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# **The Horizon of International Law**

*Earth-Thinking, Ordering and Disciplinary International  
Law in the Colonial/Modern World-System*

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# Abstract

In this thesis I conduct an analysis of international law as an institution with the aim of revealing its deeper structure. I proceed by distinguishing between two modalities of international law – one ‘disciplinary’ and another ‘dissident’. This institutional-structural analysis attempts to delineate how the ordering of limits and thresholds, the lines of normative inclusion and exclusion of the institutions of international law, are set and reset, particularly in response to historically situated events which threaten to modify, and indeed, transform them. Methodologically, this leans upon Hans Lindahl’s theory of legal ordering, as well as the spatially mediated thought of Deleuze and Guattari.

In examining the structures of international law, I make use of some thematic spatial devices such as ‘horizon’, ‘ground’ and ‘globalisation’. Alongside this, theory is made concrete through the invocation of two historical events both constitutive of and contemporary to international law: the effect of the national liberation movements of postcolonial countries during the 1950s–70s in modifying the modern international system, and the sixteenth-century encounter between Dominican theologians and Amerindian nations. The context of the latter, its discourse and terminology, is rendered familiar as a fundamental precursor to international law in its modern guise via proximity in this thesis to more recent debates on global security and development.

Finally, I deconstruct this institutional-structural analysis through the radical dualism of Amerindian cosmology. The point here is to show how that which is excluded from law and ordering, namely the un-orderable, returns as a manifestation of immanent or liminal justice to reconnect disciplinary institutions to its triadic outside. Hence, the justice practised by the other (Amerindian or social movements in the Global South) brings forth the uncontainable multiplicity or triadism of the earth, which promises to transform the disciplinary through the dissident.

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# Introduction

Roman emperors before Hadrian were reputedly obsessed with expanding their territorial reach for the greater good of the empire. It was under Trajan of Spain that the empire underwent its longest and most intense period of extension and expansion. By contrast, when Hadrian came to power, his intention was to go back to a more Augustinian model of governing that would emphasise the need for stability over the aims of extension and expansion. This continuity and contrast entailed retracting the boundaries of the empire to its core, which Hadrian did primarily through the building of walls. Thus, he provided the empire with an interiority for the first time, while at the same time projecting or positing an outside or exterior to it as ‘barbaric’ or strange.<sup>1</sup>

Instead of establishing military operations as the basis of the governing of the empire, Hadrian opted for the establishment of an economic core at the centre of a commercial network that could flow in and out of the walls positing the empire. The regulation of these flows of people and goods would then take the place of, without abolishing, the machinery of war.<sup>2</sup> Law and administrative measures put in place by the emerging bureaucracy – which came from within the same equestrian ranks of the army that had produced both Trajan and Hadrian<sup>3</sup> – became the preferred way of coding otherwise un-coded flows. The building of walls as well as legal and administrative coding – of goods and people – allowed imperial Rome not only to acquire a sense of itself, a subjectivity of sorts as Romans distinguishable from others (barbarians, gentium, etc.), with whom they would have to relate, and whose relations would also need to be coded, but also to produce a way of reaching out and bringing within sight. This was no easy feat, as Romans had grown accustomed to the idea that the boundaries of the empire would continue to expand *ad infinitum*. Coupled with this belief was the worship of the Roman God Terminus: it was said that once Terminus had set down a new boundary not even Jupiter could move it. The hallowed, eternal nature of expanding boundaries was something firmly planted in the Roman psyche. Hadrian’s policy of retrenching and bringing in the threshold of empire was, then, a risky one, and was seen as an offence to the Gods by the senatorial class.<sup>4</sup>

After the Spanish-born Trajan and Hadrian, the empire created an apparatus of inclusion and exclusion, one that could be applied to every subject without exception, but which nevertheless would draw lines of selection and relegation. Between the fifteenth and sixteenth centuries, and in the wake of the decisive encounter with Amerindians, Spain and Portugal would recover that model of operation and organisation, in order to procure for themselves a scheme for the relations between the emerging Holy Roman-Germanic Empire and Amerindia, against a background of planetary expansion. In the process, a specific model of spatial organisation would set itself to become the model of practical thought, recognised and theorised by Iberian and Dutch theologians and jurists,<sup>5</sup> and in their wake Scottish Enlightenment writers such as David Hume<sup>6</sup> and, inspired by the latter, Immanuel Kant, with his lifelong concern with geography as well as practical reason and the philosophy of law.

The theorisation of this developed spatial model of organisation, assumed by the structure of international law, would emerge via the seminal Chiapas–Valladolid debates of the sixteenth century. This is precisely the reason we wish in this manuscript to invoke the spirit of these debates, in which Dominican and Jesuit theologians and jurists played such a leading role. The discussions that took place on the ‘affair of the Indies’ and more generally on the ‘Indian Question’ can be considered to be both constitutive of and contemporary to international law in its modern guise. What we mean here is that the trans-historical alliance-structure of a ‘disciplinary’ international law owed a considerable amount to the influence of precursors or antecedents to its modern historical manifestation, noticeable in the

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<sup>1</sup> Mike Duncan, ‘Hadrian’s walls’, *History of Rome Podcast* (episode 82, 2010).

<sup>2</sup> Ibid.

<sup>3</sup> Hans Julius Wolff, *Roman Law: An historical introduction*, University of Oklahoma Press (1951, pp. 15, 46).

<sup>4</sup> Duncan (2010).

<sup>5</sup> See Nicholas Wey Gomez, *The Tropics Of Empire*, MIT Press (2008), *Machina Mundi: The Moral Authority of Place in the Early Transatlantic Encounter*. Wey Gomez cites the jurists Thomas Aquinas, Albertus Magnus, Pierre d’Ally, Francisco de Vitoria and Anotni Vieira.

<sup>6</sup> See Gilles Deleuze, *Empiricism and Subjectivity*, trans. Constantin V. Boundras, Columbia University Press (1991), and *What is Grounding?* trans. Arjun Kleinherenbrink, eds. Tony Yanick, Jason Adams, Mohammed Salemy, &&& Publishing (pp. 25–30, 2015): ‘... without Hume there would not have been Kant to retain the legitimacy of ground.’

aforementioned debates. Thus, we should emphasise this study as a ‘diacritical’<sup>7</sup> account that expatiates on the limits, ordering and structure of the planetary institutions of international law. Hence, it is no part of our work to justify any historical linearity (in any transcendental manner); rather, the goal is to articulate how legal institutions are assembled in the light of events, of which two are principally considered here: the already referenced affair of the Indies (encounter with the Indian), and the rise of postcolonial liberation movements of the 1950–70s.

In respect to the former, Dominican theology, and its elaboration by leading exponents such as Albertus Magnus, Thomas Aquinas and Francisco de Vitoria, is considered fundamental to the nascent structure of a disciplinary international law. In fact, many of the ostensibly up-to-date theories of legality today, such as law-as-plan and the security-developmental complex,<sup>8</sup> seem less so when brought into contact with the Dominican paradigm of natural law; for example, what immediately comes to mind here as a point of comparison is Aquinas’ ‘supreme’ plan in the mind of an ordering God, and Vitoria’s justification of colonialism on the basis of perfectibility and humanist concerns. Thence, we shall render familiar the unfamiliarity of the debates surrounding the Indian Question, and its associated terminology, familiar by analysing modern-day institutions of international law (Part One) through the lens of the contextual framing of its precursors (Parts Two to Four). One could say that the debates that surrounded the affair of the Indies still haunt international law today.

Whilst the periods of international law that primarily concerns us here are in the sixteenth-century encounter between Amerindians and Iberian theologians and the global expansion of the UN into Third World, beginning in the 1950s, we should also index some of the major intermediary events that define the genealogy of international law. It is important to take note of some these historical ‘pivots’ that transformed international law, so as to preclude any temptation to imagine the periods that lie outside theorisation in this work as existing in a state of bracketed stasis. We should therefore point to the treaty of Westphalia in 1648, which is commonly seen as the commencement of the states system in Europe (significant in the thought of the legal theorist Carl Schmitt for the development of the *Jus Publicum Europaeum*); to the Congo Conference in Berlin of 1884–5 as an initial attempt to organise the League of Nations; to the 1919 inter-war restructure of the League of Nations; and finally to the Human Rights Declaration in 1944.<sup>9</sup> All of these constitute pivotal points that signify a continuous process of structural mutation in the evolution of international law.

Prior to us moving on to consider in more detail the main propositions of this thesis, as well as the methodological tools deployed, let us provide the necessary critical background in respect to which this thesis can be situated. A review of the ‘spatial turn’ within legal critical theory, as well as its key advocates, is most appropriate here in light of the spatially mediated thinking, in relation to law, which is so integral to this manuscript (this is elaborated on in the rest of the introduction).

In the legal theorist Andreas Philippopoulos-Mihalopoulos’ understanding,<sup>10</sup> the ‘spatial turn’ denotes a cross-disciplinary approach to law that incorporates elements of, and has a crucial engagement with, critical geography, radical (‘open’) ecology and urban studies. The key synergy at play here, from

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<sup>7</sup> An account critical of linear deterministic narratives (*dia*, from the Greek ‘passing through’, as in the sense of the diameter of a circle) such as the ‘progressivistic’ *telos*-orientated type.

<sup>8</sup> See: Mark Duffield, *Development, Security and Unending War: Governing the world of peoples*, Polity (2007), and *Global Governance and the New Wars: The merging of development and security*, Zed Books (2001); David Plunkett, ‘Legal Positivism and the Moral Aim Thesis’, *Oxford Journal of Legal Studies* (vol. 33, no. 3, Autumn, 2013), pp. 563–605.

<sup>9</sup> See Covenant of the League of Nations (1919), in Malcolm D. Evans, *Blackstone’s International Law Documents: 12<sup>th</sup> Edition*, Oxford University Press (2015), pp. 1–7; Universal Declaration of Human Rights 1944, pp. 192–230. Also see Antonio Cassese, *International Law: Second Edition*, Oxford University Press (2005), in which he asserts that the 1919 system resembled the 1648 Settlement of Westphalia, p. 36

<sup>10</sup> Andreas Philippopoulos-Mihalopoulos, ‘Law’s Spatial Turn: Geography, Justice and a Certain Fear of Spaces’ in *Law, Culture and the Humanities*, Vol. 6 (2010); ‘Law, Space, Bodies: The Emergence of Spatial Justice’ in Laurent de Sutter (ed.), *Deleuze and Law*, Edinburgh University Press (2011); ‘In the Lawscape’ in *Law and the City*, Routledge (2007); ‘Spatial Justice: Law and the Geography of Withdrawal’ in *International Journal of Law in Context* 3, 1–16 (2010); “...the sound of a breaking string”: Critical Environmental Law and Ontological Vulnerability’ in *Journal of Environmental Law and Human Rights* Vol. 2, No. 1, pp. 5–22 (2011); *Absent Environments*, Routledge (2007); ‘From Space Immaterial: The Invisibility of the Lawscape’ in *Griffith Law Review* Vol. 17, No. 2, pp. 438–453 (2008); ‘Fear in the Lawscape’, in Jifí Pribáň (ed.), *Brauman’s Liquid Law and Society*, Routledge (2007), pp. 79–99

the perspective of the geographers Luke Bennett and Antonio Layard,<sup>11</sup> is between legality and geography, a combination that helps to draw out the ‘co-constitutive relationship of people, place and law’. We can chart the spatial turn in legal theory, according to Yishai Blank and Issi Rosen-Zvi,<sup>12</sup> from the mid-1990s onwards: a point that saw the consolidation of a more unified, if still diversified, methodology brought together under what they term ‘legal geography.’ Prior to that, as stated by the legal geographer Sandy Kedar, there were few references to and very little literature exploring the possible intersection between law and geography, although, of course, there are notable exceptions.<sup>13</sup>

The literature from the mid-1990s to the present day (see below) strongly suggests that space is increasingly becoming a necessary intermediary in critical standpoints of legality between, for example, objects and subjects (both of which it subverts or are ‘confounded’), universality/ global flows and the particular/ territorial, justice and the law, the material and the ontological, and the inside and outside. The important place that space occupies as a mediating concept, in the literature of legal theory, means that it has become a necessary component of a critical methodology that is able to disclose the complex and contingent relationality of social relations and the uncertainty, unpredictability and disorientation it frequently throws up. In other words, the dynamism and active nature of space (or at least an aspect of it which challenges representations) is utilised in a manner that continually forces law to question itself, in the sense of its own grounding assumptions, in order that it may reconfigure itself or at least reveal itself as a ‘productive force with a life of its own’. Allied to the latter view is the notion that law has the power to incentivise or discourage certain ‘spatial formations’ (such as legal spatial hierarchies), and that it is in part the responsibility of the spatial turn to bring to light the hidden processes that set the background of human norms and preferences.<sup>14</sup>

In Philippopoulos-Mihalopoulos’ work, an engagement with spatiality, drawing on the critical geographer Doreen Massey and Deleuzian theory, results in the reconceptualisation of justice as ‘spatial justice’. He envisages justice as a permanent state of oscillation between the emplacement and withdrawal of bodies in space, to the extent that any determined identity is foreclosed as the ‘alter’ and the ‘ego’ continue to exchange places, precluding the onset of dominant normative perspective. In his other closely associated works, he develops an understanding of law as assemblage or ‘lawscape’ that combines space, law and bodies in a complex assembly of constantly interacting elements. It was the legal geographer Nicole Graham who initially developed the concept of the ‘lawscape’<sup>15</sup> and we can see echoes of it in David Delaney’s theorisation of the ‘legal landscape’, or what he has more recently called the ‘nomosphere’.<sup>16</sup> With the latter concept, Delaney attempts to envisage a new way in which to suspend the disciplinary boundary between law and geography in order to offer a method that can more effectively capture the dynamic interplay between the socio-spatial and socio-legal – something he considers the spatial turn was previously struggling to achieve.<sup>17</sup>

In considering the relations proper to a spatialised justice, Sarah Keenan’s angle incorporates a spatially subversive way of looking at property relations.<sup>18</sup> Her methodology makes use of phenomenology<sup>19</sup> (particularly Sara Ahmed’s Queer Phenomenology), critical geography and empirical

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<sup>11</sup> Luke Bennett and Antonio Layard, ‘Legal Geography: Becoming Spatial Detectives’ in *Geography Compass*, Vol. 9, No. 7 (2015), pp. 406–422; also see ‘Legal Geography: An Australian Perspective’ in *Geographical Research*, Vol. 51, Issue 4 (November 2013), pp. 339–353

<sup>12</sup> Yishai Blank and Issi Rosen-Zvi, ‘Introduction: The spatial turn in legal theory’, in Pnina Motzafi and Michael Feige (eds.), *Hagar: Studies in Culture, Polity and Identity*, Vol. 10, No., 2010, pp. 37–60

<sup>13</sup> See the section on ‘Legal Geography: An emerging field’, in Sandy Kedar, ‘On the Legal Geography of Ethnocratic Settler States: Notes towards a Research Agenda’ in *Current Legal Issues* Vol. 5, pp. 401–441 (2003)

<sup>14</sup> See, for example, Blank and Rosen-Zvi (2012), p. 406

<sup>15</sup> Nicole Graham, *Landscape: Property, environment, law*, Routledge (2011). Also see *Landscape: Paradigm and place in Australian property law*, University of Sydney (2003); and Bennett and Layard (2015), pp. 409–10

<sup>16</sup> For more on this see David Delaney, *The Spatial, the Legal and the Pragmatics of World-making: Nomospheric Investigations*, Routledge (2011)

<sup>17</sup> Also see the review of Delaney’s work offered by Melinda Benson in *Antipode*, May 2012. It can be accessed here: [https://radicalantipode.files.wordpress.com/2012/05/book-review\\_benson-on-delaney.pdf](https://radicalantipode.files.wordpress.com/2012/05/book-review_benson-on-delaney.pdf)

<sup>18</sup> Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging*, Routledge (2015); ‘Subversive Property: Reshaping Malleable Spaces of Belonging’ in *Social and Legal Studies*, Vol. 19, Issue 4 (December, 2010); ‘Property as Governance: Time, space and belonging in Australia’s Northern Territory Intervention’, in *The Modern Law Review*, Vol. 76, Issue 3 (May 2013); also see, with Emma Patchett, *Spatial Justice and the Diaspora*, Counterpress (2017)

<sup>19</sup> Blank and Rosen-Zvi (p. 51) explain the importance of phenomenological works (such as those of Bachelard and de Certeau, and I may add, Merleau-Ponty) for the spatial turn by stating that they are able to ‘demonstrate the indistinguishability of the mental-subjective aspects of space from its material and social ones. Indeed,

socio-legal work, and draws upon the work of Divina Cooper, as well as the indigenous Australian understanding of property. Property relations, rather than being subject to dominant and exclusive legal definitions, are conceived as networks of relations embedded and held up by the space surrounding a property (whether an attribute or personal belongings). These malleable or spatially contingent networked relations are affective as they are linked to feelings of belonging which result in the merging of object (property) and subject (owner). The subversion occurs when these networked relations of space find themselves out-of-place in their extra-legality, where property relations are not simply, conventionally and hegemonically, rights over things, but unrecognised forms of belonging and new relations that unsettle established spaces of legality.

In the critical literature, Divina Cooper<sup>20</sup> is also of the utmost salience, particularly in relation to the attention she pays to communal modes of property and its implication more generally for property relations. In her empirical analysis she looks into various cases, from democratically run, self-governing free schools to the establishment of Jewish eruvim, in which space and property become complex means of belonging that enable subjects to navigate or challenge the boundaries between a civil, public life and a private but textured social life. Her focus on the social relations of belonging allows her to challenge the conventional notion of property as merely an object severable from the relations that gave rise to it, instead highlighting the complicated co-existence between the two.

Nicholas Blomley<sup>21</sup> is also commonly cited in the literature as one of the most important contributors to the spatial turn in his use of geographical concepts to deconstruct legal relations – such as property relations – so as to lay bare their contested history, and in order to reveal the ‘geographies of property’. This is apparent in his elucidation of concepts such as ‘hedging’, linked to the material reality of land division and acting as a signifier of law in late sixteenth- and early seventeenth-century England, and associated with the enclosures of private land that entailed the spatial division of common, open land. Using the example of the hedge, he is able to demonstrate how it came to be an instrument of dispossession regulating social relations and the traffic of bodies across land formerly held in common. He is further able to show how it acted as a means of maintaining a boundary, enforced through violence, separating the legitimate holder of property rights from threatening rogues: the disorderly and irrational; and the poor bodies of people and predatory animals that signified the beyond of a legality proper to the social order. Overall, a major part of Blomley’s project is to capture the entanglement between property, space and corporeal violence, through, to provide more examples, exploring geographical concepts such as ‘frontier’, the ‘survey’ and ‘grid’ and deploying the disjunction between outside and inside (law/nonlaw, property/non-property etc.) to explain how legal violence functions.

We can also refer to Richard Ford,<sup>22</sup> who articulates a conception of political geography in order to show how racial segregation, existing in local government jurisdictions, is enforced in the USA. In his analysis, jurisprudential and quasi-jurisdictional boundaries play a pivotal role in creating, naturalising and concealing the manner in which political influence and economic resources are distributed, aiding in the construction of racially identified places.

Furthermore, Sandy Kedar applies an approach he labels ‘critical legal geography’ to the study of ‘ethnocratic settler societies’. The focus is on the role of law in enabling the endurance of land

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phenomenology stresses the inseparability of the subject, the object and the intentionality of the former towards the latter. Hence, material spaces becomes wholly entwined with the experiencing subject and the intersubjective mediation of the two.’

<sup>20</sup> Divina Cooper, *Everyday Utopias: The Conceptual Life of Promising Places*, Duke University Press (2013); *Governing out of order: Space, law and the politics of belonging*, London and New York University Press (1998); ‘Talmudic territory: Space, Law, and Modernist Discourse’ in *Journal of Law and Society*, Vol. 23, No. 4, December 1996, pp. 529–548; ‘Opening up Ownership: Community Belonging, Belongings and the Productive Life of Property’ in *Law and Social Inquiry*, Vol. 32, No. 3 (2007), pp. 625–664; ‘Out of Place: Symbolic domains, religious rights and the Cultural Contract’ in Nicholas Blomley, David Delaney, Richard T. Ford (eds.), *The Legal Geographies Reader: Law, Power, and Space*, Blackwell Publishers (2001)

<sup>21</sup> Nicholas Blomley, *Law, Space and the Geographies of Power*, The Guildford Press (1994); ‘The Territory of Property’ in *Progress in Human Geography*, Vol. 40, Issue 5, pp. 593–609; ‘Making Private Property: Enclose, Common Right and the Work of Hedges’, in *Rural History*, Vol. 18, Issue 1, pp. 1–27, Cambridge University Press (2007); ‘Landscapes of Property’ in the *Law and Society Review* (1998); ‘Law, Property, and the Geography of Violence: The Frontier, the Survey and the Grid’ in *Annals of the association of American geographers* (2003); ‘How to turn a beggar into a bus stop: law, traffic and the ‘function of place’’, *Urban Studies*, Vol. 44, Issue 9, pp. 1697–1712 (2007); *Unsettling the City: Urban Land and the politics of property*, Routledge (2004)

<sup>22</sup> Richard Ford, ‘The Boundaries of Race: Political Geography in Legal Analysis’, in *Harvard Law Review*, Vol. 107, No. 8, pp. 1841–1921 (June 1994); also see ‘Law’s Territory (A History of Jurisdiction)’ in *Harvard Law Review*, Vol. 97, No. 4 (Feb 1999), pp. 843–930

regimes, with one of the principal case studies centring on the state of Israel. In his account, the spatial order of the ethnocratic state is maintained by ‘freezing’ initial property distributions so as to reproduce social relations of dominance – that is to say the domination of an elite (‘the founders’) over indigenous and immigrant groups. According to Kedar, implementation of a new land regime in Israel’s formative years, which was imposed through the use of technical legislation such as Absentee Property Regulations, conforms to this ethnocratic model, and acted as a means for dispossession.<sup>23</sup> Alongside this, and working on case studies within a similar geographical area, the political geographer Oren Yiftachel,<sup>24</sup> examining indigenous Bedouins and their engagement with the state of Israel, identifies ‘grey spaces’ as sites for a new transformative identities and a rejection of imposed citizenship. These are places that fall between the zones that are subject to urban planning and become marked by ‘criminality’ in the eyes of the state. In short, ‘grey spaces’ are sectors in which political subjectivities can be generated and autonomous zones set up, as the by-product of an urban geography that produces places beyond its power to control. More generally, Yiftachel is concerned with showing, throughout his work, how space, power and development create new forms of citizenship and identity.

The current work can certainly be seen to sit comfortably within the ‘spatial turn’ in critical legal theory. However, it also seeks to, tentatively, move beyond it by framing the ‘turn’ as more of a ‘return’. To address firstly what this manuscript has in common with what the commentators cited above have enumerated as the characteristics of the turn: there is a great deal of affinity between our own theoretical position and Philippopoulos-Mihalopoulos’, most specifically in his emphasis on a serious engagement with (Deleuzian inspired) spatial theory or spatiality from an ontological perspective, to redress the balance in a literature skewed towards case studies. Moreover, this present work also shares Blank and Rosen-Zvi’s, and indeed Bennett and Layard’s, focus on the importance of materiality, which they discern to be integral to the originality of legal geography, evident in the emerging literature. In addition, we wish to render explicit the link between the drawing of legal boundaries and use of law as a technology of power, utilised as a method of dispossessing the ‘other’ of their milieu and limiting their subjectivity, as demonstrated by the works of Kedar, Yiftachel, Ford and Bromley.

The point of the ‘return’ in this thesis is then to demonstrate how an engagement with geography – most crucially with a speculative geography – absorbed medieval and renaissance theologian-jurists, as it acted as an intellectual backdrop to the early development of thought on the framework of international law as well as ‘world-making’. Some of the components that make up the ‘turn’ can thus be found in the work of these figures who were indeed engaged with questions of spatiality and ordering in relation to law (the legal framework for this is addressed below). To provide an example, in looking at the contribution of the now obscure theologian Albertus Magnus to the tradition of natural law, we are immediately struck by the importance he places on geography, which is uppermost in his thinking in explaining the diversity of nations in the world. In fact, following Aristotle, Albertus connected the spatial organisation of the city-state/polis with the varying geography and climate of the world known to Europeans at the time. In his framework, the psychological standing of nations were somewhat determined, and the quality of their civic organisations heavily shaped, by the primordial elements. The elements involved, such as light radiation, were, in a similar manner to Bromley’s hedge, explicitly theorised as instruments which could be used to distinguish between the degree of political development of nations in terms that established the boundary between those who realised legality and those who were unable to. In this respect, the enduring power of Albertus’ speculative geography and its technologies of power can be seen in its great influence over Iberian theologians during the Age of Discovery. In this thesis, we endeavour to show that Vitoria approached the ‘Indian Question’ at the time of the ‘discovery’ of the Americas with Albertus’ speculative geography in mind. For Vitoria, a fundamental issue at point, in relation to the contentious nature of the Amerindians, was whether they were able to exercise the right of dominion over their own lands. In Vitoria’s final judgement, and this can be read as a rationalisation of the Spanish conquests, the Amerindians had forfeited this right, partially because of their lack of legal and political development, but also owing in part to the relationship with their fertile climes, or in other words, their intimate proximity to the earth. As we have already seen in the critical literature, property

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<sup>23</sup> Kedar (2003), pp. 420–37

<sup>24</sup> Oren Yiftachel, ‘Critical Theory and ‘gray space’: Mobilization of the colonized’, *City*, Vol. 13, No. 2–3, June–September (2009), pp. 240–256; ‘Planning and Social Control: Exploring the ‘Dark Side’’, *Journal of Planning Literature*, Vol. 12, No. 2 (1998), pp. 395–406; ‘Symposium: New Paradigm or Old Myopia? Unsettling the Communicative Turn in Planning Theory’, *Journal of Planning, Education and Research*, Vol. 19 (2000), pp. 101–110

relations today can be understood as having a clear spatial dimension. The same can be said of the Age of Discovery in relation to the exercise of dominion over the earth, which was an idea that intrinsically linked law with land. In the case of the Amerindian, for example, the fault lay with his inability to divorce himself from the primordial *givenness* of the earth (a point referred to as the ‘inconstancy’ of the Indian by Iberian Jesuits and Dominicans), and for not treating natural phenomenon as extractable objects divorced from their environment (i.e. exercising mastery over the land). As a result, Amerindian society was seen to be lying on the verge of lawlessness and in constant danger of being consumed by the contingency of the earth. Whilst acknowledging the focus on dominion and mastery, the link between land and law and the contingent quality of the earth in this argument can be seen as evoking Cooper’s and Keenan’s project of revealing property relations as contingent networks rather than reified artefacts, as well as the extra-legal status (out-of-placeness, or ‘a-legality’ in our parlance) of relations of property that do not require the realisation of an exclusivist rights claim. Here we are able to suggest that the past still retains its resonance in the present, or that there is a certain degree of contemporaneity in the spatial orientation and attentiveness of the works of the theologian-jurists we have cited, respecting of course their very different historical contexts.

While legal theorists such as Peter Fitzpatrick have demonstrated the salience of Aquinas and Vitoria to the early, emerging framework of international law on the basis of natural law, this work is concerned with highlighting the link between the aforementioned theologian-jurists and a speculative geography through the vital but largely overlooked intermediary of Albertus, to whom they were intellectually indebted. Overall, the primary innovation here is to bring into dialogue more obscure forms of medieval speculative geography – and its relation to, as well as influence over, natural law – with more contemporary forms of critical legal geography. In many ways then, we are in agreement with Delaney that critical legal geography needs to continue to find new means to push beyond its disciplinary impasse so as to reconstitute and re-energise the interaction between geography and law (of which the ‘lawscape’ and ‘nomosphere’ are examples<sup>25</sup>). We intend to do this by demonstrating that the questions that Albertus, Vitoria and Aquinas grappled with are not simply relevant to contemporary forms of legal theory, but also enable us to reimagine the theories currently in vogue in critical legal geography in novel ways via a re-examination of the aforementioned theologian-jurists’ scholarly oeuvre. This entails an engagement and relationship between ideas of the theologian-jurists and contemporary critical theory, as opposed to a temporally-rooted hierarchical relationship where the contemporary merely utilises a ‘lifeless’ past as a source-base or object of study. Indeed, as noted above, elements of contemporaneity can be found in both the ‘past’ and the ‘present’, and the works of Albertus, Vitoria and Aquinas need to be seen as having an active place in the generation, criticism and transformation of contemporary theory, just as contemporary theory shapes and reshapes them.

If spatial organisation did indeed become the model of thought in modern law,<sup>26</sup> then the question that concerns us here is the extent to which law re-territorialises thought itself – through its reliance on such practices as the drawing of lines between subjects and objects, nature and culture, own-ness and strangeness. We must also concern ourselves with the implications of such re-territorialisation of thought in and through its modern legal forms. Chief among them are Western international law, the democratic state and human rights. This implies taking stock of the fact that the modern West, and only the modern West, ‘extends and propagates its centres of immanence’ planetarily.<sup>27</sup> Hence, the legal question must also be concerned, specifically, with the sort of spatial phenomena indexed under such terms as ‘globalisation’ and ‘colonisation’, both old and new.

This is not to be understood in terms of a ‘spatial turn’ in law and legal thought, or, for that matter, any other attempt to build up an abstract, a priori or theoretical ‘model’ (as opposed to empirical research, in the Humian-Deleuzian sense) that could then be applied to the problematic at hand. The role of theory and method in this thesis is not conceived of as that of representation or abstract modelling, for what will be put into question is precisely the aprioristic approach that consists in the application of frames and models reputedly lying in wait in the mind of the observer to produce knowledge of the

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<sup>25</sup> My own formulation of the interaction between law and geography is mediated through the Amerindian schematics of the diametric and concentric dualisms, and their complex relation with a triadic root. See Part One, Chapter Four ‘Diametric and Concentric, Smooth and Striated’.

<sup>26</sup> Immanuel Kant, *Geographies*, trans. M. Cohen-Halimi, M. Marcuzzi, and V. Seroussi, Aubier (1999), p. 39

<sup>27</sup> Gilles Deleuze and Félix Guattari, *What is Philosophy?* Verso (2003), p. 97

observed object,<sup>28</sup> including their implicit set of lines of division (ground and limits, nature/culture). Rather, the point of this thesis is to make visible the acts of framing and modelling – in the concrete sense of drawing lines of division upon the earth’s global surface, i.e. ground or horizon, or walls – as themselves part and parcel of the spatial organisation of thought that is re-territorialised in the juridical forms of globalisation and coloniality. Theory and method in this thesis are, therefore, not external, but rather immanent to the problematic as well as being a tool or a set of tools with which to deal with it. This is to be understood in the sense that there are certain specific tools that are apposite to the aims of this thesis – and called for by the problematic itself as proposed in the previous paragraph – and others which are not.

In this respect, it is appropriate to determine the specific set of methodological choices and tools that are appropriate or immanent to our problematic. Let us do this in the form of a number of sub-clauses, which follow on from or develop the main proposition of this thesis:

1. Rather than a ‘spatial turn’, the problem considered here is, if anything, a matter of ‘return’.<sup>29</sup> This is so in the sense in which Immanuel Kant, the inventor of modern critique, first observed that spatial organisation was the model of thought.<sup>30</sup> In doing so, Kant situated himself and the problematic of the territoriality and deterritorialisation of thought (which he understood as a division between the empirical/transcendental) on the threshold of ancient forms of speculative geography and modern physical geography.<sup>31</sup> We locate our research project precisely in that threshold, for it is also the threshold between forms of legality that depended upon diametrical dualisms<sup>32</sup> (a spatial representation that divides into two symmetrical yet distinct category ‘halves’ such as east/west, north/south, Romans/gentium and so on), which in turn were based upon the distinctive forms of speculative geography, and forms of legality that relate territory (centres, centralised political organisations, perfectible communities or states) not only to other (foreign) centralised organisations, but moreover, with the earth and those who exist in its wild peripheries, in accordance to the distinctive forms of physical and human geography. To think law, under the aegis of spatial organisation, is not to focus solely on the line drawn between a familiar state and another familiar state (or within states, between the subject of law and the objective law that subjects him/her) and their reciprocal relations. Rather, thinking takes place in the transformational relationship between territory and earth.<sup>33</sup>
2. This is to say that in law, all primary diametrical dualisms or basic lines of division (our sovereign/their sovereign; national/foreign; subject/object) sit in a decisive relationship with a second, often unacknowledged, form of dualism. The latter can be called a concentric dualism<sup>34</sup> (see the pictorial representation below) that figures territory – the surface of the earth – as lacking a diametric axis, and expresses a contrast between a centre (populated by recognisable states that recognise one another, reciprocally) and a profane, darker, but also domestic, child-like or feminine periphery. This organisation has long been known to ethnographers, and this thesis takes stock of that fact. It was also well known to Kant, the geographer, who referred to it explicitly in his *Lectures on Geography* and implicitly in his attempts to establish a stable

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<sup>28</sup> Deleuze (2015), p. 35

<sup>29</sup> Cf., Miguel Abensour, *Democracy Against the State*, Polity (2010), xiii, xviii, xxviii. Here, ‘incessant self-return’ can be thought in very different terms – as the power of the ‘insurgent’ *demos* in its continuous self-institution, the ‘redirection of constitution to constituent power’.

<sup>30</sup> Deleuze (2015), p. 15: ‘Cognition is in the milieu and almost in the milieu of what it knows.’

<sup>31</sup> See: Stuart Elden, ‘Reintroducing Kant’s Geography’ in *Reading Kant’s Geography*, eds. Stuart Elden and Eduardo Mendieta, State University of New York (2011b), pp. 1–19; Stuart Elden, *The Birth of Territory*, University of Chicago (2013b), pp. 15, 330; David Harvey, *Cosmopolitanism and the Geographies of Freedom*, Columbia University Press (2009), pp. 17–36; Edward W. Soja, *Postmodern Geographies: The reassertion of space in critical social theory*, Verso (1989), p.125: ‘[The] Kantian legacy of transcendental spatial idealism pervades every wing of the modern hermeneutic tradition...and has been central to the modern discipline of geography since its origins in the late nineteenth century.’

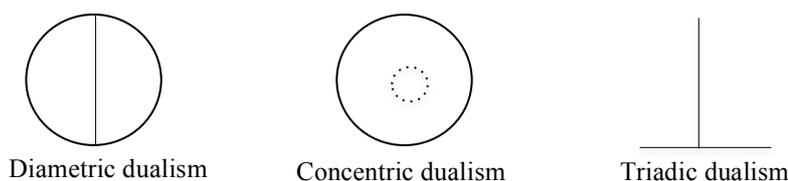
<sup>32</sup> Eduardo Viveiros de Castro, *Radical Dualism: A meta-fantasy on the square root of dual organisation, or A savage homage to Levi-Strauss*, Hatje Cantz (2012c), p. 8

<sup>33</sup> Deleuze and Guattari (2003), pp. 85–7, Viveiros de Castro (2012c), pp. 7–8

<sup>34</sup> Viveiros de Castro (2012c), p. 7

ground for thought.<sup>35</sup> Although Kant has been more often understood as a prisoner of the subject/object relationship, who stabilised the thought of the thing-in-itself (the *noumenon*) in the well-grounded position of the subject, ‘his idea of the Copernican Revolution puts thought in a direct relationship with the earth’, as Deleuze and Guattari say.<sup>36</sup> Legal theories after Kant, following his model of spatial organisation, do indeed attempt to establish legal production and the hierarchy of sources based on the position of a stable ground, which post-Kantian jurists like Hans Kelsen denominated the ‘Grundnorm’ or the constitution of a well-established, centralised state, with established borders and lines of division, whose sovereign produces the ground and limits<sup>37</sup> upon which the subjects of the law will base their behaviour. But just as in Kant, the critical model puts legal thought and practice in a direct relationship with the earth. Additionally, in post-Kantian legal modern theories one can observe the placing of the grounds for legality against the backdrop of the entire earth. The point is to make that seemingly invisible background and its function as frame (behavioural frame) apparent. Put otherwise, our methodological procedure consists of bringing the background to the foreground, thereby dissolving the illusion that only dual reciprocal relations between horizontally divided entities matter to law.<sup>38</sup> Rather, our methodological choice is to make such dualism enigmatic.

3. One of the enigmas that this thesis intends to solve is that diametric dualisms, despite their reciprocal or symmetrical forms (reciprocity being the ‘golden rule’ of international law) often oppose halves according to asymmetrical qualities (weak/strong, etc.). This enigma suggests the need to recognise that every central space of reciprocal relations always relates asymmetrically to a peripheral space characterised as having asymmetrical qualities. Indeed, the term ‘coloniality’<sup>39</sup> refers to such a recognition, and introduces the question of uneven power relations in every schema of reciprocity. Crucially, however, it is one of the most important points of this thesis to observe that the relationship between these two forms of spatial organisation – diametric dualism and concentric dualism – is one of transformation. Put otherwise, the one is latent in the other, and moreover, a triadic structure is latent and in complex coexistence with forms of dual organisation.
4. In order to make sense of the transformational relation between forms of spatial organisation often conceived of as abstract, trans-historical and non-spatial, one requires the use of both figures and concepts such as ‘ground’ and ‘horizon’.<sup>40</sup>



5. Therefore, methodologically speaking, this work proceeds in close proximity to: (a) the kind of spatial thinking that has philosophical geography at one end, and what Deleuze and Guattari call

<sup>35</sup> Elden (2011), pp. 6–8; Soja, p. 125: ‘The vision of human geography that it induces is one in which the organization of space is projected from a mental ordering of phenomenon, either intuitively given, or relativized into many different ‘ways of thinking’.’ Also see Christopher Kerslake’s *Immanence and the Vertigo of Philosophy: From Kant to Deleuze*, Edinburgh University Press (2009), pp. 3–5, for an alternative interpretation of Deleuze’s theoretical relationship with Kant and post-Kantians.

<sup>36</sup> Deleuze and Guattari (2003), p. 85, Deleuze (2015), pp. 30–6. Also see Hans Blumenberg, *The Genesis of the Copernican World*, trans. Robert M. Wallace, MIT Press (1998), p. 74

<sup>37</sup> In the same manner in which the Kantian ground ‘imposes a limit on knowledge’ as the categories only provide the ‘conditions for phenomena’. In the post-Kantian legal sense: closure (limits) is necessary for disclosure (the stabilised normativity of law). See Deleuze (2015), pp. 35–6

<sup>38</sup> Oscar Guardiola-Rivera, *After Kant’s Declaration. On Hans Lindhal’s Fault Lines of Globalisation*, paper delivered at the Fault Lines of Globalisation Workshop, Birkbeck College, University of London (December, 2013)

<sup>39</sup> See Román Grosfoguel, ‘Colonial Difference, Geopolitics of Knowledge and Global Coloniality in the Modern/Colonial Capitalist World-System’, *Review* (vol. 25, no. 3: pp. 203–24, 2002), and ‘Transmodernity, Border Thinking, and Global Coloniality’ in *Eurozine* (July, 2008)

<sup>40</sup> The diagrams of the dualities and triadic schemas are taken from figure 1 in Viveiros de Castro (2012c), p. 9

‘geophilosophy’ at the other (with both European and Amerindian sixteenth-century perspectives as well as eighteenth-century Kantian critique as intermediaries or thresholds); (b) ethnomethodology and specifically structural and post-structural anthropology, as related to the search for the emergence of state and its legality in the work of Tim Ingold and Eduardo Viveiros de Castro, inspired by Lévi-Strauss and Pierre Clastres.<sup>41</sup> These anthropologists will help us to interpret the ethnographic material of the sixteenth-century missionaries in the Americas, in light of Amerindian cosmology and radical dualist thinking. In terms of thinkers who bring these and other related perspectives to bear upon the question of the spatial organisation of legal thought, this thesis shall declare its proximity to the work done by such writers as Doreen Massey, David Harvey and especially Hans Lindhal.<sup>42</sup>

In addition, a key theme of this manuscript is to render the question of the spatial organisation of legal thought in terms of exploring two modes or paradigms of international law and to examine their interrelation. On the one hand, it is possible to consider what will be called here the ‘disciplinary’ paradigm of international law. This will be presented here as a form of dualist spatial organisation that both sublates and conserves previous forms of symmetrical dualism while innovating in respect to them in order to bring within sight the entire surface of the earth. Disciplinary forms of law function as apparatuses of capture, in Deleuze and Guattari’s parlance.<sup>43</sup> On the other hand, I shall consider the ‘dissident’ paradigm of international law. The latter not only makes it apparent that triadic classifications are always more or less present and in complex coexistence with the dual forms of the ‘disciplinary’ paradigm. No less important, dissident approaches imply that the real opposition is between diametric-cum-symmetrical dualism and asymmetrical or disciplinary triadism. Importantly, for our purposes, the latter is a transitional or nomadic figure. Dissidence, then, is here not only critical, but furthermore, on the move.

‘Disciplinary’ international law is at once ‘grounded’ and continuous with the old imperialism and colonialism which have dominated the Third World since at least the period between the sixteenth and nineteenth (in the case of the Americas) or twentieth (in the case of Africa and Asia) centuries. We will explain later what precisely is meant by the terms ‘ground’ and ‘groundedness’. For now, it will suffice to distinguish between classical and modern appeals to soil and origins as the grounds of legitimacy and rule, and also to point out that, as the foundation or ‘groundedness’ of modern/colonial imperialism was shattered by the revival of Third World utopian and remedial justice energies and struggles, particularly during the 1960s and 1970s, embodied as it was in national liberation movements and emancipatory internationalism, international law sought a new ground on which to base its budding judicial universality.

The difference between classical appeals to soil and origin, based upon the dualism between the autochthonous and the stranger, and modern divisions based on geographical, racial and class thinking applicable to territorial units and the planet as a whole, is that only in the latter is the legitimacy of a people to rule over a territory understood to presuppose the absence of other peoples from that territory; the latter must either assimilate or be gone, one assumes to some ‘wild’ outside or to face extinction. If the first is a clear example of a diametrical dualism, the second appears as a form of concentric dualism. Disciplinary international law innovates over the classical model of ‘*ius gentium*’ (the Roman law of nations) precisely insofar as it not only distinguishes between ‘us’ and ‘them’ (the recognisable ‘them’ being subject to relations of reciprocity), but also establishes such symmetrical alliances in relation to the earth as a whole, in the form of a centre and its wild periphery. If such peripheries remain a case of the stranger, that is to say if they do not convert or ‘integrate’, then their bodies and specific genealogy can (perhaps must?) be erased from the face of the earth so as to ‘purify’ the legitimacy claim of a ruling

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<sup>41</sup> The French ethnographic tradition, emerging from French colonial activities in the Americas during the sixteenth-century (particularly in the Brazilian Amazonia), links the likes of Jean de Léry, to the more contemporary Lévi-Strauss, Hélène Clastres, Pierre Clastres, the latter having inspired Deleuze and Guattari’s thoughts on nomadology and the war machine. The French intellectual tradition in ethnography has also influenced Brazilian anthropology, of which Viveiros de Castro is a notable contributor. See Hans Staden, *Hans Staden’s True History: An account of cannibal captivity in Brazil*, ed. and trans. Neil L. Whitehead, Micheal Harbsmeier; Introduction, xli–xlii, xlvi

<sup>42</sup> Doreen Massey, *For Space*, SAGE (2005); David Harvey, *Cosmopolitanism and the Geographies of Freedom*, Columbia University Press (2009); Hans Lindhal, *Fault Lines of Globalisation*, Oxford University Press (2013)

<sup>43</sup> Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and schizophrenia*, trans. Brian Massumi, Continuum (2012), pp. 468–9

people.<sup>44</sup> Crucially, such ‘purified’ or grounded legitimacy, as a people, can be projected over the entire earth as the very measure or norm for apportioning terrestrial space. The ground of legitimacy is no longer simply being of the space, but rather being in this or that space unimpeded by others. This is to say that it is not just local but actually trans-local. The ground of legitimacy becomes then the obliteration of all others who appear as an obstacle in the horizon of ‘our’ march forward in space and time.<sup>45</sup>

This means that, historically and analytically speaking, we must add a third to the two well-known elements of any law and politics that begins with the sovereignty of a *demos* (the people as mass) over a *topos* (a place). The study and consideration of the first two elements has been the main concern of modern political philosophy and the social sciences to this day: the first element is the present state of the regulator, conceived of in more or less hierarchical fashion as being able to use a set of decision-making procedures and established forms, whose function is to filter the variety of interests and settle public opinion. This first element occurs simultaneously with the second, namely, the present state of the regulated environment. Since these two elements or their states are coincident, neither can be said to cause the other. It might be better to say to say they are directionally correlated, meaning that their relation will result in an outcome in the world largely dependent on the factors antedating this present moment which influence or perhaps generates both states in the now, when we study or observe them. The standard notion in the political philosophy or scientific study of such elements in established democratic institutions is that management (the regulator) can read the world situation, act upon it and produce results which are susceptible to correction by error-controlled feedback. However, the standard view fails to account for the fact that when we read a situation we use low-variety models (like tinted glasses, or forms of the mathematical projected geographically, architectonically) that diminish our ability to deal with a high-variety environment.<sup>46</sup> Because of this, the spectrum of options to choose and to act from tends to be squeezed down. Impotence ends up by defining the boundaries of consensus (what must and what must not be done as well as what can and cannot be ordered). This is precisely what is meant when people say that politics and law take place at the level of ‘the art of the possible’. It means that eventually, both the options to choose from and the options to act (tend to) become unitary for managers and regulators, even if these final options are ludicrous and lethal. If one adds to that the important insight that warnings of incipient disaster cannot be registered in the language of the low-variety model, the conclusion is that models of sovereignty almost always end up making choices and acting in ways both ludicrous and lethal.

Hence the need to add a third element when we analyse the modern sovereignty of a people over a place: squeezed-down choices and actions end up selecting and de-selecting or de-specifying who or what counts as a people or, within the recognisable boundaries of the surrounding environment, as ‘one of us’. As the political philosopher and legal theorist Oscar Guardiola-Rivera has observed,<sup>47</sup> this can be seen not from the perspective of a dialectics of recognition (which is the basis of current concepts of law, analytic or socio-legal) but from perspectives that see failures of recognition. This is the view that places the addition or subtraction of bodies to the *demos* – not only public opinions or the finality of interests – at the centre of the operation of democratic legal institutions and the functioning of rights.<sup>48</sup> Let me explain this further by pointing out that we tend to forget how law not only establishes the boundary between what we must and must not do,<sup>49</sup> as well as policing the limits between order and disorder, but also declares who counts as orderable and who does not (the so-called ‘uncounted’<sup>50</sup> in politics).<sup>51</sup> The latter – said to be lacking of any interests or future horizons of their own, any set of normal desires or the

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<sup>44</sup> See Duffield (2013), pp. 189–190

<sup>45</sup> Duffield (2014), pp. 2–3

<sup>46</sup> Oscar Guardiola-Rivera, *À Fonds Perdu*, delivered at the II International Seminar on Institutional Theory: International Courts and Political Reality, Universidade federal do Rio de Janeiro (unpublished manuscript, 7 November 2013), p. 17

<sup>47</sup> Guardiola-Rivera (2013), p. 18

<sup>48</sup> A thorough articulation of this theory of legal ordering can be found in Hans Lindahl, *Fault Lines of Globalization*, Oxford University Press (2013), pp. 117–56. The ordering process of a legal institution effectively ‘tames’ the excesses of, in Claude Lefort’s terms, a ‘savage’ or, in Abensour’s (2010), ‘insurgent democracy’.

<sup>49</sup> Deleuze draws the distinction between law that limits actions, and institutions that act as ‘a positive model for action’. See Gilles Deleuze, *Desert Island and Other Texts: 1953–74*, ed. David Lapoujade, trans. Michael Taormina, Semiotext(e) (2004), pp. 19–20

<sup>50</sup> Abensour, xviii

<sup>51</sup> Lindahl, pp. 37–8

ability to calculate – are thrown into or relegated to the obscure realm of the rogue or un-orderable.<sup>52</sup> Law and political institutions aggregate and include, but also select and relegate. Put in deliberative terms, legal as well as political institutions not only place the rules for dialogue, but also prescribe who can take part in the conversation and who cannot. The latter may be deemed biologically, pathologically or culturally backward, or unable to speak an intelligible language, a rogue or fanatic. Put simply, legal and political institutions prescribe who counts as ‘one of our own’.<sup>53</sup> Notice, however, that this operation (adding and subtracting bodies and languages or public opinions) depends on the postulation of the not-one-of-us as zero, non-being, rogue or abnormal, as impurity or inexistence (the ‘below-otherness’).<sup>54</sup> This is, in fact, an act of ‘original displacement’ and dispossession,<sup>55</sup> of one occupying or taking the place of another. The Caribbean psychiatrist and political activist Frantz Fanon called this act ‘damnation’.<sup>56</sup> For him, such acts define colonialism beyond the master/slave dialectic or struggle for recognition.

One can call this zero-ground of the operation that adds or subtracts bodies and interests-desires, as well as public opinions, the ‘victim’, if and when compared with a beneficiary who may or may not be the same as the perpetrator. In a time and trans-local sequence this can include the successors of the perpetrators, and in a parallel but different sequence the successors of the victims. These two groups might share the same space but in fact they might just as well belong to different planets. They are ‘mutually exterior occupants of the same ground’, and thus, what characterises their situation is their prior lack of relation.<sup>57</sup> This is how Fanon sees the (colonial) situation of native and settler. According to Fanon, this is also the root of genocide.<sup>58</sup>

If this is the case, then genocide as rooted in a prior lack of relation should be understood not only as a violation of human rights or the institutional pact of democracy, an exception to the rule or contract, but actually as the disavowed ground of the rule and the frame of a certain practice and conceptualisation of international law, rights and politics as a planetary ‘culture’ of human rights, international rule of law and democracy. This is what is meant here by the ‘disciplinary’ mode of international law.

The disciplinary mode of international law is based on early imaginations of ground, exemplified by the role played by the ‘horizon’ in the linear perspective. The invention of both the linear perspective and the horizon, as both a visual technology and a physical geographical dividing line with normalising and normative implications upon the planet as a whole, can be traced back to the beginnings of circumnavigation and the possibilities this generated for thought and the practices of government, and thereafter. Indeed, it can be argued that the invention of the linear perspective, which makes both space and time calculable or predictable and thereby manageable, also played a crucial role in the emergence of international law. The notion of horizon for early navigators was enabling of the linear perspective and orientation; this regime of visibility came to dominate international law before postcolonial countries gained formal independence. Post-independence, a politics of verticality and containment would predominate, aided by the prevailing and pervasive discourse of development.

The ‘dissident’ mode of international law proves to be a persistent challenge to the disciplinary paradigm outlined above, particularly because it is disruptive of its ‘anchoring’ orientation and constructs local orientations in its place, which nevertheless have global effects. The national liberation movements that emerged in the 1950s–60s, as well as the Amerindian nations of the sixteenth century, constitute useful examples of what I am terming the ‘dissident’ mode of international law, insofar as they question

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<sup>52</sup> Lindahl, p. 157

<sup>53</sup> Guardiola-Rivera (2013), p. 18

<sup>54</sup> See Lewis R. Gordon, ‘Through the Zone of Nonbeing: A reading of *Black Skin, White Masks* in celebration of Fanon’s eightieth birthday’, *C.L.R. James Journal* (vol. 11, no.1, Summer, 2005), p. 32. Also see Maria Aristodemou, ‘Does the Letter of the Law Always Arrive at Its Destination? A Study in Feminine Psychology’, in *Law and Literature* (vol. 22, issue 3, 2010), p. 399: ‘Freedom outside the law...runs the risk of psychosis’.

<sup>55</sup> See Robert Nichols, ‘Disaggregating Primitive Accumulation’, *Radical Philosophy* (November/December, 2015) for analysis of the term ‘dispossession’ used here.

<sup>56</sup> In Lewis R. Gordon’s analysis, the etymology of ‘damnation’ can be traced back to its Latin and Hebrew roots, it can be thought of as describing a process of ‘falling’ not just to ground, but further still – to a place below ground, i.e. to hell, the realm of disappearance and non-recognition. See ‘Through the Hellish Zone of Nonbeing: Thinking through Fanon, Disaster and the Damned of the Earth’, *Human Architecture: Journal of the Sociology of Self-Knowledge* (Summer, 2007), pp. 9–11

<sup>57</sup> Guardiola-Rivera (2013), p. 19

<sup>58</sup> See Frantz Fanon, *The Wretched of the Earth (Les Damnés de la terre)*, trans. Constance Farrington, Penguin Books (2001), p. 28

the key assumption behind ‘disciplinary’ modes of international law: that the legitimacy of a people to rule over a territory is correlated with, or even dependent upon, the emptiness of such territory.

To be clear, it is true that law and politics have been obsessed with ground and origins for quite some time.<sup>59</sup> The normative idea that people sprung from the earth itself, and are the original inhabitants of a country as opposed to foreigners and strangers, and those of their descendants who kept themselves free from admixture, ‘is perhaps as old as history itself’.<sup>60</sup> We can provide as an example of the classical version of this obsession, Isocrates’ *Panegyricus*, in which the so-called myth of autochthony is elaborated. Consider, for instance, the oration, in which Isocrates tells his fellow Athenians: ‘we did not become dwellers in this land by driving others out of it, nor by finding it uninhabited, nor by coming together here a motley horde composed of many races’. The implication here is that the first person plural could only be properly attributed to and used by ‘we of a lineage so noble and pure that throughout our history we have continued in possession of the very land which gave us birth, since we are sprung from its very soil and are able to address our city by the very names which we apply to our nearest kin’.<sup>61</sup> Because the land endures, as well as our connection with it, there is a ‘we each’ as well as a ‘we together’.<sup>62</sup>

Dissident approaches to international law take stock of this fact, and question disciplinary modes of international law from the standpoint of such critique in theory and practice. Thus, for instance, Third Worldist movements in the 1960s and 1970s disclosed how the political legitimacy of planetary rulers, and the disavowal of the existence of those subjected to their rule, as well as the system of rules they created in order to maintain such a relationship of subjection, including mainstream international law, was in fact based upon a prior lack of relation. As such, the system of rules in place can be said to be ‘groundless’, and its appeal to physical or metaphysical grounding can be judged as, in fact, obscuring or disavowing this prior groundlessness. Conversely, those subjected to ‘disciplinary’ rules of international law find themselves in a situation that can be characterised as ‘free-fall’. That is the meaning of the term ‘damnés’ or ‘wretched’ in Frantz Fanon’s analysis of the modern/colonial situation.<sup>63</sup> Therefore, their self-affirmation can only have as its starting point an acknowledgement of groundlessness, of being de-based (the native always ‘presumed guilty’), in ‘free-fall’. This amounts to the radical contingency and self-constitution of the people as nation, taking place from within the global institutions of international law and against them. This could also be said of the Indians in the sixteenth century whose molecular-becoming and embrace of the other suggested their ‘free fall’ from normative set standards of a planetary jurisprudence (*ius gentium*, ‘*ius civile*’ – Roman civil law). These Indians were essentially a curious case of perceiving oneself and the lands one inhabits as in perpetual transformative movement. The dissident paradigm of international law is thus defined by its groundlessness and embrace of absolute contingency.

