Red Sea or to Christians the resurrection of Jesus. It would be equally arrogant and preposterous to reject the practices of others simply because we do not agree with or like them.

The pertinent question is not the verifiability of the other's beliefs, or their compatibility with ours, but whether their *application* is likely to precipitate consequences that are inconsistent with or violative of international human rights standards. Elsewhere, I have written:

An important part of contemporary international law concerns itself with the establishment and protection of territorially and non-territorially organized groups, and the international protection of the human rights of those who find themselves, willingly or otherwise, in their midst. International law prescribes some basic principles that can guide choices about the degree of autonomy a smaller group may exercise. Because this process and the policies it has generated to guide decisions do not derive from the positive law of a single state, but seek to limit and guide the behavior of all state elites, the arrangements that emerge between smaller groups and states should be less susceptible to the abuses that were characteristic of entirely nationalistic treatment of distinct minorities. In most general terms, the principles call for the protection of individual rights and ordain a network of claims for protection and

24. GERARDO REICHEL-DOLMATOFF, *GOLDWORK AND SHAMANISM: AN ICONOGRAPHIC STUDY OF THE GOLD MUSEUM* 18 (Colina ed. & Fereshtea Ebrahimzadelt trans., 1988).

opportunity that every person in the world is entitled to make against whoever—government or otherwise—exercises power over them. One of these claims is the right of association and group formation as an instrument for the fulfillment of personal rights. The rights of group formation and the tolerated authority of group elites over their members extend insofar as they are indispensable for the achievement of individual rights. They cannot be justified if their effect is to abridge or limit basic individual rights.²⁵

Each of us inhabits a universe that is different from others, but we are constantly seeking to bridge that gap. That is the function of communication. Wholly apart from ethical imperatives, understanding others enriches us. Understanding other cultures is as minimal a requirement of social interchange as understanding another human being. At this moment, understanding is not enough. The cultures of indigenous peoples are endangered and some are in danger of disappearing. Efforts must be undertaken to reverse that and to allow those who wish to nurture and develop their own language and symbol systems to do so. Political self-determination and economic self-determination may be important, but it is the integrity of the inner worlds of peoples—their rectitude systems or their sense of spirituality—that is their distinctive humanity. Without an opportunity to determine, sustain and develop that integrity, their humanity—and ours—is denied.

25. W. Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 YALE L.J. 401, 415-16 (1993).