We can understand how these two paradigms of international law work by looking at the geographical imaginary and spatiality underlying them. The work of Gilles Deleuze and Félix Guattari, who are among the contemporary thinkers and observers of legal and political phenomena pointing towards our contemporary condition of groundlessness, is useful in this regard. Their conceptualisation of ‘striated’ and ‘smooth’ space can be a useful paradigm to examine how the geographical imaginary of international law and its related categorical and geographical cuts, divisions or fault-lines, work. The spatial cut between the Global North and South can be said to be parallel to the cut that legal institutions in general, and those of international law in particular, make between subjects and objects of law. These spatial cuts created the grounding for the geometric matrixes of striated space that provided a toolkit to colonise the world, and for Western domination as well as the domination of Western concepts. By contrast, the smooth space of nomads and Third World social movements here offer a challenge to the geometric matrix of capture in which disciplinary international law and its institutions would like to plunge the globe.

These distinctions and clarifications may help us to understand the basis of the legal problem that underpins Part One: does the geographical imaginary of the disciplinary mode of international law stymie the postcolonial search for justice? And vice versa, how might dissident discourses which

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<sup>59</sup> Guardiola-Rivera (2013), p. 1

<sup>60</sup> *Ibid.*, pp. 1–2

<sup>61</sup> Isocrates, *Panegyricus*, Nabu Press (2013), trans. John Edwin Sandys, 4.21

<sup>62</sup> Guardiola-Rivera (2013), pp. 1–2

<sup>63</sup> Fanon (2001), pp. 39–43

underpin an alternative understanding of international law lead to a re-emergence of justice as struggle,<sup>64</sup> albeit from a local level? We argue here that spatialising justice is one of the ways in which we can theorise a renewed conception of justice as struggle against the attempts of international law to stymie Third World or ‘global southern’ claims. The new identities of social movements in the Third World, from the 1960s to the present day, are based on an alternative conception of ‘time-spaces’. This emphasises the radically incalculable nature (contingent, groundless) of their dissident discourses, which effectively escape the capture of the singular progressivist narrative of First World development.

Part Two deals with the geographical imaginary as specifically formulated by the medieval Dominican Albertus Magnus. The discussion of the latter’s speculative geography occurs in the context of an innovative revision of Aristotelian ontology and ethics. Most significantly, Albertus’ adaption of Aristotle’s theory of place (*topos*) involves the suppression of its capacity to act as a meeting point for immanent forces. Through this method, Albertus is able to partially revoke the self-ordering capacity of Aristotle’s nature (*phusis*) and push the claims of an arresting form over the movement of matter. The drafting in of Neo-Platonism through Arab optics provides for the fixity of the land and the management of the earth from above – from the location of a heavens-in-flux. Albertus thus creates the conditions for Aristotle’s immanent cosmos to be folded back into human law (*nomos*): ‘mutual affordability’ channels the formative power of the heavens back into a ‘perfectible’ normative legal order of the ‘polis’ and its institutions. Within the enclosure of the polis, rationality (*logos*) and agency are realised through control over the setting of normative boundaries. From the planetary perspective, Albertus proclaims the thesis of the moral authority of place by positing the tripartite world-machine, or ‘machina mundi’, signifying the grafting of a psycho-geography upon the orb of the earth. The privileged middle nations are located in the optimal place for the transmission of perfect form from above, and the ethical motion of the polis consolidates the citizen as a ‘perfect’ being and master over the earth. The citizen of the middle nations is therefore invested with the political power to rule over those imperfectly formed beings of the periphery nations. This, crucially, sets up the groundwork for Dominican and Jesuit perspectives on the Indian Question, and the most accomplished attempt, by the theologian-jurist Francisco de Vitoria, to justify colonialism in the Age of Discovery.

Vitoria’s response to the normative challenge thrown up by the encounter between Amerindian nations and the *conquistadores* is examined in Part Three. Vitoria’s jurisprudence, and the spatial form of organisation it appears to assume, seemed an answer to both the exclusionary violence (‘Anthropocentric’ thinking) propagated by the colonist and the problematic psychology of the Indian. While the diametrical duality of animal and man was the schema through which the coloniser perceived the Indian as an unrecognisable ‘stranger’, Vitoria’s juridical move is to integrate the Indian into his legal system through the use of canon law’s ‘Humanitas’ category of mankind, in addition to old Roman law’s *ius gentium* and *ius civile*. The integration of the Indian into a planetary jurisprudence bound indigenous societies to normative standards set by the Spaniard, thus legitimising within legality the violence that had previously existed beyond it. A common framework of law and jurisprudence held out the hope of the Indian becoming a fully functioning part of Humanitas, and by implication liberating him from the imperfections that were implied by a proximity to the un-orderable earth or the open totality of the *given*. Vitoria’s jurisprudence was thus envisioned as a way to save the Indian from the fall into ‘non-being’ by placing him on the ‘child-like’ periphery of the disciplinary system. In summary, we argue, Vitoria’s reasoning legitimised the folding of Amerindian nations and their cosmologies back into the positive law of Spanish imperialism with its established set of molar institutions.

Part Four is concerned with Vitoria’s brand of natural law, derived as it is from St Thomas Aquinas. In appraising the ‘profane’ habits indulged in by the Indian – namely cannibalism, polygamy and so on – Vitoria worked within Aquinas’ conceptual apparatus, the ‘chain of being’. The latter is theorised by Aquinas as an immense cosmic spatial arrangement (what Doreen Massey identifies as a ‘power-geometry’) or ladder from God all the way to the lowest inanimate beings. The chain thus not only acted to order and organise the natural world, but contained a prescriptive normative force governing man’s relations with others, such as predatory animals. The onto-theology here is brought together and contrasted with Amerindian cosmology and Perspectivism to demonstrate how the latter not only acts to destabilise natural law theory and its associated representational conceptual structures, but also how its prohibited ontology could herald the return of a form of immanence and dissidence. In this

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<sup>64</sup> For an elaboration on ‘justice as struggle’ see Robert Meister, *After Evil: A Politics of Human Rights*, Columbia University Press (2011), pp. 21–3

spirit, the shaman as a carrier of animal perspectives demonstrated how an immanent justice emanating from indigenous cosmology could act as a way to deconstruct the representational and contracted perceptual notions underlying natural law. The alliance-becoming between the free-falling Indian and other creatures imprisoned in the chain intimated a way in which indigenous cosmologies and practices could curb the stratifying effects of disciplinary institutions and their related anthropocentrism.

# Part One: The Horizon of International Law Development and Discipline in the Post-National Liberal Context

## Chapter One: The Horizon of International Law in its Disciplinary Mode

The idea and image of the horizon have played a central role in the development of the linear and progressive perspective that characterises the disciplinary paradigm of international law. The ‘horizon line’ came from techniques of measurement used by early Arab navigators as a means of helping them orientate themselves upon the roughness of the seas.<sup>1</sup> It would prove to be the embryo of the kind of linear perspective that has ‘long dominated our vision’, as well as the techniques of management, regulation and control based upon the architectonic projection of the mathematical upon the states of the world.<sup>2</sup>

This is so as the geometric horizon, from its inception as an early navigational concept, has entailed the flattening of the space of the globe into an ‘abstract flat line upon which the points on any horizontal plan converge’.<sup>3</sup> In order to act as an effective object or device of orientation, the horizon can be thought of as linear, something which is abstracted from, as well as suppressive of, the virtual curvature of the earth. This movement suggests both the construction of an objective ‘mathematical...infinite, continuous, and homogeneous space’ and the production of a ‘one-eyed and immobile spectator’.<sup>4</sup> The result is not only the linear horizon that reduces the states of the world to a mathematical and measurable perspective, but, in addition, the perceiving subject imagined to be static and rooted (well grounded, or with a fixed body and position<sup>5</sup>). The ‘groundedness’ of the perceiving subject *vis-à-vis* the horizon was indeed crucial to the development of technologies of circumnavigation as it posited a stable subjective perception (of the horizon) on a surface that is always moving, flowing and sinuous. What is ultimately created here is the fixed point of the horizon/object relative to the subject.

The productive capacities of this invention, the horizon, as a navigational tool as well as a means of measurement and control of the risk associated with open spaces, resonate with what Deleuze and Guattari would describe as the striating of the smooth space of the seas. It was constructive of an orientation, ‘an anchor’ that grounds, holds and creates a sense of direction which would, historically as well as conceptually, make possible the emergence of the mainstream or control-‘disciplinary’ paradigm of international law. The latter functions, precisely, as an anchoring orientation in a globalised, moving world. Put otherwise, it produces a surrogate world, calculable, anchored, divisible and low-variety. It orients and grounds by splitting and categorising between the subjects and objects it posits, or as visual theorist Hito Steyerl says, observing the political implications and controlling tendencies of political technologies of grounding, it reinvents ‘subject, time, and space’ as a ‘tool kit for enabling Western domination, and the dominations of its concepts – as well as redefining standards of representation, time, and space.’<sup>6</sup>

The horizon, as Claire Colebrook relates, is made up of two presumed universals. Firstly, there is the encompassing horizon itself, which acts as a ‘Whole’ or final ground for being. Secondly, there is the subject. The subject ‘converts being into being for us’.<sup>7</sup> The idea here is that the stable subject posited by the horizon is not merely *a subject*, it is the transcendental subject relatively freed from its immersive

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<sup>1</sup> Hito Steyerl, *The Wretched of the Screen*, Sternberg Press, e-flux journal (2009), p. 15

<sup>2</sup> *Ibid.*, p. 14. Indeed, according to the French philosopher Henri Lefebvre, the linear perspective as a representation, ‘in the making for centuries’, become enshrined in urbanistic and architectural practice. See: *The Production of Space*, trans. Donald Nicholson-Smith, Wiley Blackwell (1991), pp. 41

<sup>3</sup> Steyerl, p. 18; Lefebvre, p. 79

<sup>4</sup> Steyerl, p. 18

<sup>5</sup> *Ibid.*, p. 19

<sup>6</sup> *Ibid.*, p. 19

<sup>7</sup> Claire Colebrook, ‘The Space of Man: On the specificity of affect in Deleuze and Guattari’, in *Deleuze and Space*, eds. Ian Buchanan and Gregg Lambert, Edinburgh University Press (2005), p. 202

surroundings. The ‘toolkit’ of Western domination is all too evident here, as the transcendental subject within international law is clearly a universalisation (in a geo-political sense) of an all-too-Western subject (as will be rendered explicit throughout this work).

It is important to understand how the concepts related to the horizon work here. For Deleuze, it is possible to say that concepts are always orientating,<sup>8</sup> that they provide a direction for the movement of thought. Concepts are fluid, and ideas provide an orientation and direction for empirical reality to push beyond itself. However, the difference to the concepts of disciplinary international law is that they are not only foundational – as in their capacity as the key tenets, laying the basis for an international law – but productive of the foundation itself. This is what the anchoring orientation consists of; it is creative of several legal concepts, which endure through the continued reproduction of their configurations. However, the concepts that maintain the foundation (and thus verticality) of international law abandon the need for external reference points outside their own (conceptual, coherent) configurations, as they claim transcendence.<sup>9</sup> This is essentially a form of territorialisation amongst concepts. Transcendent concepts, such as the those which go unchallenged in shoring up the foundations of international law, cut themselves off from linking with those ‘neighbourhoods’ or configurations of other/alternative concepts.<sup>10</sup> For the most part, connections between concepts from different or alternative configurations have the deterritorialising effect of transforming not just the concepts we are familiar with, but also the configurations in which they are embedded. This process helps to continually reactivate a sense of contingency amongst concepts, as well as their connections. Transcendence amongst certain legal and economic concepts, to put it otherwise, is the result of their ghettoisation as they eschew bridges and links to other concepts and their allied neighbourhoods. This only serves to reinforce their power and force – particularly in their attempt to create a ground and lay down origins. However, this anchoring orientation that is produced from, and is productive of, the dominant Western concepts of international law, can only be thought of as a momentary ‘stoppage’ in movement or direction/directional orientation (i.e. an orientation which is not wholly fixed).<sup>11</sup>

The kind of linear perspective Steyerl refers to, legitimised by the invention of the horizon as ground and anchor, would be appropriated by the sixteenth- and seventeenth-century founders of international law in terms of justifications for (Western) extension, trans-locality, appropriation and dispossession as well as the calculation and management of space and time. It would develop, eventually, into the primary or predominant narrative of the politically grounded or control-disciplinary paradigm of international law: the narrative of development. As a quasi-ontological narrative (in the sense that it provides a name for the fullness of being, that of the ‘us’ or the ‘West’), development is dependent on the linear perspective, which draws a horizon line separating the familiar from the hazardous unknown and then defines space as ‘calculable, navigable, and predictable. It allows the calculation of future risk, which can be anticipated, and therefore, managed.’<sup>12</sup> In this way, the narrative of development posits the capacity of anticipation/forethought, or the calculable future, as the exclusive space of the West. The space which the linear perspective transforms also allows the introduction of a ‘linear time, which allows mathematical prediction and, with it, linear progress.’<sup>13</sup> The projected space of the horizon would just as well project a temporality, which is inherently disciplining in that its *raison d’être* is to manage the future in such a way as to ensure the continuity of the fixed stability of the present orientation. Essentially, this would be akin to contemporary forms of cost–benefit analysis<sup>14</sup> or risk management, which attempt to prevent any destabilisation that would result in a loss of direction for the navigator or a loss of profits for the financier.

It must be noted, then, that the construction of the horizon created a ‘groundedness’, or foundation – with the by-product of letting loose a proliferating array of properly disciplinary and hegemonic concepts. An example of this is the way in which the control-disciplinary/grounded paradigm of international law can act as a ‘horizon’, a navigational tool allegedly helping ‘underdeveloped’

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<sup>8</sup> Deleuze and Guattari (2003), p. 16

<sup>9</sup> *Ibid.*, p. 92

<sup>10</sup> See Gilles Deleuze, *Pure Immanence: Essays on A Life*, trans. Anne Boyman, Zone Books (2005), p. 26

<sup>11</sup> Deleuze and Guattari (2003), p. 92

<sup>12</sup> *Ibid.*, p. 18

<sup>13</sup> Steyerl, p. 18

<sup>14</sup> Oscar Guardiola-Rivera, ‘Absolute Contingency and the Prescriptive Force of International Law, Chiapas-Valladolid, ca. 1550’, in *Events: The force of international law*, eds. Fleur Johns, Richard Joyce, Sundhya Pahuja, Routledge (pp. 29–42, 2011), p. 38

(formerly colonised or Third World) countries steer themselves to calmer tides, thus accepting in the process a host of associated concepts – development, the nation-state as engine of economic development or protector of the ‘free’ forces supposedly unleashing economic development as well as political maturity – and their associated space and temporality, which tame their emancipatory potentials.

The concept of the ‘disciplinary’ can be further explained with recourse to Deleuze and Guattari’s allusion in *Capitalism and Schizophrenia* to ‘Binder gods or magic emperors, *One-Eyed* men emitting from their single eyes signs that capture, [and] tie knots at a distance’.<sup>15</sup> This is a description of the linear perspective. It produces the horizon that captures the subject, as well as the object, within a static space. Talk of ‘bonds’, ‘knots’, ‘nets’ echoes the rubric of the seas and circumnavigation used by Steyerl. The act as the horizon does, producing the subject and object through the imposition of social relations of dominance between them. An example that Deleuze cites is that of Romulus, who in his mythical founding of Ancient Rome, tied and bound brigands and surrounding tribes to the city. We could also mention the Gorgon Medusa, whose line of sight made men turn to stone and thus arrested them in a static space (‘at a distance’) seemingly without direct violence.

The capturing process includes the integration of an element into a greater whole or configuration. This ‘knot’ is a form of verticality (‘vertical being’) or transcendence<sup>16</sup> that leads to the formation of a hierarchy predicated upon relativity and comparability. It mirrors the transcendental aspect of international law, which in the commitment to relations and comparative narratives (nowadays, development, assisted by an assortment of aided indicators and other similar data visualisations) retains the force or moment of ‘imperium’<sup>17</sup> – which continues to form one of its dimensions. The moment or event of capture, which is also a form of deterritorialisation, is reterritorialised within a geometry which divides between sections in a relative/comparative order so as to integrate its constitutive elements into a value-metric.<sup>18</sup>

Alongside Deleuze and Guattari’s Binder Gods of capture, there is the ‘jurist-priest-king’ who ‘proceeds by treaties, pacts, contracts’.<sup>19</sup> He is the creator of law, which he makes into an institution as well as subordinating it to politically centralising ends (‘arché’), thereby making law into an establishment and not just into an institution, even if and when the diverse sections of the law look like an archipelago. In fact, the centralising operation takes place via the division of alliance-structures into the ‘dividual’<sup>20</sup> components, giving international law the combinatory look of an archipelago. The space occupied by the institution of law is the same as that which is made possible by the process of capture. The law must continually legitimise and justify capture/inclusion, both after the event and as grounds for the event. Deleuze and Guattari state that ‘the second pole, the evolved pole, must be in resonance with the first, it must continually recharge it in some way.’<sup>21</sup> Thus, the Binder Gods and the Jurist-King constitute the two poles of sovereignty, which for Deleuze and Guattari comprises the authority of the state and the combination of states/markets. Similarly, it can be said that these two interconnected poles make up the disciplinary mode of international law. The unity of these poles represents a ‘magical capture’ or combination of dividual elements, as the movement of capture/inclusion is always pre-accomplished and self-presupposing – it is magical in that it has no cause, and always reveals itself as self-justifying.

Thus, we are able to say that Disciplinary International Law (DIL, hereafter) encompasses this complex two-way movement, excluding as it captures (‘seizes what comes into reach’<sup>22</sup>) and integrating (and combining) into a greater whole. The integration/capturing process consists of bringing a

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<sup>15</sup> Deleuze and Guattari (2012), p. 469

<sup>16</sup> Deleuze and Guattari (2003), p. 87

<sup>17</sup> *Ibid.*, p. 87

<sup>18</sup> Deleuze and Guattari (2012), p. 487

<sup>19</sup> *Ibid.*, p. 469

<sup>20</sup> International law creates the overarching establishment as well as the basis of a creative institutionality, on the local level, that moves to destabilise it. On the ‘dividual’ Claire Colebrook states that it can be considered an affect ‘such that it has no identity or individuality independent of its specific quantity or division’. It is ‘divisible without parts’, ‘distinct from the states of the world’ and can ‘enter into combinations’. See Claire Colebrook, *Gilles Deleuze*, Routledge (2002), p. 61.

<sup>21</sup> Deleuze and Guattari (2012), p. 471

<sup>22</sup> Gregg Lambert, ‘What the Earth Thinks’, in *Deleuze and Space* (pp. 220–39, 2005), p. 218

multiplicity of flows together and making them hold together.<sup>23</sup> In addition, lines of escape must be anticipated and pre-empted, in order to control from within a posited whole.

The common space of universal law is the outcome of a ‘deterritorialisation’ in which spatial regions of the globe (East/West, North/South) are brought into the global institutions of international law. From this point onwards nation-states of the Third World have had to navigate between one international legal institution and the next. The outcome mirrors Foucault’s notion of ‘disciplinary societies’ (which Deleuze elaborated upon while also building upon Guattari’s original analysis of institutions as *dispositifs* or apparatuses of control<sup>24</sup>), in which people venture from one enclosed space of imposed normativity (the school, the university, the psychiatric institute, the prison, etc.) to the next.<sup>25</sup>

It is this common continuum, productive of a ‘relative deterritorialisation’, which integrates by creating reciprocal relations between nations within a common framework or relative ‘immanence’. The immanence is due to the supposedly horizontal exchange between nations in the making of law within the institutions of international law. However, the deterritorialisation is accompanied by a resulting reterritorialisation. The process of reterritorialisation is one in which nation-states, which are simultaneously created (and recognised) by and transcended through international law, now find themselves subject to a global market and its associated metrics – the archipelago of states/markets and its visualisation as future-directed data flows. The metrics of macroeconomics are hugely dependent on the future-directed productivity of the nation-state, despite the fact that the world can be seen as an integrated global marketplace. The metrics have the effect of re-emphasising temporal and spatial boundaries, limits and divisions between nations; in other words, metrics ensure comparability. They also seek to tame risk or contingency by sustaining the time and space directionality of such boundaries, limits and fault-lines as ahead or in a linear narrative. This has its ultimate conceptualisation through the economic dividing lines between ‘developed’, ‘developing’, ‘emerging’ countries, etc. (further elaborated upon below).

Notice however, that future-directed productivity is paired with and conceptualised also as a bundle of contingent claims with a payout dependent on the realisation of some future contingent event (hence the centrality of the notion of risk, around which current discourses of security and development tend to be construed). In turn, the future prices of these contingent claims can become new future events on which further contingent claims are written. The security and development complex that increasingly shapes the form of DIS depends on this seemingly endless and more or less material chain. A dilemma arises here, as DIS and the combination of states fuses itself to the market, defined as such an endless material chain. For on the one hand lies the challenge of reducing risk through security/development mechanisms, taming contingency or anticipating disaster, while on the other the endless chain of future claims and prices, benefits or ‘returns’ (another navigational metaphor) mean that at some point time drops out of the equation altogether and the future, literally, is no longer ahead. At this point we can only point towards the peculiarity of the dilemma of contemporary DIL, as any attempt to solve it would go beyond the confines of this thesis.

At this point, let us move on to an elaboration of the concept of deterritorialisation, which can be described as the freeing of the perception of space from its own locale, and of time from its own bounds.<sup>26</sup> Put differently, an individual or community’s perception of local space is transcended by a more holistic comprehension of space through the process of integration within a larger structure (global-historical). This is exactly the movement of DIL: at the point where nation-states are integrated within its global institutions, those in the Third World are seen to be granted the partial ability to transcend their petty particular interests. This is well demonstrated by the eroding of contingent claims presented in terms of reparative justice by decolonised countries (to be repaired now rather than in some endless future) throughout the years since the national liberation movements of the 1960s. The process of reterritorialisation within DIL, then, is best described in this instance by the universalisation of the Western consciousness within the horizon of a common space and the totality of time.<sup>27</sup> It is the attempt to conceptualise global spatiality from within a local sense of space and a total sense of time, which is why it focuses on avoiding or more precisely deferring the end (as an example of the security-conscious

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<sup>23</sup> Lambert, p. 218

<sup>24</sup> See Andrew Goffey, ‘Guattari and Transversality’, *Radical Philosophy* (Jan/Feb, 2016), pp. 38–47

<sup>25</sup> Maurizio Lazzarato, ‘The Concepts of Life and Living in the Societies of Control’, in *Deleuze and the Social*, eds. Martin Fuglsang and Bent Meier Sorensen, Edinburgh University Press (2006), p. 173

<sup>26</sup> Colebrook (2005), p. 193

<sup>27</sup> *Ibid.*, p. 193

efforts in international law that re-present the West in the guise of the Christian *katéchon*, who constantly defers the end by avoiding or taming ultimate risks<sup>28</sup>). Conversely, de-territorialisation efforts such as ‘permanent decolonisation’ would focus less on the purely local (understood through the myth of autochthony, leading to the damnation of the migrant stranger) and on imagining the end of the world, as well as how to defer such an end, and more on making sure there will be a world to come.<sup>29</sup> It is the local sense of space that dominates Western thinking, which following what has been said above could be described as apocalyptic, and which has been universalised via international law. This is precisely the reason why disciplinary law always tends towards absolute territorialisation: its universalism is built upon a particular local/Western perspective. The common space created by international law is representative of a spatiality produced by the Western subject made transcendental, and the Western consciousness made global. The conceptualisation of the nation-state, in itself, is suggestive of the extent in which Western legal concepts have penetrated the global. The dominance of nation-state thinking and the ever-increasing communication between nation-states through disciplinary law all serve to shore up the common horizon and space<sup>30</sup> that supposedly ground international law.

It can be said that the disciplinary mode of international law is a form of movement itself, in a Deleuzian and Guattarian vein. It is an orientation, a moving away as well as a moving ahead. What makes disciplinary law so fascinating, however, is that it is perpetually seeking to ground itself, to create its own foundations through the process mentioned above, all the while fleeing towards a future that never comes. This is its most salient quality and what differentiates it from the movements of bare earth (the tendency towards absolute deterritorialisation). While the discovery of any origins or foundation of international law is illusory, the positing of it as grounded/horizon (the transcendent concepts) strengthens the illusion of its supposed universality over the earth as the latter’s deferred end – either an earth without us, or us without the earth. The nomadic movement of thought and the related absolute deterritorialising effects of the earth are effaced by global institutional law’s stratifying and territorial attempts of theorising the world (i.e. in terms of nation-states). The positing of an origin or foundation is the orientating movement of what Deleuze and Guattari dub a ‘paranoiac transcendental law’<sup>31</sup> towards an absolute (re-)territorialisation which it cannot completely grasp. DIL is exactly that which captures, in order to reduce to origins so as to deny contingency and becoming.

What disciplinary law actually does is to continually straddle the divide between relative deterritorialisation and reterritorialisation, which helps constitute the awareness of its own limits. Hence, the boundaries of nation-states, which are fundamentally the threshold constituting the limits of their existence, fluctuate in the face of international law. Despite this, reterritorialising aspects of international law ensure that the geometric grid of lines drawn between nation-states always re-asserts itself. It is this re-assertion that demarcates the limits beyond which the institutions of DIL will cease to exercise its power of verticality or transcendence.

For the sake of completeness and clarity, let us add some more precision to our definition of the term ‘disciplinary’ before we move on to considering DIL in the context of development.<sup>32</sup> We are deploying the term here in the way it is defined by Lewis Gordon, that is to say, in the sense of ‘disciplinary *decadence*’.<sup>33</sup> So, we can state that DIL possesses this tendency towards disciplinary decadence, in that it turns away from ‘living thought, which engages reality and recognises its own limitations’. Its preoccupation and obsessions are solely concerned with transforming its discipline – as in a field of study such as development economics – into the world and of justifying itself as ‘right’ through simply ‘applying, as fetish, the methods correctly.’ Its manner of appraising all other disciplines is thus from ‘its supposedly complete standpoint’ or its propensity to lean heavily on its own fetishised terms.

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<sup>28</sup> For elaboration on the *katéchon* see Carl Schmitt, *The Nomos of the Earth in the International Law of Jus publicum Europaeum*, trans. G.L. Ulmen, Telos Press Publishing (2006), pp. 59–62

<sup>29</sup> Colebrook (2005) p. 193

<sup>30</sup> *Ibid.*, p. 193

<sup>31</sup> Gilles Deleuze and Félix Guattari, *Kafka: Towards a minor literature*, University of Minnesota Press (1986), p. 59

<sup>32</sup> This is, of course, to complement our more Deleuzian angle on International Law.

<sup>33</sup> Lewis R. Gordon, ‘Disciplinary Decadence and the Decolonisation of Knowledge’ in *African Development* Vol. XXXIX, pp. 81–92 (2014), at 86

To place this in a legal context, we can identify DIL with what the Canadian lawyer Edward McWhinney dubs ‘Classical International Law’.<sup>34</sup> It is the sort of law that is highly constrained by its conservative and unimaginative nature, and which can offer up no novel or radical solutions to the complex problems facing the world (of which, for example, climate change is one of the most severe to date). In reaction to these factors threatening the world, DIL’s move is to fetishise a duality of terms (such as those mentioned above); to posit a hierarchy of sources in respect to treaties, charters, declarations, customs or contracts<sup>35</sup>; and to advance a linear, teleological conception of ‘progress’ as a historical fact drawing upon the accumulated wisdom of a West/Europe, which as developed in isolation from the empty background of the world – that is, without any interaction with Third World nations. It also manages to institutionalise the imagined divide or hierarchy between grown-ups and children – such as in the mandate system pre-Second World War and latterly, and most appropriately for this part of the thesis, the division between the UN Security Council with its powers of veto and its basis in its members’ atomic/nuclear might and capacity to police the world, and the UN General Assembly (UNGA), with its seemingly playground indicative votes. To look at it from a different angle, *Disciplinary* International Law is, properly speaking, the ‘object of the challenge to international law’. The latter phrase is revealing as, while it is the aim to this thesis to explore the complexity behind its institutional structure, DIL only transforms itself when it is effectively challenged by forces it cannot initially contain or counteract. Looking at the sources of DIL, we can see that it was able to shape the emerging discipline of economic international law post-second world war through: the altering, watering down or constraining of the codifying force of UN resolutions and multinational treaties, such as the Charter of Economic Rights and Duties of States in 1974, in order to protect First World economic interests and to help undermine and render contingent the claim of postcolonial nations to sovereignty; the promotion of bilateral treaties protecting Western investment overseas and preserving global economic imbalances; international arbitration cases favouring Western corporations operating in the Third World; the use of UN economic, monetary institutions and development programmes to render postcolonial countries indebted to the First World, through, for example, the ‘structural adjustment’ programmes so prevalent in the 1980s, which thus reinforced neocolonialism or coloniality amongst nations.

This can be contrasted with ‘contemporary International Law’ (although we must note here that McWhinney was writing at a time prior to the point in which the reaction of the Global North to Southern claims for restorative justice really took hold through law-as-development and the security-development complex in the 1980s) or, in my rubric, Dissident modes of international law. This ‘contemporary’ sort of law promises to usher in a ‘new rule of reason’; one that is better equipped to grapple with the pressing issues confronting the world and that is more likely to solve problems through experimentation as the quickest route to success. It is the law of continual examination and validation; one which is genuinely representative and pluralistic, in which the ‘discipline’ and methods or processes of law are not unhinged from the exacting requirements to confront a reality demanding radically different means of engagement. Despite the institutional power-structure of an international law which gives the UN Security Council overruling control, we can point to the spate of significant resolutions that embodied Third World intentions of remaking international law into this far more dynamic force: a law that takes into account different histories and understandings of law or, to put it another way, the ‘perspectives’ postcolonial countries which fall outside Eurocentric legal conceptions.<sup>36</sup>

A demonstration of Dissident international law can be perceived in the power of national liberation movements accelerating the break away from the old colonial powers, as was signified formally through the momentous 1960 UN Resolution, ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’, which fully recognised that ‘the people of world ardently desire the end of colonialism’, that the fetters of imperialism held back the potential and legitimacy of international law, and that the self-determination of formerly colonised countries called out for official acknowledgment. The right of postcolonial nations to self-determination would be further embedded and consolidated with the joint treaty or ‘International Covenant on Economic, Social and Cultural Rights’ in 1966 and the ‘Declaration on Social Progress and Development’ in 1969. Further, the assertion of economic rights of

<sup>34</sup> Edward McWhinney, *The International Court of Justice and the Western Tradition of International Law: The Paul Martin Lectures in International Relations and Law*, Martin Nijhoff Publishers (1987), pp. 20–21

<sup>35</sup> Elaborated below in two examples: the first one concerning the Charter of Economic Rights and Duties of States (1974) in respect to the UN Development Decade (1970); and secondly the USA v Nicaragua case in 1984. Also see Peter Malanczuk, *Akehurt’s Modern Introduction to International Law*, Routledge (1997), pp. 56–7

<sup>36</sup> As McWhinney (p. 21) puts it, ‘towards a new polypolar, system of World public order...’

newly independent nations was upheld by the resolution at the UN Conference on Trade and Development (hereafter, UNCTAD) in 1972 to draw up a charter to ‘protect the rights of all countries, and in particular the developing states’ so that a ‘just order and stable world’ may be possible. This was an important step in paving the way for the 1972 UNGA resolution establishing the ‘Charter of Economic Rights and Duties of States’ (see the case study below) in 1974, complementing the resolution on the New International Economic Order (NIEO) of the same year. Moreover, in 1982 the UN Convention on the Law of the Sea was finalised, which was the result of a decade-long period of discussion, and declared with some justifiable gravity that the seabed is the ‘common heritage of mankind’. These resolutions, detailed below, can be thought of, in part, as the expression of a dissident international law<sup>37</sup>; one that places the emphasis on the permanent decolonisation of international law and the self-determination of the Global South; a fair economic distribution of wealth through economic cooperation over competition; the salience of continually establishing a new consensus and producing new rules; a nation’s sovereignty over its natural resources, all the while respecting the commons of the earth such as, for example, the seabed as a benefit to all and the duty of all to preserve.<sup>38</sup>

All that is left for us to say in this chapter is that Dissident international law does not, categorically, exist in any ‘pure’ or reified form, but always in complex interaction with DIL. Thus, it is for the next section to show how, despite the utopian energies behind the resolutions adumbrated above, DIL reasserts its juridical framework in order to limit the genuine achievements of postcolonial nations in their critical engagement with international law.

## **Chapter Two: The Dominant Structuralising Discourse of International Law: Development in the Post-National Liberation Context**

There was much debate amongst legal theorists concerning the context of DIL in the period following decolonisation, and again at the time national liberation movements in parts of the Third World seemed to lose their initial momentum. During the 1960s and 1970s a host of postcolonial countries joined the United Nations (UN), and this fanned hopes of a newfound global universality of international law.

To pinpoint the historical moment more precisely, let us refer to the 1960 UN Resolution, ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’, as a pivotal moment that announced in its passage through the UNGA that ‘the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism...’<sup>39</sup> Prior to the Declaration, a number of contextual factors defined the period leading up to this moment of affirmative self-determination for the Third World and the effect it had in transforming international law. To comprehend this better, we can, in order to heuristically aid us in providing us with more historical specificity, follow S.K Chatterjee by dividing international law into sub-periods of law-making. In the immediate post-war period, that is, 1945–55, the UN set out as international norms the key principles of decolonisation and self-determination. Antonio Cassese has produced a useful summary of the factors, which influenced the direction of travel of the UN during this period, and we can list them here as: (1) the pressure brought to bear from Soviet states on the West; (2) colonial peoples insistence on ‘rights’ and vocalisation of it in Resolutions and Declarations in the UNGA, as well as through national liberation movements on the ground; (3) the cost of colonialism to European powers; (4) the rise of anti-colonial social democratic parties in Europe.<sup>40</sup> Indeed, by 1955 the pressure of these factors broke the ‘logjam’ on

<sup>37</sup> Although this is not to say, as will be made clear below, that aspects of these resolutions are not problematic.

<sup>38</sup> The Mexican delegate, speaking in favour of the Charter of Economic Rights and Duties of States at the UNGA’s twenty-ninth session, 2315<sup>th</sup> Plenary meeting on the 12 December 1974, put it eloquently: ‘The world does not lack the physical resources or the spiritual energy to create a sound shared economy. The problem is poor distribution and poor use, and that is why there is an urgent need for an ethic of international solidarity...we speak of a new international economic order based on equity, sovereign equality, interdependence and cooperation among all States, of a legal order that requires for its development strict respect for such principles of law as non-intervention, peaceful co-existence, the obligation not to commit aggression...in a word, we speak of an international morality which will really bring together the powerful and the weak, and form the bridge for a genuine international coexistence.’ See A/PV.2315, pp. 1377, para.158

<sup>39</sup> From text on Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), recorded in Evans, p. 81

<sup>40</sup> Cassese, pp. 328–9

admission of new members to the UN, permitting sixteen states ‘representative of all main ideological systems’ to join the UNGA, largely altering its composition and the balance of power in international law.<sup>41</sup> Bearing this historical context in mind, with the expansion of the legitimacy of DIL, the major debate hinges around the question of whether postcolonial states proceeded to accept the prevailing Western paradigm of DIL or, at least, did little to challenge its hegemony.

We shall argue in this section that postcolonial states did in fact attempt a number of challenges to the ‘imperial’ (colonial, or postcolonial disciplinary) framework of DIL, but many of these ended in disappointment. The failure of postcolonial states post-independence to radically assert themselves and transform DIL away from Western hegemony is constitutive of several tensions. Firstly, there was a tension consisting of the strategic errors of postcolonial countries, which took place at the level of DIL. These involved the unwitting acceptance of the epistemology of their former coloniser.<sup>42</sup> However, alongside this, there was still a refusal to accept Western values wholesale, as well as a partial rejection of the affirmation of reason and ‘truth-as-groundedness’ (or Enlightenment) as universal.<sup>43</sup> After all, Third Worldism emerged from the attempt to challenge certain aspects of DIL. Secondly, tensions existed between the initial successes of postcolonial national liberation movements in breaking away from the coloniser and the eventual ceasing up of these movements’ momentum, followed by their failure and fading out. This resulted in the acceptance of state structures geared towards development in ‘one world’ flattened by capitalism and the disciplinary rule of law.

In the second period of international law making from 1956–65, characterised by the gaining of independence by many of the former colonies, the desire of many postcolonial states to move towards economic self-sufficiency became a major issue. This was embodied in and accommodated through the setting up of many UN representative bodies, building on the establishment of the Bretton Woods Institutions (BWIs) in 1945. In addition to those bodies, First World nations, in order to advance their own interests, set up the Organisation for Economic Cooperation and Development (OECD) in 1960 to represent the organised industrial might of the Western world, representing twenty-six states in total at this point. It acted as a forum ‘for cooperation, especially with regard to the coordination of economic and monetary policies for its members.’<sup>44</sup> In the same year, the first UN development decade was proclaimed and regional economic organisations such as OPEC were founded to organise the major oil exporters in a single forum, challenging the power of US oil multinationals. Four years later, to complement the OECD, UNCTAD was established to represent the economic interests of developing nations, including the Group of 77 ‘non-aligned’ Third World nations. These institutions, representing in varying degrees the economic interests of First and Third World nations, were operating and competing with each other to shape the emerging discipline of economic international law. Even prior to the creation of these institutions, a number of resolutions had passed from 1952–8 which mandated various UN commissions to look into the validity of Third World nations laying a claim to PSNR.<sup>45</sup>

According to legal theorist and international lawyer Sundhya Pahuja, the accession of DIL and its related structures by the late 1950s (recalling the expansion of UN membership in 1955 and its steady increase up to the 1960 resolution) had created a ‘universal juridical frame covering the globe’.<sup>46</sup> One of the major outcomes of this was the acceptance that ‘nation-statehood was the only way to claim legal personality’ in this juridical framework. This would result in ‘heterogeneous movements for decolonisation’ being ‘smoothed over into a coherent story to be contained within the broader framework set by Western interests.’<sup>47</sup> For former colonial states to have access to what Pahuja calls the ‘promise of international law’ and to be seen as legal actors in the world at large, tacit acceptance of the ‘national-state’ was required. This conception of statehood, heavily loaded with Western tones, makes use of a perspective of a central observer (the Western subject), organising around him an ‘outside’ that might be brought within sight, and at the same time, and in the same move, kept at a distance. It is thus that the renewed, so-called post-war, structure of DIL ‘captured’ postcolonial countries within a legal political framework which was very much part of a Western colonising lineage.

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<sup>41</sup> McWhinney, XII

<sup>42</sup> Sundhya Pahuja, *Decolonising International Law: Development, growth and the politics of universality*, Cambridge University Press (2011), p. 138

<sup>43</sup> Upendra Baxi, *Human Rights in a Posthuman World: Critical essays*, Oxford University Press (2012), p. 97

<sup>44</sup> Malanzcuk, p. 224

<sup>45</sup> Res. 523(VI) of January 1952; 626(VII) of 21 December 1952; and 1314(XIII) of 12 December 1958

<sup>46</sup> Pahuja, p. 119

<sup>47</sup> Ibid., p. 119

While the acceptance of nation-statehood would have later consequences for postcolonial states, the benefits of shaping DIL in a Third World direction seemed promising. It is this ‘promise’, as described by Pahuja, which held out hope to the Third World that it could shape international law by effectively using it as a ‘site for struggle’ for its interests.<sup>48</sup> These interests would focus on the hope of postcolonial justice, a justice that would pivot around the repair of the economies of countries ravaged by colonialism. Essentially, DIL promised a kind of additive (as opposed to subtractive) or reparative justice, which would be inclusive of the claims of the Third World.

As former colonial countries broke away from imperialism, the resulting nationalism can be considered a double-edged sword, according to Pahuja. On the one hand it was a challenge to the domination of the coloniser; such a conception of national liberation is championed by thinkers such as Michael Neocosmos and will be discussed below. On the other hand, Pahuja argues that it ‘required an acceptance by the colonised of the coloniser’s epistemological frame’ because of what was, in fact, the particular perspective of the nation as a social-organisational form based on procedures for decision-making and public opinion-making that remained blind to its own genocidal logic.<sup>49</sup> With the nation-state becoming a mainstream category in DIL, one that disavowed its own dependence on procedures to empty lands and minds (e.g. the ‘vanishing Indian’ in US legal and political history, or the ‘Indian’ and ‘Negro problem’, as well as the disavowal of slavery in the case of the trans-Atlantic nations), it would be easy to posit it as a universal entity, one whose alleged ‘universality’ would depend upon, and be the direct result of, its ‘purification’. This is to say that the race/class division (conceived of here as two hands on an ideological clock, moving at different historical speeds, but functionally coinciding in the case of historical, catastrophic events) acts to erase the particularity of the nation-state as a ‘Western’ or ‘colonial’ socio-political entity, turning it instead into a ‘global’ or at least ‘international’ and ‘metropolitan’ (or even cosmopolitan) entity.

This is true to a certain extent. However, the nationalism that Pahuja attributes to the postcolonial states did not necessarily, at first, wholly accept the Western model of the nation-state. The period of national liberation struggle actually constituted a challenge to mainstream models of social organisation. Although Pahuja does not consider it in detail,<sup>50</sup> national liberation movements at the time of decolonisation did provide some significant resistance to the eventual acceptance of the ‘epistemological frame’ of the coloniser.

Indeed, whilst on the stage of DIL former colonial countries had accepted the nation-state as their mode of socio-political organisation by the late 1970s, observers like Michael Neocosmos chart a slightly different story in respect to what occurred within the national liberation movements of the postcolonial states in Africa.<sup>51</sup> Major nations in North Africa had gained political independence in the 1950s and 60s, with Libya doing so in 1951, Tunisia, Morocco, Sudan and Ghana in 1956, and Algeria following suit in 1962 after a protracted war with their colonial overlords, France.<sup>52</sup> Within the UN, important debates were taking place on Permanently Sovereignty over National Resources (PSNR) from 1952–8, with the resolution passing in 1962, while UNCTAD, throughout its heightened period of law-making from 1969–74, had pushed for the economic self-determination of Third World nations to be recognised through the UNGA, by way of NIEO and the Charter of 1974. The resultant discourse had strongly attached the idea of the nation state to development (see below); however, the idea of national sovereignty was still a pivotal rallying cry which acted as a counterpoint to the asymmetrical nature of international economic relations.

For Neocosmos, during this period of national liberation struggles in North Africa from roughly 1951–62, the fight for decolonisation had led to the conception of the nation not as the nation-state, as would become ubiquitous post-independence, but as ‘the people making themselves as they make the nation... a subjective becoming’, or an emergent political body out of the debris left after colonisation.<sup>53</sup>

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<sup>48</sup> Pahuja, p. 6

<sup>49</sup> Ibid., p. 63

<sup>50</sup> Ibid., pp. 61–2

<sup>51</sup> Duffield (2013), pp. 79–80

<sup>52</sup> The UNGA Res. 1754(XVII) admitted Algeria into the UN in 1962, in the same year as many West Indian countries also gained admittance, and at the same time as the South Rhodesian crisis between political factions on the ground and the UK government.

<sup>53</sup> Michael Neocosmos, ‘The Neocolony and its Politics: Fanon, emancipatory nationalism and political sequences’, in *Living Fanon: Global perspectives*, ed. Nigel C. Gibson, Palgrave MacMillan (2011), pp. 187–199, at 190. Also see Duffield (2013), p. 9, quoting Hannah Arendt, who suggested that the by-products of capitalist crises are seen as ‘human debris’.

This idea of national liberation rejected any notion of the nation based on ‘social entities such as indigeneity, ethnicity or race’.<sup>54</sup> National liberation was a matter of the politicised collective subject producing itself as an inclusive people or nation. The nation is here understood as an inclusive notion that links a particular people to the oppression that humanity as a whole faces through subjugation to hierarchical and exploitative structures. In the words of Fanon it is a ‘universal politics concerning humanity as a whole and not a matter of attaining independence in a particular country’.<sup>55</sup> This concept of the nation is couched in similar terms to what some legal theorists denote as ‘bare sovereignty’, or the idea that a community of people can make the ‘decision to be in common’ and give to itself the law outside of any particular forms of political community.<sup>56</sup>

While national liberation movements remained popularly based on the politicised masses, the nation as an entity did not necessarily equate itself with a particular centralised socio-political organisation such as the nation-state. This particular hegemonic political ‘sequence’ of the nation would not let such a centralising conception take hold. Indeed, it was a form of rupture or event that was successful in producing a reconfiguration of social relations, in this case a break from colonial rulers. The linear perspective which had dominated the old imperialism was ruptured as ‘the central viewpoint, the position of mastery, control, and subjecthood...[was] abandoned and [started] tumbling and tilting, taking with it the idea of space and time as systemic constructions.’<sup>57</sup> The new self-constituted subjecthood of the postcolonial subject was breaking away from the ‘groundedness’ of DIL as old imperialism by proclaiming that only the people could create themselves in light of an absence of ground.<sup>58</sup> The logical conclusion of such an emancipatory situation would be the rejection of the concepts of development, nation-state and so on, which were so vital in ensuring the predominance of DIL as grounding or foundational. The position of the people/nation here can be described as in a state of ‘free-fall’, ‘floating over an absent ground’<sup>59</sup> in the downfall of the linear perspective. The free-fall of postcolonial peoples could only prove to destabilise the (linear) perspective of the fixed (Western) subject of the old imperialism of DIL. Frantz Fanon’s *Black Skin, White Mask* is illustrative here. In a memorable passage, he describes how the black person’s encounter with the white observer ends up disturbing the latter’s sense of perspective, leading to their disorientation.<sup>60</sup> In this fashion, national liberation movements had the force of the event for DIL, emphasising, on the one hand, the contingency upon which the old imperialism and its rule of law was based, and on the other, the Third World’s taking into its own hands the construction of its own political subjectivity, without reservation or ground.<sup>61</sup> As the horizon of the old imperialism/DIL was fading away, postcolonial subjects could become free to navigate and chart their own course, as ‘perspectives assume mobile points of view and communication is disabled within one common horizon’.<sup>62</sup>

At the time of these social movements, the politically active collective subject was linked tightly together with the sense of justice embodied by emancipatory politics. It was the same longing for the injustices of the colonialism of the past to be put right in the present that would draw the Third World into the structures of DIL. In the same vein in which DIL captured postcolonial states through the acceptance of the nation-state form, ‘the decline of the emancipatory politics of the people-nation’ was replaced ‘by state politics, by the politics of the nation-state’.<sup>63</sup> The political ‘sequence’ (in Neocosmos’ terms) of national liberation movements was to fizzle out right at the moment when many former colonial states had won their independence. A major reason for this is pointed out by Fanon, who observes that ‘the economic interests of the national bourgeoisie’ dictated that ‘they move into the posts and the

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<sup>54</sup> Neocosmos (2011), p. 191

<sup>55</sup> Ibid., p. 192

<sup>56</sup> Pahuja, p. 166

<sup>57</sup> Steyerl, p. 21

<sup>58</sup> For an extended discussion on the absence of ground from a Post-Foundationalist and Left-Heideggerian perspective see Oliver Marchart, *Post-Foundational Political Thought: Political difference in Nancy, Lefort, Badiou and Laclau*, Edinburgh University Press (2007), pp. 1–11

<sup>59</sup> Steyerl, p. 21

<sup>60</sup> Frantz Fanon, *Black Skin, White Masks*, trans. Charles Lam Markman, Pluto Press (1993), pp. 109–10

<sup>61</sup> This is echoed by Fanon’s contention that for black people there appears to be no past, there is no point in the past in which one can return. More specifically, there is no antediluvian state pre-colonialism in which to return (one cannot long ‘for black existence in a form’ in which ‘blacks could never have existed’). This is remarked upon by Lewis R. Gordon (2007), p. 8

<sup>62</sup> Steyerl, p. 22

<sup>63</sup> Neocosmos (2011), p. 194

businesses vacated by the departing Europeans'.<sup>64</sup> The creation of the nation-state post-independence chimed with the needs of national elites to maintain a type of concentrated power in the vacuum that the Europeans had left behind. As these elites used the nation-state to concretise their power, 'nationalism' became less a universal politics against oppression, and more 'based on race and indigeneity in order to exclude'.<sup>65</sup> The trick here was to use a sometimes ethnically-based nationalism in order to (re)direct anger against the foreigner; it proved an effective way for national elites to monopolise access to resources and then direct the incriminations elsewhere. These claims are reinforced by Balakrishnan Rajagopal, who points out that 'it is well known that the Europeanized elites who led these countries choose to follow western models of polity and economy'.<sup>66</sup> The universalism that Fanon had equated with national liberation had broken down into a pervasive type of particularism, strangling the Third World's claims to justice.

The emergence of the nation-state form was also abetted by what Neocosmos sees as the political party's co-option of the people as nation. With independence, the idea that 'the party has the effect of fusing popular consciousness with that of the state' became irresistible.<sup>67</sup> Justice as the struggle for reparation, which underpinned national liberation, had now given way to the social programme of the governing party of the state. This had the effect of making emancipation as it was conceived of in national liberation redundant; the new consensus would be one based on the political agency of party officials over that of the people as nation. The party was now said to represent the people rather than the people constituting themselves.

The ascendancy of the nation-state form was the outcome of a two-way movement. The first movement was on the level of DIL, which was the acceptance of the nation-state form in order to be included within the budding new global universality of the juridical framework. The second parallel movement was within postcolonial countries themselves, as the internal tension that initially manifested itself in national liberation ended up in the propping up of the nation-state as it suited national elites.

The formulation of postcolonial states, and the Third World more generally, into nation-states had many salient consequences for these countries and their standing within DIL. The integration of these countries into the structure of DIL may have offered the hope of some Third World influence over its orientation, but it also subsumed them within a paradigm still dominated by Western thinking. The particular values of the West, or First World, were embedded within a framework that claimed the universal quality of those values. Hence, DIL is both liberatory and imperial, a continuity of the old imperialism but also a break from it. In Pahuja's words it 'did not bring the new equality it promised, but did in fact effect a shift from the old rationality of rule to one which in the operative mode of that rationality was precisely the assertion of universality'.<sup>68</sup>

The break with the old imperialism was really testimony to the growing strength of the Third World through the national liberation movements (discussed above), to such an extent that Rajagopal suggests that 'the emergence of ordinary people of the Third World as political actors could no longer be ignored – [it] was transforming the relations between the West and the Third World'.<sup>69</sup> Legal theorists such as Rajagopal and Upendra Baxi agree that the national liberation movements not only espoused alternative modes of socio-political organisation (as Neocosmos alludes to), but were also a 'world historic rupture, in turn resulting in alternative visions and paths of development'.<sup>70</sup> However, the political sequence or event which led to the surfacing of the Third World in acts of resistance against the old imperialism would have to be contained, and subsequently 'the relationship between the West and the Third World would not be governed by colonialism, but by a new discipline called development'.<sup>71</sup>

The emergence of development, or developmentalism, as the dominant discourse of DIL had its seeds in the formation of the new nation-states of the Third World. Western governments could now proclaim the universality of the nation-state as a legal category. From this would flow various concepts

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<sup>64</sup> Neocosmos (2011), p. 194

<sup>65</sup> Ibid., p. 194

<sup>66</sup> Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge University Press (2003), p. 26

<sup>67</sup> Neocosmos (2011), p. 197

<sup>68</sup> Pahuja, p. 47

<sup>69</sup> Rajagopal, p. 25

<sup>70</sup> Baxi, p. 97. Also see Duffield (2014), pp. 22–3

<sup>71</sup> Rajagopal, p. 25

that would help contain the Third World within a Western paradigm, concepts that would take the nation-state as their foundational category.

Within the new structure of DIL, ‘development rejected race-based distinctions without challenging hierarchical organisation or foreign domination per se.’<sup>72</sup> In principle, the old hierarchy of imperialism based on race had no place within new structures of DIL, in principle. However, a new hierarchy of nations based on the ‘scientific measure’ of GDP had taken its place and the ‘new’ framework did not do away with the essential identification between lack of future (or the capacity to calculate it, i.e. forethought) and the almost presumed backwardness of certain peoples located south of the equator.<sup>73</sup> The ostensible sovereign equality of nations which drew the Third World into DIL was, in reality, subservient to a new world order based on the modern ‘master discourse’ of macroeconomics underpinned by a geopolitics whose origins are much older, as we shall see later on. The former (economics) operates as ground, whereas the latter is in fact part and parcel of a metaphysics linking moral as well as political authority to place, and serves as background (the earth as background). The potential of DIL, embodied in the voting power of Third World nations in the UNGA (after postcolonial countries had joined the organisation), was contained by the supremacy of economics over law and geopolitics over international law. In the realm of economics, structures such as the International Monetary Fund (IMF), World Bank (WB) and International Development Association (IDA) proliferated. We can identify these as the international economic and monetary institutions that first emerged out of the Bretton Woods Agreement in 1945.

The first two decades of IMF and WB lending were focused exclusively on industrial countries, but this facility was largely extended to developing nations at the time of the ‘oil shocks’ of 1973–4 and 1979–80 and the Latin American debt crises that followed. The establishment of a new arm of the WB, the IDA, also enabled a far greater degree of lending. While in the early years of the decade First World industrial nations had participated in the ongoing dialogue on worldwide economic management and North-South relations,<sup>74</sup> it was only in the latter part of the decade that, in response to an emboldened Group of 77, a more solidified and penetrative, if still preliminary, prescription for managing the global economic international order would emerge. This was the ‘Washington Consensus’.<sup>75</sup> Named by the economist John Williamson, it developed in the OECD, where, according to the former, ten policies, including adhering to fiscal discipline, reordering public expenditure, privatisation, deregulation and promotion of property rights among others, had become ‘accepted as appropriate.’ The tenets of monetarism, supply side economics and minimal government were also a basis for shaping economic international law and international relations, particularly in regard to sweeping aside ‘old ideas of development economics’ that had taken root in Latin American countries, in order to implement plans for ‘structural adjustment’ – the first structural adjustment loans programmes were launched by 1980 – on the basis of the aforementioned tenets.<sup>76</sup>

In parallel with the UNCTAD activity in the 1969–74 years, an early form of the Washington Consensus would become influential in the IMF and WB, whose operations the United States would have an effective veto over. This was due to the watering down of the initially equally weighted voting system that applied to all lending nations. The reality was one of American influence, able to direct lending towards or away from developing nations depending on geopolitical considerations, as was exemplified in its threat to withdraw its substantial funds from the WB if it lent to Vietnam during the height of the Cold War in the mid-1970s, or the extensive funding offered to the Somoza regime in Nicaragua to act as a bulwark against socialist governments in the region.<sup>77</sup> For countries going through economic depressions the conditionality of accepting loans would involve the above-mentioned policies of structural adjustment, and in this period more specifically it followed the ‘Polak model’ (‘the first

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<sup>72</sup> Pahuja, p. 93

<sup>73</sup> Duffield (2014), p. 83

<sup>74</sup> Ngame Woods, *The Globalizers: The IMF, the World Bank, and Their Borrowers*, Cornell University Press (2006), p. 40

<sup>75</sup> See Steven A. Ramirez, *Lawless Capitalism: The Subprime Crisis and the Case for an Economic Rule of Law*, New York University Press (2013), pp. 106–9; Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO (Second Edition)*, Zed Books (2010), pp. 14–16

<sup>76</sup> John Williamson, *A Short History of the Washington Consensus*, paper commissioned by the Fundación CIDOB for a conference ‘From the Washington Consensus towards a new Global Governance’, Barcelona, September 24–25, 2004. Also see Graham Bird, *IMF Lending to Developing Countries: Issues and Evidence*, Routledge (1995), p. 49.

<sup>77</sup> Bird, pp. 28, 33; Ramirez, p. 106

rendition of the Washington Consensus’).<sup>78</sup> The model linked the solution to balance of payments issues with the need for debt-ridden countries to reorder their economy through reduction in government spending and selling off of public assets – a policy that further exacerbated crises in borrowing countries.<sup>79</sup> In the context of Latin America, a combination of over-exposed commercial banks, increased volatility and what was perceived as political instability creating a climate of economic uncertainty, is said to have informed the IMF approach of prioritising the ‘stabilisation’ of finances through liberalisation of the nation’s economy (all spelled out in the Kissinger Commission Report of 1984<sup>80</sup>) in return for acceptance of loans.<sup>81</sup> This also allowed the BWIs to paint themselves as the protectors of the world economy, a discourse that echoes the position of industrial nations vis-à-vis the Charter of 1974. In the case of Mexico, after years of resistance to loans from the BWIs, repeated refusals to join the GATT (General Agreement on Tariffs and Trade) and to hand over economic data to the WB, the government was forced to accept loans from the IMF in 1982 – during which process it was also coming under pressure from the US with whom it was negotiating a bilateral treaty – under the conditions of structural adjustment and cuts to public budgets. As an incentive for changes in macroeconomic policy, the IMF and WB continued to offer the Mexico extensive loans that were taken up, despite dissent inside sections of its government. The WB proceeded to institutionalise itself in the country in an advisory capacity to Mexican financial institutions, even offering regular analysis and proscriptions on economic performance on a six-month rolling period to the country’s central bank.<sup>82</sup>

Another case epitomising the BWI’s approach, this time in Africa, concerns Zambia.<sup>83</sup> The country was the largest recipient of IMF loans in 1973, and took out further loans in 1976 and 1978. The nation’s desperation for these loans was borne out of conflict with neighbouring Zimbabwe and the resulting closure of the border between the two countries, which caused significant disruption to transport links and adversely impacted Zambia’s economy. The condition of the loans was a steep reduction in the country’s deficit. Despite the initial success of the country’s debt reduction strategy, a severe cut in capital expenditure ended up decimating its public finances and fuelled a political backlash. The response of the IMF directorate to this crisis was to call for a programme of far deeper structural adjustment, not just in Zambia but throughout the whole of Africa.<sup>84</sup>

It was very much the ‘discipline’ meted out by the economic organs of the UN, dominated by First World industrial powers, first and foremost amongst them the US, which moulded economic international law and the world order so as to counteract the dissident effects of UNCTAD activity. The disciplinary elements here are in respect to debt obligations and contracts between the IMF/WB and the ‘debt colonies’ that appeared in the 1973–82 period (alongside bilateral treaties agreed in the 1980s, see below for the specific cases), particularly in Latin America and Africa. The narrative of the Washington Consensus and its preliminaries placed international institutions of law in the hands of a fetishised economics which accentuated the following of programmes, or, in short, the correct ‘method’ of development, in an attempt to hold in place the asymmetry of North-South relations.

The expansion of these structures further entrenched the extension of surveillance capabilities for DIL, and that chimed from the get-go with what Steyerl calls ‘the politics of verticality’.<sup>85</sup> With the ‘free-fall’ and contingency that characterised, for a short period of time, Third World national liberation movements, the disciplinary paradigm of international law came into full swing, in order for the ‘new subjectivity’ of those movements to be ‘safely folded into surveillance technology’,<sup>86</sup> serving the purposes of development and security. But unlike the linear perspective which still dominates aspects of

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<sup>78</sup> Woods, p. 40; Bird, p. 42. For a full and comprehensive picture of the impact of structural adjustment initiatives on the Third World see *The SAPRIN report: The Policy Roots of Economic Crisis, Poverty and Inequality – A Report on a Joint Participatory Investigation by Civil Society and the World Bank on the Impact of Structural Adjustment Policies*, Zed Books (2007).

<sup>79</sup> Bird, p. 42

<sup>80</sup> Henry Kissinger, *Report of The National Bipartisan Commission on Central America*, The Council on Foreign Relations (January 1984)

<sup>81</sup> Woods, p. 47

<sup>82</sup> *Ibid.*, p. 85–90.

<sup>83</sup> *Ibid.*, p. 143

<sup>84</sup> Also see Jonathan R. Pincus and Jeffrey A. Winters (eds.), *Reinventing the World Bank*, Cornell University Press (2002), pp. 188–9

<sup>85</sup> Steyerl, p. 26

<sup>86</sup> *Ibid.*, p. 24

international law, particularly the linear temporality of development, the new surveillance of BWIs<sup>87</sup> would take a ‘God-like perspective’, ‘the view from above’ and ‘a perfect metonymy for a more general verticalization of class relations in the context of an intensified class war from above – seen through the lenses and on the screens of the military, entertainment and information industries.’<sup>88</sup> The view from above is demonstrable of the new power of macroeconomics and pseudo-scientific indicators like GDP, which take on an uncontested and divine trajectory, specifically in their capacity to arrange nation-states hierarchically from a seemingly global/universal perspective. This vertical view, like the linear perspective, presupposes a horizon or stable ground, and constitutes a privileged subject taking an aerial perspective.<sup>89</sup> The ‘free-fall’ of national liberation movements may have enacted the partial downfall of the linear perspective and its alliance with the old imperialism, but the new verticality of DIL ensured that the Third World remained constrained by the acceptance of its new ground/foundation and corresponding subjectivity. This ground is consolidated and built upon by the master discourse of macroeconomics as it utilises its power to view societies from above, in order to ensure that they are ‘surveilled aerially and policed biopolitically’.<sup>90</sup> However, it is still fundamentally the case that while the politics of verticality provides the renewed orientation of DIL, it does so ‘in a condition in which the horizons have, in fact, been shattered’.<sup>91</sup> The importance of this is that alternative paradigms of international law, such as those articulated by ‘dissident discourses’<sup>92</sup> and social movements, can still be seen as viable and as having the potential force of an event.

Despite this, BWIs and associated structures would maintain the hierarchy of nations. This would be ‘a scalar, or graduated, organization of states secured by positing an ostensibly universal end point in the status of the “developed.”’<sup>93</sup> Pahuja notes that this graduated hierarchy is slightly different from what went before, particularly in comparison to previously rigidly based racial hierarchies, which were held in place by an essentialised geography. This new hierarchy held out a promise that one could get to the end point and gain acceptance; one could claim the coveted title of a ‘developed’ nation. Baxi calls this temporality the ‘enduring time’<sup>94</sup> of development, an indefinite waiting period the underdeveloped country must experience in order to enter the league of the developed, the First World. The indeterminateness of the time that must be spent in the ‘historical waiting room’ is a way in which the First World (‘the centre’) ensures that the Third World (‘the periphery’) remains in a state of ‘backwardness’ and thus within the ambit and influence of global economic institutions. Put simply, the Third World will never be able to catch up and will always lag behind the First, despite the promise of ultimate salvation in development.<sup>95</sup>

The triumph of the nation-state form in postcolonial countries was, then, problematic, specifically because the dominant development discourse of DIL intrinsically linked the nation-state with development through GDP (and macroeconomics in more general terms). The universality of the nation-state had created a milieu in which nations could be legitimately compared to one another, in terms of economic development; this assumed the ‘difference in wealth between countries could be described as inequality’, and further ‘presupposed the existence of a global economic system in which the Third World was ready to participate’.<sup>96</sup> The Third World nation-state had now become the developmental nation-state. The nation had become a legal category that was now intimately intertwined with a global system posited by the First World and was held up by DIL’s privileging of development as a way to renew itself in a globalised world. While the nation had crucially resisted its structuralisation into a particular socio-political form in the period of national liberation, the nation-state was, at this point, easily co-opted into the domain of developmental discourse.

The problem was further compounded by the fact that many Third World lawyers accepted development discourse as a way to renew DIL, as Third World ‘problems of poverty, illiteracy and social

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<sup>87</sup> See Robert Biel, *The New Imperialism: Crisis and contradictions in North/South relations*, Zed Books (2000), pp. 232–3

<sup>88</sup> Steyerl, p. 26

<sup>89</sup> *Ibid.*, p. 24

<sup>90</sup> *Ibid.*, p. 26

<sup>91</sup> *Ibid.*, p. 26

<sup>92</sup> Guardiola-Rivera (2011), p. 41

<sup>93</sup> Pahuja, p. 43

<sup>94</sup> Baxi, p. 83; Biel pp. 74–5

<sup>95</sup> Baxi, p. 7

<sup>96</sup> *Ibid.*, p. 32

backwardness provided the raw materials for the renewal of the discipline.<sup>97</sup> The thinking of these Third World lawyers focused upon the social component and possibilities of DIL, which could continue to ensure its relevance in a globalised context. UN delegates from various parts of the Third World condoned this, as they were content to confine their ‘backwardness’ to the economic sphere, while claiming political and cultural independence and sovereignty.<sup>98</sup> The embrace of ‘backwardness’ had much to do with demands that the Third World be taken seriously in its claims for justice. Justice here was seen as the righting of economic wrongs, largely the exploitation of resources which took place under colonialism. The problem lay with the fact that these legitimate claims for justice were largely reduced to issues around development. In other words, development remained ‘tethered to the notion that the Global North owes nil obligation of global reparative justice’ to the Global South.<sup>99</sup>

The irony is that all the claims to justice that the Third World would make within DIL would be twisted by the ‘ruling rationality’,<sup>100</sup> which would transform claims to justice into claims regarding the promotion of development. On many occasions in which the Third World has used the structures of DIL, as Rajagopal would have it, as ‘terrains of resistance and struggle’,<sup>101</sup> the result has been to expand and extend the reach of developmental intervention and surveillance through provoking the proliferation of such structures.

The period of 1969–74 proved to be particularly productive for Third World nations in terms of the ‘many important resolutions, draft conventions or reports and declarations adopted by the UNGA’.<sup>102</sup> During these years, significant progress was made towards the drafting of the Charter of the Economic Duties and Right of States, and it was indeed adopted in December 1974.<sup>103</sup> The debates and manoeuvrings that took place in preparation for the Charter are of especial importance to us as they demonstrate effectively the clash between dissident and disciplinary modes of international law within the organs of the UN. Alongside the Declaration on New International Economic Order and its Programme of Action, the Charter’s adoption can be considered a watershed moment, constituting a sort of inflection point in the history of international law.

Much of the discourse around the package of suggested economic reforms in 1974 was propelled by the momentum of the Group of 77, the grouping of Third World nations that were increasingly asserting their economic and social rights in the lexicon of sovereignty and self-determination. For our purposes and for the sake of providing the necessary context for our primary case study, we can track the Group of 77’s influence from the establishment of the UNCTAD in 1964. UNCTAD, according to S.K. Chatterjee, made efforts towards the ‘modification of rules in almost every kind of economic and financial transaction, including private foreign investment, based on their own rationale.’<sup>104</sup> The purpose of UNCTAD was to act as forum for Third World nations to push their economic interests and to shape the direction of developmental discourse in the emerging field of economic international law. At the 2315<sup>th</sup> plenary of the UNGA, December 1974, in which the resolution on the Charter of the Economic Rights and Duties of States was discussed and voted on, the Argentinian delegate speaking in its favour confirmed that the Charter was to be ‘an instrument of economic international law, a branch of law in which there is considerable creative momentum because it reflects urgent needs felt by both [Third World] Governments and peoples.’<sup>105</sup> The newly developing realm of economic international law was a discipline that promised to benefit postcolonial nations by equalising disparities in resources. However, UNCTAD’s work not only offered alternative economic reforms to redress the balance between the First and Third World, it also intended to rectify more generally the social power imbalance across the Global North and South which had emerged from years of colonialism.

Certainly, the worsening global economic backdrop at the time accentuated the need for a new framework of cooperation between the First and Third World. Peter Malanczuk expresses the view that

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<sup>97</sup> Baxi, p. 31

<sup>98</sup> Pahuja, p. 70

<sup>99</sup> Baxi, p. 87

<sup>100</sup> Pahuja, p. 14

<sup>101</sup> Rajagopal, p. 88

<sup>102</sup> S.K. Chatterjee, ‘The Charter of Economic Rights and Duties of States: An Evaluation after 18 Years’ in *International & Comparative Law Quarterly*, Vol. 40, issue 3 (July 1991), pp. 669–684, at p. 670

<sup>103</sup> UNGA Res. 3281(XXIX)

<sup>104</sup> Chatterjee, p. 670

<sup>105</sup> UNGA, 29<sup>th</sup> Session, 2315<sup>th</sup> Plenary Meeting, Agenda Item 48, UN Doc A/PV.2315 (Thursday 12 December 1974, 10:30am, New York), A/PV.2315, p. 1365, para. 25

the widespread monetary issues of the time such as inflation were conducive to forms of non-tariff protectionism and catalysed the movement towards integration into regional economic blocs; developments that were seen as a tendency away from the policy of liberalising trade and the removal of tariff barriers favoured (although not solely) by industrial nations.<sup>106</sup> This climate was encapsulated by the oil crisis in 1973 driven by the Arab-Israeli conflict, heightening the suspicious regard in which many postcolonial countries held the traditional economic order. The conflict itself resulted in a series of resolutions from 1972–5 in which Arab states invoked the principle of PSNR and referred to the declaration of the NIEO in calling for ‘restitution of and full compensation’ for damage inflicted on natural resources.<sup>107</sup> Another time-appropriate case concerns the dispute that rumbled on throughout the 1970s between the US oil multinational Texaco and the Libyan Arab Republic over compensation due because of the latter’s nationalisation of US owned oil refineries and related infrastructure: an international arbitration process not resolved until 1979 with a judgement in favour of the former. Beyond this period, as a sort of epilogue, we can refer to *American International Group Inc. v. Islamic Republic of Iran (1983)*, dealing with, again, the nationalisation of US investments overseas and the infamous case of *US v. Nicaragua (1986)*, in which the latter had its accusations of infringement of sovereignty through armed intervention upheld.<sup>108</sup>

Many of the issues of the early 1970s fed into UNCTAD, and in its third session in April 1972 in Santiago, Chile, the Mexican president Luis Encheverría kick-started the process of addressing the need for a radically new framework of international economic and social norms through an appropriate and legally binding resolution:

“We must strengthen the precarious legal foundations of the international community. A just order and a stable world will not be possible until we create obligations and rights which protect the weaker States. Let us take economic co-operation out of the realm of goodwill and put it into the realm of law. Let us transfer the concrete principles of solidarity among men to the area of relations among countries.”<sup>109</sup>

The power harnessed by UNCTAD had already initiated, directly and indirectly, a host of measures and resolutions geared towards addressing some of escalating issues outlined, a few of which I shall mention here in addition to those above. These included measures on advancing peace and security in international relations, such as through the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States (adopted on 24 March 1971); on common sovereignty over natural resources beyond the jurisdiction of any given state with the Working Paper on the Regime for the Seabed and Ocean Floor (13 December 1969); on redressing imbalances in economic power in trade with the Decision on Generalised System of Preferences (January 1970; November 1972); on protection and conservation of the environment with the Declaration of the Human Environment (June 1972); on anti-discrimination with the Draft Convention on the Suppression and Punishment of the Crime of Apartheid (28 October 1971); reports on the Impact of Multinational Corporations on Development Problems and on International Relations (4 October 1970); and on further delegitimising foreign intervention with the Draft Definition of Aggression (April 1974).<sup>110</sup>

The intense activity of UNCTAD during this period had naturally led to the need for an overarching framework to deal with issues relating to the entire economic system. The Charter, as has previously been alluded to, was meant to be a binding multinational treaty and hence codified into international law. This is attested to by the UNCTAD Working Group tasked with carrying forward the Charter from 1972–4. In drafting the Charter, a number of paragraphs originally inserted by the Group of 77 were subsequently removed in order to narrow the area of disagreement between the 77 and First World nations. At the Working Group meeting of the 1 August 1974 in Mexico City, the ‘transitional’ paragraph is recorded as supported by the 77. It states that ‘The General Assembly solemnly adopts this Charter of Economic Rights and Duties of States as a first step in the codification and progressive

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<sup>106</sup> Malanczuk, p. 230

<sup>107</sup> UNGA Res. 3005(XXVII), 3175(XXVIII) and 3336(XXIX)

<sup>108</sup> See ICJ report on *Nicaragua v. United States of America* (1986).

<sup>109</sup> As quoted by the Mexican delegate. A/PV.2315, p. 1376

<sup>110</sup> Respectively: UNGA Res. 2625(XXV); Res. 2565(XXIV); Decision 75(S-IV); A/Conf.48/14; A/C.3/L.1871; E/5500; A/AC.134/L.46

development of this subject...<sup>111</sup> The paragraph was removed from the substantive prior to the draft resolution being presented for adoption at the twenty-ninth session of the UNGA. Additional evidence is given by the Commission of the European Communities in 1974, which confirmed that the ‘significance of the Charter’ was such that it would ‘provide guidelines that states will henceforth observe in their economic relations’. It would also have a ‘certain influence’ on the direction of the ‘evolution of international law’.<sup>112</sup> This would be, albeit not in a binding fashion, captured in the preamble, where the accent was placed on the ability of the Charter to induce and fashion the evolution of international relations and norms – in its own words, to ‘evolve a substantially improved system of international economic relations’. Any mention of codification is also confined to the preamble, and only then in relation to the aspirations of previous resolutions and not relating to the substantive.

For some experts on the history of international law, the fact the Charter was drained of its legal force, in the absence of consensus, much diminished its influence.<sup>113</sup> In light of this, reoccurring disputes still arose as to whether it could be a source of customary law, but perhaps this misses the point somewhat. Despite the inability for a binding framework to emerge, the Charter was still invested with a significant degree of normative force. This speaks of its dissidence; its potential and constitutive power/‘law-making capacity’ as a ‘moral force’ and beyond that a ‘nascent legal force’.<sup>114</sup> In this respect, it was imbued with the capacity to produce new norms and to upend the traditional consensus with its basis in the status quo. In fact, as the Mexican delegate noted, the Declaration of 1960 and the UN Human Rights Convention also failed to gain a consensus, yet still heralded the transformation of international law, and, we can add, not in spite of lacking consensus of it but because of it.<sup>115</sup>

Before we look at the text of the Charter and the discussions that took place around it, let us continue to flesh out the context. There are two important earlier and in a sense preliminary contributions or precursors to the 1969–74 period of UNCTAD activity that deserve mention, but I shall restrict myself to a précis of them here. These contributions relate to the Calvo and Drago doctrines, and here we shall draw on McWhinney’s description of them.<sup>116</sup> Both doctrines arose in Latin America and became recognised on a regional basis as a principle of law, even as they were disregarded by the First World on the international level. The first doctrine was articulated by the Argentine jurist Carlos Calvo in the mid nineteenth-century and was an attempt to tackle the injustice of European and US governments continuing to apply the terms of economic development contracts that had been negotiated previously at times of increased vulnerability for Latin American nations, such as, for example, at points of political instability and civil unrest. The Calvo doctrine established the practice of revoking the privileged diplomatic status of those US and/or European citizens coordinating business activities in Latin America and acquiring special access to natural resources. The point was to level the playing field in regards to who could have access to these resources and to constrain First World nations’ special rights over them. The second doctrine, named after a fellow Argentinian, the Minister of Foreign Affairs of Argentina from 1902–3, Luis Mariá Drago, asserted the sovereignty of nations in the face of a rationale that justified armed intervention on the grounds that a foreign power held the right as a creditor to recover debts from a Third World nation. Drago – in the public announcement of the doctrine in 1902 – insisted on the principle of the illegitimacy of such actions that could seemingly override the self-determination of nations. Both these doctrines, in placing value on a nation’s economic sovereignty and on self-determination as a means to thwart the impunity and aggression accompanying vastly unequal power relations on the level of the international, were important early precursors to the period of time we are now focused on.

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<sup>111</sup> UNCTAD, Report of the Working Group on the Charter of Economic Rights and Duties of States on its fourth session (Mexico City, 10–28 June), UN Doc. TB/B/AC.12/4, p. 6. The transitional paragraph is listed as ‘Alternative 1’ and the expressed support of the Group of 77 for this is given on p. 21. The aspiration behind this was still kept alive by the Mexican delegate at the UNGA plenary, see A/PV.2315, p. 1378, para.166

<sup>112</sup> Report of the Commission of the European Communities, 1974, paras.6 and 8

<sup>113</sup> This is certainly implied by the Canadian delegate speaking at the plenary session: ‘It had been the hope of my delegation that this Charter would command the consensus necessary to enable it to contribute to the codification and progressive development of law in this area; unhappily, this is not the case.’ A/PV.2315, p.1374, para.28, also see paras.156–7.

<sup>114</sup> Chatterjee quoting Sloan, p. 681

<sup>115</sup> A/PV.2315, p. 1377

<sup>116</sup> See McWhinney, p. 9

Much of the spirit of these regional doctrines would be embodied many years later in the Third World's claims to PSNR in the landmark 1962 UNGA resolution that proved an extraordinary yet less comprehensive version of the Charter of 1974.<sup>117</sup> A few years prior to remarkable years between 1969 and 1974, these claims saw the Third World attempting to assert its national sovereignty over natural resources, assets and economies, following the large-scale plundered during the time of colonialism. Power over natural resources was seen as key for countries to lay a basis for their future development.<sup>118</sup> However, this was problematic for First World countries attempting to promote their investments in the Third World, as foreign investments would require protection at all costs. If PSNR asserted the legitimacy of Third World countries in nationalising the manufacturing and productive capacities used to extract natural resources, this would be a major concern for First World investors and multinational corporations. So, while PSNR remained unresolved due to a deadlock between the First and the Third World on the issue, a 'nascent regulatory framework dealing with foreign investment'<sup>119</sup> pushed the radical claims of PSNR to one side. This framework advanced the position that foreign investors who had their assets in the Third World nationalised should be subject to compensation. Essentially, the Third World would have to compensate the First World for loss of profits. This worked in parallel with the 'extended...reach of the BWIs in a spatial, conceptual and juridical sense'.<sup>120</sup> PSNR was articulated as a political manoeuvre by the Third World, and the ensuing response from the First World was to grasp the opportunity to extend the reach of BWIs into the political sovereignty of nation-states, in order to more effectively lead in the developmental process. The Third World's approach of using international institutions as a way of 'occupying and politicising the space of international law'<sup>121</sup> only increased the legitimacy of BWIs intruding into Third World political structures.

To arrive at the time in which the Charter was in the process of its final revisions, in May 1974 the UNGA adopted the resolution 'Declaration on the Establishment of a New International Economic Order' and quickly afterwards the Programme of Action on the Establishment of NIEO.<sup>122</sup> The NIEO can be considered as a complementary measure to the Charter, which would be adopted eight months later. The essential demand of the NIEO was to 'broadly call for structural changes in the world economy'<sup>123</sup> and posit a third way in economics between the First (capitalist) and the Second (socialist) World. Again, proposals were based loosely on re-orientating international law in a Third World direction by resisting the current power relations. The NIEO attempted to do this by challenging the GATT,<sup>124</sup> calling for a new type of cooperation between independent and sovereign nations and demanding the reduction of inequalities between states through exploring the benefits of nationalisation, producer associations and preferential trade agreements.<sup>125</sup> Like PSNR, this was doomed to failure (it was in fact blocked by the USA) and once again resulted in an extension of the institutional role of DIL. Rajagopal suggests that the Third World's focus on the reform of legal institutions expanded their space as 'autonomous actors' in the legal field.<sup>126</sup> It seemed that the Third World critique of DIL, through the use of the latter's institutions, did not contest the underlying notion of development. The failed attempts of the Third World resulted, with little difficulty, in the accentuation of the view that a proliferating number of international institutions were required to intervene more substantially in the Third World to ensure development. The political sovereignty of postcolonial states seemed to be ripe for transgression due to the fact that development economics was beyond political contestation (i.e. accepted by First and Third World) and hence was not seen as an intrusion of domestic politics.

To come to the Charter itself: we are able to examine the dissidence in the resolution manifesting itself through the articulation of radically new norms, alternative ways of organising economic international

<sup>117</sup> This was eventually passed in 1962 as UNGA Res. 1803(XVII). However, it accepted PSNR as fundamentally part of the process of economic development or 'in the interest of...national development', which was framed as part and parcel of 'promoting national co-operation'. See Ian Brownie (ed.), *Basic Documents in International Law: Fifth Edition*, Oxford University Press (2002), p. 177

<sup>118</sup> Pahuja, p. 156

<sup>119</sup> Ibid., p. 143

<sup>120</sup> Ibid., p. 234

<sup>121</sup> Rajagopal, p. 88; Duffield (2014), p. 82

<sup>122</sup> UNGA Res. 3201(S-VI) and 3202(S-VI)

<sup>123</sup> Rajagopal, p. 73; Biel, pp. 125, 244; Duffield (2014), pp. 24-5

<sup>124</sup> Rajagopal, p. 84; Biel, pp. 269-70

<sup>125</sup> Rajagopal, p. 80

<sup>126</sup> Ibid., p. 94

relations and the 'reordering' of social relations across the global North/South divide through a more just and equitable legal framework. The Charter was a far more comprehensive and consolidated resolution than all that came before it, for example PSNR (see above).<sup>127</sup> Despite some overlapping concerns with the resolution of 1962, the Charter was designed to be considerably more far reaching in its impact on international relations and as was explained earlier, it was initially supposed to form the basis of a codified multinational treaty. To add to this, it allowed for the integration of a wider variety of principles, such as that of the 'common heritage of mankind' and the preservation of the environment.

In chapter 1 of the Charter, the section on the 'Fundamentals of Economic Relations' expresses the principles of restorative justice through 'remedying injustices which have been brought about by force' and the need to level the economic playing field through de-incentivising the 'attempt to seek hegemony and spheres of influence'. Here we see inextricably linked the need to address the impact of the history of classical imperialism with the future endeavour to persistently limit the emergence and maintenance of new economic relations of domination and subordination.

This is elaborated upon further, and in more concrete terms, in the Article 2 of the Charter, where three controversial and live contextual issues are addressed: namely, preferential treatment for foreign investment; the encroachment of transnational companies on the sovereignty of the nation-state; and the right to nationalise foreign property in order to assert national sovereignty over natural resources.

In respect to permanent sovereignty over natural resources, Article 2(c) in the final Charter, let us turn firstly to the alternative paragraphs put forward by the Group of 77 in the UNCTAD working group session of August 1974:

'Every State has full permanent sovereignty over the wealth and natural resources whether on land within its international boundaries, or in the sea or continental shelf within the limits of its natural jurisdiction and, consequently, has the inalienable right to the full exercise of its sovereignty freely and effectively dispose of them, including the right to nationalization.

Every State has the right and the duty to take all effective measures, *inter alia*, through the full exercise of permanent sovereignty over all its natural resources, to put an end to all forms of foreign occupation, apartheid, racial discrimination, colonial, neo-colonial and alien domination and exploitation.'<sup>128</sup>

The alternative proposed by the 77 was absolute in upholding the sovereignty of nation-states to nationalise any foreign infrastructure involved in the exploitation of resources within a domestic jurisdiction. There is also an explicit connection between this right and safeguarding the integrity of a state from all types of colonialism, whether economic and/or through armed intervention. Through the processes of negotiation between nations within the working group, the alternative paragraphs were filtered out in favour of the right to nationalise with the caveat that appropriate compensation is paid, although any resulting controversy over the enactment of this proviso was to be subject to the domestic law and legal organs of the host state. Many of the Latin American delegates at the UNGA plenary, while praising the sentiments behind Article 2 as a whole, expressed their misgivings over the lack of precision in the paragraph concerning nationalisation. The Brazilian delegate put this forcibly, telling the UNGA that such a right 'cannot brook restrictions' that would water down its normative and discursive force to transform international relations. He further reflected that some of the Western industrialised nations had 'expressed themselves accordingly on the subject, [that] these concepts are interpreted and regarded in so broad a manner that they would at once constitute a grave, unacceptable limitation to the principle of the free sovereignty of the States over the natural resources within their own territory.'<sup>129</sup> Indeed, the position of compensation was a non-negotiable one for many of the industrialised states, as taking up the contrary position would condone 'confiscation', as was aptly stated by the Canadian delegate.<sup>130</sup>

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<sup>127</sup> With the exception of a few passing references (pp. 188, 187(116ff.), 234), Pahuja does not actually examine the Charter at all in her study. Her main concern is PSNR of 1962 and NIEO of May 1974, for which she looks at the primary sources. For her, the main discussions take place prior to the Charter. However, my contention is that the Charter was a watershed moment for all that the Group of 77 and postcolonial nations fought for in this period, not just as a complementary measure to NIEO, but also as a substantial resolution in its own right, and that there is much merit in turning to it, in order to examine it through its first hand sources.

<sup>128</sup> TB/B/AC.12/4, p. 7

<sup>129</sup> A/PV.2315, p. 1369, para.77. Similar sentiments were also expressed by the Bolivian and Paraguayan delegates, see p 1366, paras.34, 36

<sup>130</sup> A/PV.2315, p. 1374, para.126

In many ways, it was the conflict expressed between the economic self-determination and absolute sovereignty of nations and the so-called dictates of the world economy – in the terms of and as pushed by the First World industrialised nations – which defines much of the dispute around the Charter. This is not to say that many of those Third World nations which participated in the Charter did not couch their positions in terms of the international, which was the case particularly with regard to cooperation between developing and developed states in order to ‘achieve a just and rational development of all parts of the world’. It is more the case that First World nations, which for the most part voted against or abstained on the Charter, and thus obstructed the achievement of any consensus around it, responded by reasserting the ‘discipline’ of orthodoxy through macroeconomics, under cover of the international, and grounded upon the sovereignty and reality of the industrial might of First World nations. For instance, within the Working Group draft, while many of the 77’s alternative paragraphs revolved around the nation’s alleged predominance over foreign capital, much within the suggested amendments from industrial nations’ centred on the need to pay attention to the ‘harmonious development of the world economy’ while accommodating developing countries.<sup>131</sup> Part of this tension around the discipline of development was captured by the UN International Development Strategy 1970, to which the Charter was broadly aligned, and which states that

‘Developing countries will adopt appropriate measures for inviting, stimulating and making effective use of foreign private capital, taking into account the areas in which such capital should be sought and bearing in mind the importance for its attraction of conditions conducive to sustained investment. Developed countries, on their part, will consider adopting further measures to encourage the flow of private capital to developing countries.’<sup>132</sup>

The Development Decade strategy was in line with the liberalisation of trade policy taking place at the time. It made the case that developing nations needed to ensure that they were ‘conducive’ and attractive to foreign investment. However, the responsibility for development still firmly rested on the developing nation<sup>133</sup> – a principle reiterated by the Mexican delegate<sup>134</sup> – and a nation-wide plan had to be in place for the furtherance of this desirable goal. The discipline of planned development on the level of the nation-state was interlinked with obligations due to the world economy, represented by the necessity to reduce the barriers to private capital from the First World (a firmly held position of the OECD). This rationality was perfectly summed up by the delegate from Thailand – placing on record his government’s differing views from the 77 while voting in favour of the Charter in solidarity with other Third World nations – who explained of ‘the desirability and indeed usefulness of foreign investment’ to his country’s economic development and the need to ‘continue to endeavour to foster’ a favourable ‘investment climate’.<sup>135</sup> The intention here was to uphold the orthodox and fetishised methods of economic international law, over and above its radical potential to reorder international relations, at least as conceived by much, if not all, of the 77 (even with admitted points of contention of this group acknowledged). We can contrast this with the Brazilian delegate’s reference to the Declaration of Asunción (as he spoke out in a dispute with the Argentinian delegate over Article 3), a regional treaty agreed between Latin American countries along the River Plate Basin (*Riό de la Plata Basin*).<sup>136</sup> According to the representative, the question over which country held the right over the Basin as a natural resource resulted in discussions concluding in the treaty, generated as an ad-hoc legal norm, which

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<sup>131</sup> Some accommodation was crucial, not just because of the voting power of Third World nations in the UNGA, but also because in the Cold War context First World nations did not want to push Third World nations into the waiting embrace of the Communist bloc.

<sup>132</sup> UNGA, 25<sup>th</sup> Session, Res. 2626(XXV)

<sup>133</sup> Res. 2626(XXV), para.11

<sup>134</sup> TB/B/AC.12/4, p 1377, para.159: ‘...the responsibility for the development of every country rests primarily upon itself.’

<sup>135</sup> A/PV.2315, p. 1372, para.104. The delegate was quoting his government’s Minister of foreign affairs, speaking at the Ninth Ministerial Conference for the Economic Development of South-East Asia in November 1974. This underlines the reality that there were many disagreements between regional economic blocs and individual Third World nations on the appropriate strategies that they should take in regard to international relations. Nonetheless, there remained a great deal of natural solidarity for the sentiments behind resolutions advanced by the Group of 77. The Mexican representative addresses these fellow developing countries in para.155, p. 1377.

<sup>136</sup> The Declaration was signed on 3 June 1971 and established ‘each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin.’ The River Plate Basin was subject to an ongoing dispute between Brazil and Argentina. The countries involved in the declaration include Argentina, Bolivia, Paraguay and Uruguay. See UN Doc. A/CN.4/274(vol.1), p. 178

proclaimed a regional norm to exercise shared sovereignty.<sup>137</sup> This suggested that the application of PSNR did not simply imply the consolidation of the territorial boundaries of a nation-state, but could be an avenue down which Third World nations could collaborate, not in order to conform to a discipline or predetermined method, but in the generation of new means of cooperation and law. The notion of shared sovereignty over natural resources between neighbouring countries intimates a different type of economic relationship over that which simply seeks to construct relations, founded on the appealing nature of a 'favourable investment environment' for private capital from First World nations.

In respect to the Charter, it is true to say that the Group of 77 had accepted the key tenets of economic development, namely growth, but even so the choice to abide by alternative or 'different economic growth models' to those offered up by industrialised nations was seen as the prerogative of developing nations, and the need to respect this policy is repeated through the Charter (as well as more generally speaking, the UN Charter of 1945) as the 'inalienable right' for a nation 'to choose its economic system'. The extinguishing of this idea foreshadows the (re-)imposition of the 'discipline' associated with reasserting the correct economic policies. This can be seen in exemplary fashion by the stirrings taking place in South America during the 1970s. For example, during this period of international law-making, General Pinochet's US-backed coup d'état, which overthrew Salvador Allende's Socialist government in Chile in 1973, constitutes a remarkable historical event that foreshadowed the rise of neoliberalism, and more specifically the structural adjustment policies applied throughout the 1980s and carried out with US support under Ronald Regan. Likewise, in the years following the adoption of the Charter, the Argentinian Junta had by 1976 installed itself in power and was regularly briefed by US Secretary of State Henry Kissinger as how best to avoid UN scrutiny over its human rights violations. On the trade side of things, despite the Charter's proclamation for the international to grant preferential treatment to developing countries in bilateral and multilateral trade treaties (Articles 14, 18, 19, 21), the terms of the bilateral trade treaties such as those between the UK and Yemen in 1982 and the US and Egypt in the same year, and furthermore between the US and Turkey in 1985, stipulated that investments in the host countries had to be protected at all costs and due compensation was demanded in the event of nationalisation.<sup>138</sup>

Moving beyond PSNR and compensation to Article 2(b), the Charter touches on the effective regulation of the activities of transnational companies operating in Third World nations, perceived to be wielding an undue influence to the point of intervention, and thus undermining the right to self-determination. The Article declares that transnational companies have to abide by the laws of the host state and respect its sovereignty, as well as economic and social policies. The precedence of state law and the integrity of the 'internal legal order' over that of transnational corporations was an important principle here, as the implication of supranational bodies settling these disputes was, in a sentiment echoed by a variety of national representatives, to put the corporation on a par with the standing of the nation state.<sup>139</sup> Moreover, this is exactly what took place in the aftermath of the Charter, as the fears expressed here were borne out in reality with international arbitration taking place in the case of *Texaco v. Libya* (1979) and *America Int. Group Inc. v. Islamic Republic of Iran* (1983), both of which ruled in favour of the transnational companies. As opposed to the respective merits of the states involved, it was the precedence these cases set that is most worthy of note here. In the terms put forth in the 2315<sup>th</sup> plenary meeting, placing nation-states on an 'equal footing' with predominantly Western transnational corporations was to grant the latter the ability to have a substantial say on the internal politics, procedures and the juridical policy-making processes of the Third World nation. It would not simply lead to the erosion of national sovereignty – 'questioning the sovereignty of states' – or act as a means to render the policy-making processes of the Third World nation contingent on compliance with Western corporations and the economic models that best suit them, but was a continuation of colonialism, 'neo-colonialism' as many Group of 77 delegates termed it (as stated in Article 16), by other means. And as the Brazilian representative put it, the implication of all this would be to give these companies 'power over development projects'<sup>140</sup> and so consolidate the linearity of an economic international law that provides for only one pathway to development. This was most acutely felt within the context of economic crises, international inflation, trade imbalances and shortage of resources such as oil due to regional conflicts

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<sup>137</sup> A/PV.2315, p. 1370, paras.83, 84

<sup>138</sup> Chatterjee, p. 676

<sup>139</sup> A/PV.2315, p.1378, para.162

<sup>140</sup> A/PV.2315, p. 1371, para.92

where there was a growing exploitation of petroleum. The reorganising of international relations through the Charter was meant to be a partial remedy for these ills. However, as was stated, the push back of a DIL reinstating the preference for seeking ‘hegemony and spheres of influence’ occurred in earnest with international arbitration upholding the privileges of Western capital over developing nation-states and pre-existing global power relations continuing to be of the utmost relevance.

In addition to all that has been stated, it is also worth pointing to the pioneering nature of Articles 29 and 30. In regards to the former, the Group of 77 fought for the principle of the common heritage of mankind to be incorporated in the Charter so as to carry forward and embed a previous 1970 resolution, and in order to act as an embryo from which would emerge the landmark Resolution on the Law of the Sea, adopted in 1982. Article 29 sets out in a preliminary manner the case that the utilisation of the ocean bed and sea soil is for the benefit of all the nations of the world, including landlocked nations, although this would be further expatiated upon in the standalone resolution. The intimation of common sovereignty is also hinted at in Article 30, which invokes the principle of the ‘protection, preservation and enhancement of the environment for the present and future generations’. Placing these environmental concerns in the context of economic international law was significant, not least because it addressed the need for the resources of the earth beyond national jurisdictions to be considered as a sort of commons, over which humanity as a whole held responsibility. This, in turn, could benefit virtual future generations as genuine subjects of international law. We could even conceive of these future generations as social relations still lying in latency or potentiality and which could perhaps have a stake in shaping legality in the present.

As a final word, we can see embedded in the Charter both dissident and disciplinary elements. In terms of its radical dissident components, the Charter held the potential to provide the impetus for the evolution of international norms. In the arena of economic international law, for example, this was a potential to move away from orthodoxy and the pre-existing international relations between the Global North and South. While our contention may be that many of the UN resolutions in the 1969–74 period of international law-making were constrained by aspects of the UN development framework, and many of the presumptions of this approach were left unchallenged, the Charter was still a genuine attempt to enshrine a more equal and just world through the protection of Third World nations’ economic self-determination and sovereignty. At least to some extent, these legal concepts could be utilised to contest the linearity of a conventional development macroeconomics propagated by the West. During the same period, however, the key facets of DIL were also being instilled, legitimated and solidified within economic international law in a manner that acted to rebuff the realisation of the latter’s more radical potentialities. This was achieved primarily through the hegemonic status that orthodox methodological assumptions secured within the conjoined spheres of the theory and practice of development economics, in which Western interests held the power to define and enforce the ‘correct’ economic organisation of nations. This therefore subverted Third World efforts to use the idea of economic self-determination and the rights of sovereignty to offer an alternative economic order, in which the particular interests of the First World were no longer internationalised through its hold on the law, but rather, one where the particular interests of all would act as the foundation to international order. Through the use of international economic law and its epistemological and methodological power, the West was thus able to secure the retrenchment of existing power relations. Even in a new geo-political context, the ideological (and coercive/military) power of the West was such that it was able to manage and maintain the international order in the form of a hierarchy of nations (coloniality), even as it did so through the use of new but in many regards conventional disciplines to achieve this. In this case, pushing the principle of compensation for nationalisation; subtly placing transnational corporations on a par with developing nation states; framing themselves as the prudent guardians or managers of the world economy; and prioritising the flows of private capital from the First World over the sovereignty of Third World and postcolonial nations, allowed the West to reinscribe a DIL that the Third World sought to challenge on a global scale following the embrace of the nation-state form. In this way, then, the field of economic international law, far from becoming part of a new discipline reordering international relations on a more equal footing, became a new means to express the decadence of a DIL.

In his concluding speech at the UNGA plenary session on the Charter, the Mexican representative warned that ‘Peace cannot survive long in the midst of injustice, but in human affairs it frequently occurs that

crisis must attend the birth of a new order.<sup>141</sup> Unfortunately, notwithstanding the positive contributions of postcolonial dissident law-making to international law<sup>142</sup>, Third World attempts to claim justice resulted in a reinforcement of development rationality, as Third World critiques were based more and more on accepting the premises of the Western legal concepts underlying DIL. This was coupled with the fact that development, along with economic growth, had become a transcendent notion lying outside political contestation.<sup>143</sup> What is most significant for us to understand here is that economic development had erased claims to justice as reparative for the ills of colonialism. The national liberation movements, which had championed a view of justice as struggle against unequal power relations on a global basis, had been extinguished with the acceptance of development as both replacement and answer to colonialism.

## Chapter Three: The ‘Spatial Cut’ and Spatiality of International Law in the Context of Development

The above-described discourse of development helps to maintain the specific spatiality of DIL and its related institutions. The first moment of this spatiality is the ‘spatial cut’ that underpins DIL. This cut is productive of what Doreen Massey calls the ‘geographical imaginary’<sup>144</sup> of international law, namely, how spatiality is both represented and constructed by the global judicial institutions; to put it another way, it is ‘the political production of space and place designed to maintain structural injustices and even modes of justification’.<sup>145</sup> In this case the spatial cut of DIL produces both the Global North and South; it is productive of the ‘geographies of injustice’<sup>146</sup> that divide the centre of international law from its periphery. What is significant about this global space is that it is ‘not so much a description of how the world is, as an *image* in which the world is being made’.<sup>147</sup>

Pahuja identifies the cut as the real foundation of DIL. The cut is ‘the boundary line of law’s own definitional truths – who is the “self” or legal subject, who is the other or legal object’.<sup>148</sup> DIL therefore ‘produces its own subjects, as well as its objects of rule’.<sup>149</sup> As previously mentioned, it is the Third World that is constructed as a legal object and so has its subjectivity denied. At the same time, however, the First World needs the Third World in order to guarantee the universal legitimacy of DIL as well as to secure and consolidate its own identity and subjecthood by ensuring that the Third World recognises the First as the supreme subject. This is substantiated by Pahuja, who states that the modern world, characterised by the rule of developed law, was seen to be produced by the West before the Third World’s integration; in her words, the West ‘posited a world – complete with coeval legality – as already in existence before the Third World’s entry into it.’<sup>150</sup> The subjecthood of the First World, or what some postcolonial theorists call ‘absolute Being’,<sup>151</sup> is somewhat based on its supposed construction of legality. The cut is therefore representative of a line dividing those who are fully subject due to the presence of law, characteristic of civilisation, and those who exist outside law and so are not capable of subjecthood, as they are only capable of existing as a newfound object of a DIL that recognises them as such. The ‘other’, originally outside the scope of law and so incapable of exercising its agency, comes to depend on the institutions of DIL to partly facilitate its involvement. It is therefore very much like the Hobbesian

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<sup>141</sup> A/PV.2315, p. 1378, para.168

<sup>142</sup> Seen with, for example, the growing strength of postcolonial countries in the UNGA, where they were able to start shifting the balance of power since 1955; the subsequent establishment of the principle of decolonisation and self-determination as a norm of international law in the following decade (1955–65); and the intense activity of the UNCTAD in 1969–74.

<sup>143</sup> Pahuja, p. 19

<sup>144</sup> Massey (2005), p. 84

<sup>145</sup> Baxi, p. 84

<sup>146</sup> *Ibid.*, p. 84

<sup>147</sup> Massey (2005), p. 84 (emphasis added); Kostas Axelos, *Introduction to a Future Way of Thought: On Marx and Heidegger*, ed. Stuart Elden, trans. Kenneth Mills, Meson Press (2015), pp. 123–4, 127–8. Also see Drucilla Cornell, *Moral Images of Freedom*, Rowman & Littlefield Publishers (2007), for an argument of how ‘moral images of freedom’ which exist beyond the limit of direct knowledge – in an ideal manner – can be the basis of an affirmative and galvanising practical philosophy.

<sup>148</sup> Pahuja, p. 44

<sup>149</sup> *Ibid.*, p. 24

<sup>150</sup> *Ibid.*, p. 201

<sup>151</sup> See Gordon (2005), p. 1

brute, living ‘constantly in a state of nature’.<sup>152</sup> The horizon-line can therefore be rearticulated as the line of exclusion – those who are excluded are paradoxically needed for the construction of the included/subject’s identity and for the latter to successfully posit their values within a universal framework.

The line of the cut also issues the division between what Baxi calls the ‘two broad global classes: the developers and the developpees’<sup>153</sup> in the language of development. The economic lines and hierarchy that have been drawn here are roughly parallel to the juridical line which separates Global North from South. While contemporary social movements, like national liberation movements in postcolonial states, continually attempt to redefine the Global South in their own terms – as terrains of struggle and resistance which deny the limitation of its agency – the Global North, through DIL, produces a mirror image to show the South what it could look like if it followed the singular narrative of salvation – of development and rule of law.

## Chapter Four: Diametric and Concentric, Smooth and Striated

The relationship between the Global South and North really defines how the centre–periphery axis works at a time of globalisation. DIL functions as an anchoring orientation in this paradigm, which holds the line of division between North and South<sup>154</sup> steady through its fracturing discourses, as well as ensuring the hegemonic identity of the centre.

Eduardo Viveiros de Castro’s study of dual organisations is useful here in elaborating how the spatial paradigm of DIL has become increasingly intricate in the event of the inclusion of the Third World. Viveiros de Castro draws heavily on the structural anthropology of Lévi-Strauss as informed by Amerindian (hereafter in this chapter contracted to ‘Indian’) cosmopolitics, particularly when looking into the spatial representations of the village morphology of many indigenous peoples.<sup>155</sup> It is exactly this spatial representation of the village that has so much to tell us about the spatial structure of DIL.

The first spatial representation Viveiros de Castro introduces us to is the ‘diametric dualism’. The diametric dualism takes on the structure of a circular village divided into two halves (West and East); this is the ‘dual organisation’. The line or ‘cut’ separating the two halves of the circular village acts as a diagrammatical representation of the symmetrical and reciprocal relationship between parts. The two opposed halves or terms are static and reversible oppositions. The Indian used such oppositional dualities to mark distinctions between classes and castes and as a basis from which to articulate the ritual and reciprocal duties (matrimonial, funerary, economic) between them within the village environs. Within the diametric dualism the Indian cosmological and mythological spatiality meets the geographical spatiality of the village. Nascent DIL, prior to the integration of postcolonial countries from the Third World, took on a similar form to that described above. A classical or overly imperial element is embedded in this form. This is because while reciprocal relations and treaties were drawn up between imperial powers and Western power blocs, the colonised Third World was completely shut out (these countries’ legal status was one confined merely to an extension of dominion or colonial trusteeship).

To expand on this point, it is possible to look closely at the vertical line or separating diameter within the village-organisation representation, and its relation to the outside boundary or circumference – the limit of the village. Viveiros de Castro relates that if an observer is placed on the diameter, they will see the circumference as a barrier or an invisible horizon; essentially, they will be unable to see beyond the invisible line of the circumferential boundary. This is because the diametric dualism is constructed as a self-sufficient system or self-contained whole enclosed by an ‘impassable frontier’. The outside is kept completely out of sight, as well as outside the realm of conceptualisation. Any idea of internal indeterminacy is non-existent, and this fulfils an existential need to keep the system firmly together as a bounded whole. The diametric dualism is thus a type of reductive system. Its *modus operandi* is to keep oppositional terms or socially defined groups integrated together within a totality. Its key characteristic is

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<sup>152</sup> Baxi, p. 94

<sup>153</sup> Ibid., p. 89

<sup>154</sup> See Samir Amin, *Eurocentricism*, trans. Russell Moore, Zed Books (1989), for more on how the North/South and centre/periphery divide is constructed, pp. 24, 141–2; Duffield (2014), pp. 5–7

<sup>155</sup> Viveiros de Castro (2012c), p. 7

to entirely preclude the occurrence of an event – a happening which could only appear from an unimagined outside in order to disrupt the dualism of a fully circumscribed village structure.

The paradigm of the diametric dualism that characterises international law before the advent of the 1960s national liberation movements has this crucial feature of precluding any idea of event. Rather than being the strength of the system, this constitutes its Achilles heel and leads to its partial downfall. The static purity of binary oppositions within the diametric dualism leaves it with an inability to contain its ‘outside’ when an event eventually does occur on the horizon. This leads us to our second spatial paradigm, which is the outcome of the morphing of our first paradigm in reaction to an event. This is the ‘concentric dualism’.

The concentric dualism, rather than a completely separate structure to the diametric dualism, can be seen as its logical progression. In addition to the purely formal and reciprocal/symmetrical relations between social classes within the village structure, asymmetrical relations between centre and periphery are included. The dualism specific to the concentric model is therefore between an inner circle, representative of the ‘sacred’ and public centre, and an outer circle, suggestive of a ‘domestic and feminine periphery’.<sup>156</sup> The relationship between the inner and outer circles is clearly a hierarchical one.

In contrast to the diametric dualism, the concentric dualism is not subject to positing itself as a complete system or totality. The outer circle, the supposed boundary-line, invites a central observer to look outside to the prospect of more encompassing circles beyond the visual horizon.<sup>157</sup> This somewhat partial embrace of the ‘outside’ prevents the concentric dualism from presenting itself as a universality, in strict contrast to the diametric structure. The outside, or ‘external zone’, acts as a reference point, which the internal circle or centre is always subject to. Within the Indian’s village spatiality, the ‘third zone’ outside the village is represented by nature or the world. The earth or environment is symbolic within this cosmology of an encircling contingency, in which the centre must always respect and regulate its own structures in relation to.

As we have stated, the encircling contingency facing international law in the 1960s and 70s took the shape of national liberation and independence movements within the periphery. These social movements mirrored the growing confidence of the colonised Third World in the face of a crumbling imperialism. With the retraction of empire and its borders, and the growing strength of national liberation movements having the force of an event, DIL’s diametric spatiality was severely inadequate in encompassing the periphery. What ensued in post-1960s international law was a mix of diametric and concentric forms of spatiality, which ensured its survival. The inclusion of the postcolonial nations in the 1960s into a new universal judicial framework, representing the reciprocal sovereignty of nations beneath the law, also included integration into the asymmetrical relations of an economic hierarchy. The economic gradient defining nation-states, or the introduction of economic comparativeness, would maintain the centre, while continually regulating the periphery. The morphology between spatial paradigms and the integration of one within the other allowed imperium to continue within the confines of DIL. Events coming out of the Third World could be more easily contained within a spatial system that pre-empted and sought to contain them. To better understand how DIL was able to regulate and confine the events that proliferated within the Third World, we will need to delve more deeply into Gilles Deleuze’s comprehension of the event.

The most salient aspect of Deleuze’s, and Félix Guattari’s, notion of the event is that it is most concerned with *becoming*. The question that the event seeks to address is: how do we reactivate becoming, considering the fact that we are commonly completely unable to perceive becoming in everyday life?<sup>158</sup> As Deleuze concluded via his engagement with Scottish Enlightenment notions<sup>159</sup> of legality, regularity and causality (themselves heavily dependent on the sixteenth-century recovery of speculative geography and imperial legality among Salamanca School jurist-theologians), within the chain of cause and effect that so defines history, the qualities that make up the event – creation of the new, experimentation, constant and perpetual change<sup>160</sup> – are covered up. The event itself is what makes the process of change overt, i.e. discloses it – change within beings and subjectivity on the one hand, and the place and space the subject is situated in, on the other. The event is thus not merely another part of the

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<sup>156</sup> Viveiros de Castro (2012c), p. 8

<sup>157</sup> Ibid., p. 11

<sup>158</sup> Colebrook (2002), p. 127

<sup>159</sup> Deleuze particularly drew upon Humian philosophy. See Deleuze (2011)

<sup>160</sup> Deleuze and Guattari (2003), p. 111

linear temporality of history; it is what escapes history.<sup>161</sup> In his interview with Antonio Negri, Deleuze makes this point explicit – the event is the Untimely, in the sense that it leaves behind the preconditions of history in order to create anew.<sup>162</sup> Hence, the present time of beings is not that which is enmeshed within the causal chain of history, but that which is ceasing to be or leaving behind to take off on a new trajectory.

The new trajectory, or in Deleuzian parlance ‘line of flight’, is therefore an escape or severance from the dominant space-time of a system. The system, with recourse to the paradigms we mentioned above, is a representation which seeks to divide up reality ‘into definable things which stand in an *ordered* relation to one another’.<sup>163</sup> The ‘situatedness’ of the subject within this spatial system dictates what that subject can perceive; for example, in the case of the diametric dualism, the subject situated on the diameter is prohibited from seeing beyond the boundary-horizon. As has already been noted, with the concentric dualism, a subject located within the inner circle is able to imagine enclosing circles beyond the visible. In a sense, it is possible to say ‘where something is situated has everything to do with how it is structured.’<sup>164</sup>

An event can thus be seen as an escape not only from an imposed situatedness within a structure, but also from the type of subjectivity that the structure confines the subject to. Because the experience of the subject is influenced by the structure itself, what is created here is the normative subject.<sup>165</sup> The normative subject is defined as acting as a type of centre which experiences are organised around.<sup>166</sup> The organising centre of the subject experiences the flows of life as a unified, coherent whole. The holistic grasp in which the subject organises its experience can be called ‘sense’<sup>167</sup> – the meaning the subject derives from ordering and ranking experiences into a conceptual structure or whole. These flows, impressions or singularities of affect (i.e. the individual affects or impressions the world imparts to the subject before their integration into a structure of meaning) are regulated by the normative conceptualisation of time and space held by the subject.

As has been stated, this normative/conventional space-time is influenced by the organisation or structure that encloses the subject. This allows us to bring the horizon back into consideration. The homogenous continuum of the horizon can be thought of as the territory of the self-regulating subject.<sup>168</sup> The behavioural habits or ‘refrains’ of the experiencing subject enable him/her to associate the territory with a type of causal/inductive reasoning and laws, producing the sense of the familiar and predictable. This causal reasoning links together sensations, feelings and habitual activities into one ‘continuous stable space’<sup>169</sup> of a regulated reality. What could otherwise be seen as separate activities, potentially contributing to the subject’s sense of becoming, is integrated into this territorial-whole.

While we may look at the village spatialities as circumscribing what the subject can experience, it also needs to be noted that the subject regulates itself with regard to the perception of its surrounding territory. The outcome of this process is one in which the normative subject ‘staves off forms of

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<sup>161</sup> Deleuze and Guattari (2003), p. 111

<sup>162</sup> Gilles Deleuze, *Control and Becoming: Gilles Deleuze in conversation with Antonio Negri*, trans. M. Joughin, original in *Futur Antérieur* (Spring, 1990) (<https://antonionegriinenglish.wordpress.com/2010/09/23/control-and-becoming-negri-interview-with-deleuze/>, uploaded on 23 September 2010)

<sup>163</sup> Heidar Due, *Deleuze*, Polity Press (2007), p. 23 (emphasis added)

<sup>164</sup> Ed Casey, *The Fate of Place: A philosophical history*, University of California Press (1998), p. 303

<sup>165</sup> Tamsin Lorraine, ‘Ahab and Becoming-Whale: The nomadic subject in smooth space’, in *Deleuze and Space* (pp. 159–75, 2005), p. 159. Reflecting on Deleuze’s critique of normativity, it is important to ask whether he could possibly sanction any variant of normativity or whether his philosophy aims merely at deconstructing its foundations and putative universality in favour of some value-neutral creativity. Hence, a common contention concerns whether Deleuze permits an ‘anything goes’ theory of law. In discussing this problematic, Claire Colebrook utilises a Deleuzian approach in positing a ‘counter-normativity’ which sees the problem in terms of a normative disjunction: the need to simultaneously, if partially, accept a given normativity while breaking away from it to create something new so as to shift modes of normalisation and begin to realise a ‘counter-ethics’. See Colebrook, *Norm Wars*, in Rosi Braidotti and Patricia Pisters (eds.), *Revisiting Normativity with Deleuze*, Bloomsbury (2014), pp. 81–97. Ronald Bogue argues that Deleuzian jurisprudence constitutes a ‘pragmatic ontology’ that, while offering no model for a political institution, allows for the generation of new/ creative norms. He further asserts that Deleuze’s ontology permits him broad underlying normative commitments or what can be considered as an ethics: a ‘becoming-democratic’ that guides political action and a ‘vitalism’ that imagines new possibilities for existence. For more on this see Bogue, *Nature, Law and Chaosmopolitanism* in Braidotti and Pisters (2014), pp. 98–112. Also see ff. 126 for more discussion on this issue.

<sup>166</sup> Colebrook (2002), p. 128

<sup>167</sup> *Ibid.*, p. 59

<sup>168</sup> Lorraine, p. 163

<sup>169</sup> *Ibid.*, p. 162

repetition that entail continual becoming-other'.<sup>170</sup> Becoming is arrested as the subject of organising experience posits its own stable identity (a combination of narrative linear time and regulated space, i.e. an interiority), which is duly regulated and positioned in respect to its surrounding territory. This fits in with the representative or categorising function of spatial organisations, which situate stable and self-regulating identities within a territory.

Within this context, the process of the event can be seen, as Claire Colebrook states, as a deterritorialisation that occurs 'when an event of becoming escapes or detaches from an original territory'.<sup>171</sup> It is the nomadic subject that can be said to partake in such an event. In contrast to the normative subject, the nomadic subject conceives of reality as separate 'blocks' of space-time, de-linked or de-severed from a holistic territory or structure.<sup>172</sup> The nomadic subject is able to comprehend the idea that reality, far from being composed of a space-time continuum, is made up of heterogeneous blocks which relate to the subject's encounter with differing milieus. These different blocks are usually combined into an ordered, uniform and seamless unity in respect to the experiencing normative subject. However, the nomadic subject experiences them as combinations that can be reconfigured and connected in various different ways, each reconfiguration completely transforming the blocks brought together.

The deterritorialisation process occurs when unified, overarching space-times entrenched within boundaries disintegrate to reveal a multiplicity of blocks. It is precisely the escape, or line of flight from a structure, which creates new connections with the world by bringing together blocks of space-time in novel combinations outside the normatively defined.<sup>173</sup> The *connecting together* of blocks does not, on this account, act in a representational fashion. This is not simply a connection of entities, denoted by metrics, integrated into a socially quantifiable whole; every connection of one block to another in this instance creates a *qualitative* change to the whole, as well as a quantifiable one.<sup>174</sup> The connection, in this way, can be seen to maintain a certain form of dynamism that cannot be reduced to representational forms. The blocks brought together are never constitutive of a definitively new whole, as the potentiality exists of further connections and production.<sup>175</sup>

In *Kafka: Towards a minor literature* Deleuze and Guattari explain that 'terms are distributed throughout the ordinary series, at the end of one series or the beginning of another, and so mark the manner in which they link, transform, or proliferate'<sup>176</sup> (this can be summed up in the phrase 'every beginning is an end, every end a beginning'). What Deleuze and Guattari denote as the beginning or end of one series can rightly be called a 'threshold'. The threshold is essentially a boundary-line, which ensures the identity and being of what is on the inside. When the boundary-line is crossed, when the *terminus* is expanded so to speak, the being whose existence is reliant on the demarcation is transformed. To reinforce the point, in *Capitalism and Schizophrenia* Deleuze and Guattari state that 'the limit designates the penultimate marking an inevitable change...the limit beyond which the enterprise would have to change its structure.'<sup>177</sup> Moreover, their argument in *Kafka* is an elaboration of the idea that connectors – those terms at the beginning or end of a series – once they bind themselves onto another series, result in the production of a completely novel composition or the outcome of the complete transformation of the original parts. The same process is evident with the nomadic subject in relation to the event. Within the intensity of the event, the subject's becoming and fluid identity are reactivated; the normative subject is completely subverted. In this instance, the static, circumscribed being of the normative subject passes a threshold which reactivates the fluidity of its identity and being. It is no longer pure interiority, but subject to continuous becoming. Furthermore, we can assert that the nomadic subject is less subject than *subject-becoming*.

The subject-becoming is further clarified in the notion of the 'fold'. Rather than simply passing a threshold drawn up by a normative subject's experience of a space-time structure, the nomadic subject appropriates the threshold itself. This threshold can also be seen as a fold – that is to say, a nominal boundary that renders conspicuous a continuous movement between an outside and an inside.<sup>178</sup>

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<sup>170</sup> Lorraine, p. 162

<sup>171</sup> Colebrook (2002), p. 59

<sup>172</sup> Lorraine, p. 159

<sup>173</sup> Lorraine, p. 164

<sup>174</sup> Deleuze and Guattari (2012), p. 484

<sup>175</sup> Colebrook (2005), p. 192

<sup>176</sup> Deleuze and Guattari (1986), p. 63

<sup>177</sup> Deleuze and Guattari (2012), p. 484

<sup>178</sup> Deleuze (1990)

Deleuze's favoured exemplar of the fold is between being and thinking: as it is difficult to delineate between where being ends and thinking begins, the fold can be considered to be the perpetual enmeshed interaction between the two (although they cannot be formally distinguished). In which case, the subject itself constitutes such a fold. While it is worth noting here, for the sake of clarity, that a fold may be considered a boundary of sorts, more often than not it erases any clear-cut distinctions manifested in the boundary-line, as it is a process of continual, restless movement. Any distinct and 'crisp' boundary-line is, for the most part, drawn up by a spatial system of representation and control in the process of annulling becoming.

The nomadic subject can thus be said to epitomise how the fold operates within subject-becoming (or 'becoming-other'). In appropriating the threshold, the state of becoming of the nomadic subject enables it to act as a connector between the different disparate milieus (or blocks of space-time) it experiences. Hence, the milieus themselves are perceived by the subject-becoming, rather than as another unified space-time, as holding themselves in a perpetual state of transformation. The subject, becoming de-centred, no longer acts as an organising centre of experience. That is to say, it can no longer organise its experiences around a static identity, located within a homogeneous space-time.

The fold, which is conspicuous as well as inherent to the nomadic subject, permits the latter to embrace the contingency of the outside. Conversely, the *inside* is stopped from positing itself as totalised identity and being. This is not only apparent due to the connecting role the nomadic subject plays in bringing together disparate milieus; it is also due to the fact that the nomadic subject is a type of conduit through which the virtual can realise itself at the moment of the event. The virtual can be thought of as the 'fullness of reality'.<sup>179</sup> This fullness incorporates the entirety of actuality, including all potential possibilities that are yet to materialise. These potentialities are, for Deleuze, no less real or part of reality despite not, at least ostensibly, existing within the confines of the present. The potentialities of the virtual are then those of becoming and transformation through differentiation.

In relation to the virtual, the event (as discussed above) can be considered as a significant actor. According to Thanem and Linstead, the 'event taking place with the actualisation of the virtual never terminates its connection to the extended and indeterminate world of the undivided virtual Whole.'<sup>180</sup> The event provides a link that tethers potentialities – which are undergoing actualisation within its space – to the further unactualised potentialities of the virtual. In this scenario, actualised potentialities are not fixed and determined simply by becoming actualised in the present; this is because they continue to maintain a link, through the event, with further virtually unrealised possibilities.

The nomadic subject's<sup>181</sup> sense of perception in the event is skewed, as it is de-severed from the dominant or over-arching spatial structure. It is this innovative perspective and angle on experience that for Deleuze opens up a new world. It is made possible by the nomadic subject's continual passage through thresholds, as well as the subject's openness to the outside, which allows it to participate in the event so as to retain a link with the virtual. This new sense of perspective is aided by the event's concept-creating nature;<sup>182</sup> after all, the alternative possibilities generated by the virtual include a manifold of concepts and ways of thinking.

Suffice to say, with the national liberation movements of the 1960s various legal concepts and contestations were thrown up. Deleuze hints at this when he points to the event as creative of new law: 'Jurisprudence... is a matter of a situation, and a situation that evolves.'<sup>183</sup> The event invents the right of new ways of being and perceiving: it generates a new legality. It interacts with novel ways of becoming by aiding the subject's passage through, and indeed past, the threshold of normativity governing positive law, and thereby creating a certain immanent law. This is the fluid law of interaction that operates as a fold – it takes up the position between that which makes up the inner being of positive law and its

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<sup>179</sup> Torkild Thanem and Stephen Linstead, 'The Trembling Organisation', in *Deleuze and the Social*, eds. Martin Fuglsang, Bent Meier Sorensen, Edinburgh University Press (2006), p. 152

<sup>180</sup> Thanem and Linstead, p. 152

<sup>181</sup> To add to ff. 110, Rosi Braidotti and Patricia Pisters suggest that the nomadic subject can be considered in light of a 'nomadic jurisprudence' that is 'process-oriented' with a value-system 'differential but never relativistic'. Such a legal assemblage is based on a normativity of immanent ethical principles that generates values not on the consideration of what ought to be 'but rather might be.' See Introduction, pp. 1–8, in Braidotti and Pisters (2014) and Rosi Braidotti, *Transpositions: On Nomadic Ethics*, Polity (2006)

<sup>182</sup> Deleuze and Guattari (2003), p. 110

<sup>183</sup> Deleuze, *On Human Rights*, L'Abecedaire de Gilles Deleuze, avec Claire Parnet, Video Ed. Montparnasse (1996) (transcript take from: [http://www.faculty.umb.edu/gary\\_zabel/Courses/Phil%20108-08/Deleuze%20on%20Human%20rights.htm](http://www.faculty.umb.edu/gary_zabel/Courses/Phil%20108-08/Deleuze%20on%20Human%20rights.htm), uploaded on 26 February 2004)

outside. It is the law proper to justice,<sup>184</sup> which is prodigious in its creativity and innovative in the production of the new, and perpetually attempts to detach itself from the horizontal plane of transcendental law.

In order to further articulate the nature of this immanent law and jurisprudence in terms of postcolonial social movements, let us now turn to the spatiality proper to the event. The space that is opened up by events is what is called 'smooth space'. Smooth space draws 'a deterritorialisation that cuts across both the lineal territorialities and territory or deterritoriality of the state'.<sup>185</sup> To elaborate within the postcolonial context we have thus far been examining, the allegorical nomads of Guattari and Deleuze's philosophy can be seen in the light of some of the social movements today that exist on a level both local and global; they exist outside the confines of the nation-state in order to disrupt its striated space (discussed below) and claim to territorialisation. Moreover, we can say that the event of national liberation, in which the subject-becoming of the people-nation emerges, is productive of this proliferating smooth space.

The postcolonial subjectivity proper to this space is created through empirical processes of resistance against the spatial structures of colonialism. The debris of scattered, enslaved subjects under colonialism, in re-gathering itself into a people-nation, reactivates its sense of becoming. The people-nation, however, is kept in a state of becoming purely because its empirical self-creation (i.e. in political resistance) is tethered to the virtual/idea that is the beyond of its experience. Any grouping or assemblage of this kind is kept in a state of dynamic becoming and qualitative change due to its continued adherence to the contingency (or virtual potentialities) of its outside. The people-nation, in the event of national liberation, constitutes itself not only as a political subjective-becoming, but also as a sort of fold. This fold equates to the appropriation of the 'cut' or, as Deleuze would have it, the 'anticipation–presentation' mechanism<sup>186</sup> from those who would otherwise use it against the Third World. In this case, embracing the contingency of the outside helps to both anticipate and ward off the nation-state form and its corresponding mode of thinking; any interiority of the people-nation is stopped from positing itself as a stable being and identity opposed to continuous becoming.

What is right and proper to this people/nation/fold and its deterritorialising effects is a relation to the earth. National liberation movements, and the social movements that sprang from them, can be said to have a leaning towards the absolute deterritorialising effect of the earth. If we are to bring up the concentric dualism representation once again, it will be recalled that Indians proclaimed the outside of this village spatiality to be inhabited by a 'third zone' – by the natural contingency of the earth. The earth acts as the ultimate outside or (absent) ground of contingency, which definitively resists the territorialisation of any one spatial system of representation. As Gregg Lambert relates, philosophy or politics from the point of view of the earth<sup>187</sup> assumes a perspective from which all human societies are seen as transitory, and therefore in a state of becoming, no matter how much they attempt to withstand it

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<sup>184</sup> Deleuze and Guattari (1986), p. 86. We should note here the critical discussion on 'Deleuzian jurisprudence' and its applicability to legality between Laurent de Sutter and Alexander Lefebvre, which is superbly detailed by Constantin V. Boundas in 'Encounters, Creativity and Spiritual Automata' in Braidotti and Pisters (2014), pp. 68–73. The former suggests that the force of law, its institutions and associations, can be located in its uncanny ability to invent and indeed reinvent relations between individuals as well as wider structural/ societal relations. Law is directed towards the 'institution' and the expansion of the connections 'among things and beings'. More precisely, jurisprudence can be considered as the 'taxonomy of cases' that rapidly multiplies and mutates where unique cases (or singularities) dynamically interact with each other in the creation of the new. De Sutter's conclusion is that this analysis has no practical normative consequences for law, but signifies the philosophical *becoming* of jurisprudence – the perspective of cases which assume 'mobile points of view' – replacing the legislator and legality. For more on this position, see Laurent de Sutter 'How to get rid of legal theory' in Zenon Bankowski (ed.), *Epistemology and Ontology: IVR Symposium Lund*, Franz Steiner Verlag (2003) and *La Pratique du Droit*, Michalon (2009). In contrast, Lefebvre takes a view of Deleuze's 'speculative jurisprudence' that is best exemplified in the legislator's or judge's attempt at validation and adjudication in the encounter with new cases. In this scenario, the judge, in making her adjudication or judgement in the context of a new case, must transform the existing body or 'archive' of law in invoking its 'virtual past'. In combining virtual elements, the judge is a 'spiritual automation' – a notion developed by Boundas in his contribution to the debate – in producing a legal assemblage of law (also see here how legal assemblages between law, space and bodies might be conceived as a *lawscape* in Philippopoulos-Mihalopoulos (2007)). The creativity involved in this process constitutes the 'law of adjudication' (see p. 112, 17ff. for the opposing process of 'subsumptive adjudication'). See: Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza*, Stanford University Press (2008). Both theorists, despite the diverging conclusions drawn, attempt to demonstrate that a constructive engagement with Deleuze can aid in the radical reconceptualisation of legality.

<sup>185</sup> Deleuze and Guattari (2012), p. 431

<sup>186</sup> Ibid., p. 484

<sup>187</sup> Lambert, pp. 233–34

by positing a stable essence or interiority. From the position of the nation-state, it is partially due to the subject's incarceration in spatial systems of representation as an organising subject of experience that the perspective of the earth is precluded. In which case, when one thinks from the viewpoint of the earth, the subject-object duality of spatial representation gives way to the continuous movement between territories and the absolute deterritorialisation of the earth.<sup>188</sup> This perspective is only possible when the nomadic subjectivity and the smooth spaces it inhabits decentre the normative subject of organising experience. This is simply as to understand the perspective of the earth is to move towards a position of absolute deterritorialisation.

While relative deterritorialisation concerns the historical transience of territories and human societies upon the earth, absolute deterritorialisation is the process in which territories are completely swallowed up by the totality of the earth as a whole.<sup>189</sup> The earth as Whole is reality in its entirety – all virtual/latent possibilities as existing simultaneously in the present.<sup>190</sup> Absolute deterritorialisation is thus the complete actualisation of the virtual whole in reality – Deleuze and Guattari use the term 'utopia' and other writers 'non-place'<sup>191</sup> to describe this. This non-place is the ahistorical aspect of the event, which is fundamental in reanimating being within the conditions of history. Geography, in Deleuze and Guattari's philosophy, is crucial to becoming and the event as it 'wrests history from the cult of *origins* in order to affirm the power of *milieu*'.<sup>192</sup> The symbolic character of origins is that of the Greek 'autochthon' – a being that literally 'springs from the soil'. The autochthon is thus a creature of territory and marked origins. To deterritorialise the Autochthon is to see it in its proper relation to the entirety of the earth – in doing so, we recreate it as a new being.

In relation to the national liberation movements we have had cause to mention, the threshold between relative and absolute deterritorialisation is of especial importance. The threshold is the tipping point in which the relative state passes into the absolute state,<sup>193</sup> that which was momentarily occupied and appropriated by national liberation movements during the collapse of colonialism. Here, we are able to conceive of the overlapping folds and thresholds, which constitute the particular types of smooth spaces occupied by the kind of movements we have considered. It is the process of connection between and proliferation of the folds and smooth spaces that encompass the earth which haunts the nation-state, as 'movements of relative deterritorialisation...always [threaten] to be absolute.'<sup>194</sup> In addition, this involves a process of delinking, which can be explained as the cutting away of some of the links that weld hierarchical or asymmetrical social relations to those of the nation-state form. In terms of the earth itself, it can only be 'defined by this degree of imbalance, or disequilibrium [between absolute and relative states]'.<sup>195</sup> It is this disequilibrium that lends to the earth the power to create new territories (relative deterritorialisation), as well as providing the impetuous in its perpetual leaning towards the absolute state.

While the nomadic subjectivity's relations to the event, deterritorialisation and the earth mark the principal qualities of smooth space, it is also appropriate to note how smooth space resists the type of metricisation that typifies increasingly homogeneous striated space. To this end, the smooth space of the nomads defies the geometric matrix of the horizon as it encompasses an 'open space, one that is indefinite and noncommunicating'.<sup>196</sup> It is 'without division into shares...a space without borders or enclosure'<sup>197</sup> and is therefore delimited and vast, or infinite/absolute, in its resistance to both territorialisation and reduction to measurable distances. Smooth space, rather than being characterised by borders, is formed of folds in which distinctly separating boundaries are erased (like the sand dunes continuously shifted by the ceaseless motion of the desert winds). While most demarcated spaces have

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<sup>188</sup> Deleuze and Guattari (2003), p. 85. Also see Bernd Herzogenrath, 'Nature|Geophilosophy|Machines|Ecosophy', in *Deleuze|Guattari & Ecology* (pp. 1–22, 2009), p. 4

<sup>189</sup> Deleuze and Guattari (2003), p. 88

<sup>190</sup> *Ibid.*, p. 100

<sup>191</sup> Lambert, p. 226

<sup>192</sup> Deleuze and Guattari (2003), p. 96 (emphases added)

<sup>193</sup> Lambert, p. 235

<sup>194</sup> *Ibid.*, p. 235, cf. John Holloway's ontological theory in which contingency radiating from the events of self-constituting create 'cracks' which join up, and eventually lead to the collapse of an entire system of representation. See *Crack Capitalism*, Pluto Press (2010)

<sup>195</sup> Lambert, p. 235; Herzogenrath, p. 4

<sup>196</sup> Deleuze and Guattari (2012), p. 420

<sup>197</sup> *Ibid.*, p. 420

clear boundaries, the ‘spatialising traces’<sup>198</sup> that a structure leaves behind in the creation of boundaries are suppressed. In other words, while the boundaries themselves (those that have been laid down) are considered clear-cut, the actual act of ‘cutting’ (that which produces the boundary), whereby the structure is divided between its inside and outside, is concealed. It is the process of appropriating this threshold, outside the central control of a structure, which is unique to smooth spaces. The events that open up or disclose smooth space also ensure that they are freed from causal modes of reasoning, and therefore metricisation and control.

What takes place in this scenario is that the majoritarian model, which ‘people [are forced to] conform to’,<sup>199</sup> has been rejected or put off in favour of a minority becoming. Minoritarian becoming, consistent with the nomadic subject, has no models. The negation of the model equates to an all-encompassing embrace of uncertainty and unpredictability – in a word, contingency. When minorities do construct a model, it is under the assumption that they are in no way beholden to it, as it is created solely out of the resources of the people-nation. These minority models can thus be easily changed and/or discarded by the people themselves. In contrast, the majoritarian model can be considered to be the normative framework of DIL. This model breaks down in the cauldron of the event, in which jurisprudence and the situational creation of right throw off the conventional threshold of positive law.

This minority model of jurisprudential formation *in situ* is consistent with the workings of smooth spaces, in which lines and points are replaced by wanderings ‘along a trajectory’,<sup>200</sup> where points along a path are oriented by ‘local operations’ or varying points of note such as are characteristic of a local place. The points here are ‘invisible’ because they are forgotten as soon as they have served their purpose in providing orientation; they are not mapped or made static through the power of geometry. In other words, smooth space is a ‘local absolute one occupies – without counting’.<sup>201</sup> The absoluteness of local place here is fundamentally characterised by the intensity of the being that travels and lives through place/regions – ‘Intense *Spatium* instead of *Extensio*’.<sup>202</sup>

The trajectories that are indicative of smooth spaces can be properly considered to be lines of flight, which differ from the geometric lines that enclose and define subjects. The geometric line is reduced to points: it moves between one point and the next.<sup>203</sup> In contrast, the line of flight escapes from representational structures in order to move unimpeded and multiply unabated, changing qualitatively as it proliferates. So, it simply cannot be reduced to points as the orientation here is unanchored and in constant variation<sup>204</sup> so as to avert capture. It corresponds to the expression of a new becoming that unfolds in a different way depending on the unique features of the (smooth) space. This accords with the experience of the nomadic subject who encounters events, intensities or singularities of affect, and helps to remove her/him from the coherent organising experience of sense. The intensity of experience and expression, such as also identifiable in situational jurisprudence, occurs as a detachment from sense *qua* whole. In fact, what occurs is a deterritorialisation of sense. Sense, in its normative mode, is a fixed image produced in the mind from an encounter with the other. These images and associations, remaining in a state of fixity uncondusive to becoming, are amalgamated and linked through causal-chain reasoning. But in the newly deterritorialised sense attributable to the nomadic subject, sense, in terms of affects, not only emerges from encounters, but also takes part in a process of releasing itself, along with the subject, ‘from [the] world of *effected* relations, from territories’ to form the ‘potential for [perceiving and experiencing] other relations and new worlds’.<sup>205</sup>

It is these new worlds that hint at a new sense of experiencing and perceiving. The perception is local in that it has detached itself from the territorialised form of sense and experience. These new worlds, or blocks, contain their own spatiality and temporality, separated from normative conventions (and majoritarian ordering). From each of these blocks – Deleuze also equates these with monads – perceptions unfold with new forms of being, stimulating new expressions.<sup>206</sup> Each monad, or ‘atom’, while holding onto its local place from which it perceives, absorbs the outside through the intensities of

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<sup>198</sup> Colebrook (2005), p. 197

<sup>199</sup> Deleuze (*Futur Anterieur*, 1990)

<sup>200</sup> Deleuze and Guattari (2012), p. 419

<sup>201</sup> Casey, p. 304

<sup>202</sup> Deleuze and Guattari (2012), p. 528

<sup>203</sup> Colebrook (2005), p. 203

<sup>204</sup> *Ibid.*, p. 198

<sup>205</sup> *Ibid.*, p. 191 (emphasis added)

<sup>206</sup> *Ibid.*, p. 201

its affects i.e. of individual experiences, which come out of the encounter with the world, and in so doing shakes off territorialised experience and sense. Orientation through intensities of experience, via the event, sustains a link with the outside, which holds off any normative spatial structure of experience/sense and its corresponding subjectivity (the interior space of scientific man).<sup>207</sup> The outside or ‘absolute’, which worlds and monads are tethered to, is the virtual – this is the monad’s grasp of the infinite, that which transcends it.

It should be clear that this is a fundamental challenge, emerging from a ‘local absolute’, to the orientating anchor of a DIL. In this way, the subjective being of social movements can simultaneously evade capture by the state and international law. What is characteristic of some of the social movements emerging from the Third World, according to Rajagopal, is that despite being locally embedded and non-statist, they are still able to challenge DIL on a global level (as has been explained above).<sup>208</sup> However, the main quality of these heterogeneous groups, and what they share with the smooth space inhabited by the nomad, is that they ‘resist exact centration or reproduction, and all the more so universalization’.<sup>209</sup> The intensities inherent to smooth spaces suggest the irreducible nature of the experiences and perceptions they stimulate. The situational nature of justice and creation of right can be seen here, produced as they are within the intensities of events.

The multiplicity of social movements fits in aptly with a manifold of trajectories that is intrinsic to smooth space – a multiplicity that challenges the homogeneous, all-encompassing quality of the geometric grid. On this basis, the putative universality of DIL is contradicted by the ‘peripheral or semi-peripheral sites which function adroitly within the political spaces created by globalisation’.<sup>210</sup> These social movements, which make up many of the enclaves within the periphery, are at the forefront of a critique of development discourse as supremely limited in its blindness in acknowledging the organising principle of justice as struggle. The struggle here is intricately intertwined with the preservation of the local ‘absolute’ of place, which is characterised more by Neocosmos’ articulation of the nation as an inclusive political subjectivity than by a crude, militant particularism based upon a bounded idea of place (something which the institutions of international law are quick to admonish). The ‘vastness’ of the nomad’s deterritorialised sense of place (usually conceived of in terms of picturesque panoramas such as the desert or steppe) rings true with the social movements of the Third World, which threaten the accentuated borders of the nation-state.

The smooth spaces proper to events are recaptured within the paradigm of concentric dualism, as we have already outlined. In contrast to the diametric dualism alone, the concentric dualism is able to contain and adapt to the possibility of events, such as those embodied by national liberation movements. However, it is the concentric and diametric dualism together, in partnership, which epitomises the dominance of DIL from the 1960s onwards.

While the concentric dualism can be used to explain how DIL proved to be far more open to the event in comparison to previous paradigms of colonialism and imperialism, a further comprehension of ‘striated spaces’ can demonstrate how nomadic subjectivity was re-captured and contained.

Striated spaces primarily involve the process of sorting and ‘sedimentation’ occurring on the surface of the earth. Strata, which form striated spaces, are layers that are built on one another upon the earth. They can be considered to be ‘acts of capture’<sup>211</sup> that seize what is near, in order to force and bind together. In this manner, singularities and intensities, which are productive of smooth spaces, are ‘imprisoned’ or ‘locked’ into systems that are codified and enclosed as territories. Both the diametric and the concentric dualism provide good examples of this method of codification, as social groups and castes are given demarcated positions in a system which define their characteristics (centre: male, public; periphery: feminine, weakness, etc.). The outcome of this process is the *socius* – the stratification that occurs from the territorial machine of the (nation-)state form.<sup>212</sup> The stratifications built upon the earth make it ‘heavy’, ‘bloated’ and ‘overburdened’<sup>213</sup> with forms of sovereignty attached to centralised structures. The act of overburdening through sedimentation and the accumulation of layers acts as a way

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<sup>207</sup> Colebrook (2005), p. 201

<sup>208</sup> Rajagopal, p. 268

<sup>209</sup> Casey, p. 303

<sup>210</sup> Rajagopal, p. 270

<sup>211</sup> Deleuze and Guattari (2012), p. 45; Lambert, p. 225

<sup>212</sup> Lambert, p. 223

<sup>213</sup> Ibid., p. 225

to blunt the natural contingency of the earth. This is signified starkly by the imagery of the earth's surface weighed down by territorial layers. The sedimentation process is conspicuous with the ascension of political parties: national liberation movements gave way to parties in former colonial states as the institutions of DIL exclusively acknowledged the nation-state form through the UN.

The manner in which the political party operated to subdue national liberation movements demonstrates well how the sedimentation/codification process of striated space takes place. Vital to sedimentation is the collapse of the *societas*<sup>214</sup> or state of alliance that characterises the smooth spaces of the people-nation. These 'alliance relationships'<sup>215</sup> stop social roles from accumulating into the distinct strata that make up striated spaces. When sedimentation takes hold, however, a 'sorting and ranking'<sup>216</sup> process occurs. This operation takes a variety of loosely configured roles and constructs a distinguishable structure out of them, arranged into social classes. The result of this is emergence of a new elite, which carves out a space and establishes itself as 'legitimators of change and delineators of the limits of innovation'.<sup>217</sup> These elites essentially capture the threshold that the former alliance/*societas* held; the former deterritorialisation of the people-nation collapses back into territorialisation of the nation-state and the party apparatus.

The distinct social roles that are created within the party structure correspond to different positions within varying strata. The elites, who now govern the nation through the party and the state, monopolise and mark off the leading social roles from the great multitude of people. While the former *societas* of the people-nation corresponded to a line of flight, connection between different events, nomadic subjectivities and blocks of time-space, the political party organisation heralds the return of distinct boundary-lines. The 'line' within political parties is constituted through its subordination to ordered points (recall the linear perspective).<sup>218</sup> Each demarcated point is a social role fixed within one of the multiple levels or layers of strata. Points on different strata are securely connected to one another through a line. The line does not simply denote a discernible hierarchy but delineates between social classes, as in the diametric dualism, and their qualities, as in the concentric dualism. The organisation of the party in this sense can be seen as a 'pluralism of order' based on 'positions, interests and governmentality'.<sup>219</sup> This chimes with the way in which Deleuze and Guattari describe striated space as 'both limited and limiting...it is limited in its parts, which are assigned constant directions, are oriented in relation to one another, divisible by boundaries, and can interlink.'<sup>220</sup> The territorialisation of the social movement through the political party, and the people-nation by the nation-state, corresponds to striated space's championing of divisible, metrically located boundaries which divide people, but also ensure their centralised control and 'capture' (in the state-form). The political party, and its method of control over the organs of the nation-state, represents the ordering excesses of the formal organisation.<sup>221</sup>

These ordering excesses are indicative of the triumph of what Deleuze calls the molar, over the molecular. The molecular can be seen as the hidden dynamism of points that interact with each other, in a mode alongside one another (as opposed to hierarchically), in a similar way to the series, which we noted above. The encounter between molecules is transformative, and their continued becoming ensures they evades capture and integration into an enclosed whole. The molar, however, is a form of reterritorialisation that joins points together into an ordered unity within a static identity.<sup>222</sup> The points within a molar segment or the social roles of the nation-state are fixed within a whole and are therefore conducive to 'stable behaviour patterns'.<sup>223</sup> The people who embody these social roles are ordered through subjectification<sup>224</sup> – they are brought into a normative understanding of the world through restriction to a single way of being or behaving, corresponding to that role they occupy. Their behaviour thus becomes predictable as seen from the perspective of the structure (the God's eye view, see above).

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<sup>214</sup> The term is used by Hannah Arendt in *On Revolution* and is distinct from simply a society or the *socius*.

<sup>215</sup> Thanem and Linstead, p. 44

<sup>216</sup> *Ibid.*, p. 44

<sup>217</sup> *Ibid.*, p. 44

<sup>218</sup> Deleuze and Guattari (2012), p. 529

<sup>219</sup> Thanem and Linstead, p. 42

<sup>220</sup> Deleuze and Guattari (2012) p. 422

<sup>221</sup> Thanem and Linstead, p. 42

<sup>222</sup> Thanem and Linstead, p. 47

<sup>223</sup> *Ibid.*, p. 44

<sup>224</sup> *Ibid.*, p. 46

This is precisely why Deleuze and Guattari associate striated space with what they call ‘Royal Science’,<sup>225</sup> or the centralised science of the state. Royal Science is founded upon a ‘fixed model of form, mathematical figures, and measurement’, all of which inclines it towards the ‘static’<sup>226</sup> as opposed to becoming. It has a ‘metric power’<sup>227</sup> that categorises as it ‘aspires to universality’.<sup>228</sup> The majoritarian ‘model’ is crucial for strata and striated spaces to hold a structure in place via socially definable metrics. The model is predictive of human behaviour and ways of being which are imputed to the defined social roles of a stratum. Human behaviour, in these models, is reducible to constants or universal laws. This compounds ‘a conception of society as being composed of inert subjects susceptible and bound to the application of universal laws of the state’.<sup>229</sup> The social division of labour and the codified social classes that this brings about converts the subject into a unit<sup>230</sup> of productivity, completely at odds with the nomadic subject as the dynamic centre of forces.<sup>231</sup> The nomadic subject’s line of flight is defined by irregularities, as opposed to constants, and the unpredictable and uncontrolled transformations of becoming. Universal metrics, the language of the structuralising forces of the concentric and diametric dualism, becomes a new threshold, which defines and binds together interiority (this model is best exemplified by such terms such as ‘world order’, as utilised by Donald Rumsfeld and Henry Kissinger).

The hold that Royal Science has over legal practice and concepts is evinced by the emergence of managerial theories such as law-as-plan. The latter, in the same manner as the majoritarian models we have thus far discussed, provides a cognitive frame that allows for the reduction or minimisation of disruption caused to a normative (or moral) orientation by events. In many ways, it provides a method in which to block or at least obscure openings that may appear to the virtual. For the model/plan events appear solely as unplanned occurrences, the so-called ‘conditions of legality’<sup>232</sup> that necessitate a demand for as well as give rise to the rule of law. To elaborate, they are the ambiguous, complex or arbitrary moral contexts (or situations) that can only be circumvented or ordered by resorting to the ‘master plan’ (ground) of legality.<sup>233</sup> The irrationality that breaks forth in unplanned occurrences must submit to those officeholders<sup>234</sup> (those in the higher-end social roles of the stratum) who are in place to carry out the planning process. Cost-efficiency is deemed to be the major benefit of this approach, in complete contrast to prohibitively costly modes of ‘spontaneous self-ordering’ and experimentation.<sup>235</sup> This is because once plans or models are adopted by a group of officeholders there is explicit reason to adhere to them; plans which are persistently discarded or tinkered with (i.e. minoritarian plans/models) are detrimental to a durable legality.<sup>236</sup> Any attempts to re-open the master plan or majoritarian model is strongly resisted as the manner of ordering society must be *settled* beyond any costly contestation. Legal institutions (or systems) become the means through which plans can be carried out as they configure the normative orientation that will guide the collective-subject impelled to follow. The implementation and construction of plans on behalf of the collective-subject, which is de-politicised and de-subjectified, effectively produce an obligation to conform to the officeholders’ interpretation of the instructions that are derived from the master plan. To put it another way, the highly rational organisational abilities of the officeholders make up for the costly errors of the people-nation at large.

On the planetary scale, the *modus operandi* of Royal Science parallels that of DIL as it is built upon categories that are the grounds for its claim to universal principles. This is comparable to the universality of DIL, with its foundation in the categorical cuts it effects and the new hierarchy of power it seeks to define with the pseudo-scientific basis of measurable macroeconomics – the metric power of GDP, development and so on. The geometric divisions of nation-states are all too complicit with the power of metric measurability to capture and locate people in a system of control. To come back to the

<sup>225</sup> Deleuze and Guattari (2012), p. 402

<sup>226</sup> Ibid., p. 402

<sup>227</sup> Ibid., p. 412

<sup>228</sup> Ibid., p. 418

<sup>229</sup> Eugene W. Holland, ‘Nomad Citizenship and Global Democracy’ in *Deleuze and the Social*, eds. Martin Fuglsang, Bent Meier Sorensen, Edinburgh University Press (pp. 191–206, 2005), p. 194

<sup>230</sup> Ibid., p. 196

<sup>231</sup> Ibid., p. 196

<sup>232</sup> Plunkett, p. 583

<sup>233</sup> Nick McBride, *Shapiro’s Planning Theory of Law: A Review of Scott Shapiro’s Legality*, (<https://mcbridesguides.files.wordpress.com/2014/08/shapiros-planning-theory-of-law.pdf>, uploaded August 2014), p. 6

<sup>234</sup> Ibid., p. 6

<sup>235</sup> Plunkett, p. 583

<sup>236</sup> McBride, p. 2

cut/line of striated space, the manoeuvre is ‘from point to point, hence from one countable simple location to another’ so that ‘any qualitative properties... properly neutralised... can be assigned definite values, mathematical or otherwise.’<sup>237</sup> The division of postcolonial states into nation-states through the drawing of spatial lines would be a necessary precursor to a territoriality inseparable from quantitatively defined development statistics.

Nowhere is the power of the majoritarian model more pronounced than in a discursive and policy context that has arisen post decolonisation, one that has allowed for the convergence of developmental economics with global security concerns. This development-cum-security model, as Mark Duffield notes, harbours planetary-wide ambitions.<sup>238</sup> For the model to be firmly secured on a global basis the instability of minoritarian models must be re-accentuated, this time explicitly associated not just with economic primitiveness but also with social conflict. The ‘arbitrary’ and complex moral scenarios of unplanned events may lead directly to social dissolution, criminality and internecine civil strife.<sup>239</sup> Moreover, wars that arise from the social circumstances of squalor and poverty result in the destruction of valuable socio-economic assets – it would seem that the risk involved in the pursuit of such marginal models is, by and large, extensive. More significantly, a lack of planning through the conventional and accepted model of development spreads instability globally and the circulation of destabilising flows (refugees, economic crises, terrorism, etc.) sends ripples through the entire world-system. Hence, the reality of international interconnection means that underdevelopment becomes a major security concern: it is an enormous breach in global security waiting to happen.

Around the development-security mode a proliferating array or ‘strategic complex’ of institutional actors have arranged themselves (for the start of this process from 1973–82, see the previous chapter<sup>240</sup>). They make up a radically new assemblage,<sup>241</sup> equipped with an augmented capacity to intervene in order to provide a robust defence of the model. These institutions (NGOs, civil society and aid organisations, private companies and so on) assemble themselves into formations that enhance their ability to penetrate into the developmental nation-state. The operation of these institutional actors unfolds through direct access to, and co-option of, ‘the people’, by providing the latter with the methods and means necessary to follow the development-security model, regardless of the pre-existing machinery of the state. Furthermore, the concept of ‘the people’ itself is replaced by ‘the population’, a term and concept well suited to biopolitical management, measurability, control and containment.<sup>242</sup> It is, after all, manageable populations that fit comfortably into the presiding model or master plan, as they are easily controlled and bounded through economic indicators and welfare statistics. While, as we have stated, national liberation movements momentarily managed to decouple the ‘nation’ from the ‘state’, the ability of the people or popular masses to connect with the nation and vice versa is prevented and indeed anticipated by the emerging development-security model that folds back the people into the population and reinforces the link between the nation and the centralised state. This thoroughly controlled population (control-group), enmeshed within the developmental nation-state, is the outcome of a policy that seeks to provide Third World nations with the canny ability to ‘contain’ and manage destabilising effects, which threaten to circulate outwards and go global, within their own borders.

The development-security policy model advocated by a variety of non-governmental institutional actors equips Third World nations with a trajectory that aims at no less than the complete social transformation of society.<sup>243</sup> This entails the wholesale reordering of the nation-state along lines

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<sup>237</sup> Casey, p. 302

<sup>238</sup> Duffield (2013), p. 191

<sup>239</sup> Duffield (2014), pp. 131–4

<sup>240</sup> Chapter Two, pp. 26–27.

<sup>241</sup> Duffield (2013), p. 125

<sup>242</sup> *Ibid.*, pp. 5–7, 183

<sup>243</sup> Duffield (2014), p. 14. Duffield explores the development-security complex through the example of Sudan and its long running civil war since the mid-1980s, see pp. 202–53. Furthermore, he examines the civil war in Mozambique, again in the mid-1980s, and the part played by NGOs in the subsequent reconstruction of the country in Duffield (2007), pp. 82–109, and ‘Social Reconstruction and the Radicalisation of Development: Aid as a Relation of Global Liberal Governance’ in *Development and Change*, Vol. 33, Issue 5, pp. 1049–1071, at 1062–1063. For insightful discussion on the development-security complex more generally see: Tim Allen and Alan Thomas (eds.), *Poverty and Development into the 21<sup>st</sup> Century*, Oxford University Press (2000), pp. 212–213; Balakrishnan Rajagopal, ‘Counter-hegemonic International Law: Rethinking human rights and development as a Third World Strategy’ in *Third World Quarterly*, Vol. 27, No. 5, pp. 767–783 (2006), at 778; David Chandler, ‘The security-development nexus and the rise of ‘anti-foreign policy’’ in *Journal of International Relations and Development*, Vol. 10 (2007), pp. 362–386, at 365–8. For an overview countries identified as case studies demonstrating how the

more conducive to the aforementioned model.<sup>244</sup> It is the goal of the model to inculcate nations with the capacities to socially ‘progress’ and become ‘self-reliant’, ostensibly to help place ‘ineffective’ states on the same level as the ‘effective’ ones.<sup>245</sup> This then returns us to the paradox at the heart of DIL. In terms of the leading paradigm of development and security, the strategy from institutional actors is to emphasise the ‘contingent sovereignty’<sup>246</sup> of undeveloped nation-states in an international context in which the emission of destabilising flows has global consequences. The actors therefore have a rationale to intervene, as sovereignty cannot exist in an absolute state amongst those ineffectual nations, particularly when the world-system is at stake. And yet, the aim of intervention is precisely to enable the self-reliance of the developmental nation-state in its own economic affairs in that very same, interconnected global context. The nations of the Global South are deterritorialised only in order for them to be then re-territorialised. The palpable result of this subordinating rationality is that the development-security model is secured on a planetary scale through undermining the sovereignty of the nation-state, yet only seemingly in order to reassert this same sovereignty by helping establish powers of containment over populations.

In notable contrast to the ideal Third World state that has realised its self-reliance (a nominally authorised form of reterritorialisation), the spectre of the fragile and fragmenting state conjures up the pernicious prospect of the ‘ungoverned space’,<sup>247</sup> constituting an unauthorised, as well as dangerous, form of deterritorialisation. This disconcerting image serves to strengthen the argument that spontaneous and destabilising circulatory flows<sup>248</sup> require the developmental nation-state, which can contain the harmful effects that threaten to scatter themselves indefinitely across the surface of the globe. The escalation of these flows, if left unabated, even threatens to redound upon the Global North to such a grave extent as to collapse the very distinction between developed and underdeveloped.<sup>249</sup>

Overall, it seems that the legalistic power of Royal Science is all too suggestive of the concentrated power of the state over its national boundaries. And, indeed, as Third World governments accepted the nation-state form, the resulting structuralisation of the people-nation aided in the extinguishing of national liberation energies, as well as the capture of Third World peoples into the institutions of a DIL. So, it would seem that while the nation-state can be said to striate space on a local level, DIL achieves this operation on a global level.

During the era of traditional imperialism, the centre depended on its privileged First World status as it exploited the colonies via a one-way relationship between itself and the periphery. Globalisation seems to continue this state of affairs while additionally generating the global resistance directed against it. To put it in other words, ‘even as capitalism is increasingly organised on a global basis, resistance to it is also emerging on an extra-territorial basis through social movements.’<sup>250</sup> The relationship between the centre-periphery is as much defined by the centre’s occupying the margins as by the margins’ inward movement to the centre. This has partly to do with the Global South’s use of the promise of DIL, albeit generally resulting in failure. It also has to do with the mobility of social movements, which are based locally in place yet can act globally through the subversion of DIL – by redirecting it to their own ends.

To look at things from another perspective, we can surmise that what most defines the power centres of DIL, or of the concentric dualism, is ‘what escapes them or by their impotence [more so] than by their zone of power.’<sup>251</sup> We must remember that the concentric-dualist mode of DIL (with its origins in the analysis of Indian cosmology) was the answer to the problems posed by the postcolonial Third World, from which lines of flight or decoded flows seemed to be escaping at a rapid rate. Yet even as the concentric–diametric paradigm of DIL has been partially successful in stymying Third World claims to justice, the key problem still persists – can institutions and organisations, both of disciplinary and dissident international law, effectively conspire with or against the absolute deterritorialising effects of

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development-security complex functions from 1960–1993, see Frances Stewart, CRISE working paper, *Development and Security* (2004).

<sup>244</sup> Duffield (2013), p. 160

<sup>245</sup> *Ibid.*, p. 113

<sup>246</sup> *Ibid.*, p. 28

<sup>247</sup> *Ibid.*, p. 183

<sup>248</sup> *Ibid.*, pp. 19, 115

<sup>249</sup> *Ibid.*, pp. 127, 184

<sup>250</sup> Rajagopal, p. 267

<sup>251</sup> Thanem and Linstead, p. 45

the earth? How open can these international movements or institutions be to the eternal movements of the earth?

Matters are complicated, however, when we note that for Deleuze and Guattari, striated and smooth spaces are interdependent. They are in constant interaction: ‘smooth space is constantly being translated, transversed into a striated space; striated space is constantly being reversed into a smooth space.’<sup>252</sup> The smooth space of the nomad is continually in the process of being captured by state mechanisms which map, measure and place or locate it in a geometric grid or matrix. Yet striated space is continually transformed into smooth space – places which escape state control and are either reconfigured by nomads/local groups and/or are subject to the earth – which ‘asserts its own powers of deterritorialization’<sup>253</sup> predominately through the power of covering up and concealing, something idiosyncratic of the naturally changing world. This constantly changing world resists the ultimate triumph of striated space. Thus, smooth space relies on the striated, as it provides it with an opportunity to renew itself and re-emerge with a new dynamism without which it would wither and die of its own accord.<sup>254</sup> Likewise, striated space requires the resurfacing of the smooth in order to renew and re-energise its geometric capture of the world.

If one looks at smooth/striated spaces at the level of organisations, institutions or even social movements, just as in societies, one can see they consist of ‘changing mixtures of meshworks and strata’.<sup>255</sup> The ambiguity at the basis of UN institutions, for example, is that despite the stratifying influences they impart on the global level, they are in themselves a mixture of the striated and the smooth. Just as with the concentric dualism, UN institutions are somewhat open to events. This allows them the scope to properly react to and contain them. The old institutions/formal organisations of the nation-state and political parties, on the other hand, seem to lack, at least, the same degree of openness to contingency and events.

This is the fundamentally equivocal nature that exists at the heart of the institutions of DIL. The smooth space of these institutions guards against their own complete capture by social movements, which in turn occupy and inhabit their own very different type of deterritorialising spaces, as well as their nation-states within the Third World. This is generally because there is an operative dynamism in these institutions which refigures cuts and thresholds – such as between the economic and political, between the international and national, between institutions, and so on – to suit themselves.<sup>256</sup> This dynamism ensures the dominance of Western paradigms through the institutions of DIL (see above) and underlies the hegemony of development economics and associated discourses. While these cuts, which play out within the terrain of institutions, have the effect of maintaining a globalised striated space, the spaces of these institutions themselves have proven to be dynamic enough to avoid Third World capture. As structuralising discourses like development help contain the spread of social movements across the globe and the renewal of the cause of justice, these discourses extend themselves institutionally through an unmatched flexibility which sidesteps categorisation, assuring its own continuity and survival. The place of international institutions can be thought of as deterritorialising in a similar way to nomadic space, as it is less the single nation-state as the discourses which cut through them all that are of significance. This could be seen in the initial attempts of the Third World to harness DIL for its own ends: demands for economic justice by the postcolonial states were reduced to the notion of development as a cure-for-all, something which openly defies the particular borders of the sovereign nation-state. International institutions of law invoke a transformative dynamic in which they are at once a promising type of local meeting place for nations and yet also one from which the resulting global effects are all too evident. In other words, a multiplicity of nations may be involved, but they are all too often subject to a singular, unifying narrative of salvation. These international institutions thus function, paradoxically, through smooth space, in the same manner Deleuze and Guattari impute to transnational actors in general terms, while promoting a global striated space.<sup>257</sup> However, the smooth spaces of DIL’s institutions and nomad/social movements are not to be confused; while they may share a lot of the characteristics of smooth space in general, they operate in diverging ways due to the difference in social actors and subjectivities involved.

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<sup>252</sup> Casey, p. 308

<sup>253</sup> Deleuze and Guattari (2012), p. 466

<sup>254</sup> *Ibid.*, p. 536

<sup>255</sup> Thanem and Linstead, p. 45

<sup>256</sup> Pahuja, pp. 146–8

<sup>257</sup> See Duffield (2014), pp. 44–5

It is thus possible to say that there exists an inner (relative) threshold within institutions of DIS between meshworks/smooth spaces and those more striated/prone to sedimentation. This inner fold is always in flux, and is susceptible to changes depending on the relation of the institution to a dissident international law. The same can be said of the multitude of social movements which make up dissident international law – while there may be a leaning towards the meshwork of smooth space, sedimentation always exists within as a lurking and latent possibility. Institutions, characterised as they are by the type of connections that proliferate within them, vary in their relation to the outside. Moreover, it was only by becoming more open to the outside that DIL was able to reduce the influence of a dissident international law's claims to justice (through a process of recapture).

Ultimately, this inner fold is subject to the greater fold between DIL/dissident international law and its relation to the earth. It is, after all, the attempt to keep the absolute contingency of the earth at bay that defines the concentric dualism from the viewpoint of the rooted European (and Eurocentric) observer. The struggle really hinges, as Gregg Lambert insightfully points out, upon DIL's continual attempt to stop dissident international law from conspiring with the earth and its absolutely deterritorialising effects.<sup>258</sup>

Viveiros de Castro is cognisant of a different spatial paradigm besides that of the concentric and diametric types. This is the 'triadic schema', which notes the latent presence of 'triadic classifications (social, ceremonial, or *cosmological*)'.<sup>259</sup> As we are already aware, the diametric dualism denotes symmetrically static and reciprocal relations, while the concentric dualism is representative of contrasting, asymmetrical relations. However, it is the triadic schema that can be seen as the true foundation of this representational duality. What the triadic schema really reveals is the undisclosed frame that the dualisms conceal. In this sense 'all binary opposition, in short, is the degeneration...of a ternary structure.'<sup>260</sup> The ternary structure is the root of the dualisms and as such acts as the foundational figure of geometry and mapping. It reveals the unseen schematic between what would otherwise be immobile dualisms – a far cry from the static representation that is epitomised by diametric dualism.

We should observe that there is an element of movement between representations – particularly with the concentric dualism, which mediates between the stationary diametric dualism and the hidden, foundational triadic schema. The triadic structure, as the concealed root of the dualisms, is radically open to movement and becoming. This is because when, and if, the diametric dualism is transformed or converted back into the original triadic structure, the terms of the triangularity are incommensurable.<sup>261</sup> To explain, the diameter of the diametric dualism can be resolved into legs (terms) of equal length that can be transformed or assembled into the triadic schema, but the hypotenuse of this triangle (the relation between terms) cannot equate with these sides of equal length (see the pictorial representation above, on page 8, for clarification). In fact, the hypotenuse is the square root of the sum of the other two sides, which is an irrational number.<sup>262</sup> This would mean the relation between the terms of the dualism, now transformed into a triangle, is 'a continuous and involute entity, inward growing and properly interminable'.<sup>263</sup> The irrational number is in a state of becoming as its fractions continue to proliferate in an uncontrollable manner. The properly geometric triadic schema, the root of the dualistic spatial representation, contains its own internal dynamism. It is, literally speaking, radical.

The horizon, with which the triadic schema is synonymous, may act as a foundation but it is continually threatened by its own internal contingency, which it may not be able to control. We have discussed the horizon-foundation of DIL post the event of national liberation – the horizon reconstitutes itself as foundation, yet it still contains traces of contingency that remain clearly evident. We can liken this to the movement of the concentric dualism – it may well be more receptive to events, and hence, overall, preserve its spatial organisation (or arrangement) by embracing openness to some extent (in order

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<sup>258</sup> Lambert, p. 236

<sup>259</sup> Viveiros De Castro (2012c), p. 9 (emphasis added). The significance of the triadic schema – which discloses an un-orderable multiplicity or foundational contingency as the concealed basis of the other two representations – operating through an immanent cosmology will made overt in Part Two.

<sup>260</sup> Ibid., p. 10

<sup>261</sup> Ibid., p. 20

<sup>262</sup> Ibid., p. 22. To elaborate, if the sum of the two legs of equal length = 2, then the hypotenuse would be the  $\sqrt{2}$ , which is 1.41421356... (the square root of the sum of the two lengths  $1 + 1 = \sqrt{2}$ ). See p. 22 for full explanation.

<sup>263</sup> Ibid., pp. 21–22

to exercise some control over it), and yet it cannot keep the triadic schema completely hidden from sight (mirroring the inability of the diametric dualism to ultimately keep veiled the horizon that lies beyond).

Another way in which to view the triadic schema is through the normative structure of the nuclear family. The normative family structure (father–mother–son) or the ‘family-conjugal-triangle’,<sup>264</sup> for Deleuze and Guattari, is the result of the ‘oedipalisation’ of desire.<sup>265</sup> The original prohibition that is constructive of the oedipal triadic-family is that which condemns incestuous relations between the mother and the son outright.<sup>266</sup> In this prohibition, the son looks away from the mother and so turns towards the father. The father is the representation of the political authority figure, and the son waits his turn to carry on in his footsteps, biding his time in order to become the new ‘sanctioning authority’.<sup>267</sup> In this process, the son continues to maintain the triadic spatial-structural representation through an acceptance of defined social roles/strata and the associated normative subjectivity.

Accordingly, Deleuze and Guattari’s critique of both Freud and Lacan centres on the idea that the creation of the normative subject, through the unconscious, is a supremely political act. The production of the superego, through the internalisation of spatial structures of authority, is not simply to be accepted as a process of psychological development.<sup>268</sup>

The normative social subjectivity of the son, constructed within the triadic schema, distinguishes between the contrasting qualities of the father and the mother. It is then possible to say that the paranoid transcendental law’s prohibition<sup>269</sup> on incest creates, on the one hand, the father as the normative subject of authority, and on the other the mother as the repressed, prohibited object of desire.<sup>270</sup> It is this original prohibition that creates the law and its reliance on the object–subject duality. The prohibition between the mother (object) and son (subject) generates the repressed desire to return back to origins, and in the case of DIL, absolute territorialisation. This return to origins also takes on the form in Freud and Lacan of the engrained desire to return back to the wholeness and interiority of the womb – something that safeguards and marks the final expulsion of the outside. This form of oedipal desire is only possible with the stratified triadic schema.

The compulsive (i.e. paranoid) obsession with origins is one that is also characteristic of DIL. The original prohibition that marks the creation of a modern, post-1950s DIL is the exclusion of the postcolonial Third World, embodied in its national liberation movements, from the centres of power. In addition, we can say that ‘paranoid transcendental law...never stops agitating a finite segment and making it into a complete object’.<sup>271</sup> The fanatical obsession with returning to origins manifests itself in a sedimentation process, in which those on the top layer (such as those with economic superiority) are determined to ground DIL on an absolute territorialisation which admits of no outside. Any differentiation becomes purely internal to the structure (Deleuze calls this ‘unity of composition’).

We will recall that the periphery of the concentric dualism is described as being inscribed with ‘feminine characteristics’ (weakness, etc.). Within the triadic family, it is possible to say that the mother constitutes the Third World, excluded by the political and economic authority of the First World/father that predominates over DIL. The mother still retains a salient role in the maintenance of the triadic family, just as the Third World remains fundamental to the construction of a judicial universality, granting legitimacy to DIL. Despite this, the mother is consigned to the periphery, mirroring the exclusion of the Third World due to what is commonly perceived as a lack of economic strength through development.

However, it is also possible to say that the Third World resembles the son, patiently waiting for the time when he can become the sanctioning power, controlling the reigns of international law through economic might. It may be best to suggest here that the Third World in actuality embodies the hypotenuse of the triadic schema – namely the relation between the two terms of the dualism, or between the mother and the son. While the hypotenuse is held in a unity within the triadic schema, its length equates to an irrational number and so can be considered to be in a perpetual state of internal (fractal) becoming. The contingency radiating from the hypotenuse is kept in check through the power of the

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<sup>264</sup> Deleuze and Guattari (1986), p. 67

<sup>265</sup> *Ibid.*, p. 81

<sup>266</sup> Prohibition can be seen to be the ‘the ultimate foundation of social space’. See: Henri Lefebvre, pp. 35–36

<sup>267</sup> *Ibid.*, p. 81

<sup>268</sup> *Ibid.*, p. 110

<sup>269</sup> Deleuze and Guattari (1986), p. 63

<sup>270</sup> Colebrook (2002), p. 143

<sup>271</sup> Deleuze and Guattari (1986), p. 59

authority of law *qua* original prohibition. Overcoming this prohibition and stimulating a line of flight between the mother and son is the proscribed role which immanent justice plays.

In order for 'immanent' justice-as-struggle to be renewed, it requires re-engaging with the *idea* of justice. Pahuja espouses this as its 'utopian, aspirational face'.<sup>272</sup> She goes on to explore the gap between positive law as the descriptive, constitutional body of law, and the idea of justice, which is 'the excess created by law's invincible promise'.<sup>273</sup> What makes international law so productive, despite its hegemonic discourses, is that it creates an excess over and above 'the body of its own doctrine', and this is when it 'operates as a screen onto which people project a variety of struggles'.<sup>274</sup> The immanence of justice relies upon a (re-)connection with justice's virtual possibilities, a connection that will ultimately continue to disrupt and so reactivate the triadic schema by adding to its instability. Justice will create the conditions conducive for the lines of flight of social movements in the Third World, and so allow for an escape from the territorialisation of enclosed spaces within the triadic schema.

Justice itself acts both as a legal creation thrown up in the intensity of the situation or event and as a reactivation of the unactualised possibilities which make up the virtual. It is the shifting borderline between dissident and DIL, the borderline that both paradigms fight over and their existence is intrinsically bound up with.

## Conclusion

The re-emergence of justice as struggle in Third World social movements, existing outside nation-state control, is an effective challenge to the hegemonising influences of DIL. A spatialised justice emphasises the temporary nature of structured social relations, be they relations inherent to the state or between states through the institutions of international law.

Justice as struggle can be said to reanimate the idea of justice, associated as it is with an emancipatory politics that harnesses the future promise of justice as having been served and which is woven together with the situational struggle of the present in anticipation of righting the injustices of organised and ordered social relationships. The utopian energies of a political cause, which humanitarian ethics does so much to stamp out, re-surfaces within the space-time enclaves or smooth spaces of these global social movements. Alternatives to the mainstream narrative of development and its singular temporality, as well as its closely allied discourse on human rights, are contained within these movements. They represent an effective rejection of the striated spatiality of DIL, a refusal to accept the fixed spatial image (of the one world or 'orb') that the Global North presents to the Global South as its likeness.

These social movements, although based upon the 'local absolute' of a place characterised by the intensity of the struggle for justice, are also able to effectively and strategically utilise the institutions of DIL when it suits them to do so, as noted by Rajagopal. The outcome of these movements is a re-politicisation of the people, based on Neocosmos' idea of 'the nation' as a politicised subjectivity in excess, which is deterritorialising in so much as it desists from accepting a particular, fixed (Western) socio-political organisational form. The uncontainable dimension of DIL, that is to say the idea of justice, alongside the 'excess' of political subjectivity outside the structural relations of the nation-state, provides the opportunities for Third World social movements to project an alternative way, namely, a dissident international law.

The sprawling people-nations (the deterritorialising nationalism of the *damnés*, or wretched) of the postcolonial Third World had the effect of re-introducing equivocality into the institutions of DIL (resulting, notably, in their reformulation post-imperialism, so as to absorb the new decolonising energies), most notably bringing these institutions into proximity with the deterritorialising force of the earth. Without question, the immanent justice (the 'membrane' notion of justice) embodied in the people-nation came face to face with conjunctive possibilities<sup>275</sup> and immanent expression of earth/nature. Even if only momentarily, national liberation and movements of decolonisation made use of institutional assemblages as a means of passage – a process in which the affects of transformation and re-invention for

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<sup>272</sup> Pahuja, p. 114 (emphasis added).

<sup>273</sup> Ibid., p. 31

<sup>274</sup> Ibid., p. 32

<sup>275</sup> Herzogenrath, p. 7

the collective-subject became ‘ultimately inseparable’ from the openings which bring into purview the ‘outside’ of the institution.<sup>276</sup>

In the accord between the collective-agent and the outside, or ‘intensive other’ (nature, earth, animals; the un-orderable beyond of positivist law) of the institution, the unactualised possibilities of DIS could come to be enacted. This runs contrary to the Lacanian conviction that nature constitutes the realm of the ‘impossible-real’, i.e. that which may only be perceived through representations, whose very functionality relies on the submission of reality (of objects) to the cognitive ground of the subject. For Guattari, the real (or, nature) is the artificial (the ‘abstract machine’ of experimental, inter-transformable parts) and not the impossible that Lacan would proclaim it to be.<sup>277</sup> And as such, the ‘natural as real’ is as much a practical assemblage that people may connect to as, say, the machines of the nation-state, the capitalist world-economy, the world-system, and so on. As Guattari would make us understand, communication between the creative side (the ‘instituting’ or constitutive power) of institutions and nature requires the becoming of group subjectivities who are, in addition, able to critique themselves through self-analysis (or immanent analysis/critique). In this fashion, the ‘segregative split’ between nature and people is overcome; one assemblage (space-time block) docks with another.

We would be wise to suggest, however, that Lacan’s belief in the *representational* perception of nature has a strong current of thought behind it within the historical and conceptual ‘sequences’ (which does not imply strict continuity or determinism)<sup>278</sup> of DIL. The modes of thought that have been influential in shaping international law have continually sought to ‘block’ a connectivity between colonised/subjugated people and an intensive other that would preclude the onset of a predominating positivist law. Indeed, it is the link with a ‘radical’ (even ‘irrational’, in the terms of the hypotenuse of the triadic schema) alterity that would, and can, beckon alternative socio-political forms. As opposed to a viewpoint that would simply define the social movements of subjugated peoples’ negativity (as solely disrupting the order and existent way of things), we can state that they have been, and continue to be, positive assertions of the type of practical experimentation that stimulates concept-production and thus points beyond the dispossessive, geospatial ordering of a DIL. In contradistinction to this, previous sequences have also been defined by the conception and setting up of anticipatory spatial structures and socio-political formations (the place-state, *machina mundi*, *ius gentium*, *Anthropos–Humanitas*, the great chain of being, Spanish imperium, etc.) for the expressed purpose of pre-empting and ambushing an emergent immanent justice/law. Put differently, holding in place the dis-connection between justice/law and earth/nature has been the major project of Neo-Aristotelian natural law (to which we shall now turn) of which the main proponents of interest to us include the jurist-theologians who so decisively influenced the thinkers of the Scottish Enlightenment as well as the emergence of international law: Albertus Magnus, St Thomas Aquinas and Francisco de Vitoria.

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<sup>276</sup> Goffey, p. 47

<sup>277</sup> Ibid., p. 46. Also see Tim Ingold, ‘Hunting and Gathering as Ways of Perceiving the Environment’ in *The Perception of the Environment: Essays on livelihood, dwelling and skill*, Routledge (2000), pp. 40–2, for a presentation and critique, from an anthropological viewpoint, of representational perceptions of nature.

<sup>278</sup> See Neocosmos (2011): ‘Sequences refer to (often discontinuous) historical periods understood as purely subjective. Political sequences are governed by modes of thought, discourses, and names that are hegemonic and more or less contested...’

# Part Two: The Dialectic of *Nomos* and *Topos*: Self-Ordering, Nature and Power in Aristotle and Albertus Magnus

## Chapter One: Aristotelian Cosmology and Albertus' Speculative Geography

The immanent justice exercised by a people-nation, as was explained in the previous section, takes up its position between a positivist law and its outside. It assumes the form of a 'membrane' suspended between a majoritarian, established constitutional body of law, and its beyond – the radical reinvention and multiplicity of institutions. This equates to an in-between position that connects a people existing in excess of the law by which they find themselves bound to that which appears to throw off any attempts to trammel it – namely, the earth. The place of justice seems to lie on a threshold, one which looks forward to ushering the 'unaccounted' into positivist law, adding to the flux of institutions which have seemingly closed in on themselves. Immanent justice invariably invokes the absolutely 'un-orderable' earth and its capacity for self-organisation as that 'minoritarian model' which guards against sedimentation.

With this membrane justice, the molecular-becoming of a people-nation connects itself to the enormous 'abstract machine' of nature, that is to say, to the power of matter. In other words, the molecular energy of the deterritorialising nation comes to embrace the molecular-matter of nature; it re-makes the relations to the earth once turned asunder by processes of dispossession and accumulation, re-making itself in the process.

One recent example of a process like this is the re-emergence of the community among the indigenous peoples of Bolivia in the wake of the water wars in 2000.<sup>1</sup> Prompted by an attempt to dispossess and further commodify water consumption, urban and rural peoples gathered themselves around the water-earth (understood precisely as that which cannot be fully reduced to the legal-economic, low-intensity schemes of the state/market and its posited laws), in the process gaining enough momentum to attempt Miltonian-like flight. Crossing the border between nature and culture they re-made themselves as a people-nation (the self-recognition as indigenous people among Bolivians shot up during and after the water wars),<sup>2</sup> paving the way towards the re-articulation of the relation between the state and the people and the earth at its basis via the introduction within the Bolivian constitution of such strange concepts as *Buen Vivir*. The *ethnos*<sup>3</sup> of a people-nation (or the common, to be distinguished from and opposed to the reduction of a *demos* to the *ethnos* of the myth of autochtony) emerges in the ceaseless movement between a specific geography (the mountains, the Altiplano, the sources of water, and the fertile Santa Cruz crescent all the way to the Amazon basin) and the deployment of equipment (law being one form of such equipment), solving political questions. *Ethnos*, the community as a technical state, is a relation of technical rather than 'cultural' forces, in the limited or even 'necessitarian' sense often given to moral, religious, psychological, artistic or scientific attributes.

In order to understand the conditions that make up such a technical state, the behaviour of human groups should be analysed under the double conditions of their interior and exterior milieus. The point of these concepts – exterior milieu, apprehending everything materially surrounding the human, from the geographical and the animal to signs and ideas characterised by their plasticity or 'originary' virtuality; and interior milieu, or social memory from oral storytelling to meta-data storage, supported by the non-zoological organisation of objects and yet quasi-biological in its functioning and evolution – taken from the field of biology is to understand the human at the level of the group in its functioning as an organism. In our Bolivian exemplar, the point is made concrete in the fact that the struggle for water evoked the becoming-human of nature as well as the becoming-nature of the human. It is from this

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<sup>1</sup> See, for example, Building Bridges Collective, *Space For Movement? Reflections from Bolivia on climate change, social movements and the state* (2010), p. 21, for a perspective on the issue.

<sup>2</sup> *Ibid.*, p. 22: 'Just as the "water war" weakened the legitimacy of the traditional political parties and unions, it also strengthened the power and capacity of broad coalitions among a diverse range of social actors. Indigenous movements were reinvigorated'.

<sup>3</sup> See Deborah Danowski and Eduardo Viveiros de Castro, *Is There a World to Come?* (<http://supercommunity.e-flux.com/authors/deborah-danowski/>, uploaded on 7 July 2015)

double movement that the ethnos emerges as a political force to be reckoned with (a people-nation, the indigenous movement and the MAS coalition<sup>4</sup>). In this respect, the ethnographic present is not some immobile or immemorial time, i.e. backward, the past, pre-modernity, under-development, etc. Rather, as Viveiros de Castro says, ‘slow societies know infinite speeds, extra-historical accelerations...that make the indigenous concept *Buen Vivir* (“good life”) something metaphysically closer to extreme sports than a relaxed retirement in the countryside.’<sup>5</sup>

Following from this enticing invocation of politics and law as ‘extreme sports’ in relation to the case of the recent legal and political developments of the Americas in the twenty-first century, it can be said that it is in the combination of the two – nature and people, external milieu and internal milieu, or ‘world’ as a multiplicity of intricately connected multiplicities – that the capacity for a boundary defying self-assembly is realised; the power of the people comes to enact the force of ‘matter-movement’ itself. Matter, in ‘engendering its own formations’, carries within itself the productivity to (re-)create itself through its technical differentiations. It can be said to ‘bear events’, and in so doing, disallows any external influences or forces (any ‘outside agency’) from exercising control over it.<sup>6</sup>

The people-nation, in mirroring the potentiality of matter, creates itself through continually gathering itself together, a process that reactivates its sense of collective becoming. This molecular-becoming signifies a re-injection of equivocality into *topos* (place) – an outcome of the immanent relations between a people (*demos*) and its milieu, within the wider context of the earth. As such, the other’s political agency is maintained through the people-nation’s alliance with the unbounded nature of the place it inhabits.

It therefore becomes a major project within the lineage of the positivist, natural law tradition (as a significant, constitutive precursor to a DIL) and the prospect for global trade and rule, to disconnect the people-nation from the earth by enforcing an ongoing segregative split between the two, to insure against the onset of an immanent justice as practised by the other. This project was played out via the modifications made to Aristotelian ontology by Neo-Aristotelian natural law theorists such as Albertus Magnus. For Aristotelian ontology, *topos* takes on the function of a modulating ‘membrane’ (a ‘connector’) between the self-gathering capacity of *phusis* (nature) and the spatial ordering of *nomos* (human convention or law). *Topos* therefore becomes an integral concept, as well as a key target, for Neo-Aristotelians. In the Aristotelian tradition, *topos*/place acts as a medium linking beings to the immanent flows of the cosmos. It prevents the onset of a perception of the world mediated, largely, through a *quantitative* mathematical model that reduces the qualitative characteristics of nature to an assessment of ‘surfaces, lengths, and solids of natural bodies by abstraction’.<sup>7</sup> Phenomenological concepts such as *topos* convey Aristotle’s scepticism of mathematical accounts of nature<sup>8</sup> (such as those celebrated by Proclus the Successor, who was famously critical of the Aristotelian approach), which promote a purely technical understanding of the world. Instead, an immanent structure of the cosmos is advanced, so as to guard against nature’s absorption by a mathematical model privileging the abstraction of form over ‘sensible beings, and experience’.<sup>9</sup>

Aristotle can be considered to be a ‘pre-critical’ philosopher (as some theorists designate him) in so much as he does not present cognition as a stable ground from which a subject can gain knowledge of an object. In other words, the object is not required to order itself in relation to, or orbit around, the organising subject in any way (a condition of so-called ‘modern subjectivity’). The absence of this type of subject–object relationship has much to do with the capacity of Aristotle’s cosmos to act as a self-ordering interiority lacking an outside – a type of organisational dynamic compatible with Christopher Kerslake’s reading of immanence.<sup>10</sup> However, this standpoint misses something quite significant in respect to Aristotelian ontology, namely that latent sedimentary processes still lurk within it, as well as without, in the form of an embryonic *nomos* thinking (exemplified in the *Politics* in the form of the

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<sup>4</sup> Movimiento al Socialismo won the state legislature and presidential elections, led by Evo Morales. Building Bridges Collective, p. 20

<sup>5</sup> See Danowski and Viveiros de Castro. See also Bernard Stiegler, *Technics and Time 1: The fault of Epimetheus*, Stanford University Press (1998), pp. 56–7

<sup>6</sup> Herzogenrath, p. 6

<sup>7</sup> Russell Winslow, *Aristotle and Rational Discovery*, Continuum (2007), p. 1

<sup>8</sup> Also see Stuart Elden, ‘The Place of Geometry: Heidegger’s Mathematical Excursion on Aristotle’, *Heythorpe Journal* (no. 32, pp. 311–28, 2001b), pp. 317–19

<sup>9</sup> Winslow, p. 1

<sup>10</sup> Kerslake, p. 3. Also see Deleuze (2005), pp. 26–7

tripartite distinction of people) – something which Albertus and his successors in the natural law tradition would exploit, and utilise against the more unpalatable (i.e. paganistic) elements of Aristotelian cosmology.

For Christian theologians like Albertus, a cosmos of ‘immanent spatiality’ collapses back into a system of the natural world/order by means of a radical decoupling of *topos* from *phusis*. A *topos* disconnected from *phusis*, enabling the former to be framed as ‘social location’, is crucial here; it will come to define the overriding aims of the Neo-Aristotelian project, that is, constructing a framework within which to understand the other’s relation to place, elaborating upon a method of ‘placing’ the other in a wider spatial system, and manoeuvring to co-opt place as an instrument of power and imposition (as a capturing apparatus). The modification and appropriation of *topos* by Neo-Aristotelians went hand in hand with the whittling away of the concept’s equivocality – in the sense in which it was previously conceived of as a zone of intermingling or meeting point between nature’s immanent forces. Moreover, *topos* completes its transformation into social location, considered to be the reduction of beings by an external agent (eventually embodied by man; this is given its theoretical finalisation by Aquinas and Vitoria) to a geopolitical location within the world-machine. Place (as *topos*), in effect, becomes territorialised as a bounded entity.

Continuing this line of thought, it would seem that the Neo-Aristotelian tradition operates through reversing the relation between *nomos* and *topos* – with the former gaining the upper hand over the latter by colonising *phusis* from without as well as from within Aristotelian thought. This leads to the puncturing and draining of immanence from nature, although not its complete erasure. Immanence as the mode of relationship between matter and its virtual beyond (for Aristotle, the cosmos as the ‘Whole’), returns, but at the behest of the ethical citizen, that is to say, as contained within the ethical life of the polis or the city-states of European nations.

In summary, a natural law consolidated through its spatial arrangement and ordering expresses its positivist leaning by revoking the self-gathering capacities of nature, as well as through the construction of apparatuses of capture in anticipation of the people-nation. Place, within the natural law tradition, becomes influential in explaining ‘otherness’ – in the sense of the ‘lack’ of agency of those in thrall to the immanent workings of earth and nature, as well as its perfection for those who are able to force the world to submit to their whims. This Part seeks to continue from the previous one in demonstrating how the spatiality of a positivist (natural) law, articulated by Albertus, sets up the conceptual apparatus and structures that will stifle and anticipate the immanent justice intermittently practised by the other.

In Russell Winslow’s formulation, Aristotle’s *phusis* (nature) represents a unique ‘self-gathering’.<sup>11</sup> It is a multiplicity brought together into a unity – a gathering-into-continuity.<sup>12</sup> The gathered-togetherness of nature corresponds to an array of potentialities and actualised activity (‘being-at-work’) that make up, individually, its manifold beings. Thus, each being can be considered a unity of potential and actualised activity, the unity of which secures an autonomous identity.

The self-gathering capacity of nature can thus be discerned within the very workings of individual beings. Beings, in themselves, constitute a multiplicity of parts (of traits, qualities and so on), but the division between these is dissolved through the continuous movement and activity proper to the being in question. Continuity of movement ensures continuity of identity, on this reading of Aristotle. In other words, the work or activity of each being furnishes it with its independent and continuous identity.<sup>13</sup> During the cycle of a being’s existence, its ‘potency array’ or potentiality is transformed into realised activity or work. Conversely, actualised activity may withdraw back into latency, back into the potency array, while still constituting the gathered-togetherness of a being.

*Phusis*, as a whole, manifests itself throughout the entire cosmos. The identity of *phusis*, and by implication the cosmos, is possible only through this gathered-togetherness of a manifold of beings. To put it differently, on the cosmic scale, continuity between all beings allows for the distinct, unfolding identity of *phusis*. The latter consists of a multiplicity brought together through its being-at-work (actualised activity) and potentiality. The being-at-work or movement of each contributes to the eternal movement of the cosmos – the cosmos, after all, can be thought of as ‘eternity in movement’. It is the

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<sup>11</sup> Winslow, p. 5

<sup>12</sup> Ibid., p. 8

<sup>13</sup> Ibid., p. 35

continuity between beings – the being-at-work or continuous activity of all – which guarantees the eternity of this movement, and so the self-identity of the cosmos. The cosmos, moreover, is not simply the sum of all potentialities actualised in any given moment, but the full array of latent, as well as realised, potentiality (i.e. activity held back for future occurrence). It is this that – just as it keeps individual beings in movement – keeps the cosmos in perpetual movement.<sup>14</sup>

The foremost movement that occurs within the cosmos is the perfect, self-contained, circular motion of the heavenly bodies, the fountainhead from which all beings derive their unique trajectories. Furthermore, what is noteworthy in Aristotle’s cosmos is that it retains the power to order itself, that is to say, it governs itself autonomously through a process of self-ordering. Self-ordering is the outcome of the mutual dependence between beings, as the dynamic and unique trajectories of each relies on the galvanising proximity of the other. Thence, beings can be said to orientate and order themselves through their constitutive relation to others – to gather together’. In its eternity the cosmos is the endless shifting of the position, as well as the relation, between beings that are ‘at-work’. In this equation, place/*topos* plays an important role as the immediate environs that attach beings-at-work with each other. More profoundly, place links beings not just with other beings, but also with the cosmos as a whole (i.e. to all other beings). In being gathered together in this way, beings assume an immanent relation with each other; they are free from interference from any agent external to or outside of the cosmos.

In his commentary on Aristotle, the medieval Dominican theologian and bishop of Regensburg Albertus Magnus (the Great)<sup>15</sup> articulates a major subversion of the former’s cosmology in order to fit a Christian, and therefore Neo-Aristotelian framework. His alterations have far-reaching implications for the self-ordering processes that keep the Aristotelian cosmos in movement. Albertus was, indeed, deeply interested in the manifest order of nature and earth. However, this order had to reveal itself within the limitations of Christian theology, which could not permit of the ‘pagan elements’ of Aristotle’s cosmology. In which case, Albertus was impelled to jettison the idea of the eternity of the cosmos,<sup>16</sup> a notion underpinning the self-ordering capacity or gathered-togetherness of beings. Hence, Albertus was drawn into seeking another foundation on which to base his ordering of nature – he found his theoretical range in drafting-in not just theology, but astrology, speculative geography and geopolitics to support his cause.<sup>17</sup>

Albertus’ interest in the study of nature was perfectly sincere; he genuinely wished to understand the relationship between people and their environment.<sup>18</sup> His intellectual project centred on how the earth was considered to resemble a domain of ‘natural order’, an established legality with the likeness of ‘a mosaic where *everything was in its place* and the design of the creator was clear’.<sup>19</sup> While he expounded on the beauty of the earth, he was mostly interested in it as a fundamental design: in its production and its establishment or order, in addition to how it could be altered by human hands. Given his aim of effecting a compromise between Christian theology and a (Neo-)Aristotelian framework, the principal issue was how to contain the immanence of Aristotle’s cosmos. The latter needed to be replaced with a far more determinate system that left a place for an external divinity yet did not completely sideline human agency.

Albertus was therefore forced to take another tack. His method involved tampering with the delicate hylomorphic model, assembled by Aristotle to reflect his observations of nature. This manoeuvre

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<sup>14</sup> Winslow, p. 81

<sup>15</sup> Albertus, despite his great obscurity in modern times, can be seen as a figure of much significance. It is claimed that he gave the first ‘fundamental treatment’ of Aristotle’s writing in the context of 12<sup>th</sup> century medieval Christian theology, and is therefore credited as making Aristotle’s writings accessible to scholasticism. It has also been asserted that Albertus was one of the first theologians to investigate the entire ‘system of the world’ on the ‘basis of an acquaintance with the entire Aristotelian corpus’. See: Adam Takahashi, ‘Nature, Formative Power and Intellect in the Natural Philosophy of Albert the Great’ in *Early Science and Medicine* Vol. 13 (2008), pp. 451–481 and Hieronymus Wilms, *Albert The Great: Saint and Doctor of the Church*, Burns Oates & Washbourne (1933), pp. 63, 68. Also see James A. Weisheipl, ‘The Life and Works of St. Albert the Great’ in James A. Weisheipl (ed.), *Albertus Magnus and The Sciences: Commemorative Essays 1980*, Pontifical Institute of Mediaeval Studies (1980), pp. 13–52, and Jean Paul Tilmann, *An Appraisal of the geographical works of Albertus Magnus and his contributions to geographical thought*, University of Michigan (1971), pp. 14–21.

<sup>16</sup> Clarence J. Glacken, *Traces on the Rhodian Shore: Nature in Western thought from ancient times to the end of the eighteenth century*, University of California Press (1967), p. 228

<sup>17</sup> *Ibid.*, pp. 265–6

<sup>18</sup> *Ibid.*, p. 265. Also see Benedict M. Ashley, ‘St. Albert and the Nature of Natural Science’ in James A. Weisheipl (1980), pp. 73–102

<sup>19</sup> *Ibid.*, p. 227 (emphasis added)

was in line with his Neo-Aristotelianism, in the sense that form became the recipient of a vast amount of ontological and explanatory power to the detriment of matter. The self-propelling movement of matter/*dynamis* to ‘run after’ form/*energeia* was revoked in favour of the latter’s power to move matter and bodies at will. The immanent relation between *dynamis* and *energeia* was replaced in Albertus’ model by the control of *energeia* over *dynamis*. Consequently, the ordering of nature was no longer a self-gathering based upon the parity natural beings realised in assembling themselves. Order was now realised as something that must be imposed from above. The question now became: ‘what is this above? Where exactly is order imposed *from*?’ To answer this line of enquiry, Albertus shifted to the discipline of speculative geography, so as to conceptualise the order appropriate to the earth. He combined this analysis with the more ancient theories of astrology<sup>20</sup>, so as to explain how imposition emanated from ‘above’ – or more precisely, from the firmament. Furthermore, he split the ‘above’ – the sky – from the ‘below’ – the earth. The ‘biospheric’ imagery of the sky/earth relation suggested a thoroughly hierarchical relationship to parallel that between form and matter.

The foregoing division is evocative of the Greek mythological story of the titan of Navigation and Astrology, Atlas Telemon (‘The Endurer’). Atlas’ defeat at the hands of Zeus led to his punishment of holding up the sky, or ‘heavenly vault’, thus severing the primordial interrelatedness between earth (Gaia) and sky (Uranus).<sup>21</sup> Likewise, the primordial virtuality of the ecology of nature, intimated also by various indigenous cosmologies (for example in the North American Iroquois creation myth), is severed in Albertus’ theorisation with the aid of the emerging sciences of optics and the precursor of geopolitics. This was, in essence, a view that utilised the mechanisms of science to privilege the ‘fragmentation’<sup>22</sup> of natural habitats to the detriment of boundary-trespassing ecologies and political cosmologies.

With the division posited between the earth and the sky, Albertus was then able to draw upon the contingency or flux of the firmament or constellations, i.e. the radiation of light, assuming the role of a medium imposing a determinate order on earth. For all his Neo-Aristotelianism, it was in fact the Neo-Platonic element of light that subdues, as well as transmits form to matter. In Albertus’ use of astrology and the Neo-Platonism<sup>23</sup> of Arabic optics – which casts light as the master element capable of transmitting order by imposing a form on matter – he managed to find a method of re-introducing order through a means more conducive to fixity and a view from above. Indeterminacy was now something relegated to the outer heavens so that determinate and established order could be realised on earth. However, this raised the issue of how determinate order could be compatible with the agency of human beings on earth. At this point, Albertus makes use of the nascent legal order or the inner realm of the polis by positioning ethical life as the key condition for exercising political agency. Coupled with this, he invokes the Aristotle-inspired medieval image of the tripartite world-machine. In making use of the tripartite system, the nations of the planet could be differentiated and hierarchically arranged into blocs along the lines of the political and ethical agency they were supposedly capable of realising and according to where they were placed in the moral order of the world.

Albertus’ use of the elements, in this case light, to shape and fix the form of beings on earth can be seen as an initial ordering process. The outcome of this process was to distinguish between geographical zones corresponding to the above-mentioned tripartite system, in which the world is split between three separate blocs of people. The differentiation is established through the varying strength of

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<sup>20</sup> Albertus Magnus, *Speculum Astronomiae* (Speculation on Astronomy), trans. C.S.F. Burnett, K. Lippincott, O. Pingree and P. Zambelli, in Paola Zambelli, *The Speculum Astronomiae and its Enigma: Astrology, Theology and Science in Albertus Magnus and his Contemporaries*, Kluwer Academic Publishers (1992), pp. 203–274. Albertus adheres to the distinction between astronomy – the science of analysing the movement of the stars and the heavens in his interpretation – and Astrology, or discerning how the flux of the stars determines events on earth (p. 209–11). It is worth noting that there is a slight controversy attached to *Speculum Astronomiae*: whilst it is commonly attributed to Albertus, the neo-Thomist historian Pierre Mandonnet muddied the waters by considering the true author to be Roger Bacon. By drawing on historiographical analysis and by identifying the book’s consistencies with Albertus’ other works Zambelli, however, makes a compelling case that the book was correctly attributed to Albertus.

<sup>21</sup> Robert Graves, *The Greek Myths*, London Penguin Books (1992), p. 47; Malcolm Grant, *Myths of the Romans and the Greeks*, Weidenfeld and Nicolson (1962), pp. 140–1

<sup>22</sup> Steven H. Schneider, *Laboratory Earth: The planetary gamble we can’t afford to lose*, Basic Books (1998), p. 5

<sup>23</sup> Neo-Platonism was the source of a constructive ambiguity between ‘cosmological and anthropological systematics’ that was never really resolved, precisely because it allowed the likes of Albertus to retain the ontological supremacy of the heavens while building up a privileged place for man. See Blumenburg, p. 460, and for further discussion on Albertus’ attempt to reconcile his Aristotelianism with Neo-Platonism: Takahashi, pp. 469–470, and Thérèse Bonin, *Creation as Emanation: The origin of Diversity in Albert the Great’s On the Causes and the Processes of the Universe*, University of Notre Dame Press (2017)

form-inducing light radiation that shines upon the inhabitants in various regions of the earth. Of these blocs, one group (the perfect ‘middle nations’) is understood to have obtained the psychological ‘harmony’ required to exercise political agency over the others. This way Albertus did not completely erase contingency from his ordering process, but gifted it to those he saw as well positioned to receive it, leaving room for free will and agency.

In the secondary ordering process, Albertus made use of the seminal position of the polis as the centre of ethical life for Aristotle. Accordingly, it is only within its enclosure that ethical potency can be actualised and agency upheld. The polis is the realm of the ethical situation – of the encounter between ethical beings. It is therefore the only place where the rational faculties (*logos*) can be practised and self-transcendence from the determinism of geographical location can occur. Those who live in the polis as ethical beings are bequeathed the agency to govern the world-machine; there is an ethical imperative bestowed upon these polis-dwellers to bring others to a moral life, realised solely through the state-form. In seeing to these imperatives, they uphold a territorialised *ordering* over the earth. This was certainly one way, in Albertus’ mind, that the self-gathering capacities of *phusis* (in Aristotelian ontology) and the Ecosphere (in the realm of speculative geography) could be tamed or controlled by bringing order to the earth.

Overall, Albertus’ argumentation can be seen to unfold over what can be identified as a range of three levels, or ‘spatial scales’.<sup>24</sup> Every scale represents a domain of interaction between forces and elements, whether (1) natural/atmospheric (hemispheres of earth/sky), (2) ethical (the polis) or (3) political (world-machine). Within each scale, political battles occur over whether place/*topos* opens up to a greater beyond (such as the cosmos) or is *closed* off and regulated (to delimit an enclosed ethical and legal order).

## Chapter Two: Harmony and the Nature of Place

For Aristotle, nature (*phusis*) can initially be comprehended when one contrasts it with *nomos*. While nature is said to be ‘the same everywhere’, *nomos* – usually translated as convention, human law or custom – is seen to vary from place to place.<sup>25</sup> Hence, what holds by nature is seen as eternally the same and is therefore applicable to all. In contradistinction, what holds by *nomos* only holds true for a particular community.

Following on from this, it should be possible to consider the universal and eternal constitution of nature. These are qualities that make it unique and spectacular in the eyes of Aristotle, and constitute its cosmic quality. Nature cannot be thought outside of or external to the wider cosmos of which it forms a fundamental part. It might be tempting to conclude from this that, due to the eternal qualities attributed to it, nature constitutes a static entity. This would, however, be a truly mistaken perception. On the contrary, Aristotle’s cosmos is ‘eternity in movement’.<sup>26</sup> It is something with ‘no beginning and end in time’.<sup>27</sup> By being forever in movement, nature can instead be grasped as that in which things continuously ‘generate and grow’.<sup>28</sup> A static account of nature is inconceivable for Aristotle as it would suppress its vital component – that of its eternal movement – and so limit it to a lower level, that of human affairs and its constrained perspective (i.e. that which is proper to human community). If this *nomos*-perception indeed provided a valid method in which to understand nature, the distinction between human existence and the cosmos would thus cease to hold (the latter would be subsumed by the former).<sup>29</sup>

In our continued analysis of the law of *phusis*, it is necessary to defer to the foremost conceptual tool in Aristotle’s armoury – that of place. Place cannot be said to have any life as a concept absent the movement and circulation of natural bodies and entities. The law of *nomos*, on the other hand, linked as it is with convention and culture, derives its force from the spatial order<sup>30</sup> over that which is proper to

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<sup>24</sup> Schneider, p. 2

<sup>25</sup> Aristotle, *The Politics*, trans. Ernest Barker, Oxford University Press (2009), viii (introduction by R.F. Stalley)

<sup>26</sup> Todd Mei, *Heidegger, Work, and Being*, Continuum (2009), p. 64

<sup>27</sup> Wey Gomez, p. 241

<sup>28</sup> Mei, p.60

<sup>29</sup> *Ibid.*, p.60

<sup>30</sup> Peter Fitzpatrick, *Modernism and the Grounds of Law*, Cambridge University Press (2001), p. 92. For Schmitt’s formulation of *nomos* as interpreted variously as Appropriation/Distribution/Production see Part V: Appendix: Chapter 1: Appropriation/Distribution/Production: An Attempt to Determine from *Nomos* the Basic Questions of Every Social and Economic Order, pp. 324–336. For elaboration on this see Part Three of the present manuscript, Chapter One, p. 95

place. This is so in the sense that the connotative meaning of *nomos* can be traced back to the primordial act of drawing a line in the soil in order to demarcate territory, which brings the land together with law.<sup>31</sup> Its denotative meaning is that of an act of enclosure or ‘hedging’. The demarcation of territory – the ‘order of the soil’<sup>32</sup> through hedging and enclosure – is primarily concerned with the occupation of a particular spatial order through the unique conventions and laws that rule over it. In thus constituting itself, *nomos* proceeds to differentiate itself via the moral authority of place (autochthony) and bureaucratic administration. These are the qualities that also serve to distinguish the people on ‘this’ side of the enclosure (as autochthonous) from the *other people* on its far side. *Nomos*, on this reading, is suggestive of a particular type of spatial unity – that which defines a community or collective which, through spatial closure, marks itself off from another as a distinct legal order over and against an exterior that is in principle un-orderable. This denotes what Hans Lindahl terms ‘a-legality’ (discussed at length in Part Three), the strange and ulterior normativity (‘xenonomy’) that defines legal orders distinct from that in which one is situated.<sup>33</sup>

Contra *nomos*, which can be said to rule over the narrower and more particular realms of the bounded spatial order, *phusis* consists of those qualities inherent to the wider cosmos. Intrinsic to this cosmos is a unique type of order – more commonly understood as harmony. From the ‘shortened’ (solely human) perspective of an established *nomos*, the self-ordering of *phusis* as considered from the cosmic perspective appears as ostensibly un-orderable. This is due to the fact that, unlike the (closed) spatial fixity of *nomos*, the cosmos is the harmony that perpetually moves.<sup>34</sup> Put otherwise, it is the proper ordering of things that ensures all things are in constant movement in relation to one another. The defining feature of the wider cosmos is a ‘belonging togetherness’<sup>35</sup> of entities and things, or in Russell Winslow’s terms a ‘self-gathering’.<sup>36</sup> This mutual movement between bodies and things is at the forefront of Aristotle’s understanding of nature. Movement is thus significant for both thinking about and perceiving nature. We can add that the cosmos is suffused with an immanence of rationality and order, rendering it coherent (although not from the solely partial perspective of *nomos*).<sup>37</sup> For Aristotle, it would logically follow that the ‘divine nature of the cosmos is immanence’.<sup>38</sup> Divinity and rationality are therefore evenly interspersed throughout the cosmos alongside the moving harmony of nature.

Thinking within a framework of change and movement, Aristotle develops what is commonly known as the ‘hylomorphic model’.<sup>39</sup> Therein lies Aristotle’s conception of nature in greater detail, as well as its connection to the wider and more general observations we have made on the cosmos. The more specific concepts of ‘matter’, ‘form’ and ‘place’ are a part of what can be described as Aristotle’s ‘phenomenological view’.<sup>40</sup> Essentially, these concepts allow him to build a model around which he can closely examine the data of experience or phenomenon,<sup>41</sup> which act as a basis for his wider cosmological views or his ‘preunderstanding’.<sup>42</sup>

The hylomorphic model is illustrative of one of the major infusions or interactions that furnish nature with its necessary motion. The interaction in this model takes place between matter (*hyle*) and form (*morphe*),<sup>43</sup> said to have a close working relationship with each other. Matter, within this paradigm, can be defined as the ‘innate and active potential’ to seek form. Indeed, it is the nature of matter to ‘run after’ form, as it were.<sup>44</sup> As long as matter reserves the right to move of its own accord towards its final form it holds an inherent potentiality that pushes it onwards. The end result of matter’s motion is its

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<sup>31</sup> Fitzpatrick (2001), p. 92

<sup>32</sup> *Ibid.*, p. 92

<sup>33</sup> Lindahl, p. 37. This is an updated version of the distinction that Carl Schmitt makes between what is beyond the line and remains ‘outside the legal, moral, and political values’ that are ‘recognised on this side of the line’. See Schmitt, p. 89

<sup>34</sup> Mei, p. 64

<sup>35</sup> *Ibid.*, p. 102

<sup>36</sup> Winslow, p. 5

<sup>37</sup> Casey, p. 57. This is contrasted with Plato’s cosmology, which is characterised by imposition.

<sup>38</sup> Mei, p. 71

<sup>39</sup> Casey, p. 56; Tim Ingold, *Brings Things to Life: Creative entanglements in a world of materials*, Working Paper #15 presented at ‘Vital Signs: Researching Real Life’ (9 September 2008, University of Manchester), p. 2.

<sup>40</sup> Casey, p. 55

<sup>41</sup> Aristotle, *Politics*, ix (Introduction)

<sup>42</sup> Mei, p. 59

<sup>43</sup> Tim Ingold, *Brings Things to Life: Creative entanglements in world of materials*, Working Paper #15, presented at ‘Vital Signs: Researching Real Life’ (9<sup>th</sup> September 2008, University of Manchester), p. 2

<sup>44</sup> Wey Gomez, p. 241

infusion with form. Form is the final, formal shape in which matter is moulded once it has carried out its activity through movement. This final shape is closely associated with the surface of the body of matter; a boundary is created between matter and its limiting outer surface – it is this shaping boundary that constitutes form.<sup>45</sup>

Within the sphere of its immediate environment or place (*topos*), matter in its formative movements can be re-described as body.<sup>46</sup> Thus, a body can be seen to run after form; once it has reached it, it has come to rest. In alighting at its final form it has also arrived at its ‘proper’ place within the order of the cosmos. As within the hylomorphic model matter runs after form, so, in the immediate environs of nature, body runs after its proper place where things are ‘innately inclined to rest’.<sup>47</sup> The point at which a body reaches its form is inherently linked with *where* this occurs. This is its proper place. When a body rests, it has, if only momentarily, concluded its movement in activity and its shape is delineated.

The proper place in which a body comes to rest needs to be disentangled from place in general. For Aristotle, everything both has its place and is in place. Where something is situated or placed constitutes a basic metaphysical category.<sup>48</sup> When something is in its proper place it can be said to be a full participant within the ordered harmony of the wider cosmos; to be in the proper place is thus to be properly ordered. This can be illustrated with reference to the self-referential power of bodies to be moved, mirroring their capacity to seek their full potentiality and purpose or form – their *telos*. We can, again, see the end or purpose (*telos*) of a body as residing in form. This is in line with Aristotle’s belief in the intrinsic generative power of nature as *phusis*, something not imposed from without but residing within.<sup>49</sup> In other words, each natural thing contains the principle of its own production. That is, it contains the ability to change its shape and encounter stability in its actuality.<sup>50</sup> But most significantly, in nature, ‘anything that maintains itself in wholeness has its end in being itself.’<sup>51</sup> So, when something arrives at its proper place, it has realised itself in being ordered, and thus in belonging to the wholeness of nature’s being. Wholeness corresponds to both the completed form of the entity – the perfect being, which is complete within itself – and the linking of the entity to the wider unity. While entities may complete themselves by finding their end in form, they cannot truly realise themselves when divorced from their proper place. They are linked as if by an umbilical cord to the incubating wholeness of nature’s being, and thus transformative processes.

To put it in other terms, the movement and activity of a body as it arrives at its proper place ensure that the stability of that being comes to the fore. The completeness, or continuity, of a body as a stable identity is dependent upon its movement to place. The continuity of a body’s identity involves the dissolution of its ‘internal differences’ or the many parts from which it is made up.<sup>52</sup> Movement therefore preserves the autonomous identity of a body, by holding it together in a unity or gathered-togetherness (a whole). A body’s link to the entirety of the cosmos is crucial as its unique movement derives in part from the perfect ‘everlasting motion of the [celestial] spheres’.<sup>53</sup> The perfectly complete, circular orbit of the celestial spheres keeps in train the unique movement of each body in the cosmos and therefore upholds the unity of individual beings, as well as the Whole. Hence, each body depends on the unity of the Whole, as the Whole depends on its constitutive unity.

A body can also be thought to be simply *in* place depending solely on its continued locomotion or movement.<sup>54</sup> This does not necessarily imply a qualitative change in the body, but merely a change from place to place.<sup>55</sup> We can understand this as a phenomenological categorisation premised on the observation that a being is always *in* something; a being is always *in* place.<sup>56</sup>

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<sup>45</sup> Casey, p. 54–5

<sup>46</sup> Wey Gomez, p. 241

<sup>47</sup> *Ibid.*, p. 241

<sup>48</sup> Casey, p. 50

<sup>49</sup> Wey Gomez, p. 243

<sup>50</sup> Christopher Bracken, *Magical Criticism: The recourse of savage philosophy*, The University of Chicago Press (2008), pp. 17–8

<sup>51</sup> Aristotle, *Nicomachean Ethics*, trans. Joe Sachs, Focus Publishing (2002), p. 204 (Glossary)

<sup>52</sup> Winslow, p. 43

<sup>53</sup> *Ibid.*, p. 51

<sup>54</sup> Wey Gomez, pp. 244–5

<sup>55</sup> *Ibid.*, p. 244

<sup>56</sup> Casey, p. 53

Aristotle sees place in its most basic form as a container or vessel<sup>57</sup> that surrounds physical bodies, or ‘the innermost motionless boundary which contains a thing’.<sup>58</sup> Place is theorised as the boundary between the surface/form and its outside. This boundary is the container, which cannot be considered part of the object *per se*.<sup>59</sup> This attests to the salience imputed to boundaries, limits and surfaces within Aristotle’s ontology. For being in place is inextricably linked with ‘being bounded by a surface, of being limited’.<sup>60</sup> The limit is found in place, and in fact ‘is part of place itself’.<sup>61</sup> As we can see, we have two boundary-limits worthy of note which make up Aristotle’s account of nature: firstly, the limiting boundary between matter and its surface, known as *form*; and secondly, the boundary-limit between a body’s surface and its immediate outside, known as *place*.

It is a testament to the subtlety of Aristotle’s thought that the boundary-limits of form and place are far more than a mere fencing off marking the distinction between being and non-being. But if this is the case, then it becomes pertinent to ask: what is the actual nature of this ‘limit’ (*peras*)? In order to answer this question effectively, we need to locate this discussion of limits in the wider context of potentiality (*dynamis*) and actuality (*energeia*). The interaction between potentiality and actuality, as we have already seen, is closely interwoven with that between matter and form, motion and change.

As has already been noted, bodies have their own in-built dynamism or potentiality, fully actualised when they are fully formed. It is the motion of a body that can be thought of as the ‘actualization of some potential’.<sup>62</sup> This raises the contention of whether it is safe to assume that actualisation (*energeia*) as the completion of an entity’s being involves foreclosure of further movement or activity. Todd Mei argues against any such notion, for if this were the case, we would be deceiving ourselves in thinking *energeia* a ‘static mode of being’. Instead, he observes, it is more a ‘manner of performance, or *being-at-work*’.<sup>63</sup> The dispute hinges around the multiple meanings of *energeia*. In its most general form, *energeia* is the ‘power to actualise capacities’.<sup>64</sup> While *energeia* could designate the end of an activity that realises form, or the end point of matter that has arrived at its final form,<sup>65</sup> the real stress in Mei’s definition is on the *force* involved in actualisation as a transformative process. It is to this end that we can interpret *energeia* in a hermeneutic manner as being-at-work. What being-at-work denotes is the condition whereby all things partake of their being only by virtue of being in constant activity.<sup>66</sup> Nature is ‘not explainable by material but only the *formative* activities always-at-work in material’.<sup>67</sup> The formative activities of nature suggest a pertinaciously persistent motion at the heart of things that resists any type of foreclosure.

When working with definitions of *energeia* which lay a pronounced emphasis on the end of an activity – i.e. as its final form – the temptation is to equate genuine actuality as ‘one in which its state of being is in its completeness’.<sup>68</sup> Actuality in this understanding becomes a mere mode of formal being which resides not in continued activity but in the stasis of stability, placing undue significance on an ideal end point. It is important to consider here that when matter reaches its rest in form, and thereby completes a cycle of activity, it is not precluded from reinitiating its movement and/or once again changing its form (this is most notable in locomotion). The completion of matter in form can be thought to designate a temporary marker (Winslow considers form to be a ‘incomplete completeness’<sup>69</sup>), implying the fleeting nature of any one completed action. Being-at-work continuously transcends these markers indicative of the transient completion of any given action.<sup>70</sup> It is, after all, the quality of perpetual *becoming* that

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<sup>57</sup> Casey, p. 54

<sup>58</sup> Wey Gomez, p. 246

<sup>59</sup> Casey, pp. 54–5

<sup>60</sup> Wey Gomez, p. 244

<sup>61</sup> Casey, p. 55

<sup>62</sup> Wey Gomez, p. 244

<sup>63</sup> Mei, p. 63 (emphasis added)

<sup>64</sup> Bracken, p. 57 (emphasis added)

<sup>65</sup> Aristotle, *Politics*, X (Introduction)

<sup>66</sup> Aristotle, *NE*, p. 202 (Glossary)

<sup>67</sup> *Ibid.*, p. 202 (emphasis added)

<sup>68</sup> Mei, p. 63

<sup>69</sup> Winslow, p. 14

<sup>70</sup> Blumenburg (p. 453) states that with the circle it is possible ‘to establish a boundary anywhere on it...which determines what is before and after, what is earlier and what is later.’ As this marker can be placed *anywhere* on the circle – something which can be conceived as a revolutionary movement – the fundamental contingency or arbitrariness of this operation is clear to see. Within the context of our discussion, the indicative markers are exactly that, indicative and not as yet set cut off points of demarcation.

characterises nature. To put it in another way, *phusis* 'is the substantial nature of things and their becoming'.<sup>71</sup>

*Energeia* as an actualisation of activity is an enactment of performance, which has its end in itself, or, to put it another way, 'its performance is its *actuality*'.<sup>72</sup> In this sense it can be said to be perfect, particularly in contrast to *kinesis*, which Aristotle claims is 'a temporary mode of being incomplete' due to its inherent relation with temporality.<sup>73</sup> It is the case here that *energeia* and *kinesis* realise their ends differently. While *energeia* has its end within itself (as matter and bodies have the productive principles of change and movement within themselves), *kinesis* realises its end over time or duration;<sup>74</sup> its movement is the culmination of an entire process, which has its end in a perfection that lies outside of its very being.

What can be ascertained here is that while *energeia* can be thought of as the *movement* that attains to the end of activity, *dynamis* or potentiality is the *force*<sup>75</sup> that induces change within matter or bodies. The interplay between potentiality and actuality is fundamental to the flowering and flourishing of entities within the wider framework of *earth*.<sup>76</sup> The unlimited potentiality/force of the earth – its definitive feature – can only reveal itself within the continuous being-at-work of nature, something only perceivable through the phenomenological and dialectical traits of movement and change, flowering and flourishing.

We are now able to return to the discussion regarding limits (*peras*) with a far more acute comprehension of what this entails in its substantiality. Firstly, let us reconsider the first boundary – that between matter and its surface, which is wholly constitutive of form. It has been stated that when matter reaches its final form it has been perfected as an entity that has reached actuality. This actuality, which coincides with the boundary-limit of matter, does not close off being as a completed artefact. It is not simply a boundary designating the fencing off of being from non-being. What it amounts to is an end to one cycle of movement, which concludes with an infusion between matter (*hyle*) and form (*morphe*). As being-at-work (*energeia*) is a continuous phenomenon, the limit can only divide one cycle of movement from another cycle that is yet to be induced, and so acts as a contingent exteriority. As nature is part of the unlimited potentiality of earth and cosmos, there is no end to the transformations that could take place for matter/body. The primordial act that gives form to matter<sup>77</sup> is that which opens up the world to further potentiality rather than closing it off. This is the eternity of the cosmos in motion, one that is always in the process of opening itself up to further change and transformation.

Following on from this, it is necessary for us re-examine our second boundary-limit – that between the form as surface and its outside as the surrounding container of place. As remarked above, place itself is seen as a limit, as well as limiting. Elaborating on this theme, Ed Casey explains that place 'contains-and-surrounds the body *by furnishing to it an environment* that, if not always stable...is nevertheless a defining locatory *presence*'.<sup>78</sup> What is depicted here is the power of place to attach a body to its wider, yet most immediate environment. In this sense it is 'circumambient rather than merely receptive'.<sup>79</sup> In other words, it can be seen as an active interface between the body and its surrounding world as opposed to a mere container which separates the body from its outside.

The link that attaches a body to its exteriority is made possible by the harmonious ordering of nature. We have already seen the harmonious dialectical relationship between potentiality and actuality, and the same relation can be said to characterise the connection between place and body. This interwoven quality points to the 'belonging togetherness' of the two. This type of relation between body and place can be defined by 'cooperative action', since things are always in the process of being placed, and conversely place is always in the process of being filled.<sup>80</sup> Casey further considers this relation a 'double immanence' that reveals the 'reciprocal belongingness' of place and body.<sup>81</sup> The immanence invoked

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<sup>71</sup> Winslow, p. 64

<sup>72</sup> Ibid., p. 60–1 (emphasis in original)

<sup>73</sup> Ibid., p. 65

<sup>74</sup> Ibid., p. 64

<sup>75</sup> Ibid., p. 104

<sup>76</sup> Mei, p. 79. Please note here that I am referring to a wider ontological reading or interpretation of earth, in the same manner as Heidegger.

<sup>77</sup> Mei., p. 79

<sup>78</sup> Casey, p. 55 (emphases added)

<sup>79</sup> Ibid., p. 55

<sup>80</sup> Ibid., p. 58

<sup>81</sup> Ibid., p. 58

here is suggestive of the horizontal exchange or mutual diffusion of body in place, and place around body. Each actively influences the other and so shapes a space of mutual co-existence.<sup>82</sup> This relation is demonstrative of what Aristotle sees as the intrinsic order that permeates the cosmos. Certainly, it is a matter of some interest that relations within the cosmos, or at least those which are aligned with and do not transgress *phusis*,<sup>83</sup> are characterised by a mutual belonging togetherness in which entities cannot but exist in the process of being-with-others.

While there is no hierarchy in the relationship between the place and the body, hierarchy within the cosmos, where ‘lower elements exist for the sake of the higher’,<sup>84</sup> does not seem to entail a relationship of dominance and subordination. This is no less true than in the relationship between the first unmoved mover and the rest of the cosmos. The first unmoved mover, despite setting the cosmos in motion, exists outside of it (in the sense of playing no active, reciprocal role; it can still be considered to be part of the cosmos) and therefore cannot interfere or intervene within it, even seeming ‘unconcerned with it’.<sup>85</sup> The cosmos remains a timeless entity with no beginning or end, but celestial bodies within it remain finite and dependent on the movement of other bodies to help them realise their innate capacity. This chain of movement is traced all the way back to the first unmoved mover which initiates the movement.<sup>86</sup> The key aspect of this immanence is the lack of imposition from above, and a capacity to exist in movement alongside others. Hence, Aristotle theorises order in nature through immanent harmony and not imposition.<sup>87</sup>

Place, considered as a container, does not simply contain, but opens up a body to the possibilities of the wider world. Just as the form-limit can be said to open up to the possibilities of further transformative activity which can result in shape-shifting, so the place-limit can be reinterpreted as an opening up to the change and movement of other placed entities. To understand the ambiguity that surrounds place as something that acts in an en-closing and closing-off<sup>88</sup> manner on the one hand, and links, attaches and opens up on the other, we can better think place as a ‘horizon’ (*horismos*).<sup>89</sup>

Place, as horizon, is where something can begin its presentation or ‘presencing’ (discussed below); it is ‘an active source of presencing: within its close embrace things get located and begin to happen.’<sup>90</sup> Place is where things are revealed and make their appearance as part of nature. While we have considered already the mechanisms of containment which can be attributable to the horizon,<sup>91</sup> it should be stated that the potential for the horizon to open up to a beyond need not be dismissed. Peter Fitzpatrick articulates this exact point when he accurately observes that the horizon need not simply be ‘a closed finality but the opening to all possibility that is beyond an affirmed order’.<sup>92</sup> Returning to the idea that place is a basic metaphysical category in Aristotle’s thought, we can quite clearly see that a being which reveals itself through its activity and movement can only do so *in* and *through* place. Hence, place is ‘requisite even to grasping change itself’.<sup>93</sup>

Things being open to each other – when they are open to each other’s ways of being (and hence of being formed and reaching potential) – is itself a demonstration of the true harmony and order immanent to the cosmos. As has been stated above, the order that is envisaged is not imposed from above (as it is in the legal imposition of order alluded to in the previous quotation) but can be seen as a horizontal exchange or flow of forces between the ontological entities of nature. Harmony here relies upon the openness of entities to others beyond themselves in order for things to properly enact and participate in ‘belonging-togetherness’. What harmony fully entails is the capacity of beings to answer the call to continually go beyond the restrictive boundaries of their final form, through continuous being-at-work. Additionally, the boundary-lines that separate different ontological forces of *dynamis* and *energeia*, change and movement, are continually being erased or at least breaking down in mutual exchange and infusion (and, therefore, can at times seem indistinguishable). It is this mutual exchange

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<sup>82</sup> Casey, p. 58

<sup>83</sup> See Aristotle, *Politics*, 1252b5–10, 1255b16–39

<sup>84</sup> *Ibid.*, xvii

<sup>85</sup> Wey Gomez, p. 240

<sup>86</sup> *Ibid.*, p. 240

<sup>87</sup> Casey, p. 63

<sup>88</sup> *Ibid.*, p. 63

<sup>89</sup> *Ibid.*, p. 63, derived from the Greek word *horos* (boundary).

<sup>90</sup> *Ibid.*, p. 63

<sup>91</sup> See previous Part, the chapter on ‘The Horizon of International Law’.

<sup>92</sup> Fitzpatrick (2001), p. 100

<sup>93</sup> Casey, p. 51

that is characteristic of nature. While bodies and matter in nature cannot be thought to have any agency as such, they do have an internal dynamism, which is attributable to a primordial belonging or gathered-togetherness. So it would seem that Aristotle's universe always appears full.<sup>94</sup>

Harmony is no more implicit than in the relationship between the two limits we have been discussing – the form-limit and the container-limit. These two limits not only work harmoniously together, but are also in some senses intermingled. Their related processes shape a common space in which the limits of form and container are perpetually being transgressed. The interaction between limits ensures that they both remain open to change, which remains inevitable, and are kept in constant contact with their beyond. Place remains open to being filled by another body which it links to its outside, and form remains open to the further activity and change which emanates from within. Fitzpatrick's observation concerning *nomos* is also apt for our developing understanding of place. He states that it 'cannot be positioned only in the bounded but must somehow extend intrinsically to an "outside"'.<sup>95</sup> Certainly, the reaching-outwards quality of place is destructive of a model which sees place solely as a bounded whole. But equally, the notion that a body is wholly at the mercy of its beyond cannot hold as the inner motion and dynamism of matter wards off any ultimate determination from outside. The balance of the two does not simply equate to a stalemate or static equilibrium but is constitutive of a harmony in which the counteraction of forces (one from within, one from without) leads to the eternal movement of nature, and more widely, the cosmos.

In concluding this section, it may be possible to hypothesise that the limits that book-end Aristotle's moving bodies are better read as types of membranes or skins which are reactive and adaptive to their exteriority or beyond. Notions such as place can be seen in the light of the vital interfacing role they play in mediating between a local environment, manifested in its actuality, and the vast potentiality of the earth in its ontological guise as its beyond. Mei makes the point that '[being-at-]work moves the earth itself into the Open of a world and keeps it there. *The work lets the earth be an earth.*'<sup>96</sup> In perceiving the fluidity, dynamism and constant openings which constitute particular emanations of nature, we may hope to grasp the unlimited potentiality and enormous power to shift our world from beneath our feet which encapsulate the earth/cosmos in its eternity.

## Chapter Three: Genesis Lost: The Dismantling of the Hylomorphic Model

Aristotle's hylomorphic model, explains Tim Ingold, became more and more embedded in the history of Western thought, but also, 'increasingly unbalanced. Form came to be seen as imposed, by an agent with a particular end or goal in mind, while matter – thus rendered passive and inert – was that which was *imposed upon*.'<sup>97</sup> The hylomorphic model is, as we have argued, like the greater part of Aristotle's cosmology, held together by the finely intertwining threads of immanence which run through the cosmos. As explained earlier, immanence is a key component of Aristotle's ontology of harmony and productive ordering. The harmony of the matter-form model is a progressively and continuously realised equilibrium, giving rise to change and movement in nature. Body and form in Aristotle's account of nature are held in balance, with form in its final state less an absolute end point than the boundary between the end of one cycle of movement and change and the beginning of another. It is thus the emphasis upon the 'final products' of the processes of formation<sup>98</sup> that marks the genealogy of Christian Aristotelianism.

At this point, we are able to discern the figure of Albertus Magnus. Like Aristotle, Albertus was interested in explaining the formative processes within nature. While the latter retains the hylomorphic model as an effective basis of analysis, the relationship between form and matter/body becomes increasingly unbalanced, leading to the expulsion of the immanence that plays such a significant ontological role within Aristotle's framework.

We will recall that for Casey there can be perceived within Aristotle's place-form model a 'double immanence'. The implication of this is a double transgression that parries the final victory of

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<sup>94</sup> Casey, p. 56

<sup>95</sup> Fitzpatrick (2001), p. 101

<sup>96</sup> Mei, p. 79, quoting Heidegger (emphasis in the original)

<sup>97</sup> Ingold (2008), p. 2 (emphasis added)

<sup>98</sup> *Ibid.*, p. 2

form over body/matter and resists the reduction of place to a final enclosure fencing off the outside. Thus the boundary-limits within Aristotle's notion of place are neither fixed nor determinate, but dynamic and always in the process of being erased. It is here that we can really understand Albertus' manoeuvre in all of its salience, which is an outcome of the need to render Aristotle's *phusis* fit for a Christian ontology. This involves the inversion of Aristotle's hylomorphic model, whereby the boundary-limits that act as temporary separations between ontological forces are displaced. Let us then elaborate on how the two boundary-limits of Aristotle's conception of place are altered by Albertus, significantly changing how they function.

The first manoeuvre – articulated in Albertus' *De Natura Locorum*<sup>99</sup> – concerns the collapse of the immanence inherent to the hylomorphic model. The hylomorphic model is effectively dismantled and reconfigured, and with it the generative capacity of *phusis* is lost. This generative power can be thought of as generic and termed 'genesis', and it lies at the very centre of Aristotle's idea of place. To grasp the fallout from Albertus' unbalancing of the model, we are obliged to reveal the operative nature of generic/genesis for Aristotle.

The very vitality and versatility of *phusis* is maintained through the ability of the model to endure solely through constant change. Here the words of Alain Badiou, who is thought of more as a Platonist, on the subject of love are both relevant and apt: 'the point of creation is also the point of resistance.'<sup>100</sup> Genesis is a prevailing force of creation that gives rise to something new<sup>101</sup> through self-generative motion. The primordial movement of matter and bodies attests to the empowering ability of charting and forging a unique trajectory. The temporary end of a trajectory may result in form, but the particularity of a direction corresponds to the specificity of an equally temporary form. The shaping of matter in place, which, as we shall detail, is a complex process, embodies creating anew as much as resistance against attempts to annul (or contain) motion. In re-engaging with these thoughts let us introduce new concepts – perspective and orientation – which will yield us rich dividends. This new approach will provide us with the discernment we require to fill in the theoretical space linking Aristotle and Albertus.

Perspective can be considered the unique trajectory that matter and bodies take in movement – it is the mode of being's expression.<sup>102</sup> The irreducibility of this perspective stands at the heart of what self-generation is all about. Matter holds the power to move itself, and hence the power of self-ordering within the cosmos. Order, as has been noted, is the motion of matter to its proper place. The arrangement of matter may be partly subject to form, but harmony only manifests itself when matter deploys the force to advance by guiding itself forth. Thus entities of matter assume partial perspectives brought about by the singular direction they take through place. This struggle of matter through its trails involves the exhibition of *dynamis* – the intensive force of forging a new direction which (re-)animates existence.

In reconsidering matter's arrival at form, let us envisage *telos* as a mode of orientation. When matter reaches form it accomplishes *telos*, which is the end point of any one cycle of motion. This end point, in its fragility and effulgence, only acts as a sort of spur to further motion and generation. Orientation is only ever partially fulfilled, and is unable to be accomplished in its completeness due to the cessation of motion and the annulling of the cosmos' eternity this would entail. Hence, orientation is concerned here with the eternal motion of the cosmos. Entities of matter have their own unique perspective, which interacts and contributes to the eternal cosmos but is not subsumed by it. The partial perspective of matter thus comes face to face through orientation (*telos*) with the eternal Whole – that which is only comprehensible through its absence of beginning or ultimate end. The relationship between perspective and orientation acts as a catalyst to a productivity seemingly incapable of being exhausted. The relationship is a chief contributor to the genesis inherent to Aristotle's hylomorphic model.

Here it is felicitous to re-introduce place in the slightly altered terrain between Aristotle and Albertus. Place is effectively where particular perspectives and orientations meet or intersect. It is where body and form intermingle, the domain in which the irreducible is caressed by the eternal. It is where the double immanence discloses itself. The ingenuity of such a versatile concept is that it operates as a sort of

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<sup>99</sup> See Albertus Magnus, 'De Natura Locorum', trans. Jean Paul Tilman, in *An Appraisal of the Geographical Works of Albertus Magnus and His Contributions to Geographical Thought*, University of Michigan (1971), pp. 25–145; Wey Gomez, p. 238.

<sup>100</sup> Alan Badiou and Nicolas Truong, *In Praise of Love*, trans. Peter Bush, Serpent's Tail (2012), p. 99

<sup>101</sup> John David Dewsbury and Nigel Thrift, 'Genesis Eternal': After Paul Klee', in *Deleuze and Space* (2005), p. 93

<sup>102</sup> Winslow, p. 44

passage or corridor between domains while containing the co-habiting forces of *energeia* and *dynamis* – the forces of movement and change.

Let us start by reaffirming place as a zone of co-existence and co-habitation between varying forces. The self-generating movement of matter, its *dynamis*, in its encounter with form or *energeia*, results in the generation of the new, and fundamentally the creation of novel shapes. Thus, it is the counteraction between forces that creates anew. In spite of the fact that it is no matter of chance that these specific forces come together, we are still able to proclaim with Sarah Ahmed that ‘in the nearness of objects to each other what happens in the “now” of this newness remains open, in the sense that we don’t always know how things affect each other, or how we will be affected by things’.<sup>103</sup> It is precisely because place is a cauldron of interacting forces that it can act as an impetus to the creation of the new. With the proximity of matter and form within the confines of place, a reciprocal subversion occurs.<sup>104</sup> Within the container of place, both forces remain open to each other. When the relation is between fluid intensive forces, boundaries between co-habitants do not hold.<sup>105</sup> In the binding of *energeia* and *dynamis*, a mutual shaping occurs in the ‘co-incident’<sup>106</sup> of these forces; we can observe change and movement intersecting through place. In this case, when matter arrives at its proper place, form is empowered to shape its contents. On the other hand, the self-generated movement of bodies effectively means that matter can shape the place it passes in its trajectory. Places are haunted by bodies, as matter co-habits with form while form continually greets and embraces matter in place. Certainly, bodies are submerged in place, but significantly, in return, their self-motion attests to their power to shape place.<sup>107</sup> We can then be so bold as to assert that the identity of place is regularly subverted by *dynamis*’ trajectory and particular perspective, thus denying place the safe anchoring of fixity.

We can then consider difference to be the outcome of the perpetual encounter between forces. In this manner, the new is continually generated within the place of encounter. It is a genesis that, in its spontaneity, interminably recreates itself in novel forms. There is, however, an added layer to place that maintains genesis. Place is a domain of co-habitation, but is also a hidden passageway *between* domains. It may seem counterintuitive to consider place as a type of passage as well as container, but this is not as contradictory as it may initially sound. What deserves our attention, here, are the consequences of *dynamis* denying place fixity in identity. The shaping of space through criss-crossing trajectories and perspectives precludes place closing in on itself – into the demarcated surface of a territory (*nomos*). In circumventing the emergence of a surface closed in on itself, place discloses something far more profound. Indeed, place is at liberty to provide a passageway to the Whole. This Whole, as has already been mentioned, is the entire cosmos – the perpetual movement of all. And this eternal movement also implies eternal genesis.

Place, in its capacity as a container, is a sanctum in which ‘presencing’ is sustained. In order to elaborate on this, we must first expatiate on what we mean when we assert that place is a sort of container. Place is a container not because it tenaciously holds matter and form in any fixity, but because it acts as a microcosm that is able to encompass the entire scope of the cosmos. Inversely, it is a macrocosm that subsists in even the tiniest place. To reiterate, place is a corridor between the very particular event of encountering forces and the Whole. Alternatively, place is a passageway between the particular and universal. These openings to the Whole that reside in place are tentative and delicate – liable to close and vanish as quickly as they open.<sup>108</sup> It is these openings which place affords to matter that can truly be described as disclosure or presencing.

When the Whole is rendered present to matter, it is through the unique passageway that place affords. The partial perspective of matter is not absorbed and therefore effaced by orientation (*telos*). The singular trajectory of matter is the point of penetration at which it confronts the eternal. The particularity of a perspective is allied to that particularity which is definitive of place. In this joint venture a unique tunnelling passageway<sup>109</sup> is momentarily held open. This is the point where genesis resists; the

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<sup>103</sup> Sarah Ahmed, *Queer Phenomenology*, Duke University Press (2006), p. 39

<sup>104</sup> Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy*, Verso (2001), p. 129

<sup>105</sup> Ahmed, p. 53

<sup>106</sup> Ibid., p. 49

<sup>107</sup> Ibid., p. 54

<sup>108</sup> Dewsbury and Thrift, p. 99

<sup>109</sup> See Stuart Elden, ‘Secure the Volume: Vertical geopolitics and the depth of power’, *Political Geography* (no. 32, 2013a), p. 13 (<http://dx.doi.org/10.1016/j.polgeo.2012.12.009>). Tunnels are opposed to a vertical geopolitics as they

presencing within place anticipates and resists the onset of a 're-presencing'. Re-presencing would not be possible, as every moment of presencing is its first and last. Not only are passageways to the Whole completely dependent on the unique circumstances of place, the passageways or openings collapse in on themselves, never to reappear in the same form.

In the process of rethinking place, Albertus is hugely successful in breaking down the points of resistance that provide the hylomorphic model with its resilience. The double immanence (although there is of course a further one we have identified) that is such an engrained feature of the hylomorphic model is dismantled. The immanent or dialectical relation between form and body, place and body, and furthermore between place and cosmos, collapses as Albertus separates them through his theoretical incisions. The separating of these respected forces and entities from each other has its corollary in the disqualification of a previous proximity. With Albertus' incisions we see that the heart of the hylomorphic model – genesis – is ripped out in a major operative manoeuvre.

Albertus' opening gambit is to revoke the self-generative capacity of matter. He therefore evinces matter to be 'lifeless and motionless' as 'material' cannot be 'the cause of...power'.<sup>110</sup> In his remodelled conception of nature, the inner dynamism of bodies to move and change of their own accord, which is the fundamental generative quality of *phusis*, is lost, as a body is 'not moved either by itself or through an accident...'.<sup>111</sup> Nicholas Wey Gomez states that in Albertus' notion of nature there is 'no longer an intrinsic cause of being moved and being at rest in natural things'.<sup>112</sup> In other words, matter is disempowered through the removal of its self-generated trajectories. We are immediately able to deduce how immense the consequences of this theoretical move may be.

The power of matter to order itself – its self-ordering – cannot hold under these new circumstances. Through the power of self-ordering, matter is able to assume its own particular perspective and therefore its unique trajectory. Self-ordering ensures that matter is free from being completely determined by orientation. It is only through the initial separation of the perspective of matter from the guiding orientation of the cosmos that harmony is possible. This is, after all, the condition of possibility that allows for the tunnels and passageways (through place) to link matter to the Whole.

In the redaction of matter's control over its own trajectories, not only is self-ordering no longer a possibility, but the unique passageways that penetrate into the Whole crumble away. The singular nature of matter's trajectories through place bursts into the Whole in a unique way. The particularity that defines matter's journey can no longer combine with the particularism of place like a key that unlocks the door to the domain of the Whole. On the contrary, matter becomes submerged in an overriding orientation.<sup>113</sup> What this means is that matter's generation through movement is wholly dependent on an orientation that absorbs its particularisms. Matter is essentially blinded and is no longer able to navigate its own way through the world. It is now induced to move by movers existing outside itself. For Albertus, potentiality exists for all bodies – inanimate or animate – within the confines of nature, only in the desire for a soul.<sup>114</sup> Nature thus comes to be defined by the potentiality of all bodies to desire a soul, and it is this which induces movement to form and actuality. Matter is now at the behest of soul, and no longer communicates with a Whole capable of acting as a reminder that motion is always an ongoing mission.

In Albertus' theorisation, it is *energeia* that becomes the prevailing force, and advances on *dynamis* through cannibalising it. *Energeia*'s relation to the Whole is through its combination with matter, but as this correspondence is obviated, *energeia* comes to steal a march over *dynamis*. Albertus' manoeuvre is significant in adding rigidity to the first boundary-limit, represented by form.<sup>115</sup> With the annulling of the intrinsic quality of matter to move itself, body has lost its ability to transgress its final form or, to put it in other words, to shift its shape and in doing so to resist the surface-limit of form. It is effectively the first containment of being we encounter, made possible by the offsetting and rendering out

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'rarely go directly down' in a linear fashion, but are characterised by a destabilising, or a resistance generating incline which de-centres a centre of gravity.

<sup>110</sup> Wey Gomez, p. 251; Albertus (1971), pp. 31, 48

<sup>111</sup> Albertus (1971), p. 31

<sup>112</sup> Ibid., p. 252; Albertus (1971), p. 27

<sup>113</sup> Indeed, Albertus sharpens the 'active and teleological character of natural operations beyond Aristotle's original intentions.' See Takahashi, p. 481

<sup>114</sup> Wey Gomez, p. 244; Albertus (1971), p. 27; Albertus Magnus, 'Questions on Book X of the Ethics' in Stephen McGrade et al. (eds.), *The Cambridge Translations of Medieval Philosophical Texts, Volume Two: Ethics and Political Philosophy*, Cambridge University Press (2001), pp. 12–167, at p. 74

<sup>115</sup> Albertus (2001), p. 30

of joint of the finely tuned equilibrium of the hylomorphic model. With the loss of equilibrium, the mutual subversion that staves off the descent into fixity for either matter or form is disabled. What becomes pronounced and rather explicit is an internal hierarchy in the hylomorphic model between form and body. Hence, Albertus expresses the opinion that higher things must always be considered in relation to lower things, such as that of ‘form to its own material substance’.<sup>116</sup> It would seem, though, that with the loss of a mutual shaping, form loses as much of its potency as matter.

In the case of inanimate natural entities, Albertus considers their form induced by movers existing outside of them.<sup>117</sup> As inanimate natural entities are not considered to be in possession of soul, they must be commandeered by a soul existing beyond them. Hence, with the lifeless and inert matter of inanimate things, movement into form is transmitted from beyond.<sup>118</sup> The imposition of movement and change on naturally inanimate things effectively covers up or hides the formative, and as such, symbiotic and generative processes that give rise to them.<sup>119</sup> In such an ontology of imposition, natural entities become objects which ‘are locked into their final forms, closed in upon themselves’.<sup>120</sup>

Rather than opening up, in Albertus’ place-determinate model – a type of what David Harvey dubs environmental determinism<sup>121</sup> – place becomes a mechanism that functions through closing down and containing (enclosure, hedging, and further, dispossession). For the most part, Albertus retains aspects of Aristotle’s conceptualisation of place as a mediating influence between the environment and the body. It is a power mediating between the natural habitat, the climate of an immediate environment of the earth below, and the potent life-forming influence of the heavens above, in the shape of the first mover.<sup>122</sup> In this guise, place becomes an ‘active medium informing body’<sup>123</sup> because it acts as ‘an active principle of generation.’<sup>124</sup> As natural bodies are given form by the first mover which resides above, it is incumbent upon place to act as an apparatus of capture in order to hold and maintain bodies in their location. This means that they are impelled to remain open to and at the mercy of the beyond. Place is now augmented with a certain power: it acts as a tool<sup>125</sup> used by nature to induce bodies to move to their proper place and is thereby invested with the power to bring ‘forth forms in matter of simple bodies.’<sup>126</sup> It is therefore a container for a controlling form, and in taking up this employment it becomes something akin to territory<sup>127</sup> (or what the critical geographer Stuart Elden has previously referred to as a ‘bordered power container’<sup>128</sup>). Specifically, it becomes a boundary that objectifies natural entities as final product, and a habitat or place that is converted into a territory through powers that are beyond it.

## Chapter Four: A Seepage that Would be Sutured: The Sky–Earth Fold

The native North American Iroquois tribes,<sup>129</sup> very much in awe of the sky, dared to imagine that its irresistible force derived from its ‘unfathomable height’.<sup>130</sup> Samuel Taylor Coleridge, in a perceptive remark, dreamily observed: ‘Deep Sky is of all visual impressions the nearest akin to a feeling. It is more of a feeling than a sight, or rather, it is the melting away and entire union of feeling and sight.’<sup>131</sup>

The enigmatic and formidable powers of the sky are just what Albertus has in mind as he shifts the terrain of conceptual battle to the geographical circumambience of the earth, as well as the sky.

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<sup>116</sup> Albertus (1971), p. 25

<sup>117</sup> Albertus (2001), p. 74; Takahashi, p. 472–473

<sup>118</sup> Ibid, p. 112

<sup>119</sup> Ingold (2008), pp. 5–6

<sup>120</sup> Ibid., p. 5

<sup>121</sup> See Harvey, p. 126

<sup>122</sup> Albertus (2001), p. 52–53: at this point he discusses the first mover in the context of perfection.

<sup>123</sup> Wey Gomez, p. 252; Albertus (1971), pp. 32, 33

<sup>124</sup> Albertus (1971), p. 25, 26

<sup>125</sup> Wey Gomez, p. 252

<sup>126</sup> Albertus (1971), p. 41

<sup>127</sup> See Blomley (2007), p. 16

<sup>128</sup> The term is taken from Anthony Giddens. See Stuart Elden, ‘Land, Terrain, Territory’, *Progress in Human Geography* (vol. 6, no. 36, pp. 799–817, 2010), pp. 800, 810–1

<sup>129</sup> See Diana Ferguson, *Native American Myths*, Collins and Brown (2001)

<sup>130</sup> Grant, p. 115

<sup>131</sup> Ibid., p. 115

Albertus' intention is to tackle the problem of the interaction of the two hemispheres in his own way.<sup>132</sup> In spite of the disabling of Aristotle's double immanence, there is still a place for contingency in Albertus' model and hence a promising node from which to base the relationship between hemispheres. Contingency manifests itself in his thought through the notion of 'flux'.<sup>133</sup> With its very specific meaning, this is introduced partly due to Albertus' reduction of matter – and by implication earth – to a cul-de-sac for thought. It is no surprise that he turns to Neo-Platonism<sup>134</sup> at this point since it provides him with a theoretical rescue in furnishing him with the transmitting elements that will connect earth and place with the beyond of the heavens or sky. Albertus finds these transmitting elements in the light radiation that flows down from the sun and the celestial bodies which make up the constellations.<sup>135</sup>

Herein it is noticeable that Albertus has constructed another model that easily complements the hierarchy implicit in his rendering of the hylomorphic model. This model is built on what can be seen as the first fold that underlies Albertus' study. The hierarchical model, in which the beyond, the heavens or sky comes to dominate the earth, is constructed through the erection of an overt boundary, separating one from the other, with only the interface of place as a go-between. The earth and sky come to inhabit 'mutually exclusive hemispheres'.<sup>136</sup> The inspiration for this hierarchical sky/earth division can be traced to the Neo-Platonists: Wey Gomez elaborates that those such as Macrobius and others were of the opinion that 'earth ought to occupy the lowest, farthest place from the first cause on the periphery of the cosmos because earth was the most ignoble among all creatures in the ladder of being flowing down from the divine'.<sup>137</sup> Albertus is one with Macrobius on this issue, and he states that: 'the earth is denser and lower according to nature, and by reason of that property, ought to have a place...further away from the location of fire [or the light of the stars]'.<sup>138</sup> While he is primarily addressing the science behind this cosmic positioning, the moral dimension here is implied and we shall consider this in turn in the next chapter. While the divine operates through the transmission of light radiation, which has its source in the heavenly bodies, the earth is reduced to acquiescence in accepting its hegemonic configuration from above. And here we return to Albertus' notion of flux, or, the means by which things are formed anew. Light, or 'the complex of different powers that flowed down from above',<sup>139</sup> is the source of the diversity of places<sup>140</sup> or 'compositions'.<sup>141</sup> The shape that these powers take is dependent on the hugely complicated, interrelated and ever-changing configuration of the celestial constellations.<sup>142</sup> The events of rupture and change in the world are subject to the changing patterns of the rich, interweaving tapestry of the firmament.<sup>143</sup> The flux of the heavens and their eternally changing configurations is suggestive of the idea that while what is beyond or above may be immersed in utter contingency, that which is contained below is reduced to carrying out the summons of what is above. Thus, form is transmitted via the

<sup>132</sup> Albertus' extensive scholarly interest in geography is amply shown through the details he enumerates of the hemispheres and regions of the world in Part III ('A Description of the Regions of the World'), Chapters 1–3 of *De Natura Locorum*. To add to this, Thomas M. Schwertner states that all the sciences that Albertus drew upon concern 'the earth and the sky' and Wilms (p. 57) notes that he was influenced by the 'momentous revolution in map science and in the art of navigation.' (Quoted by Tilman, p. 5)

<sup>133</sup> Wey Gomez, p. 252; Takahashi, p. 479–80

<sup>134</sup> Albertus (2001), p. 12

<sup>135</sup> Albertus (1971), pp. 29, 48

<sup>136</sup> Tim Ingold, 'Earth, Sky, and Weather', *Journal of the Royal Anthropological Institute* (vol. 13, pp. 13–38, 2007), p. 19; Albertus (1971), p. 50

<sup>137</sup> Wey Gomez, p. 259; Albertus (1971), pp. 25, 34, 36, 37–8; Albertus (1992), pp. 208–273, 221; Albertus (2001), pp. 14, 86, and direct citation of Macrobius at p. 94. The earth is a deficient analogue to that which exists above – the celestial orbs. The point of origin of life is thus in the heavens, to which we are obliged to turn back. See Blumenburg, p. 461

<sup>138</sup> Albertus (1971), p. 36

<sup>139</sup> Albertus (1971), p. 43; Wey Gomez, p. 262

<sup>140</sup> Albertus (1971), pp. 43, 44

<sup>141</sup> *Ibid.*, p. 46. For Albertus place is a 'composition' of bodies and elements generated and structured by the 'prime' element of fire, which is also able to dissolve and reconfigure that very same composition. Elsewhere, he uses the analogy of place as a 'womb' receiving the 'formative power of the embryo'. See, Takahashi, p. 457

<sup>142</sup> Wey Gomez, p. 267. This is explained at great length by Albertus (1992): pp. 223, 225, 229, 231. According to Takahashi (p. 458), divine intelligence or the first mover/architect pours forth his formative powers into 'chunks of earth' through the mediation of the celestial bodies. The latter can also be thought of as instruments in the hands of the architect, which are used to construct the 'compositions' of place.

<sup>143</sup> The biblical term 'firmament' carries the Christian connotation of the heavens remaining 'fixed' or 'firm'. Many of the contemporary debates amongst theologians hinged over whether the heavens stood still or were in perpetual movement. In respect to our current concern with Albertus' cosmology, we are able to say that he believed the heavens to be fixed, only insofar as it is placed above the earth; it still held the ability to transform itself continuously in what initially appear to be unknowable ways. See Hans Blumenburg, p. 462

slipstream of light rays emanating from the stars in the heavens.<sup>144</sup> Within this system, it is the sky that is always on top, and yet the earth exists as firm ground<sup>145</sup> on which structures of necessity are realised. So, it seems that it is solely that power from above – a ‘heavenly’ power – that can bind ‘matter to a specific thing...’<sup>146</sup>

In Albertus’ formulation we do not see only the co-option of Aristotle’s notion of place and the positing of a fundamentally unbalanced hylomorphic model, but also the corroboration of these representations against a primordial ecology that constructs the earth through the process of genesis. The elements of the sky are set against the earth, with which it was originally in an immanent relationship. With Albertus the primordial pact is broken. It is only in the breaking down of this pact – the Ecosphere – that the sky can be re-conceived not just as a beyond, but as the firmament that acts to territorialise the earth, driving away the previous ecology that maintained the earth in a fragile genesis.

According to the anthropologist Tim Ingold’s reading of his sources on matters concerning the earth, sky, wind and weather, there is a perceptible realm in between the hemispheres of the earth and sky, seemingly hidden away in the horizon where they appear to meet.<sup>147</sup> This discreet realm, screened from theorisation, is the ‘weather-world’. It is the domain of the ‘medium’, a place where all the action is said to happen yet which is given little conceptual exposure. It is also the realm of place, which in mediating between earth and sky resides in a critical position in Albertus’ world-machine.<sup>148</sup> Without the co-option of the medium, Albertus’ final unveiling of the tripartite geopolitical model does not carry the same potent theoretical, hegemonic force with which he invests it. The incipient frontier between the earth and the sky is the ambient scene of struggle between those who would keep it open, and those who would shut it down.

To understand Albertus’ battle for the medium, it is first wise to elaborate upon what the medium actually consists of. The medium existing within the weather-world relates to the naturally occurring elements that dwell within it; the weather-world is defined by the ‘restless life of these elements’.<sup>149</sup> The medium can be thought of as the affirmative flux and flows of the elements – including light, but also air, wind and the currents of the weather in general<sup>150</sup> – which afford perception and movement.<sup>151</sup> In other words, they can be considered the intensive forces that come to co-habit that generative ambience between hemispheres as ‘vectors’<sup>152</sup> of interaction.

To follow on from this, we should say that the special role designated to the medium is, in fact, to prevent the hemispheres from shutting themselves off in sutured or closed-off totalities. The fluxes and flows of the medium are as much a part of the earth as they are part of the sky. If we take the example of light – which is most appropriate to Albertus’ commentary – it is possible to reveal that elements of the medium exist in a form of *immanence* which is experienced not as independent of the observer, but as an unfolding ‘within [a] field of relations established by way of their presence within a certain environment’.<sup>153</sup> Sense and perception cannot exist without immersion in change, movement and flux. It is the very flows of the medium that underwrite perception in the first instance. In this sense, matter (or substances) exist immersed ‘in the currents of the medium’.<sup>154</sup> The elements of the medium – such as light – do not exist outside bodies/matter but *alongside* them as part of the world, part of the ‘soil of the sensible’.<sup>155</sup> Beings are bathed and suffused in currents of luminosity as they feel the light, as it flows, change the surroundings they interact with and inhabit. The observer comes to feel, perceive and engage with the permutations induced in their ambience by the radiation of light. As light ‘invades us’ we come to meet it, and this meeting constitutes the union between the vicissitudes of feeling and sensation that is the core of an entity’s being. Light, in its capacity as medium, is therefore an ‘interpenetration’ between

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<sup>144</sup> Albertus (1971), p. 47

<sup>145</sup> Ingold (2007), p. 25

<sup>146</sup> Albertus (1971), pp. 44, 34

<sup>147</sup> Ingold (2007), p. 26

<sup>148</sup> Albertus (1971), p. 38

<sup>149</sup> Ibid, p. 38, 41, 42

<sup>150</sup> Ibid, p. 34. For further discussion of the medium, see Albertus (2001), p. 72–3

<sup>151</sup> Ingold (2007), p. 25

<sup>152</sup> Ibid., p. 30

<sup>153</sup> Tim Ingold, ‘The Eye of the Storm: Visual Perception and the Weather’, *Visual Studies* (vol. 20, no.2: pp. 97–104, October, 2005), p. 99; Albertus (1971), p. 50

<sup>154</sup> Ingold (2007), p. 30

<sup>155</sup> Ibid., p. 29

things and their surroundings.<sup>156</sup> Thus, elements are not unidirectional in their movement but flow in and out, disrupting the boundary-line between interiority and exteriority, earth and sky, and consequently resisting the emergence of any frontier that might transform hemispheres into separated totalities.

When sky and earth are considered as a fold we come to understand that they are inextricably linked within an indivisible field.<sup>157</sup> Thus, the elements of the weather-world or medium come to maintain the symbiotic sky–earth relationship. The medium opens up the land and earth, ensuring their reactivity and contingency in response to the sky. The land as a surface is not a boundary or interface between earth and sky but a ‘vaguely defined zone of admixture and intermingling’.<sup>158</sup>

The interactions inherent in the sky–earth fold through the weather-world can thus be considered to play a substantial part in upholding the Ecosphere that perpetually unfolds itself. The sky–earth fold is the point of interception between hemispheres where elements such as light assemble. This point of interception is the open wound, so to speak, from which the multiplicity of co-inhabiting life-forms seep out. It is a zone of intensity where intermingling takes place between the elements and a proliferation of life-forms – the ‘infinite sum of the diverse’.<sup>159</sup> This multiplicity of life forms, drawn out by intercepting elements, act as the binders, or ‘border beings’, which defend against the erection of any frontier boundaries between sky and earth. In this open world, living entities withstand objectification by being conduits for life. In its comings and goings and productive movements the open world ‘may generate formations, swellings, growths, protuberances and occurrences, *but not objects*.’<sup>160</sup>

In contrast to the open world of the sky–earth fold, Albertus is led to subscribe to a two-dimensional surface ontology<sup>161</sup> through his utilisation of ‘spatialised optics’ (elaborated upon below). In this surface ontology, the land that separates earth from sky becomes an interface. Land becomes a properly disciplinary concept – a regulated boundary between the earth and the sky that ensures order. The sky–earth fold – where the earth requires interaction with its beyond in the sky – wards off the temptation to enclose the land.<sup>162</sup> But with land as a regulated interface, the earth can no longer respond to the call of the sky and the sky is no longer open to the cries of the earth. The forces of light and the firmament are free to shape the land as a barrier or iron-cast division between hemispheres – a prerequisite for the creation of territory. In this manoeuvre, Albertus ensures that the ‘generative movements of life [are] turned into the boundaries of exclusion’.<sup>163</sup>

In this positing of a militarised frontier between sky and earth, the life-generative space in between them is sutured up. The middle realm of the weather-world (the place where the limits of earth and sky meet in a creative entanglement) is transformed into a frontier. The interface of land is no longer the zone of admixture. The land, as structured patterns generated by light, is now a centre between earth and sky. In becoming this interfacial centre, it ‘subordinates and organises all spaces’ and so completes the transformation into an ‘organising principle’ which reduces other spaces to ‘differential moments internal to itself’.<sup>164</sup> Land organises the spaces of the earth through regulating the movement and flows of the elements. It allows the one-way traffic of light radiation to flow down from above to structure the earth. The land, as interface, disallows the earth any reciprocal approach towards the sky. Thus, the separating boundary between earth and sky also acts to separate the pure *contingency* above from the *necessity* realised below. Above this boundary, the sky is able to impart order on earth, and below it, the earth-as-contained cannot similarly affect the heavens – the autonomy of the latter is duly revoked.<sup>165</sup>

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<sup>156</sup> Ingold (2007), p. 27

<sup>157</sup> Ingold (2005), p. 97

<sup>158</sup> Ingold (2007), p. 33

<sup>159</sup> Dewsbury and Thrift, p. 104

<sup>160</sup> *Ibid.*, p. 31 (emphases in original)

<sup>161</sup> Lefebvre (p. 313) describes best how this surface ontology operates: ‘An extraordinary – indeed unthinkable, impossible – confusion gradually arises between space and surface, with the latter determining a spatial abstraction which it endows with a half-imaginary, half-real physical existence. This abstract space eventually becomes the simulacrum of a full space.’ The surface of an object, in other words, becomes fully ontological (subsumes the ‘fullness’ or constitutes the wholeness of space), taking on powers of determination over other elements integral to space and place, such as the circulating elements and bodies in its immediate environs.

<sup>162</sup> Ingold (2007) p. 26

<sup>163</sup> Ingold (2008), p. 1805

<sup>164</sup> *Ibid.*, pp. 183–4

<sup>165</sup> It is also true to say that the Earth, in Albertus’ cosmology, must act as the immobile centre of the cosmos around which the celestial orbs rotate. The rotation of heavenly bodies animates the earth in terms of generation and corruption of bodies, but this life-generating circular movement has its reference point in a stable centre (i.e. the Earth). This is discussed in depth in the context of Albertus’ engagement with Averroës in Pierre Duhem, *Medieval*

The land as intermediary is the domain of place. Place, along with land, makes up the structure of order that contains entities and life-forms. What is in the process of beginning to emerge here is the colonised territoriality model<sup>166</sup> (which will only really fully appear with Aquinas and Vitoria), although at this point we can only assert that suturing and fixity emerge hand-in-hand with the establishment of a discernible and institutionalised order.<sup>167</sup> Land is not a place that realises the co-habitation of inhabitants, but presents itself as a place to be occupied, as the ‘grounded fixities of landscape’.<sup>168</sup> The ‘exhabitants’, or entities that occupy this place, exist segregated from one other as objects adorning the land. The ground of this potential territory to be occupied is built upon the erasure of the dynamic Ecosphere.

In his study of light, Albertus turns towards a philosophy in which it is a centrifugal element: Neo-Platonism. In giving light considerable metaphysical weight,<sup>169</sup> Albertus finds something of grave significance to his own thinking in the Neo-Platonic tradition. For this strand of thought he had not only to thank the Ancients, but also the Arab philosophers<sup>170</sup> who had preserved and conveyed it.

We have already stated that light is an element that belongs to the medium. Neo-Platonists, however, envisaged light as not just any element amongst others.<sup>171</sup> Light is the principle or supreme element of the medium, the first amongst equals, as it uniquely stores away hidden formative powers. Naturally, Albertus is drawn towards Neo-Platonism since light makes up one of the key elements of the medium which it is vital for him to co-opt.<sup>172</sup> In strategically embarking upon the conscription of light, Albertus correctly identifies it as the potential kingmaker between the earth and sky. It is thus important for him to separate light from other elements of the weather-world in order to promote it in his system and set it against its co-inhabitants.<sup>173</sup>

For Neo-Platonists, light is an immense power that carries forth the vibrant energy of the sun’s rays.<sup>174</sup> It is perfect in its immateriality, an immateriality that holds quite an allure for Neo-Platonists, closely associated, as it is, with the weightless purity of the soul.<sup>175</sup> The point of origin for light is the firmament, and specifically the all-powerful sun, which is the eye (from above) with the ability to bring things about.<sup>176</sup> The heavenly vault, from which light emanates outward, is the site of an alternative multiplicity and flux (to the sky–earth fold) – that of the ‘pure contingency’ of the configuring stars.<sup>177</sup> The ever-shifting celestial constellations fixed beyond and above the sky–earth fold are positioned in a location from which Albertus can contest the Ecosphere.

Albertus must maintain an element of flux within his paradigm so that he can explain how generation takes place and the new comes about on earth. In this, the limitless beyond of the skies proves useful as it retains a potentiality for constant variation. For Albertus, the horizon alludes to the constellations and contingency of the celestial bodies with their perpetual permutations and particularity.

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*Cosmology: Theories of Infinity, Place, Time, Void and the Plurality of Worlds*, Roger Ariew (ed. and trans.), The University of Chicago Press (1985), p. 150. For additional context, see Blumenburg, p. 464

<sup>166</sup> Ingold (2005), p. 102

<sup>167</sup> Laclau and Mouffe, p. 106

<sup>168</sup> Ingold (2005), p. 103

<sup>169</sup> Albertus (1971), pp. 34–37; Albertus (2001), p. 89; Wey Gomez, p. 260

<sup>170</sup> Al-Kindī, Albumasar and Averroes amongst others. See Albertus (1971), pp. 41, 42, 54, 57; Albertus (1992) p. 231; Wey Gomez, p. 262; Wilms (1933), p. 44

<sup>171</sup> Albertus (2001), p. 51

<sup>172</sup> See Bromley (2007), p. 16, for the significance of ‘enrolling’ material objects (in our case the element of light) with a view to creating demarcations for territory – such as the case with the early seventeenth-century Enclosures: ‘...privatisation in this era entailed turning property itself into a thing or territory, an ideological move of profound significance. In that remaking, other things have to be enrolled...material things are put to work...’ It is also worth noting that for Albertus light functions in a similar way to the ‘hedge’ in the rural social order – as an instrument of dispossession and in order to impose a legal order.

<sup>173</sup> Albertus (1971), pp. 38–9

<sup>174</sup> Albertus (1971), p. 36; Albertus (2001), p. 57; Wey Gomez, p. 265

<sup>175</sup> Albertus (1971), p. 34, 35, 37; Albertus (2001), p. 59

<sup>176</sup> Albertus (1971), pp. 36, 46; Wey Gomez, p. 263. Lefebvre, p. 286: ‘The eye, however, tends to regulate objects to the distance, to render them passive. That which is merely *seen* is reduced to an image...’ As a side point, it was this form of Neo-Platonism (emergent in the Renaissance) that influenced Kant, in his musing on cosmology. For Kant, the firmament is a site of battle between intuition and reason, with the latter represented by the sun and the former by the mysterious or ungraspable nature of the heavens more generally. Indeed, it inspired him to write his now obscure essay ‘*Universal natural history of the heavens or Essay on the Constitution and the Mechanical Origin of the Whole Universe according to Newtonian Principles*’. For more on this, see Blumenburg, p. 55–6

<sup>177</sup> The pure foundational contingency of the stars can be considered to be the appearance of a triadic-cosmological schema, something which Albertus attempts to contain, (re-)conceal and exploit for his own theoretical ends.

Correspondingly, the position of the perceiver on earth as they glance up to the heavens can be said to attest to the uniqueness of place.<sup>178</sup> The specificity of constellations is commensurate with the particularity it affords to place. It is only from the initial point of pure contingency or flux – displaced to the firmament above the earth – that an external force can be realised with the power to order the earth.

Albertus' aim is then to separate light from the other elements of the weather-world, so as to appropriate it on behalf of the pure contingency of the firmament. In order to do this, he must harness the Neo-Platonic properties of light. This involves splitting it away from the immanence of which it is a part. The pivotal attribute of light in the Neo-Platonic tradition is that it acts both as transmitter and unifier. Light is invested with the ability to order and rank the other elements and bodies of the earth. Indeed, it is the 'master' element that arranges others around it by disclosing a pattern of structural positions. It can thus transmit an order, and, through this, forcibly unify the bodies of the earth from above. The process of unifying implies the power of forcibly bringing and holding together bodies against their will.<sup>179</sup> Thence, the transmission of the immaterial, pure contingency of the firmament generates a unified material order on earth. Light is then turned into an extensive force, as opposed to the intensive forces of the medium.

In order to co-opt light and realise its Neo-Platonic properties, Albertus makes use of the optics and physics of light.<sup>180</sup> The Neo-Platonic view of light can be said to underpin the proto-scientific mechanism of 'spatialized optics'.<sup>181</sup> It is this proto-scientific mechanism (or technique/'technology') that provides Albertus with the tools to separate and capture light from the immanence of the medium, and to activate its compelling, Neo-Platonic side. Optical laws provide the framework in which light can externalise a discernible order by translating the contingency of the firmament into a contained spatial structure upon earth.<sup>182</sup>

Albertus understands optical principles and laws as principally determining the extent of which form is conveyed. The angle at which light rays hit a place and the distance they have to travel will have a determining impact on the type of form that is generated.<sup>183</sup> So, both angle and distance greatly affect the power of light radiation in shaping place. As the transmission of light rays comes from a unique horizon and astrology,<sup>184</sup> every place will have an 'unrepeatable form'.<sup>185</sup> As Ingold states, the science of optics depends on light becoming a medium isolated from the observer.<sup>186</sup> In other words, light exists as something separated from the viewer – something existing outside of the observer's body – and, at least for human beings, is only taken in by the interiority of the eye and mind.<sup>187</sup> Light is said to flow to the perceiver unidirectionally.<sup>188</sup> The direct, linear transmission of radiation is all the more interesting in the Neo-platonic tradition, contrasting sharply as it does with the more indirect influences of the circular motion of heavenly bodies.<sup>189</sup> The master element is no longer at liberty to suffuse the viewer, whom it immerses, but exists on the outside as separated by an unbridgeable chasm. On the outside it is ordered into uniform lines, and on the inside it is translated into the faculties of sight or perception for animate entities. Light then sets itself upon animate entities and other elements, as opposed to communing with them.

Albertus subscribes to the view that light which falls perpendicularly in straight lines results in the undistorted conveyance of form, whereas light that arrives at an angle results in the distorted

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<sup>178</sup> Albertus (1971), pp. 47–8; Wey Gomez, p. 269

<sup>179</sup> Wey Gomez, p. 261

<sup>180</sup> Ingold (2005), p. 99; Albertus (2001), p. 48

<sup>181</sup> Wey Gomez, p. 261

<sup>182</sup> See Blumenburg, p. 466

<sup>183</sup> Albertus (1971), p. 47; Wey Gomez, p. 268

<sup>184</sup> Albertus (1992), pp. 209, 219, 221; Albertus (2001), p. 143. For a further exposition of Albertus' astrology and physical astronomy, in relation to his sources and contemporaries, see Betsy Barker Price, 'The Physical Astronomy and Astrology of Albertus Magnus' in J.A. Weisheipl, pp. 155–185. We can also reference Blumenburg (pp. 60, 55–6) here, who states that 'astrology relates the universe to man, makes it the sum of signs for him, and thus makes him the reference point for all physical processes.' While the heavens may be the realm of contingency and intuition, they underline the need all the more for the reassertion of rationality.

<sup>185</sup> Albertus (1971), p. 47; Wey Gomez, p. 269. Albertus Magnus is also quoted by Henri Lefebvre (pp. 45–6) as an example of how medieval theories attempted to explain the interplay between bodies and representations relating to space, particularly in regard to interpretations of cosmological representations: 'Taurus rules over the neck... Gemini over the shoulders; Cancer over the stomach; Libra takes care of the second part of the back; Scorpio is responsible for the three parts that belong to lust...'

<sup>186</sup> Ingold (2005), p. 98

<sup>187</sup> Albertus (2001), p. 48; 50–51

<sup>188</sup> Ingold (2005), p. 98; Albertus (2001), p. 162.

<sup>189</sup> For more on this, see Blumenburg, p. 480

transmission of form.<sup>190</sup> This chimes with the contemporary view of optics at the time, which held that light falling perpendicularly projected perfect images onto surfaces, and distorted images when at an angle.<sup>191</sup>

The consequences of such a theory can be demonstrated on so-called ‘inanimate’ bodies such as plants.<sup>192</sup> They are moved to actuality by light radiation, which acts as an outside mover communicating the power of form.<sup>193</sup> This is achieved by imparting the generative capacities of nutrition and reproduction.<sup>194</sup> Light no longer suffuses the plant on a par with the other elements – which invariably brings together the earth and sky. The other elements are now at the behest of the master element of light, which takes on the primary role in the formative process. While light may be said to impose form, inanimate entities are no longer in a reciprocal relation with light and thus open to influencing it. The process of mutual subversion breaks down on either side of the boundary erected by optical laws to keep light and recipient from intermixing. The plant no longer has the ability to combine elements – most significantly light – with matter.<sup>195</sup> It is trapped on one side of the optical boundary, imprisoned in its imposed form, and so is unable to bind elements in (re-)constructing the world. The creative force of the plant is thus retracted and controlled from without; its ability to resist objectification quite simply dissolves away. Ingold sums up the situation best: ‘[the] dynamic potential of life-world and animate manifold [is] represented as interior property...[and] is carved up and distributed among forms themselves.’<sup>196</sup>

The co-option of light through optical laws means the generative and formative processes that were previously secured and entrenched by the sky–earth fold are now proffered by light in its connection with the pure contingency of the firmament. The immanent relations between the elements of the weather-world are broken down and displaced (in terms of generative capacities) by a multitude of stars and constellations – by an alien astrology, which asserts an evocative power and pull. Here, Albertus paves the way for his spatialised optics, which allows for the replacement of the sky–earth fold with a hierarchical sky/earth relationship.

The final stage of the mechanism of optics concerns the surfaces of matter which light rays help to illuminate.<sup>197</sup> Matter is here associated closely with the surfaces of earth in contrast to the translucent and radiant quality of light emanating from the heavens. Evidently, Albertus theorises the earth and matter entirely through the surface-form. This approach effectively conceals the dynamism and depth inherent to matter and materials themselves.

A surface is rendered visible in optics when a ‘characteristic scatter pattern in light is reflected’ off of it.<sup>198</sup> Surfaces are distinct and persistent patterns or textures, only made visible to the eye when light is reflected off them and subsequently taken in by the perceiver as visual perception.<sup>199</sup> Light acts out its function as transmitter by translating the unique patterns of the celestial orbs onto the bodies of the earth.<sup>200</sup> The patterns that form surfaces constitute the limit-form of matter; bodies come to take on the image of stratified layers or distinct structures on the earth. What light reveals to our perception is the formulated structures and (geographical) systems that are constructed when matter is mastered through the unifying qualities of light. It seizes and holds together bodies and matter, in their varying degrees of perfected form, in order to produce and compile through them a coherent structure.

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<sup>190</sup> Albertus (1971), p. 47; Wey Gomez, p. 276

<sup>191</sup> Albertus (1971), p. 47; Wey Gomez, p. 276

<sup>192</sup> For a study on Albertus’ theory on plants see Karen Reeds, ‘Albert on the Natural Philosophy of Plant Life’ in J.A. Weisheipl (1980)

<sup>193</sup> Albertus (1971), p. 44; Wey Gomez, p. 263. Albertus quotes Hermes in explaining the power of light that emanates from the cosmos (p. 48): ‘constellation is that which causes [the] power of the natures of those things which are poured forth to the lower things, and it is their formative principle through the condition of the elements which are *instruments*, so to speak, of heavenly powers.’ (Emphasis added.) Also see Albertus (1992), pp. 221, 243, 245, 247 and Takahashi, p. 459–60, 473

<sup>194</sup> Albertus (1971), p. 46; Albertus (2001), p.120; Wey Gomez, p. 281

<sup>195</sup> Albertus (1971), p. 49

<sup>196</sup> Ingold (2007), p. 531; Takahashi, p. 471

<sup>197</sup> Ingold (2005), p. 101

<sup>198</sup> Ingold (2007), p. 526

<sup>199</sup> *Ibid.*, p. 526; Albertus (2001), pp. 46, 47

<sup>200</sup> We could represent this entire operation in this schematic manner: Prime Principle (universally active intellect) → Formative power (a copy of the power of divine intelligence inscribed in stars acting as ‘intermediary services’ and emitted as light emanation) → Natural world (diversity and order of beings). For further elaboration, see Takahashi, pp. 477–478

Upon this purified land constructed via optics the way has been cleared for structures erected by humanity to now appear ‘out of the woodwork’. In contrast to the prior depth of the earth, the pure contingency of the sky (its ‘unfathomable height’) remains high above, seemingly out of the reach of all human control. Nevertheless, and despite the suturing of the sky–earth fold, a new opening (to a generative realm) reveals itself elsewhere for Albertus – one within the control of a chosen people.

## Chapter Five: That Which Remains Open: Establishing the Polis as Perfectible Community

The sky, in acting as a beyond, is precisely that: it is the pure contingency which may structure the earth below, but itself fades away far above the horizon, shrinking all human interaction. Despite acting as the displaced absolute contingency in Albertus’ geopolitical system, the sky does not offer an accessible opening to a virtual realm (such as the earth, eternal cosmos) of formative possibilities within the grasp of human beings. Hence, from the perspective of the human ensconced on earth, the system is still tantamount to an inert, lifeless totality.<sup>201</sup> But where the sky–earth fold has been shut down, an alternative opening to a generative, agency-bestowing Whole (realm of the virtual) does present itself.

It initially takes the shape of a get-out clause in Albertus’ commentary. He hints at a way in which the structuralising forces of the beyond or the heavens could be counteracted. The feat can be achieved ‘artificially by experts cognizant of powers communicated by the stars’ (or those ‘who have known the location and the powers of the stars’). These experts or scientists possess the insight needed to come up with an ‘antidote’ to, or can at least impede the effect of, nature.<sup>202</sup>

The expert or scientist – Aristotle would categorise them as the ‘wise men’ or masters – can effectively construct an enclosure that repels the forces of the beyond. This enclosure converts the beyond of the sky into a more *manageable* exteriority existing outside of, but constitutive to, the construction of an interiority. Put differently, what in fact the (technical) expert is able to achieve is to convert the pure contingency of the beyond to a more ‘affordable’ and ‘economically viable’ exteriority.<sup>203</sup> This involves a procedure for ‘hedging’ (the creation of containing boundaries which filters out uncertainty and regulates risk) or making technically manageable the uncertainty of the world’s exteriority. It can be considered an early forerunner to a sort of managerialism-cum-technical rationality (a precursor to the entrepreneurial spirit of Christian Calvinism, articulated famously by Weber and Du Bois, and latterly in terms of control by Foucault, Deleuze and Guattari). To flesh this out, the problematic concerns the ability of man to regulate the interactions with an exteriority (i.e. between an entity and its environment) in such way that he can ‘afford’ to be open to it – he can ‘survive’ a connection with it via the reduction of its uncertainty (or ‘unfathomability’) so as to best accommodate it. In order to maintain a reciprocal relationship between man and the world’s exteriority, and so preserve the dynamic place of the polis-dweller in the geopolitical system as a whole, the former must repulse and/or filter exteriority.<sup>204</sup> As the normative ground for action and agency, the city-state or polis is able to repulse the more ‘enchanted’ or ‘mysterious’ aspects of exteriority, as well as filter its generative or corrupting effects (through normative structures that enclose the land) as the case may be. The radical

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<sup>201</sup> Blumenburg (p. 481) makes the important point that Christian theologians must have felt the need to mount a defence of man’s freedom due to the ‘universal determinism of Averroist orthodoxy’, and, despite his great admiration for Averroës, Albertus was exactly of this opinion. Hence, ‘there must be motions that result from actions that are endogenous to the world, if freedom in the world is supposed possible.’ In addition, for some added context, it is worth noting Blumenburg’s discussion on the contingency of the heavens (an ‘accidental simultaneity of its elements’) as an open totality and how this was tackled or accommodated for during the renaissance: pp. 52, 54–55, 57, 62

<sup>202</sup> Albertus (1971), p. 49; Albertus (1992), pp. 257, 259, 261, 267; Albertus (2001), p. 145; Wey Gomez, p. 271. Albertus states in the *Speculum* that man is able to change or modify his temperament in relation to events he successfully divines in advance, thus seemingly averting fate. However, he also states that it is not always possible to correctly read the heavens and in circumstances where chance might still go either way, the heavens retains its mystery.

<sup>203</sup> Reza Negarestani, ‘Islamic Exotericism: Apocalypse in the wake of Refractory Impossibility’, *Collapse II: Philosophical Research and Development*, Urbanomic (vol. 2, pp. 273–311, 2012), pp. 274–5, and ‘The Militarization of Peace: Absence of Terror or Terror of Absence?’ *Collapse I: Research and Development*, Urbanomic (vol. 1, pp. 53–93, September, 2007), pp. 72–3n.11

<sup>204</sup> Negarestani (2007), pp. 72–3n.11. Blumenburg (p. 66) bears quoting in full here: ‘As that which has asserted its unavailability, in the [heavens’] universal materialization, they are at the same time that which convicts man anew of his finitude and that which, in his inevitable resignation, either mocks him or presents itself to him as the mere foreground of a metaphysical transcendence.’

exteriority or ‘Impossibility’<sup>205</sup> of the heavens is levelled down through a process of mutual affordability (the part played by the heavens is discussed in the next chapter) that brings the sky within the grasp of human capacity, containment and closure on a strictly regulated basis. Once the impossible-sky is drawn within the reach of man, the latter can release the former’s possibilities, which become ‘possessable’ for man. In this process, it is the polis that assumes a technical role for man in making the sky affordable and rendering its impossibility or unfathomability transitory. In this new contract between man and nature, implicitly depicted by Albertus, the earth is managed by human hands on behalf of nature (with the retraction of its self-ordering capacities, nature harbours less uncertainty and no longer needs to order itself), as the elements from above (light radiation) are filtered and regulated to ensure a ‘groundwork’ for human survival. The certainty of the earth is secured just as the uncertainty of the beyond is regulated.

Here, it is apposite to consider the role of the city-dweller. His task is to maintain a dynamic yet stable position within Albertus’ geopolitical model, which confers the ethical obligation to govern, while surviving exposure to a harsh beyond – that which is liable to unpredictable and uncontrollable shifts. The interiority of the polis or city-state emerges out of its own possibility for dynamic change, albeit ethical and political, as a counterpoint that is able to meet the sky-exteriority on equal terms. However, to complement this, ethical and political agency or capacity is directed towards the technical control over nature, involving the imposition of definitions on natural beings (rendering them less mysterious), enabling them to be instrumentally and practically utilised for human ends. The emerging technical and regulating rationality will act as an engine and impetus for a future imperialism, as well as the global economic system. In terms of the domain of ethical life, it can be said to act as the platform or ground from which the wise man<sup>206</sup> can realise his political agency over an exteriority which he is able to meet on his own terms.

Within the polis, motion is very much an organising principle of society. The human capacity for movement and change develops in line with the actualised potential of rationality and reasoning (*logos*). Accordingly, what Aristotle calls ‘perfect beings’ can be thought of as fully autonomous and self-contained people who have been fully formed in actuality.<sup>207</sup> These perfect beings, in Albertus’ interpretation of Aristotle, cannot reach their actuality outside of the enclosure of the polis.<sup>208</sup> The polis is required as ethical and social beings can only realise themselves in a moral community in which continuous activity or being-at-work (*energeia*) is possible.<sup>209</sup>

Since the self-propelling powers of physical beings have been contained, for Albertus the only beings that still have the capacity for autonomous movement are the well-ordered citizens of the polis, who strive for perfection.<sup>210</sup> The polis is fertile territory for the being-at-work of the citizen, due to the fact it is pervaded with a ‘governing awareness’ – the *prouparchousa gnosis*.<sup>211</sup> This governing awareness can be thought of as a kind of interior milieu or atmosphere – the cultural norms, habits, laws and language which surround, inform and preserve a person’s perceptions. Perceptions are shaped by a culture that is already at-work<sup>212</sup> and so pre-exists any one person. As public culture is already at-work, it can be thought of as the potency or potentiality that is coterminous with the boundaries of the polis. The potency that exists out there in the cultural domain is absorbed by, and so assimilates, the members of the polis as they develop the capacity for rationality.<sup>213</sup> The perception for which the governing awareness acts as a precondition for possibility is one that is exercised in advance of immediate experience. Hence, it furnishes citizens with an understanding of universals and the rational principles needed prior to becoming familiar and at ease with the world. It thus provides the ability to ‘see’ particulars at the

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<sup>205</sup> Negarestani (2012), p. 273

<sup>206</sup> The theologian Jacob Burckhardt puts it memorably: ‘The wise man will inherit the stars’. As quoted by Blumenburg, p. 37

<sup>207</sup> Albertus would have based this upon commentaries in Part Two, Chapter Three of *De Natura Locorum*, (‘Concerning the Diversity of the Accidents of those Things which are Generated According to Predetermined Universals’) on Aristotle’s *Politics*: 1253a25; *NE*, 1177a22–b5

<sup>208</sup> Aristotle, *Politics*, 1259b18, 1253a25; *NE*, 1177a22–b5

<sup>209</sup> This ‘masterful’ or normative activity within the polis will become the pastoral activity made explicit by Aquinas, and which his successors turn into a method for controlling the global through international law as disciplinary management.

<sup>210</sup> Albertus (2001), p.85

<sup>211</sup> Winslow, p. 44

<sup>212</sup> *Ibid.*, p. 9

<sup>213</sup> *Ibid.*, p. 98

moment they are encountered. Winslow identifies this as the first stage of the *logos*-structure (structure of discursive rationality) that is activated via the polis.<sup>214</sup>

The first stage of the *logos*-structure seems to necessarily involve the sociality of the polis. Within it, moral and ethical behaviour constitutes a continual performance in which a being is constitutively held open through the encounter with others. This manner of reasoning leads Aristotle to state that neither the life of philosophy nor that of politics should be associated with the idea that thought is an activity divorced from the sociality of the polis<sup>215</sup> or ethical community<sup>216</sup>; thinking constitutes a form of being-at-work or continuous activity<sup>217</sup> and is dependent on being-with-others.<sup>218</sup>

The good life on this account is not simply the following of inert, intrinsic principles (*arche*)<sup>219</sup> or the enjoyment of external material goods.<sup>220</sup> Rather, it is an immersion in particular circumstances with others – circumstances that always renew the motion of being-at-work. Hence, encountering the particulars of a situation compels one to return to the first principles<sup>221</sup> (such as *phronesis* or *Sophia*<sup>222</sup>) that guide action. Significantly, guiding principles shape and hone *praxis*, which in turn links those principles to the potential becoming inherent to the changing particulars of the situation.<sup>223</sup> Hence, a hermeneutic interpretation of one's own being or identity is always possible; life is kept open by *praxis* and so any final conceptualisation of what constitutes the self is deferred indefinitely. Within the ethical community of being-with-others, the other has a substantive role for the perfected ethical being. The presence of the other within the community prevents one from being 'totally' oneself. In other words, the ethical encounter with the other renders the full constitution of the subject or Being (i.e. modern subjectivity) an impossibility<sup>224</sup>; it is this distance between fullness and emptiness which is the true ground of ethics as *praxis*.

*Praxis* here links the wider principles of practical judgement (*phronesis*) to the particulars of any given situation. The tension between principle and practice is what results in a continual becoming.<sup>225</sup> Thus, the manner in which engagement occurs in an activity always has the capability of transforming the subject as it relates to ethical-political decisions.<sup>226</sup> Any given situation is made up of an ethical multitude – the plentiful particulars which both construct a situation and vie for and demand deliberation. In navigating the ethical multitude implicit in a situation, and investing radically in a norm or injunction that becomes the symbol of something heterogeneous to itself, distinct from the given set of rules, options and choices, this immersion in ethical life serves to destratify fixed and stable identities in the given order of things.<sup>227</sup> At least three considerations are important for the development of a legal theory attuned to the fact that the links between fullness of being or subjectivity and particulars are precarious and contingent (which, by the way, may be the best way to describe justice): first, the ethical can only exist invested in the normative and the relation between the two is one of structural mutation; second, the question concerning the extent to which socio-juridical normativity is left unhinged when one emphasises the contingent relation between fullness and the particulars of a situation is, strictly speaking, a question having to do with the presence or absence of ground (so, there is no logical transition between the ethical and a certain normative order); third, it is the absence of ground that makes *praxis* worthwhile, understood as the distance between the sedimented social practices or undecidable structures within

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<sup>214</sup> Winslow, p. 64. Also see Stuart Elden, 'Reading Logos as Speech: Heidegger, Aristotle and Rhetorical Politics', *Philosophy and Rhetoric* (no. 38, pp. 281–301, 2005).

<sup>215</sup> Aristotle, *Politics*, Book 7, 1323a43–45; Albertus (2001), pp. 76, 167

<sup>216</sup> *Ibid.*, 1252b27

<sup>217</sup> *Ibid.*, 1325b14–18

<sup>218</sup> Aristotle, *Politics*, 1168a4–9

<sup>219</sup> Albertus (2001), p. 85

<sup>220</sup> *Ibid.*, pp. 79, 80, 83, 84, 112, 113, 114, 115

<sup>221</sup> *Ibid.*, pp. 84, 85

<sup>222</sup> *Ibid.*, p. 83. Albertus calls *Sophia* the 'first philosophy'.

<sup>223</sup> Michael Davies, *The Politics of Philosophy: A commentary on Aristotle's Politics*, Rowman & Littlefield Publishers Inc. (1996), p. 5; Mei, p. 62. Also see D.J. Depew, 'Politics, Music and Contemplation in Aristotle's Ideal State' in *A Companion to Aristotle's Politics*, eds. David Keyt and Fred D. Miller (Oxford/Blackwell, 1991), p. 352: 'politics and contemplative engagements can fuse into a *sui generis* way of life.' Also see Albertus' (2001) commentary on this: pp. 78–80

<sup>224</sup> Laclau and Mouffe, p. 129, also Laclau, 'Ethics, Normativity and the Heteronomy of the Law', in *The Rhetorical Foundations of Society*, Verso Books (pp. 127–37, 2014), p. 132. Also see Albertus' (2001) discussion on friendship and the role of the friend in ethical life: p. 23, 78

<sup>225</sup> Mei, pp. 62–3

<sup>226</sup> *Ibid.*, p. 69

<sup>227</sup> Laclau and Mouffe, p. 99

which we live (our 'interior milieu') and a decision. A corollary of this is that there is no absolute subject or omnipotent chooser, which is why the proper sense of a *praxis* is that of a radical encounter between a (less than) subject and a heterogeneous element (an other) which calls for normative (and factual) displacement. This may be the very opposite of asking for an absolute grounding of a system of norms, or full (perfected) subjectivity.

In the encounter with this heterogeneous something, call it the other or the stranger as Lindahl does, through the use of rationality we can come to gauge the other's potentiality. Put otherwise, the encounter with the other ensures that full autonomy and self-regulation are not what happens or ought to happen in practical life. This does not mean that categories of autonomy and self-determination or freedom become obsolete, but rather that the relation between autonomy and heteronomy is always at work in society and cannot be foreclosed. Thus, it makes sense to speak of a heteronomous dimension to law in social life. For with the encounter we come to understand the other's subjectivity as a self-gathering (not to be confused with modern subjectivity-as-full-autonomy or pure self-regulation) – that which is being-at-work and therefore present, but more significantly the other's array of potentialities, which lies latent within them. *Logos*, as discursive rationality, is the unique manner in which we come to comprehend the potentiality of others – something which demands respect and openness towards them. This is not because we are irrational or because traces of irrationality remain with us, but rather because the heteronomous dimension that we have referred to before (gaps, faults in social life) is inherent to rationality itself. This opacity of self-regulation and the law may be the genesis of another type of freedom, one that would be more akin to tunnelling through boundaries, walls and hedges than to the verticality of sight and power that inheres to the act of drawing lines on a flat surface. The subjectivity that is detected by *logos* is the other's potentiality (to detect and move beyond boundaries, gaps and fault-line), absent the 'material' as constitutive exterior.<sup>228</sup> Through discursive rationality one can visualise the potencies of the other, even when they are not materially present. The process of coming to detect the potency array of the other, which is a unique trait of human rationality, but would be no especial attribute in a more human world (this is the strange hypothesis of an 'us before the world' entertained by various Indian cosmologies, for instance) still requires *praxis* (the physical encounter with particulars), without which *logos* remains inactive. In addition, *praxis* allows us to re-evaluate the potentiality of the other on an ongoing basis.

With the impossibility of the full constitution of the ethical subject, the next best thing occurs – transcendence as the outcome of encounter or political alliance.<sup>229</sup> In Neo-Aristotelianism the name for this transcendence is perfectibility. This is the form which becoming takes when the integration of *praxis* (the particulars encountered) with *phronesis* (as universalisation procedure) resists the closure of being – the closure of being stuck either in a practical present or in the abstraction of rational principles. We have stated that the ethical citizen acquires his rationality from the surrounding cultural environment of the polis. This is the first stage of the *logos*-structure. In the second stage, the citizen in his encounter with the ethical situation can exercise his agency in making a decision, notwithstanding the undecidable nature of sedimented social practices, which involves unhooking himself from his cultural world, the governing order and awareness that conceives of itself as the ultimate ordering.<sup>230</sup> A rationality that is first derived from technics/culture (and from which the ethnos/human is derived) empowers the citizen to make informed decisions that may include breaking from that order and awareness which is already given. The condition for this to happen is the appreciation of the fact that the gap between an order and ordering can never be closed completely, and so no order is the ultimate ordering. At bottom, this entails a constant renegotiation of the relation between the ethical and the normative, which may constitute the very fabric of social life or what us moderns tend to call 'critical distance'.<sup>231</sup> In ordinary language, the process requires generating a critical distance from the prevailing perception, through laying bare all the arguments (practical and intellectual knowledge) conveyed on an issue. For Albertus, though, it is the wise men or philosophers who have the task of laying out all the arguments on an issue. He seems close to giving wise men or philosophers (who at this point may be at the point of becoming technical experts) the role of legislators or at least helpers of what we now call public opinion, which would fit the Neo-

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<sup>228</sup> Winslow, p. 8

<sup>229</sup> See Gilles Deleuze, *Empiricism and Subjectivity: An essay on Hume's theory of human nature*, trans. Constantin Boundas, Columbia University Press (1991), p. 16

<sup>230</sup> Winslow, p. 10

<sup>231</sup> Laclau, p. 136

Platonic tendencies of his reading of Aristotle. The citizen would then be in a position to make a decision on whether to affirm the already existing way of things, or to challenge and critique them. The agency the latter course of action exerts indicates the citizen has ‘stepped out’ of the given awareness in order to practise the intensive capacities proper to rationality. What the cultural world bequeaths to the ethical citizen is the additional ability to break away from pre-constituted perceptions. In breaking away in order to move against the governing awareness, a citizen ‘makes a stand’ and undergoes the ‘self-differing rational work that leads to choice’.<sup>232</sup>

In the moment of the ethical situation, making a stand to disregard the prevailing forethought of culture entails a circular motion, albeit a virtuous one. If the ethical citizen decides to unhinge himself from the governing perspective in order to make a decision, the choice that is made contributes to the constitution of the polis. The decision effectively completes a perfect circular motion by returning to shape the prevailing awareness (through the incorporation of new particulars).<sup>233</sup> Since this awareness induces rationality in members of the polis, making a decision can be thought of as shaping the souls of the polis’ inhabitants.<sup>234</sup> Making a choice implies the use of original or first principles in a universalisation procedure (not to be confused with a given universality) with which all subjects of the polis are interlinked.<sup>235</sup> The original principles are persistently renewed through ethical investment of the normative or activity with others. And because the life of the polis is social, social life is essentially practical – the practice ‘by which social relations are made by human production’.<sup>236</sup> *Praxis* incorporates the unlimited potential for human relationships within the polis, and this helps to some extent in thwarting the onset of the final form of the human. This is all only possible within the polis, which acts as an enclosure that allows being-at-work to ‘shine forth’ through its ‘transformative display’.<sup>237</sup>

Within the polis, the boundary between thought and deed can be said to blur.<sup>238</sup> The perfected beings of the polis are those wrapped up in the internal motion<sup>239</sup> of thought and the external movement of practical deliberation, which are both in action in any given ethical situation. Hence, thought as movement links together contemplative activities (*Sophia*) and practical activities (*praxis*) within the confines of the polis.<sup>240</sup>

The linking of *Sophia* and *praxis* is additionally a primary condition for hitting the mean, and thereby actualising the right ethical conduct in any given situation. Hitting the mean in virtuous activity involves a ‘*maximum* condition in which all human powers of thinking and desire are present and free to work together’.<sup>241</sup> Additionally, the mean is a judgement made on the basis of sense perception (drawing upon the governing order and awareness), on a truly *qualitative* rather than quantitative understanding of reality.<sup>242</sup> Thus, the mean can only be realised in a *sui generis* way of life,<sup>243</sup> where the boundaries of being are continually transcended through the mutual receptivity between action and thought. Within a different context, this manner of reasoning is invoked by Brenna Bhandar, who considers a *sui generis* model for a legal order that fuses two separate modes of thought, and in so doing resists the hypostatizing positing of difference through the creation of clear-cut boundaries.<sup>244</sup> Moreover, the relation of contemplative life and practical life (*praxis*), and the use of the faculties of both *Sophia* and *phronesis* (original principles) in hitting the mean, is a delineation of the fold between deed and thought which establishes the basis of the polis.

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<sup>232</sup> Winslow, p. 12

<sup>233</sup> Ibid., p. 104

<sup>234</sup> Ibid., p. 104

<sup>235</sup> Mei, p. 104

<sup>236</sup> Ibid., p. 59

<sup>237</sup> Winslow, p. 78

<sup>238</sup> Davies, p. 122

<sup>239</sup> Duprew, p. 351

<sup>240</sup> Davies, p. 126. The citizen of the polis ‘must practice political virtue, but it must itself be modelled in philosophy.’

<sup>241</sup> Aristotle, *NE*, p. 208 (Glossary) (emphasis added). Hitting the mean in ethical activity is thus a form of conduct only available to those who realise this maximum potentiality.

<sup>242</sup> Aristotle, *NE*, p. 208 (Glossary) (emphasis added.)

<sup>243</sup> Depew, p. 352

<sup>244</sup> Brenna Bhandar, ‘Re-covering the Limits of Recognition: The politics of difference and decolonisation in John Borrows’ *Recovering Canada: The resurgence of indigenous law*, *The Australian Feminist Journal* (no. 28, 2007), p. 11

The enclosure of the city-state<sup>245</sup> thus becomes associated with a type of homeland for thought as activity striving towards perfection.<sup>246</sup> It is the polis which opens up, which ‘opens the world and declares a manner of belonging within and to being’ based on human thinking and deliberative ethical action.<sup>247</sup> It is solely within the enclosure of the polis that a world can be opened up for human beings.

In this opening, the general laws and principles that guide ethical activity are said to play a primary part.<sup>248</sup> They carry, in the intensity of their activation, the ability to integrate individual ethical acts with the moral community of the polis as a whole. In the intensive process of the ethical situation human faculties are integrated into a singularity of combined activity and thought, and, on top of this, the perfect being or ethical subject is constituted via its integration with an ethical totality.<sup>249</sup> Ethical principles or general laws act as an intermediary between the human faculties and intensive ethical activity, as well as between the subject and the ethical totality of the polis.<sup>250</sup> Finally, the polis, as the grounds for the two-stage process of rationality, allows man to generate his own conditions of possibility – the enveloping, ethical atmosphere. This mirrors (and threatens to supplant) the heavens, which initially sets the conditions for man and his changeability.<sup>251</sup>

With the confiscation of the self-moving powers of non-human natural bodies and phenomena, the master or wise man in his privileged ethical motion is ideally situated to hoist definitions and identities on the former. It is important to relate that for Aristotle, the second stage of the *logos* structure enables the citizen to discover the nature of a physical being by discerning the unique way it moves through the world, its unique trajectory or perspective. In divorcing oneself from the governing awareness, one can come to an understanding of a being based on terms of its own nature, as opposed to the point of view of exclusive or human-human nature (for instance, Socrates listening to the gods or his daemon in his dreams).<sup>252</sup> This self-differing capacity of rationality allows for a genuine discovery of the nature of another physical being. Albertus has already obstructed this possibility for rationality, as in his model of nature non-human physical beings are incapable of that self-ordering or self-gathering that enables the being-at-work so worthy of rational discovery.

Another way to consider this issue is from the standpoint of temporality. For Aristotle, the time of human ethical life has its origin in the outermost heavens – it is the cosmos and the motion of the stars that generates time for the polis-dweller, which is the view conveyed and adopted by Averroës. However, this time is radically cyclical in having no beginning and end (the ‘cosmic circle’ here is not a boundary between inside and outside but a rotational motion that dissolves any internal markers as it goes along), aligned as it is with the eternal movement of the cosmos. While Albertus and Thomas Aquinas are said to have granted that time did indeed emanate from the heavens, with Christian eschatology a linear temporality is layered on top of Aristotelian cyclical time patterns, breaking it up into sequences that ends with its completion in the eventual salvation of the adherent. Uniform linear temporality and the revolutionary cosmic cycle were interrelated for the ancients, but medieval Christian theology’s clear focus on the former clears the way for the evolution of the rational subject’s ‘internal time consciousness’, as outer experience is safeguarded and consolidated within. For Blumenburg, this epitomises the transition from cosmology to anthropology that defines Christianity’s development from the medieval world to the renaissance.<sup>253</sup>

The ultimate result is that the nature of other physical beings remains inaccessible, and so it is left to the master to impose a nature and order upon them. The only place where a fully dynamic openness to the other can be said to exist is in the domain of the polis, and that is between human beings considered to be of the same level of potency.

The polis, being the realm of human potentiality and perfectibility, disqualifies those who, like the barbarian, subsist outside the city walls. The barbarian’s lack of political agency is in contrast to the

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<sup>245</sup> Albertus (2001) notes that the city is the order that ‘pertains to law’. See pp. 162–3

<sup>246</sup> Ingold (2007), p. 529. The phrase is borrowed from Ingold, quoting Merleau-Ponty. Here I use it to describe the enclosure of the city.

<sup>247</sup> Mei, p. 105

<sup>248</sup> Albertus (2001), p. 101, 107, 152–6

<sup>249</sup> Deleuze (1991), p. 15

<sup>250</sup> Albertus (2001), p. 148, 158

<sup>251</sup> Blumenburg, p. 474

<sup>252</sup> Winslow, p. 12

<sup>253</sup> See Blumenburg, pp. 453–62, 473, 474

master's abundant powers. The latter's agency and subjectivity are equated with the creation of legal boundaries. According to Neocosmos, subjectivity fluctuates depending on historical context, as the normative boundaries political agents create for themselves are always in the process of being transcended.<sup>254</sup> The master's self-differing rationality grants him effective control over the setting of these legal boundaries. In possessing the opportunity to divorce himself from the governing awareness of culture, through the exercise of making decisions that result in its alteration, his subjectivity can be said to exist in excess of an objective social location.<sup>255</sup> Hence, the result of the empowerment of politically activated agents is the ability to define their own subjectivities, and correspondingly to aid in the construction of their society's normative boundaries. The boundaries that political subjects create for themselves are always in the process of being transcended and elude reduction to an objective social location or the particularity of a structural context.<sup>256</sup> This delineates the 'social contract' in which the ethical citizens of the polis take on the responsibility from nature for the work of drawing boundaries, regulating the 'traffic' across them, and thence exercising agency so as to maintain and preside over the world and the barbarians that subsist upon it.

## Chapter Six: The Tripartite System: The Middle Nations and the Visibility–Invisibility Fold

The ethical citizen's ability to draw or shape the normative boundaries of the polis is an outcome of the mutual affordability between the heavens and man. We have already stated that from man's end of the bargain, the polis as (en)closure effectively filters and inhibits unwanted emissions from the sky. This closure can be considered more accurately to be a 'modulated/economic openness'<sup>257</sup> (a qualified or conditional openness) that secures the continued survival of man in light of the unpredictable flux of the stars (as exemplars of generative power), as well as, importantly, maintaining lines of communication with the heavens. However, what completes this mutuality is, correspondingly, the heavens' role of affording man. This involves the sky surpassing its 'ontological isolation'<sup>258</sup> by securing a position or location in the world where the transmission of radiation is relayed in an optimal optic manner, so as to result in the perfect transfer of form. Through this means, the sky reciprocates by affording man so as to retain, at least initially, connection and communication with him. What this communication implies, in addition to the overcoming of distance, is a shared capacity that unites the two. It is the capacity for formative change (ethical becoming in man; generative from the heavens), transmitted via light radiation, which is now realised in the space interior to man's existence; in other words, the shared container of the polis is where man and star's joint capacity meet.<sup>259</sup> Consequently, the sky and its powers are folded back ('pleated') into the polis; the cosmic is folded back into man's normative ground. The heavens now appear 'in-the-house', or domesticated, through partial annexation by an interiority: the sky is within the horizon of man's possibilities.<sup>260</sup> One can almost see in this speculative geography and law the beginnings of today's vertical politics and the legality of broadcast images and affordable signals.

In this schema, we can locate the polis as the verticality that enables man and the sky to meet, and furthermore to be mutually affordable and compatible ('compossible'). Verticality, as a mode of geopolitical power,<sup>261</sup> is volumetric in its dimensions – that is to say, the polis is not to be defined merely by normative boundaries (inside/outside), but also by its height and depth.<sup>262</sup> Hence, the polis enables man to set his normative boundaries as if from above (from the altitude of the sky) while simultaneously being grounded from below. The polis owes its height and extension outwards – its abstraction from a merely objective social location – to the transcendence activated by man's ethical becoming (the ethical immanence residing within the polis). Most significantly, the verticality of the polis – gathering together

<sup>254</sup> Michael Neocosmos, 'Are Those-Who-Do-Not-Count Capable of Reason? Thinking Political Subjectivity in the (Neo-)Colonial World and the Limits of History', *Journal of Asian and African Studies*, SAGE (no. 47, 2012), p. 533

<sup>255</sup> Neocosmos (2012), p. 532

<sup>256</sup> *Ibid.*, p. 533

<sup>257</sup> Negarestani (2012), p. 274

<sup>258</sup> *Ibid.*, p. 287

<sup>259</sup> *Ibid.*, p. 277

<sup>260</sup> *Ibid.*, p. 282

<sup>261</sup> Elden (2013a), p. 2

<sup>262</sup> *Ibid.*, p. 1

man and the heavens – allows man to bring the entire world(-machine) into sight, and indeed, into his possession.

At this point Albertus is able to unveil his tripartite system, which is inspired by Aristotle's consideration of the three peoples or nations in the *Politics*. Through the tripartite system, Albertus is able to position his notion of place within a wider spatial order – that which becomes the world-machine, or *machina mundi*.<sup>263</sup> This is the same prevailing geopolitical model that would 'assert itself...into the era of European colonialism in the Americas'.<sup>264</sup> Prior to Albertus, the tripartite system constituted a model that had existed in Europe for centuries, but it would now be re-established and re-imagined with some crucial embellishments (considered to be newly gleaned empirical observations) drawn particularly from the emerging science of optics. Light, as we have already seen, is accountable for the diversity of places in the world, due to the variations in intensity of the light rays that hit any given place. Thence, in the place-as-container model,<sup>265</sup> the physical properties of place are communicated by light.<sup>266</sup> In this view, light radiation structures matter and bodies in such a way as to create the spatial patterns of the model. This was famously the basis of Albertus' conviction – one that would later influence Columbus in his sea voyages and the jurist-theologians who laid the foundations of international law in the sixteenth century – that the so-called inhabitable 'torrid zones' were fertile exactly because of the intensity of the light radiation upon them.<sup>267</sup> The model of the geopolitical world-machine sets the basis for what will be a type of 'social contract' for Albertus – in which those in the privileged middle nations are called upon, and ethically obliged, to exercise governance over the world.

For Albertus, what distinguishes Aristotle's original three peoples – the 'peoples of the colder regions of Europe; the people of Asia; and the Greek people'<sup>268</sup> – is the nature of the place they inhabit and its relation to the varying intensity of light radiation. Those who, for Aristotle, inhabit the colder geographical regions such as Northern Europe are characterised by a 'greater slowness and viscosity of blood, caused by the constriction of their bodies'.<sup>269</sup> Aristotle considers these people as 'full of spirit, but deficient in skill and intelligence'.<sup>270</sup> Albertus attributes the quantity of spirit to the vital heat retained by the body's major organs in order to compensate for and counteract the cold climes. Despite the Northern Europeans' 'spirit', their constricted bodies interfere with their use of reason, rendering them 'stupid and dull'.<sup>271</sup>

Likewise, Aristotle claims that the people of Asia 'are endowed with skill and intelligence, but are deficient in spirit'.<sup>272</sup> Here, Albertus equates these qualities with the people of Ethiopia and India, who are subject to an intensity of heat which causes 'them to excel in ingenuity'.<sup>273</sup> as constant evaporation through the pores purifies the blood and internal organs. In spite of this, the intensity of heat results in a loss of bodily vitality and hence a depletion of spirit.<sup>274</sup>

Aristotle concludes his thoughts on these two sets of people by dismissing them as capable of being no more than slaves, unable to reach any advanced level of political development.<sup>275</sup> In Albertus'

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<sup>263</sup> Albertus' vision of the world-machine is very much an instrumentalist one. When describing the relative standing of the soul and body in relation to the prime intelligence and more generally his overall system he draws heavily upon analogies with actual machinery, enabling him to blur the boundaries between the operations of nature and those of artificial processes. See Takahashi, p. 467

<sup>264</sup> Anthony Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology*, Cambridge University Press (1982), p. 71

<sup>265</sup> Henri Lefebvre (p. 94) makes an interesting point in respect to this model that is pertinent to the discussion here and bears quoting: 'To picture space as a 'frame' or container into which nothing can be put unless it is smaller than the recipient, and to imagine that this container has no other purpose than to preserve what has been put into' it.

<sup>266</sup> Wey Gomez, p. 281; Albertus (1971), p. 49

<sup>267</sup> Albertus (1971), pp. 50, 52–5; Wey Gomez, p. 276

<sup>268</sup> Aristotle, *Politics*, VII, 1327b18–37

<sup>269</sup> Wey Gomez, p. 281; Albertus (1971), p. 103

<sup>270</sup> Aristotle, *Politics*, 1327b18–37; Albertus (1971), p. 104

<sup>271</sup> Albertus (1971) on p. 103 also specifically cites the Slavs and Dacians 'from the West' and the Goths 'from the East' as subject to these conditions, in addition to characterising them as 'wolfish on account of the heat in their hearts.'

<sup>272</sup> *Ibid.*, 1327b18–37

<sup>273</sup> Albertus (1971), p. 102; Wey Gomez, p. 280

<sup>274</sup> Albertus (1971), p. 101; Wey Gomez, p. 279

<sup>275</sup> Aristotle, *Politics*, 1327b18–36; Albertus (1971), pp. 51, 104

estimation, both these sets of people, inhabiting the extreme climes of the globe, are subject to the corrupting nature of their place with its stratifying and constricting effect on the soul.<sup>276</sup>

In these instances, place locks in the structuring forces of the beyond and in so doing throws off the delicate synchronisation (or ‘balanced make-up’) between the body and the soul of a people.<sup>277</sup> The corruption of bodies and matter in the container of place means that the soul cannot, in movement, command the body, since the proper boundary between soul and body has been disrupted.<sup>278</sup> On the contrary, the body, enclosed in its surface-form, holds back the soul and thus can be said to command it.<sup>279</sup> The body, in resisting the soul, finds itself outside the boundary that defines nature,<sup>280</sup> ‘as generated things are changed from their own boundaries...’<sup>281</sup> The functionality of the soul depends upon acting within nature’s confines. The surface-form of the body, in its physiology, negatively affects the psychology of a people by limiting their ability to tap into the reasoning powers that result from perfect form. Rationality can only come about when body and soul are in synchronisation and realised in the proper hierarchy, and appropriate boundaries are maintained to stop the body from impeding the soul’s progress.<sup>282</sup> It would seem that the physiology of a people is able to act as an indicator of some internal disharmony – a direct result of the ontological priority given to surfaces.

Interestingly enough, the people inhabiting the geographical extremes exist on the wrong side of a boundary-line; they exist outside of their nature, as the corrupted quality of their place determines the body’s rule over the soul. One can only exist within nature/being if the proper principle of the soul ruling over the body is observed.<sup>283</sup> This mirrors the distinction Aristotle makes between master and slave, in which epistemic insight is only accessible to the few who have the correct or perfected manner of being.

It therefore comes as no surprise that Aristotle thinks of the Greeks as being a middling people existing between the two extremes, and so, as Albertus adds, existing within their nature (‘their functions are natural’).<sup>284</sup> Aristotle himself claims that:

The Greek stock, intermediate in geographical position, unites the qualities of both sets of people. It possesses both spirit and intelligence, for which reason it continues to be free, to have the highest political development, and to be capable of governing every other people...<sup>285</sup>

Only those people in the middling places possess the luxury of a body and soul in harmonious relationship; their character traits and customs<sup>286</sup> are not at all excessive, and they are in fact ‘laudable in their activities’ for being moderate, as their ethical life enables them to reach the mean.<sup>287</sup> In Albertus’ opinion, this is due to the fact that those nations such as the Greeks live in temperate climes.<sup>288</sup>

As we can anticipate, Aristotle’s notion of the middle or mean in morality is at once applied by Albertus to place, with global normative consequences. The middle place is in the privileged position of being occupied by the ‘right sort’ of people, bestowed as they are with the ability to govern the unruly people of the world. Albertus rationalises this by stating that the ‘inhabitants of the fourth and fifth climate displayed the virtues that pertained to those who live in the middle’.<sup>289</sup> The ‘middle nations’, with their cultivation of moderation in all things, embody the requisite virtues and ability to exercise governance over the world. They consist of the citizens of the Greek polis and the rulers of the Roman

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<sup>276</sup> Albertus (1971), p. 48

<sup>277</sup> Albertus (2001), p. 143

<sup>278</sup> Ibid., p. 143. The soul appears as an instrument or the chosen vehicle used directly by the divine intelligence to introduce life into the body. Hence, when the body prevails over the soul, the ‘material principle’ prevails over the ‘prime principle’ of intelligence transmitted into the spirit from above. See Takahashi, pp. 468, 472

<sup>279</sup> Wey Gomez, p. 285

<sup>280</sup> Albertus (2001), pp. 37, 17. The foundation, after all, of Albertus’ world system is based on the axiom that the works of nature and of intelligence are one and the same. The body outside nature is therefore uninformed by the divine intelligence. See Takahashi, p. 465

<sup>281</sup> ‘...sometimes for the better, sometimes for the worse.’ So, change induced from above results in a being transgressing the boundaries of its nature. Put otherwise, it expands the limits of a body up to the point where it must transform itself. Albertus (1971), p. 48, 49.

<sup>282</sup> Albertus (2001), p. 104

<sup>283</sup> Wey Gomez., p. 286 ; Albertus (2001), p. 18, 19, 145: ‘the soul is nobler and conquers the body’

<sup>284</sup> Albertus (1971), p. 104; Wey Gomez, p. 285

<sup>285</sup> Aristotle, *Politics*, 1327b18–36

<sup>286</sup> See Albertus (2001), p. 75, for discussion of character traits and habits

<sup>287</sup> Ibid, p. 40, 130

<sup>288</sup> Albertus (1971) p. 104

<sup>289</sup> Albertus (1971), p. 104; Wey Gomez, p. 282

Empire,<sup>290</sup> with the baton passing to the Spaniard in the sixteenth century. The outcome of this line of reasoning can be surmised by the following: ‘We come to witness the transition in Albertus’ argument from the idea that creatures had a place in the cosmos according to their rank in the scale of perfection to the idea that peoples also were hierarchically distributed across the globe – indeed, that place implied position in a *moral order*.’<sup>291</sup> A gradient of being is spatialised and ‘distributed across the globe’.<sup>292</sup> The effect of this is to project a vast moral order onto the world in line with the conception of the *machina mundi*<sup>293</sup> or the world-machine as a vast system of capture, with its adjoining and interconnecting parts. And, indeed, it comes to take the place of that other vast machine – *phusis* itself.

We can assert that these middling nations, able to realise the mean, are most like those citizens who actualise the virtues of the polis. It would seem to follow that the special privilege of the middling nations is the capacity for governance even beyond their own lands. Evidently, the benefit of being able to resist the stratifying boundary between thought and action includes the power to posit it and impose it on others. Hence, Northern Europeans are people of *spirit* – of *action* and *deed* – but not *intelligence*, and Asians and Africans are people of *intelligence* – but not of *spirit* and *deed*. These people of the periphery are said by Aristotle to be unable to live in cities, and are hence unable to enclose themselves within city-states that allow for being-at-work.<sup>294</sup> It is only within the confines of the polis that rationality in both of its major modes – practical (*phronesis*) and intellectual (*Sophia*) – is made possible, and so entirely enabled.<sup>295</sup> The mechanism that enables the boundary between thought and deed to be set is one that has well and truly been appropriated by the middling nations. The middle nations, in actualising the mean in moral and ethical *praxis*, lay claim to a fold they deny to others, who inevitably fall foul of the boundaries imposed upon them. The ability of the middle nations to govern is, in addition, the power of the political manoeuvre to set clear-cut boundaries that detrimentally come to define others yet are erased or transgressed in their own societies.

To simply think that those middle nations which attain being-at-work are ‘perfected beings’ in the sense of reaching final form is to miss the subtlety at play here. In being able to practise being-at-work, the middle people find themselves at liberty to define who constitutes the lower rungs, or the exteriority, of a moral order of personhood. In contrast, they are able to withstand categorisation themselves: they cannot be defined against their will, as they are the ones who are empowered to set the boundaries of what defines personhood in the first instance. While it may be assumed that the middling people are the highest categorisation of personhood on the moral scale of being, any definition of what constitutes a ‘person’ – in this case, he or she who realises rationality – is surely liable to change or modification, so as to maintain the exclusion of some people from the system/order, or to at the very least ensure that they are numbered among the lower ranks.

These middle nations with their state-forms (although at this stage not yet equivalent to the modern state) constitute outposts ‘of reason and order’ in an otherwise ‘hostile world’.<sup>296</sup> The place of those nations in the middle affords not only the emergence of a highly developed state, but the epistemic insight that could even counteract the power of the world. The two are combined, as the highly developed moral order can construct an enclosure that maintains agency over and within the boundaries of nature (as soul), as well as securing a separation from, and managing, a threatening outside.

Here, we can return to the place-as-container model in order to understand its effect, as well as its consequences, on all the nations of the tripartite system. For, as Neocosmos suggests, it is only through the politics of the contestation of place that conditions conducive to critical thought are generated.<sup>297</sup> With the place-as-container model we have the reduction of those nations that inhabit the periphery of the geopolitical system to a social location,<sup>298</sup> consequently, their subjectivities are limited to being homogenised expressions of places.<sup>299</sup>

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<sup>290</sup> Albertus (1971), p. 104; Albertus (2001), p. 40

<sup>291</sup> Wey Gomez, p. 281 (emphases added); Albertus (2001), p. 145; Albertus (1971), p. 32: ‘they [bodies] are thus ordered in place it is due to them by reason of their importance according to which are their very causes which are produced in nature.’

<sup>292</sup> Wey Gomez, p. 260; Albertus (2001), pp. 27, 28

<sup>293</sup> *Ibid.*, p. 93–5

<sup>294</sup> *Ibid.*, p. 283

<sup>295</sup> Aristotle, *Politics*, 1333a23–28; Davies, p. 124

<sup>296</sup> Pagden (1982), p. 21

<sup>297</sup> Neocosmos (2012), p. 531

<sup>298</sup> *Ibid.*, p. 532

<sup>299</sup> *Ibid.*, p. 530

To elaborate, scientific analysis frames place as objective social location. For example, the objectivity of place is disclosed by Albertus through analysis of how the sun, the heavens and constellations, and other natural phenomena, come to produce the structures of the earth. Those people or nations we could consider as subjects – with the possession of their own agency and politics – become thought of as the products of an objective place that determines how they function. On the contrary, for Neocosmos, the nation consists of ‘subjective affirmations’ that can be considered as distinct from, or at least irreducible to, social location. This is because politics consists of political subjectivities collectively creating themselves as a nation, whereby a people come to define themselves and therefore resist confinement within objective boundaries.

With regard to the middling nations, place is reduced to the developed moral order as the state-form, inherent as it is to the polis or city-state enclosure. In Albertus’ reading of Aristotle, it is only this state-form that actualises the political agency that Neocosmos associates with the nation. The state really becomes, in this instance, the ‘manager and regulator of place’.<sup>300</sup> It regulates and maintains what exists, and so precludes the possibility of the new. In effect, the contingency and flux induced from above can be regulated by the state-form in its management and ordering of place.

Within the middle nations, the structure of the state regulates the relation between place and its beyond. By acting in subservience to the beyond, the place-as-container model – with its confining boundaries holding bodies in their fixity – is now enslaved to the state-form and its power to create boundaries anew. What, in effect, is happening is that the state-form is emerging as a ‘spatially defined unit’.<sup>301</sup> As a spatially demarcated enclosure, it can ‘disavow the event’<sup>302</sup> that emanates from the exteriority of the world – the unforeseen event being a necessary outcome of a flux beyond human control (precisely why exteriority must be rendered affordable). Contingency thus becomes displaced: rather than emanating from above, it becomes constitutive of being-at-work’s very real powers to adapt so as to preserve itself from determination. While the middle nations may initially occupy the temperate regions, the threatening flux of the constellations and celestial bodies means that nothing is definitively beyond change. This is made clear by Albertus when he points out that ‘mutations in elements appear immediately from even a moderate variation or change of the stars...’.<sup>303</sup> However, the state-form as developed moral order, in co-opting place as an enclosure, takes control over the boundaries that shield it from not just the earth but also the sky, and so events are precluded from breaching the walls of the polis.

The developed state of the middle nations concerns itself with ‘constancy and preservation in the face of the future and stranger’.<sup>304</sup> There is an associated danger here that the state-form, with its defensive positivism, in closing itself off could stifle being by reducing it to lifeless inertia. However, being-at-work (in its techno-ethical capacity), realised exclusively within the polis-enclosure, grounds the organisational structure of the state in terms of a reactivity and adaptability to the beyond. This will furnish the structures of imperialism with its geopolitical dynamic, with its enduring quality. The agency intrinsic to the being-at-work of the middle nations acts as a shared capacity, a shared contingency with the beyond, and comes to be enclosed within the very structures that govern the *machina mundi*.

Within the tripartite model, politics and governance become linked with the formal and public power structures of the state-form as the developed moral order. Politics as a form of agency that exists in excess of state structures is comprehensively denied.<sup>305</sup> The notion of political agency as embedded in the idea of the sprawling people-nation is expelled from the state-form; agency becomes that which is realised only through a process of enclosing and hedging.

The emergent condition of the periphery nations, existing as they do as an exteriority *vis-à-vis* the middle nations, is contained within the geopolitical system. The nation finds its becoming annulled by the centralised states that inhabit the privileged middle. Cast as a centre, these middle states are brought together through the manifestation of certain unifying organisational principles (such as that between soul and body). They comprise a centre that exerts power through ordering all that orbits around them; thus, they are given the licence to integrate the peripheral nations into the geopolitical organisation. The states that occupy the centre are now in a position to manage the entire geopolitical axis.

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<sup>300</sup> Neocosmos (2012), p. 533

<sup>301</sup> Guardiola-Rivera (2011), p. 29; Elden (2010), p. 800

<sup>302</sup> Guardiola-Rivera (2011), p. 31

<sup>303</sup> Albertus (1971), p. 49

<sup>304</sup> *Ibid.*, p. 31

<sup>305</sup> Neocosmos (2012), p. 540

Those nations on the periphery, in being unable to transcend their place, cannot satisfy a requirement that is a condition not only for political agency but also for moral personhood. They are confined to a ‘contained particularity’<sup>306</sup> without being able to project vertically outwards towards the heavens in an affordable manner. A key failing attributed to them in this regard is an inability to properly enclose themselves from the surface of the earth – they are ‘too attached to the earth, a creature of blood and soil’.<sup>307</sup> In this corrosive attachment to the earth, the barbarians of the periphery nations cannot be said to actually inhabit the earth as such, as the ‘terrestrial environment becomes habitable to the extent the world is no longer open but *enclosed*’.<sup>308</sup> It is the occupation and enclosure of the land that becomes the sole acceptable criterion for inhabitation. The barbarian, in dwelling within the earth, subsists as an exile from the moral centre. He happens to be engrained within the perilous exteriority of the bare, open frontier of the earth. At this point, left to carry out this mode of living, the barbarian must acknowledge the consequences of being exposed to the unaffordable, transformative and imposing power of the heavens.

Thus, we encounter a fundamental aspect of the tripartite model: the invisibility–visibility fold. It is in the make-up of this fold to operate as a continually shifting division in the interminable process of erasing itself. Hence, it cannot be reduced to an inflexible dualism or even dialectic, as the operation of the fold involved allows for great fluidity.

We have stated that the geopolitical system, as Albertus considers it, ensures the visibility of those who inhabit the periphery by shedding light on the objective social location of those people. It is only by making visible the social location of those on the exteriority that we can grasp the geopolitical system as whole. On the other hand, we are also able to maintain, in addition, that those very same nations – consisting of the exteriority – have been rendered invisible. As Cheliotis explains, ‘invisibilisation pursue[s] the *anterior* (because *superior*) aim of disinheriting the invisible of membership of human kind...[H]and in hand with the invisibilisation of victims and their natural humanity goes the invisibilisation of their otherwise shocking lot.’<sup>309</sup> While visibility and light ‘capture’ in order to bring inside, and hence, in effect, disclose the geopolitical system as a whole, invisibility continues to uphold exclusion from the personhood and political agency of those in the far reaches of the system. ‘Invisibilisation’ involves the ‘subhumanisation of others’ through exclusion ‘from the moral order of belonging to the human species’.<sup>310</sup> The issue in question here is the ‘never-fully realised process of inclusion in the category of human personhood’.<sup>311</sup> To put it in other words, sight and blindness seem to go hand in hand. Sight is the ability to locate and confine things; it is the power of the *oculus mundi*, the eye of the world,<sup>312</sup> which renders visible, captures and manages the objects within its geopolitical orbit. Blindness, on the other hand, is a type of ‘dominating principle’ that allows for the juxtaposition of objects ‘which would be impossible if they could see each other’.<sup>313</sup>

If the periphery nations are subject to both visibility and invisibility, this also appertains to the middle nations. To take up visibility first, we should note that with regard to the middle nations, visibility (or ‘visibilisation’) goes hand in hand with perception (‘the eye which sees’). The special powers of the middle nations correspond to the ability to realise the mean, which affords ethical perception. The basis of this perception, we will remember, is the intensive contingency of the ethical situation that activates the mean as a supreme moral force or capability. Perception can be said to make visible to the subject immersed in the hidden contingency (depth) of an ethical situation the structures of normativity which properly stimulate being-at-work or ethical subjectivity. It is the moral situation that continually constructs or contributes to a renewed acquaintance with ethical perception – the unassailable mean.

These capabilities of perception or sight bear out the view that those in the middle nations have, exclusively, full membership of moral personhood. The exclusion of those on the periphery from the moral order only shores up the desirability of being ‘inside’ and hence the legitimacy of the middle

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<sup>306</sup> Fitzpatrick (2001), p. 147

<sup>307</sup> *Ibid.*, p. 159

<sup>308</sup> Ingold (2005), p. 34 (emphasis added)

<sup>309</sup> Leonidas Cheliotis, ‘The Sociospatial Mechanics of Domination: Transcending the “exclusion/inclusion” dualism’, *Law Critique* (no. 21, 2010), pp. 134–5 (emphases in original)

<sup>310</sup> *Ibid.*, p. 136

<sup>311</sup> *Ibid.*, p. 136

<sup>312</sup> Merryl Wyn Davies, Ashish Nandy, Ziauddin Sardar, *Barbaric Others: A manifesto on Western racism*, Pluto Press (1993), p. 2

<sup>313</sup> Fitzpatrick, *Law as Resistance: Modernism, imperialism, legalism (Collected essays in law)*, Ashgate (2008), p. 278

nations. The moral legitimacy bestowed upon the middle nations brings us back to the ability of these nations to exercise political control and agency via the means of the closure of the state-form. On the level of ethical life the polis directs its perception outwards, towards the world-machine; the perception of the middle nations is perfectly aligned with the orientation of the whole. While the consequence of visibility for peripheral nations is the reduction to objective social location, for the middle nations it means the ability to connect with the entire world-machine through the powers of a privileged perception or (in)sight.

The process which links the middle nations to the orientating whole of the spatial system is something cloaked from the sight of the periphery nations. The barbarians are blind to that which they cannot perceive, and thus the middle nations conspire to make themselves invisible. The perception – which connects situations to structures of realisation – uniquely envisages and opens up the world beyond. Only subjects of the polis can grasp the world in its entirety, due to their ethically induced ability to transcend their location and mode of being. A similar power of movement is exercised by birds, which ‘routinely move from one domain to another’.<sup>314</sup> This is the power exercised by the polis-dweller, who, due to his transcendent capabilities, can travel through the opening made by the polis to the world-machine beyond. The form or structure of the geopolitical system can be considered as a politically empowering totality. Thus, the polis-dweller can smoothly move between the agency-bestowing political structures of the polis and the world.

The highest form of political agency that these middle nations exercise is the ability to render themselves invisible by erasing their particularities and proclaiming their qualities universal<sup>315</sup> or, in Albertus’ terms, moderate.<sup>316</sup> The erasure of particularities is an ‘invisibilisation’ that can be traced to the citizen’s immersion in ethical life – within the depths of the polis. Within these depths – generated by the interacting complexities of a constellation of ethical situations – the polis-dweller remains hidden from sight.<sup>317</sup> The citizen is able to perceive outwards while remaining safely hidden within the enclosure. The constellation or multitude of the ethical is an obvious counterpoint to the mysterious and discreet movement and capacity of the stars. In contrast, we can only think that the barbarian remains stranded on the outer surface of the earth,<sup>318</sup> unable to move beyond their place through to any other domains (in lacking all depth and verticality, they cannot grasp the world as totality, in thought). They are left subject to the elements and unable to conceive of or participate in the common good of civil community.<sup>319</sup>

The political agency of the middle nations rests upon a curious form of verticality<sup>320</sup> which accords with the ethical and political developments of the state-form. The construction of this verticality has its roots in the citizen who is linked to the moral community of the polis, which, in turn, acts as the ultimate portal to the entire geopolitical system. In moving through the levels, the ethical subject comes to almost float above the world-machine, in order to take in the prospect of the earth and barbarians on the surface below, both conveniently ruled out of ethical agency. In this view, ethical transcendence of the citizen – a necessary condition to exercising agency – becomes associated with a privileged comprehension of the orientation of the whole world-machine. In short, transcendence becomes attached to the governance and administration of the geopolitical system.

In rendering particularity invisible, the ‘moderate’ customs and morality posited by the middle nations are transformed into the supreme form of values of the tripartite system. The polis-as-enclosure conceals the ethical contingency at the core of political agency and governance. However, the moderate customs of the middle nations can only be realised on a global scale when they are rendered visible within the geopolitical system as a totality. Hence, middle nations will have moral legitimacy in any future practices of colonialism,<sup>321</sup> entailing the occupation of periphery nations – trapped as they are within their limited particularity outside the legal and moral order of the polis.<sup>322</sup>

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<sup>314</sup> Ingold (2005), p. 104

<sup>315</sup> Fitzpatrick (2001), p. 147

<sup>316</sup> Albertus (1971), p. 104

<sup>317</sup> See Elden (2013a), p. 6

<sup>318</sup> Ingold (2005), p. 34

<sup>319</sup> Pagden (1982), p. 43

<sup>320</sup> Elden (2013), pp. 2–3. The vertical dimension is an outcome of power, in which an observer can simultaneously be below (grounded) and above. In other words it is a way of securing the ground from an aerial perspective.

<sup>321</sup> Wey Gomez, p. 288

<sup>322</sup> Fitzpatrick (2001), p. 147

The middle nations, which will extend themselves through the movement of colonialism, will not only affirm the state-form and polis as the only way to actualise political agency, but will also affirm themselves in their nationhood, with the moral superiority this involves. After all, the nation in this morally exclusive sense can only be shored up in its orientation towards the universal<sup>323</sup> and its vertical movement and transcendence out of a contained place (verticality towards the heavens). Alongside this, the state seems to reinforce itself as the manager of place through its movement inwards – into a centralised enclosure that affords an exteriority, which, likewise, affords it back. From this perspective, it is only within this state-form that being is safely secured from an unaffordable beyond, and is thus able to transcend itself and lay claim to *dominium*.<sup>324</sup> *Dominium* becomes the principle ethical act in which the moral beings of the polis take on the political legitimacy of ordering other nations in order to align them with the orientation of the world-machine.

The fold inherent to the middle nations, between thought and action, is co-emergent, and interdependent on that fold employed by the geopolitical system as a whole, that between visibility and invisibility. In the final analysis, it seems that Albertus' thought lends itself to the interpretation that the moral order or state-form enthrones itself as the ultimate creator of boundaries, surpassing the ability of the earth and, eventually, even the heavens.<sup>325</sup>

## Conclusion

Albertus Magnus' modifications to Aristotelian ontology, that is to say his containment and curbing of the self-generated movement of bodies (*dynamis*), will have lasting consequences for Neo-Aristotelian thought as well as the conceptions of legality and trade bequeathed to us by the Scottish Enlightenment. This is because, for Aristotle, the self-movement (being-at-work) of matter (*hyle*) is fundamental for a being's independent identity. After all, it is only through its own action that a being can secure its continuity as a gathered-togetherness. Through a being's autonomous activity, the internal differences or myriad qualities constituting it are dissolved. In this dissolution of internal difference, a being is preserved as a whole – as a unity that can posit itself as an independent identity. Without the ability to move itself in activity, a being is reduced to rubble – to a 'heap'.<sup>326</sup> In this reduction to the heap, a being lacks the ability to order itself (self-ordering) into a continuous whole; it remains scattered into its independent parts. Hence, as the being is unable to define itself in its independent nature as an autonomous identity demanding respect for its otherness,<sup>327</sup> it is left to the forces beyond it to hoist a definition and identity upon it.

In the reduction of *phusis*' self-gathering powers to the heap, Albertus' variant of Neo-Aristotelianism can claim no direct access to a being's nature (in Aristotelian terms). Instead, potentiality is forced onto beings; they are ordered by an external agent or power (a process of *in*-formation over *trans*-formation<sup>328</sup>), firstly through the light of the heavens, and then by the legitimacy that man as polis-dweller derives from being located at the moral centre of the world. Beings are defined no longer by what they are but, implicitly, by their relation to man placed at the commanding heights of the moral order. Hence, natural phenomena are considered quantitatively or extensively, not intensively through their unique movement and trajectory (at-work) in and through the cosmos.<sup>329</sup> The external ordering of beings that results from this theoretical manoeuvre announces the onset of a territoriality, an outcome of the clearing of *phusis* of its self-ordering powers.

This sets the scene for Albertus' exposition on the tripartite world-machine, which entails the ascendancy of a '*nomos*-thinking' over *phusis*, and thus the prevalence of the paradigm of a nascent

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<sup>323</sup> Fitzpatrick (2001), p. 146

<sup>324</sup> Albertus (1971), p. 104; Wey Gomez, p. 282. The Roman concept of *dominion* as referred to by the architect Vitruvius.

<sup>325</sup> Man seems to be located outside of the heavens/earth totality with the 'idealization of the center of the world', so as to be safe from the 'cosmological revolution'. This was part and parcel of the process that gathered steam throughout the medieval period into the renaissance – most specifically with the loss of man's physical position at the centre of the cosmos, and with the adjustment to this taking the form of the 'Platonic Renaissance'. For more discussion on this, see Blumenburg, p. 206, pp. 38–39

<sup>326</sup> Winslow, p. 71

<sup>327</sup> Ibid., p. 74

<sup>328</sup> See Eduardo Viveiros de Castro, *Cosmological Perspectivism in Amazonia and Elsewhere*, Masterclass Series 1, Manchester: HAU Network of Ethnographic Theory (2012a), p. 57

<sup>329</sup> Ibid., p. 73

spatial legal and territorial moral order over a place (*topos*) which formerly acted as a constitutive link to the wider eternity of the cosmos. Place finds itself ensconced, as it is recruited as a territorial interface between, in Albertus' speculative geography, the hemispheres of the earth and sky, effectively subduing the former and regulating the latter. Figuratively speaking, we could say that Atlas is firmly held in place, as a spanner wrenching asunder the primordial immanence of the Ecosphere. With the emergence of the polis as an enclosure, the privileged place of ethical life comes to replace and contain a contingency displaced from the sky–earth fold. Man emerges as the ethical and legal being best equipped with the political agency to impose order on all things that surround him.

To revert back to the terminology employed in Part One, what Albertus attempts to deal with here is the uncontained 'triadic-cosmological schema', which emerges not just from within Aristotelian cosmology, but also from Christian theology's attempt to retain for man an openness to the heavens (of which mutual affordability acts as a partial solution). In re-concealing the foundational contingency inherent to the triadic model (i.e. the eternal cosmos), Albertus' thought led him to structure and contain an un-orderable cosmic multiplicity (immanence) at the level of geopolitics (*nomos*), so as to re-introduce a process of ordering through the thesis of the moral authority of place.<sup>330</sup> The idea would continue, many years later, to shape the theoretical justifications for colonialism over the Americas, and particularly influenced Albertus' fellow Neo-Aristotelian Francisco de Vitoria (via Aquinas, who tried to 'fix' the cosmic manifold<sup>331</sup>) by providing a method of 'folding back' triadic elements into seemingly universal, planetary-wide legal structures (and thus rendering the confined triadic disciplinary). And, indeed, Albertus' theories regarding the other's relation to nature/earth and its ecology would find their historical realisation at the point of the Spaniard's encounter with the Indian.

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<sup>330</sup> In many ways, to prevent man from being 'opened up to the inside', or to control the flux of the heavens *inherent* to Albertus' system (the 'outside within') so it is not swallowed up or transformed from within by its own foundational contingency. See Viveiros de Castro (2012c), p. 11

<sup>331</sup> Albertus and Thomas Aquinas are considered to be the Dominicans' two most influential thinkers. The former is cited as having directly contributed to the 'Age of Exploration'. See Wey Gomez, pp. 231–2

# Part Three: Vitoria's Jurisprudence and Indian A-Legality

## Chapter One: Vitoria's Historical and Legal Context

Albertus' operation of folding back seemingly un-orderable cosmic elements into the polis, and indeed his geopolitics, had already provided the method for Francisco de Vitoria's jurisprudence. The latter can be said to have done for Amerindian societies what the former achieved in the previous Part in respect to Aristotelian cosmology. For Vitoria, the folding back of Indian cosmologies and institutions into the positive law of Spanish imperialism was an attempt to contain, as well as anticipate, the force of a latent triadism lurking behind the 'binary machine' of Amerindian thought.<sup>1</sup> Vitoria's work was significant at the time of Spanish colonialism over the Americas, as the foundational contingency inherent to the triadic-cosmological schema threatened to return with the encounter of the Indian; the undisclosed frame of the deterritorialising earth seemed to make its appearance felt once again. Vitoria had spent his early years studying and lecturing at Paris; more specifically he was attached to the Dominican college of S. Jacques, which counted the figures of Albertus Magnus and St. Thomas Aquinas amongst its most prestigious luminaries (the latter having been the former's student).<sup>2</sup> It was these two Dominican theologians that were to influence Vitoria most when he came to consider the 'affair of the Indies' from a legal standpoint.

Let us start by noting that the historical and legal context of sixteenth-century Spain required a theory which would properly legitimise Spanish claims over the Americas, in the wake of the (mis-)conduct of the Spanish conquistadors. The conquistadors' actions would result in the re-examination of the justice of titles in the Americas and, indeed, Spanish claims to territory became a matter of public interest as they fell under intense scrutiny from the Dominican Orders.<sup>3</sup> With the resurgence of Natural Law Theory, alongside the Spanish colonists' 'butchery' and 'pillage'<sup>4</sup> in the Americas, the conditions were apt for Francisco de Vitoria's major contribution to international law. Legal theorists such as Peter Fitzpatrick dub Vitoria the 'reluctant father'<sup>5</sup> of international law, while others such as the anthropologist Anthony Pagden are more hesitant in their approach.<sup>6</sup> However, there is little doubt that Vitoria's construction of jurisprudence in the face of the affairs of the Indies<sup>7</sup> and his subsequent juridical justification of Spanish colonialism can be seen as a serious theoretical precursor to a system of international law and international relations.<sup>8</sup>

What captures Vitoria's erudition and underpins claims that he is the father of international law is his response to the foundational violence of colonialism in the Americas. By 1513 the Spaniards occupied only a handful of islands in the Caribbean (Hispaniola, Cuba, Jamaica and Puerto Rico),<sup>9</sup> but this all changed during the 1520s and 1530s – a time in which the 'great American Empires of Mexico and Peru [were] discovered'.<sup>10</sup> With the defeat of the Mexica and the Incas, a huge amount of territory now lay in the hands of the Spanish Crown, making a by no means insignificant number of Indians officially its vassals. While the Spanish colonialists saw the remote islands hitherto colonised as inhabited by tribes of the Indies barely considered fit to be part of humanity, the vaster regions of central and southern America revealed 'more civilised' empires, which seemed to contain some semblance of political organisation and self-governance. This was met with growing abuses and outrages by the

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<sup>1</sup> In this sense, according to Schmitt, empire, based on the Christian *republica christiana*, was seen as the great restrainer – the *katéchon* – of the Anti-Christ, which kept the world safe from rogue elements such as the Islamic nations prior to the 'discovery' of the Americas. See Schmitt (2006), p. 87

<sup>2</sup> Bernice Hamilton, *Political Thought in Sixteenth-Century Spain: A study of the political ideas of Vitoria, De Soto, Suárez, and Molina*, Oxford: Clarendon Press (pp. 171–6, 1963); Wey Gomez, pp. 238–9

<sup>3</sup> Pagden (1982), p. 57

<sup>4</sup> Francisco De Vitoria, 'Letters on Political Matters: Letter to Miguel de Arcos, OP, Salamanca, 8<sup>th</sup> November 1534' in *Vitoria: Political writings*, eds. Anthony Pagden, Jeremy Lawrence, Cambridge University Press (1991), p. 331

<sup>5</sup> Fitzpatrick (2001), p. 152, and (2008), p. 279; Guardiola-Rivera (2011), p. 32

<sup>6</sup> Vitoria, Introduction xxviii (Pagden): '...although it is clearly false to speak of Vitoria as the father of anything so generalised and modern as 'International Law', it is the case that his writings became an integral part of later attempts to introduce some regulative principle into international relations.' Also see Hamilton, p. 98

<sup>7</sup> Vitoria, p. 331

<sup>8</sup> *Ibid.*, xxviii

<sup>9</sup> Amongst others, see Pagden (1982), p. 58

<sup>10</sup> *Ibid.*, p. 59

colonists, which brought into sharper focus the possible illegality of Spanish conquests.<sup>11</sup> The question of the legality or justice of the Spanish title to the Americas was one that Vitoria sought to place at the heart of his scholarly studies. Importantly for Vitoria, an examination of the Spanish claim was overdue as ‘most...[Spaniards] no longer thought about’ it.<sup>12</sup> In light of events in the Americas, the issue would need to be exhumed and thoroughly scrutinised in the crucible of the public realm. The events in question, confided Vitoria in private letters to colleagues, were in no uncertain terms ‘vile’, and constituted ‘impiety’, ‘tyranny’ and ‘blood massacres’.<sup>13</sup> In themselves they provided ample grounds for doubting just title.

In considering just title, Vitoria was reawakening European anxieties over justifications for colonialism. Anxieties easily resurfaced as ‘European powers became increasingly preoccupied with questions of legitimacy.’<sup>14</sup> Questions of legitimacy abounded due to the inability of any European state to make an ‘unassailable claim to sovereignty’ over overseas possessions.<sup>15</sup> Hitherto, appeals to Roman modes of rationalising the judicious nature of acquisition had proved tenuous since the Roman model consisted of a ‘series of devices’ which allowed conquests to be represented as wars against aggressors.<sup>16</sup> European nations found it increasingly difficult to appropriate Roman laws and justifications for war for their own purposes; indeed, it would take an incredibly devious sleight of hand to represent conquests – at least initially – as anything other than enslaving ‘peoples living peacefully on their own lands’.<sup>17</sup>

Through his deliberations upon the unabashed violence that took place in Central America and Peru, Vitoria was able to construct the foundations of his disciplinary legal system. Despite the evident difficulties in appealing to Roman legality, Vitoria laid the groundwork for his jurisprudence through an adaptation of the old Roman Law of Nations, as well as through an adherence to medieval canon law’s doctrine on the rights of infidels (first developed by Pope Innocent IV).<sup>18</sup> In the face of what some legal theorists term genocide,<sup>19</sup> the unique circumstances of the Spaniard’s encounter with the ‘vanishing’ Indian<sup>20</sup> would prove to be the firm basis for his legality.<sup>21</sup>

The pressing juridical questions thrown up by the encounter with Amerindian nations primarily concerned the legal rights attributable to the Indian, such as whether the natives had the proper rights of dominion over the territory they occupied. Furthermore, and more generally speaking, what was it that actually constituted sovereignty within the commonwealth; what were the rights and duties extant between different states and nations? Albertus, as a figure much studied and cited in Iberia at the time, provided an intellectual backdrop for theologians and jurists contemplating these questions. As we will recall from the previous Part, he had already asserted the claim that the ‘clearing’ away of the self-ordering capacities of nature, through the management of the medium of the land, was a necessary prerequisite for a perfect sovereign community.<sup>22</sup> It would prove difficult for any nations abandoned to the un-orderable nature of the earth to obtain sovereignty (in the sense of dominion) over territory unless they could demonstrate a prior ability to manage and order the land. For Iberian jurist-theologians working within the confines of Albertus’ schema, ‘periphery’ nations, such as the Amerindian’s, could only be subject to planetary law once their pre-existing traditional ties and social bonds with the earth were dissolved, to make way for the external imposition of order. The dispossession (or ‘dispossessive ordering’) this implied would require the separation between native cosmology and the earth to which it held a prior proximity. As we have already argued, the productive particularities and specificities inherent to earth and land (as an outcome of contingent ‘worldly circumstances’ or the experimental equivocations of nature)<sup>23</sup> can be considered a medium creative of unique social relationships and geospatial

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<sup>11</sup> Pagden (1982), p. 59

<sup>12</sup> Ibid., p. 66

<sup>13</sup> Vitoria, p. 238, pp. 332–3

<sup>14</sup> Anthony Pagden, ‘Stoicism, Cosmopolitanism, and the Legacy of European Imperialism’, *Constellations* (vol. 7, issue 1 2000), p. 6

<sup>15</sup> Ibid., p. 6

<sup>16</sup> Ibid., p. 6

<sup>17</sup> Ibid., p. 6

<sup>18</sup> James Muldoon, *Popes, Lawyers and Infidels*, University of Pennsylvania (1979), p. 149

<sup>19</sup> Fitzpatrick (2008), p. 324

<sup>20</sup> In this instance meant *sensu lato*, as in Madruera’s ‘vanished Tupin’ cited in Neil L. Whitehead’s Introduction to Staden, lxxiii

<sup>21</sup> Elaborated in two lectures: ‘On the Indians Lately Discovered’ and ‘On the War Made by the Spaniards Against the Barbarian’, see Anghie, p. 321

<sup>22</sup> Nichols, p. 19

<sup>23</sup> Ibid., pp. 23, 26

orientations. Opposed to this is nature as disenchanted and manageable surface, displaying itself to a power beyond it (i.e. man as polis-dweller), which rearranges and reorients its geospatiality.<sup>24</sup> The outcome of Albertus' speculative geography was the preparation for the land to be rendered homogenous and universal, and therefore a resource or commodity the colonist could place a value upon. Moreover, it is possible for us to link Albertus' geopolitical analysis with the growth of a planetary economy flooded with resources from the Americas (the exemplar being gold), seemingly ripe for expropriation. This would be crucial in the establishment of the world-system in its colonial/modern form as land and earth previously left un-orderable (from the European perspective) by Amerindian societies were fully integrated into the global economy.<sup>25</sup> Further, it is worth suggesting here that the Spanish appropriation of vast swathes of the New World invokes the connection Carl Schmitt draws between *nomos* and the key processes of any legal order: namely, appropriation/production/distribution. The original violence that led to land-appropriation can be considered part and parcel of a *nomos*<sup>26</sup> in which the primordial action of 'taking' and cultivating for the purposes of production comes together with the distribution of what has been taken. The first act of appropriation can therefore be considered as the basis for the distributive justice that follows; it is law and economy that together ground the legal order, as demonstrated by Spanish colonisation. Once the original appropriation or founding violence has taken place, it is quickly forgotten, as the focus of the legal order becomes distribution or economic and technical considerations over and above the validity of the original act. Schmitt's take on the original appropriation as that which generates the ground for law and economy despite ostensibly being completely beyond it is echoed in Lindahl's concept of a-legality, which I make use of below.<sup>27</sup>

Thus, in terms of Albertus' geopolitical paradigm, Vitoria attempted to juridically justify the need to re-order Amerindian societies geospatially, so that Indian cultures were 'freed' from the stranglehold of an un-orderable earth (the *given*). To this end, the principal issue seemed to be the lack of a common framework in which to address universally binding questions of legality.<sup>28</sup> In the absence of the aforementioned, there was no way to bind people to universally regulating principles within a system of normativity that included all.<sup>29</sup> Vitoria's response to these questions would also provide an answer – which would become somewhat of an orthodoxy in Spain – to the debates surrounding the extent of the self-governing capacities of the Amerindians, one which would sit comfortably within Albertus' speculative geography.

Indeed, with the help of Albertus, geography re-merged as a significant technology of control with the very empirical 'discovery' of the Americas. As Carl Schmitt states, the European struggle of conquest over the New World led to 'a new spatial order with new divisions.'<sup>30</sup> It was these divisions on the face of the globe that facilitated the political struggle, not just for land-appropriation between Christian states, but also between native and settler, indigenous and coloniser. Geography as a 'new global concept' now had at its disposal a new 'planetary image of world' that it could effectively adapt itself to.<sup>31</sup> This new spatial consciousness, termed 'global linear thinking' by Schmitt, could divide, after the fashion of Albertus, the ordered relations of the medieval *respublica Christiana* – the sovereign Christian states – from the un-ordered 'open spaces' of the New World.<sup>32</sup> In respect to the relations between the Christian and non-Christian territories and princes, Vitoria worked within the spatial order and institutions of the *respublica Christiana*, which remained a fundamental point of reference during the Age of Discovery despite the declining power of the Church as an adjudicating body over issues of law.<sup>33</sup>

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<sup>24</sup> Nichols, pp. 23–4

<sup>25</sup> The 'discovery' of the New World should be understood as marking the beginning of the creation of the modern/colonial world-system, and the emergence of the world economy. See Anibal Quijano and Immanuel Wallerstein, 'Americanness as a Concept, or the Americas in the Modern World-System', *International Journal of Social Sciences* (no. 134, pp. 549–57, 1992), pp. 549–50, 553. Also see Quijano, 'Coloniality of Power, Eurocentrism, and Latin America', *Nepantla* (no. 1, vol. 3, pp. 533–80, Fall, 1998)

<sup>26</sup> See Schmitt's various interpretations of *nomos*, p. 327.

<sup>27</sup> Schmitt, pp. 324–335. Hans Lindahl's 'a-legality' can be seen as an updated version of many of Schmitt's theoretical positions.

<sup>28</sup> Anghie, p. 322

<sup>29</sup> *Ibid.*, p. 324

<sup>30</sup> Schmitt, p. 87

<sup>31</sup> *Ibid.*, p. 88

<sup>32</sup> *Ibid.*, p. 101.

<sup>33</sup> *Ibid.*, p. 113. The *jus publicum Europaeum* is linked to increasing secularisation and the strengthening power of European states as spatial orders that could determine their own normativity.

It was also during the time of Vitoria that Schmitt charts the rise of the *jus publicum Europaeum*: the law among sovereign European states – the ‘European core that determined the nomos of the rest of the Earth.’<sup>34</sup> It was Spain as ‘the first great land appropriator’ that expedited the move away from the authority of the Church<sup>35</sup> (see below) and that is identified by Schmitt as precipitating the major event prefiguring a European interstate system. Crucial to this process were the internal dividing lines between sovereign Christian states themselves. For example, the dividing lines demarcating Spanish from Portuguese territory, such as the friendly Rayas lines emerging from, and encapsulated in, the Treaty of Tordesillas, which recognised each empire’s claim to land on the basis of reciprocity between Christian nations under the notional authority of the Catholic Church<sup>36</sup>; and the amity lines of conflict, derived from the conflict between Protestant England and Catholic France, that is, between those nations which were involved in an ongoing dispute over claims to land-appropriation, partly due to the lack of an overarching adjudicating authority.<sup>37</sup>

We have already intimated that the event of the encounter took on the form of a legal question that demanded a response. The event-as-question solicited two very different answers, at least ostensibly: one embodied in the exclusionary violence of the colonist, and the other in the relational ethics of Vitoria. In many ways, the former’s response to the encounter pre-empted the ontological significance of the Indian for the latter’s jurisprudence. A further background to this dispute is provided by the direct influence of Albertus’ pioneering psycho-geography, already explained above, on Jesuit and Dominican missionaries in the New World.<sup>38</sup> In fact, many sixteenth-century chroniclers (lay travellers) who journeyed through the Americas supported the analogy drawn by those very missionaries at the time – that the Amerindian was part of a nation constructed out of ‘myrtle’, meaning, the Amerindian’s psychology revealed an ability to comprehend belief yet lacked the ‘solidity’ of will and memory to consistently adhere to it. This was said to contrast with those nations of ‘marble’, whose strength of will, as well as intelligence, provided for the ability to steadfastly commit to belief (and faith).<sup>39</sup> The basis of the distinction invoked Albertus’ tripartite geopolitics, grounded as it is upon the (Neo-Aristotelian) tripartite division of the soul. Thus, the Indian soul displayed an obvious disharmony, suggesting a tropical ‘myrtle’ ‘mineral resistance’ or molecular-becoming. This jarred with the molar ‘marble’ harmony and solidity<sup>40</sup> of the more promising ‘middle’ nations.

The response of the conquistador was to regard the ‘molecular-myrtle’ Indian nations with considerable suspicion. The supposedly inconstant nature of the Indian drove the colonist’s discourse, which was framed through the expectation of meeting the ‘diabolical’, that which is monstrous by virtue of its ‘double’ quality. To this purpose, a common tale in circulation at the time held that the Indians were enchanters who merely conjured up the outward guise of humanity. Underneath appearances, the Indian forbore any categorical designation. He was man mingled with beast; his outward aspect belied the animal nature within. Moreover, the colonist’s exclusionary deportment led him to subscribe to a specific mode of defining mankind: this was the classical Anthro-po-centric mode of mankind, propelled by the declining force of Greek antiquity, which struggled in fully explaining the mysteries of the New World.

The duality of man and animal through which the colonist perceived the Indian upheld a reductive metaphysical schema, overtly disrupted by the Indian’s own radical dualism, in which what lay behind the image of ‘man mixed with beast’ was the creative ability of beings to transform themselves. The Indian’s belief in the potential for inter-transformability between species<sup>41</sup> perplexed the colonists’ narrow frame of Anthro-po-centric thinking, which drew a strict (if illusory) division between animality

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<sup>34</sup> Schmitt, pp. 126–7, 138. The *jus publicum Europaeum* is a spatial form, fitting the European inter-state structure, which could support a specifically new international law.

<sup>35</sup> *Ibid.*, p. 130

<sup>36</sup> In this example, territory was divided on the basis of whether it fell to the West or the East of the line between the Spanish and Portuguese empires.

<sup>37</sup> *Ibid.*, pp. 89–99

<sup>38</sup> See Wey Gomez, pp. 232, 235, 237, 238

<sup>39</sup> Viveiros de Castro (2011), pp. 2–6

<sup>40</sup> Viveiros de Castro (2012a), p. 96

<sup>41</sup> Transformability is a constant theme in Amerindian cosmologies, particularly, for example, in terms of the creation-myth, and as regards the trans-specific nature of the shaman (see Part Four: sections 4.6, 4.7). See Viveiros de Castro (2012a), pp. 57–9 and *Immanence and Fear: Stranger-events and subjects in Amazonia*, trans. David Rogers, Iracema Dullely, *Hau: Journal of Ethnography Theory* 2, (vol. 1, pp. 27–48, 2012b), pp. 32, 36

and humanity.<sup>42</sup> In the Amerindian schema a person (whether man or non-human) could connect with the latent yet formative (uncontained) triadism of the (immanent) cosmos. In other words, we can say that Amerindian cosmo-sociological dualities were in a state of ‘perpetual disequilibrium’, in contradistinction to the more stationary and classical (diametric) dualities of the coloniser. Trans-specific beings,<sup>43</sup> that is to say, creatures that occupied some ‘in-between’ zone between animal and man, could only be represented indirectly in the classical colonisers’ paradigm as ‘mythical beings’ such as the Cyclops or Sphinx of ancient Greek legend. They were essentially thrust into a zone of ‘non-being’ – a non-place, containing beings perpetually in the process of transformation but existing safely beyond the diametric dualism’s boundary-edge. This un-orderable place of non-being is precisely where the ‘cosmic schematism’<sup>44</sup> of the Indian’s radical dualism connected with a triadic root, the multiplicity or sensuous flux of the earth.

In opposition to this capacity for transformability, a pronounced aspect of Indian cosmology, the categorical Anthropos definition of mankind delineated a type of enclosed and strictly demarcated rationality that did not extend beyond a select few who were able to properly realise the form of man (an ‘in-formation’). The force of this rationality derived from its being fully exercised against those deemed to be lacking in it. According to this view, beyond the immediate world of the Spaniard there existed an ‘outside’ in which there resided enchanted creatures beyond the scope of rationality, i.e. considered to be utterly irrational. These beings, exiled from the Spanish world, were, due to their lack of proximity to familiar forms or ways of being, not to be admitted. Rationality was thus a quality exclusively in the possession of those who resided within the confines of a very narrow cultural world. What this in fact meant was that the Indian’s inconstancy, his inability to commit to a fixed judgement and *settle* on a *plan* or course of action, completely precluded him from establishing or conforming to the (molar) institutions of ‘king, law and faith’. This hard-line position chimed with some of the Jesuit missionaries, who put forward the opinion that ‘order, constancy, exactitude’<sup>45</sup> would perhaps remain unattainable for the Indian.

The colonist’s mentality and spirit of conquest were indubitably excited by the expulsion of the Moors in Spain in the same year as the ‘discovery’ of the Americas (1492). The *Reconquista* signified the purification of the Spanish world of the other, exiled due to their infidel status. Thus, the normativity of the Spanish world could only be bolstered and secured through the exclusion of the other and the world they inhabited. Furthermore, it would not have seemed a huge leap for the colonist to export his exclusionary manner of thinking to the Americas. To this end, the conquistadors looked ‘upon the newly found lands principally as a boundless field for the spirit of conquest engendered during the medieval *Reconquista*’.<sup>46</sup> The colonist’s exclusionary approach effectively meant the Indian would meet the same fate as the Moor within Spain, or an even worse one; once the interiority was purified, it would be left for the colonist to probe the exteriority of empire. Both through war and enslavement, it was this Anthropocentric thinking that drove the colonist’s approach towards the Indian.

At least in his initial account of the Indian, the colonist hit upon the ontological nature of the answer to the question arising from the uncertainty and contingency unleashed by the event of the encounter. It is this that takes us to the very heart of the Indian Question: do the Indians have a soul? How do we understand the personality or psychology of the Indian? A common answer necessarily involved a reference to Aristotle’s natural slavery theory. This was, in essence, a ready-to-hand theory which was propagated most ardently by the theologian Juan Ginés de Sepúlveda and proved popular as an explanation amongst the colonists of the Indian’s strange hybrid nature. In response, it elicited a scathing critique from Vitoria and the Dominican Bishop of Chiapas, Bartholomé Las Casas. However, in setting out his own account of the Indian’s personality, Vitoria found it imperative to first dismiss the credibility of the Pope’s jurisdiction over Indian lands (the Spanish Crown had depended on the Papal

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<sup>42</sup> See Tim Ingold, ‘Humanity and Animality’, in *Companion Encyclopedia of Anthropology: Humanity, culture and social life*, ed. Tim Ingold, Routledge (pp. 14–32, 1994), p. 14

<sup>43</sup> Viveiros de Castro (2012a), p. 48

<sup>44</sup> *Ibid.*, p. 48

<sup>45</sup> Viveiros de Castro (2011), p. 6

<sup>46</sup> Lewis Hanke, *All Mankind is One: A study of the disputation between Bartolomé de Las Casas and Juan Ginés de Sepúlveda on the religious and intellectual capacities of the American Indians*, Northern Illinois University Press (1994), p. 5. Schmitt draws upon Hanke in his overview of Vitoria’s contribution to a European International Law or the *Respublica Christiana*, p. 101, 1. ff. Also see Quijano and Wallerstein, p. 553

bulls issued by Pope Alexander VI); he could then, in turn, dismantle Aristotle-inspired theories of natural slavery.<sup>47</sup>

Drawing on medieval canon law, Vitoria was of the view that the Pope had no ‘spiritual or temporal power’ (or authority) over unbelievers/barbarians in any circumstances.<sup>48</sup> No overseas territory could thus be legitimately given to the Spanish Crown on the basis of the Pope’s jurisdiction over infidel territories,<sup>49</sup> as religion could not act as a basis for a common framework of jurisprudence (this was acknowledged by medieval canon lawyers such as Innocent IV). Despite the Papacy’s diminishing influence, its mediating power revived in the course of the fifteenth and sixteenth centuries; with overseas European expansion Christian rulers sought moral cover from the Pope for conquests they justified as part of a programme to extend the boundaries of the Church. As long as conquests were justified as such, the Papacy was in a position to sway the manner in which conquered people were treated.<sup>50</sup>

The Pope’s power was significant at a time in which European nations vied with each other for the spoils of overseas territories.<sup>51</sup> In such circumstances, concerns were raised over the plausible threat that the Pope might transfer his allegiance from one Christian nation to another, on the basis of conquered people being treated harshly, with little care for their souls. Within this context, we can fully appreciate Vitoria’s approval of the comparatively little blood spilled by the Portuguese in Brazil as a thinly veiled critique of the management of Spanish colonial operations. Indeed, the colonists’ indiscretions were a topic on which the Spanish monarchy felt particularly vulnerable, having partially justified colonisation on the salvation of souls.<sup>52</sup> This was undoubtedly a contention in which Vitoria could find some favour in the advancement of his own considered opinions. This view was strengthened by his feeling that Spanish lawyers were simply hiding behind Papal patronage and the narrow letter of the law.

At times where the dispute hinged upon the more scholarly grounds of the validity of natural slavery in assessing the Indian, Vitoria was effectively able to dismiss the argument by reverting to the legal doctrine of canon law and the rights of infidels. For the most part, he was able to show that the empirical particulars in the Indies indicated in the most definitive manner that the Indians were ‘masters over their own affairs and had *order* in their lives’.<sup>53</sup> This reinforced the universal basis of a jurisprudence that could include nations hitherto unknown to the Spanish world, as ethnographic information gathered by observers in the Americas yielded ample evidence of shared or, at least, recognisable practices. In repudiating natural slavery theory, Vitoria’s intention was to reveal not only that reason proved to be the basis of all law (i.e. a universal law), but that it also remained adaptable in the face of normative challenges such as those implicit to the encounter.<sup>54</sup> However, as a staunch Thomist and Neo-Aristotelian, he still found it necessary to retain much of Aristotle’s psychological and ontological framework, despite the jettisoning of natural slavery theory.<sup>55</sup>

Vitoria held a similar line in denying Papal jurisdiction over Indian territories. He affirmed that it could only be reason, ‘the defining quality of law’, which could provide for the universality of jurisprudence. At this point Vitoria found it opportune to draw upon the Roman doctrine of *ius gentium*, or the law of nations; it was on this basis of universal reason that he asserted the territorial and self-governing rights of the Indians. In respect to this, the main issue of note was ‘the nature of the Indian *qua* man and his proper place in the world’.<sup>56</sup> Hence, we see that the matter was as much an ontological issue as it was a matter of human law.<sup>57</sup> Here, Vitoria arrives at the mode of mankind that could effectively counter the Anthropos of the colonists: the proper place of the Indian was in the inclusive category of *Humanitas*. The Christian-inspired *Humanitas* encompassed all people, even unbelievers, who remained within the sphere of possible salvation, or certainly not irrevocably beyond its reach. This was due to the

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<sup>47</sup> Guardiola-Rivera (2011), p. 32

<sup>48</sup> Vitoria, p. 263

<sup>49</sup> Anghie, p. 322; Pagden (1982), p. 30

<sup>50</sup> Muldoon, pp. 138–9

<sup>51</sup> The question of legal title over the Americas becomes a struggle between individual European Powers competing for land-appropriations, and so sharpened the distinction between states and consolidated the extended powers of the Church. See Schmitt, p. 130

<sup>52</sup> *Ibid.*, p. 140

<sup>53</sup> Vitoria, p. 250 (emphasis added)

<sup>54</sup> Fitzpatrick (2008), p. 43

<sup>55</sup> Pagden (1982), p. 37

<sup>56</sup> *Ibid.*, p. 67

<sup>57</sup> *Ibid.*, pp. 28, 48

power of divine law to grant all the intrinsic potentiality for reasoning, a constitutive openness to persuasion through strength of argument.

Within Albertus' tripartite structure of rationality,<sup>58</sup> Vitoria stressed the importance of reason (which the Indian seemed to possess due to rationality's intrinsic nature) in the creation and comprehension of law, while other elements – such as will (vital for a commitment to faith) and appetite (or desire/ instinct) – were open to modification with the development of the right normative institutions.<sup>59</sup> If Amerindian nations could be persuaded to convert through the power of rational argumentation, they could just as easily be convinced of the need to remove the impediments to their 'perfectibility' or (constructivist) recognition as perfect communities.<sup>60</sup> What, in effect, amounted to the lack of perfection in Amerindian nations did not necessarily prevent the future onset of developed legal institutions, which could help in ameliorating the Indian's psychology and moral condition. The theory harked back to Albertus and Aristotle's ethical motion within the community; there lay an obligation upon perfect communities in granting assistance to those nations wherein 'blockages' or impediments arrested the 'perfect' autonomy bestowing<sup>61</sup> motion of ethical subjects (i.e. citizens). It was within the power of the legislator and his skill in formulating the law to actualise the community's perfection through directing the conduct of citizens, in order to make them good and just.<sup>62</sup> For the Indian, perfection was still a possibility if they were able to accept their position within Humanitas.

Through the potential to be saved, if holding to proper Christian belief, the Indian enters into the universal category of Humanitas, qualifying him for legal status and natural rights. The portrayal of the Indian as pure victim was in no small part due to the foundational violence of Spanish colonialism; Vitoria considered the Indian as needing to be saved not only from his imperfect ways, but also from the destructive logic of the perpetrators of violence – the Spanish colonisers. And so the Indian as 'victim' was able to take the place of the other which acts as foundational for ethics and politics.<sup>63</sup> The logical conclusion of the 'genocidal' excess of the conquistadors was an exclusionary violence resulting in the extinction of the other: there was simply no place for the Indian within the Spanish world. However, within Vitoria's legal system, relational violence becomes less exclusion, more 'integration into the self-same world'.<sup>64</sup> In gaining admittance to the Spanish world, the Indian-as-victim could be a future beneficiary of the Spaniard's tutelage and guardianship (derived from the Roman civil law, or *ius civile*). This went hand in hand with the suppression of the Indian-as-victim's political agency, as his society and governance structures were made to conform to a universal jurisprudence in which normative standards were set by the Spanish. Moreover, the overt violence of the conquistadors would become internalised and meaningful within a system in which the disciplinary and 'ontological violence' of the other's inclusion took the place of the exclusionary violence of total annihilation.<sup>65</sup>

To put it in terms that continue and extend Albertus' geographical imaginary, Vitoria theorised a way in which Amerindian societies could be folded back into the molar legal institutions of Spanish imperialism. The latter now had a claim (in jurisprudential terms) to exercise control over the earth, in the sense of dominion extended outwards over the hitherto un-ordered and fertile lands of the Americas. Through the admission of the Indian into a mutual affordability with the heavens, cosmic-cum-molecular transformability based upon the finitude or transitory nature of form could be replaced with 'the promise of a narcissistic fusion with the absolute'.<sup>66</sup> In a sense, the potential perfectibility of Amerindian nations contained the hope of re-channelling the Indian's personality, so as to direct it towards a cosmic absolute (in the form of the Godhead). In which case, to abandon the Indian to the un-ordered earth (in its fertile depths hidden *below*, in opposition to the managed and ordered earth-as-surface seen from an elevated position *above*) would essentially be to accept his damnation and inevitable fall from Humanitas. On the

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<sup>58</sup> From the previous Part, the model consists of 'intelligence, spirit and skill' (Albertus' interpretation, directly from Aristotle). The structure is preserved, but re-interpreted by Vitoria via Aquinas as reason, will and intelligence. The 'appetite' is a sub-category modulated by the relationship between three principal elements.

<sup>59</sup> Vitoria, p. 218, 222

<sup>60</sup> *Ibid.*, pp. 222, 225

<sup>61</sup> *Ibid.*, p. 158

<sup>62</sup> *Ibid.*, p. 222

<sup>63</sup> Jan Nayar, 'The Politics of Hope and the Other-in-the-World: Thinking exteriority', *Law and Critique* (vol. 24, 2013), p. 65

<sup>64</sup> *Ibid.*, p. 66

<sup>65</sup> Ben Golder, Victoria Ridler, Illan Rua Wall, 'Editors' Introduction: 'The Politics of the Border/The Borders of the Political', *Law and Critique* (vol. 20, pp. 105–111, 2009), p. 110

<sup>66</sup> Félix Guattari, *Psychoanalysis and Transversality: Text and interviews 1955-1971*, Semiotext(e) (2003), p. 233

other hand, in choosing to accept his position as part of a planetary jurisprudential system, the Indian could still transcend his victimhood as a subject-willing-to-be-ordered.

To speak in more general terms, through the construction of his legal system Vitoria posited a foundation for law that could adapt to the event so as to contain and manage it. Through his jurisprudence, he was able to reset the normative boundaries of the Spanish world (or legal order) so as to re-posit it as a completed totality in imperium (in juridical terms, the ‘commonwealth’). Thus, it was for the Spanish state to initially acknowledge an exteriority that was outside its control in order to, through a process of constructivist recognition, ultimately include, contain and assimilate. To put it another way, it was only through responsiveness to the initial contingency of the encounter, in the inclusion of the excluded other, that a concentric-diametric system of legality could ultimately act for its own self-preservation.<sup>67</sup>

## Chapter Two: The Indian’s ‘Unrecognisable Shape’

In encountering the Indian, the conquistadors and early colonists found themselves somewhat perplexed. A curious observation at the time centres on remarks concerning the ‘form’ or ‘shape’ taken by the Indian. Intriguingly, the Indian was seen to have possessed an ‘unrecognisable shape’<sup>68</sup> (a ‘xenomorph’). This is very much supported by the evidence recorded by Dominican friars, such as Zonta,<sup>69</sup> who confirmed the widespread circulation of myths in vogue amongst the colonists. A popular myth, which gained traction, held that the Indians were human merely in appearance. The Indian, it was supposed, only took on the guise of being human. Certainly, the Spanish captains setting forth to the Americas seem to have been predisposed to seeing any number of ‘mythical’ and invented beings during and after their conquests.<sup>70</sup> Despite the seemingly fantastical fixations of the colonists, they had nevertheless managed to give utterance to the opening salvos of much wider philosophical inquiries.<sup>71</sup>

The issue regarding the Indian’s form, once raised, caused much disagreement even amongst the colonists themselves. One controversial viewpoint, given prominence by the theologian Sepúlveda (although he offered later a partial retraction based on semantics) during the Valladolid debates with Las Casas, categorised the Indian as more ‘animal’ or ‘beast’ than ‘man’.<sup>72</sup> Maintaining an allegiance to this position proved to be challenging, as it flew in the face of the theological orthodoxy adhered to by religious interests such as the Dominicans. Certainly, the prevailing view was aptly represented by the bishop Antonio de Montesino in his acclaimed sermon on Hispaniola in 1511. Against the colonists, he gave vent with the cry: “Are these Indians not men? Do they not have rational souls?”<sup>73</sup> The exclamation proved to be a galvanising starting point to the Dominican project of fighting the colonists theoretically on the Indian Question. Alternatively, colonists fell back on the position that the Indians were men, but of a lower species – an anthropological type of ‘Homo monstrosus’.<sup>74</sup> This only served to emphasise the ambiguity at the heart of the Indian’s form. Moreover, this lent further credence to the thought that the Indian occupied some murky ontological realm falling between more distinct categories – between animal and man. This ostensible resistance to a coherent classification induced in the colonists a distinctive Proustian anxiety. The Indian constantly – and alarmingly – revealed hidden selves, while suggesting yet others, unknown and unknowable.<sup>75</sup> His primary manifestation appeared to be that of an eerie stranger, of being *incognito*.

In addition to some of the epistemic questions raised by the colonists, another prominent issue concerned the Indian’s fragile psychology. This was seen to be borne out by the Indian’s erratic

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<sup>67</sup> One could say the ability of Vitoria’s spatially organised jurisprudence to contain or absorb events echoes that of the concentric dualism (combined with the diametric). Hans Blumenburg (p.80) describes this post-Copernican paradigm as ‘the construction of a topographic-schematic center’ with ‘concentric relations to it.’

<sup>68</sup> Pagden (1982), p. 25

<sup>69</sup> Hanke (1994); p. 132; Staden, lxi

<sup>70</sup> Lewis Hanke, *Aristotle and the American Indian: A study in race prejudice in the modern world*, Indiana University Press (1975), pp. 2–3

<sup>71</sup> Staden, xxx–xxi

<sup>72</sup> Hanke (1994), p. 85, and (1975), p. 48; Bracken, p. 35

<sup>73</sup> Hanke (1994), p. 4

<sup>74</sup> William Arens, *The Man-Eating Myth: Anthropology and anthropophagy*, Oxford University Press (1980), p. 33; Staden, lxiii, lxxii. Also see Stuart Elden, ‘The Constitution of the Normal: Monsters and Masturbation at the Collège de France’, *boundary 2* (no. 28, 2001a), pp. 91–105.

<sup>75</sup> Marcel Proust, *In Search of Lost Time*, trans. Carol Clarke and Peter Collier, Penguin Books (vols. 5 and 6, 2003), Introduction, xxii

behaviour, primarily recorded in various ethnographic literature drawn up by Jesuits as well as the Dominicans.<sup>76</sup> Attitudes were exemplified through a constant refrain of the colonists themselves, espoused by Diego le Cruz in this instance, that the ‘Indians are not stable persons’.<sup>77</sup> It alluded to the worry that the ‘disharmonious’ psychology of the natives (following Albertus) was beyond being ‘perfected’ to the degree required to accord with the set normative standards of the Spanish establishment. Indeed, the supposed inadequacies of the Indian’s will (as a constitutive part of the tripartite rationality) to commit to a judgement or belief, or to convey consistent behavioural patterns, suggested the failure of indigenous institutions to reach the standards of developed rationality conducive to the harmony of perfect ethical beings. On this interpretation, a disharmonious personality was symptomatic of an imperfect ontological form.

The colonists’ hypothesis that the Indian’s psychology was beyond the scope of the established institutions of the Spanish state to remedy (or ‘perfect’) was anathema to the Dominican mainstream. The Dominican friars, as gatekeepers to the Indian soul, needed a stable subject capable of salvation. They simply had no truck with the notion that the native’s personality could never be made, and rather failed to conform to the molar institutions of the Spanish establishment. The very real anxieties lying just underneath the theoretical conflict between leading Dominicans and the colonists (and a minority of allied missionaries) intimated the weighty significance of the philosophical disputes that arose out of the context of encounter.<sup>78</sup> The colonists’ appraisal of the Indian threw up questions of normativity, potential perfectibility and the nature of humanity, which demanded a response. Let us now turn, in greater detail, to the colonists’ thoughts on the matter of the Indian Question, as it requires due consideration, and will provide us with a better understanding of exactly what Vitoria tried to circumvent in his own evaluation of the Indian psychology.

The conquistadors’ (henceforth I use the general term ‘colonist’) or discoverers’ initial thoughts could only reveal the inadequacy of preconceived frameworks to suitably locate the Indian in the Spanish world. These Europeans, ‘configurers’ or fixers of worlds, were presented with a stubbornly strange or unknown world that confronted them with the ‘power of lived experience’ over the theoretical claims of the past.<sup>79</sup> In short, they were faced with a ‘discovery’ in all of the empiricism that it entailed. After all, the term ‘discovery’ derives from the Latin *disco-operio*, meaning ‘to uncover or expose to the gaze’.<sup>80</sup> In many ways, the capturing power of visuality over the New World paralleled the form-imposing powers of Arab optics for Albertus.<sup>81</sup> In this instance, the gaze of the discoverer denoted a mode of possession over the planet, the entire orb as exposed to the powers of the colonist to potentially shape what they saw.<sup>82</sup> Whereas for Albertus the established design or pattern of the world depended on the emanation of light from the distant stars of the heavens, the colonialist could more directly *see* or visualise the potential expansion of the Spanish establishment into the New World. However, in perceiving the Indian through colonial eyes, an issue now lay with the colonist’s own ‘category error’. This error to satisfactorily place what was before them, and the subsequent ambiguity this gave rise to, demonstrated the radically incomplete nature of a past<sup>83</sup> that could not completely grasp the events of the present. For the early

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<sup>76</sup> The sixteenth-century ethnographic literature, mostly consisting of state-directed socio-psychological research, were records not only deriving from the Jesuits in Brazil, and the Dominicans (for the most part) in the rest of Latin America, but from significant compilations of second-hand accounts put together by French colonists in Amazonia. Of the latter, the most prominent is Jean de Léry, whom the anthropologist Levi-Strauss considered a forerunner of modern ethnography. See Staden, xli–xlvi

<sup>77</sup> Hanke (1994), p. 26. Jerome Gordon (1501–1576) shared this view; see Margaret T. Hodgen, *Early Anthropology in the Sixteenth and Seventeenth Centuries*, University of Pennsylvania Press (1964), pp. 376–7

<sup>78</sup> Staden, xli

<sup>79</sup> Anthony Pagden, *European Encounters with the New World: From Renaissance to Romanticism*, Yale University Press (1993), p. 89. The power of the empirical ‘discovery’ was championed by the humanists, such as Erasmus, and ethnographers such as the French missionary André Thevet, as a force that could expand the limits of (and, indeed, liberate) knowledge. The ‘incomplete’ or partial nature of the past was revealed by experience of new phenomena, which suggested the inability of scholasticism based upon classical thought (i.e. from antiquity) to fully explain the world as a ‘completed’ entity.

<sup>80</sup> *Ibid.*, p. 5

<sup>81</sup> According to Albertus, sight also ‘serves for discovery’. See Albertus (2001), p. 58

<sup>82</sup> The colonist’s notion of possession through discovery is dealt with by Vitoria (pp. 244–5), who discredits the *terra nullius* as a stand-alone argument capable of overriding the Indian’s claim to dominion. Also see Sven Lindqvist, *Terra Nullius: A journey through no one’s land*, Granta Books (2012), for a further explication of the *terra nullius* argument in the context of the aborigines of Australia.

<sup>83</sup> Pagden (1993), p. 94

colonists to maintain an open mind to or gaze upon the Indian was to accept him as defying existing ontological categories. In other words, to analyse the Indian in his own terms would be to defy the stable categories underpinning the Spanish world. Thus, the theoretical groping around to designate the Indian as 'animal' or 'beast' was part of an effort to articulate the notion that the Indian lived in another world entire and inaccessible to the Spaniard.

The 'unrecognisability' thesis' central claim lay with the unstable nature of the Indian's personality and its implications for the missionaries' proselytising project. According to the anthropologist Viveiros de Castro, the Portuguese Jesuits faced many difficulties in the process of converting the Tupi indigenous societies of Brazil to Christianity. A dominant motif concerns the Indian's resistance to doctrine; while many of the Indians would avidly assimilate new forms of thought, they would just as easily relinquish teachings to take flight and look for refuge in nearby forests. The Jesuits blamed the Indian's 'inconstancy' for the initial failures of doctrine to take root.<sup>84</sup> At the heart of the matter was the Indian's openness to the constant acquisition of 'new forms': a type of perpetual shape-shifting which revealed the contingency inherent to his very soul. This contingency almost seemed to intertwine the Indian with the sinuous and fertile nature of his exotic lands.<sup>85</sup>

Many of the Jesuits' written opinions on the 'inconstancy' of the Indian correspond with the Spanish colonists' unrecognisability thesis. The Indian's nature seemed a challenge to stabilised forms of social institutions (such as Crown, conjugal family, Church) based firmly upon habituation. Hence, the Jesuits were quick to scrutinise the unruly habits that the native seemed to possess; alongside demonstrations of 'disinterest' and 'forgetfulness' Indian men seemed to pursue wives, wars and intoxication with excessive zeal.<sup>86</sup> The temptation was to conclude that indigenous society simply did not display the firm normative grounding for conversion to Christianity to flourish.

The Indian's inconstancy was closely associated with a long-standing conflation of nomadism with disorder. In the Christian tradition, this evokes some of the more outspoken medieval canonists' opinions on Muslim infidels as 'untamed animals of the field' whose nomadic sensibilities placed them beyond the ambit of normativity.<sup>87</sup> In like manner, the colonists identified the Indian's inconstancy with the excessive emigrative movements of nomadism, in contrast to the stabilised forms of order of the Spanish state and cities. The Indian's nomadic nature seemed well suited to the 'magnificent irregularities' of the earth.<sup>88</sup> However, it was precisely these lines of communication that the Indian held with his constantly shifting surroundings (the forests that Viveiros de Castro notes the Indians regularly fled back to) that hardened him against a definitive acceptance of doctrine. If the Indian could not be pinned down, the question arose: was he beyond the pale of salvation? The Dominican bishop and first biographer of Columbus, Agostino Guistinuani, noted that some Spanish colonists believed the Indian's capacity for conversion was 'very slight'.<sup>89</sup> Many colonists seemed to have had a great readiness to accept that the Indian could not be subsumed within a recognisable normative order. This downbeat assessment of the Indian personality, which seemed to evade the capture of categorisation, put the viability of conversion in grave doubt. On this account, the Indian was simply too changeable to commit himself to Christianity.

The argument from the point of view of the colonists can be considered in another way. This centres on the Indian's inability to put forward a recognisable 'counter-universality'.<sup>90</sup> In positing the latter, the Indian could well have advanced his own alternative categorisations of, for example, what constituted humanity and what did not. In comprehending the lines of exclusion and inclusion that defined the Indian's thinking on the nature of man, he could take on a discernible shape in the eyes of the colonist. Once the Indian idea of universality was understood, it would only be a matter of persuading the

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<sup>84</sup> Viveiros de Castro principally cites the Portuguese Jesuit missionaries (see footnote below). However, their claims were also corroborated by the Spanish Dominicans and colonists; for example Governor Nicolás Oviedo put forward the standard formulation: 'the faith had been preached to them before; they had *accepted* it, and then fell back into idolatry...' (emphasis added). See Hanke (1994), pp. 8, 90, 98

<sup>85</sup> Eduardo Viveiros de Castro, *The Inconstancy of the Indian Soul: The encounter of Catholics and cannibals in 16<sup>th</sup>-century Brazil* (trans. Gregory Duff Morton), Prickly Paradigm Press (2011), pp. 3–5, also see Pagden (1982), p. 35; Hanke (1994), p. 121; Quijano and Wallerstein, p. 552

<sup>86</sup> Viveiros de Castro (2011), p. 9

<sup>87</sup> Muldoon, p. 19; the quote is from the medieval canonist Oldratus de Ponte.

<sup>88</sup> Pagden (1993), p. 150

<sup>89</sup> Hanke (1994), p. 19

<sup>90</sup> See Judith Butler, Ernesto Laclau, Slavoj Žižek; *Contingency, Hegemony, Universality*, Verso (2000), pp. 102, 316, 318

Indian of the falsity of his beliefs. This would make him more accessible to the missionary, and more susceptible to the arguments of the gospel. However, as we have seen, both the Portuguese Jesuits and Spanish colonists hinted that the chief problem concerned the Indian's lack of belief in the idea of universality itself.<sup>91</sup>

A common hypothesis in this regard was the idea that the Indian's language could not make use of universals since he could not conceive of them. Thus, the Indian-savage's unmediated relationship with the *given* nature of the world shaped the development of his capability for speech and language. The 'natural man' was able to describe unmediated the instantaneous sensations emanating from the *given* flux of the natural world; the vital mediation of ideas simply did not factor into his processes of speech making. In Locke's account, the natural man has no access to 'abstractions or universals' and so their language cannot reflect the logic inherent to the speech of European man.<sup>92</sup>

The Indian's speech-act was merely a way to capture the *immediacy* of the image of the surrounding world.<sup>93</sup> It was an attempt to grasp the totality of a perception, without the prerequisite 'decomposition' (see below) which characterised the cognitive processes of the European man. The Indian's discourse, in representing the totality of perception or the immediacy of the image, seemed almost completely indeterminate.

On the other hand, European languages were mediated through ideas not immediately accessible via the senses. This mediation allowed for structured, reflective thought. The process was initiated through decomposition – the breaking up of the immediate wholeness or fusion of sensation into an organised linearity. In ordering perception or received sensation into a linearity, images were gathered into a continuous but distinguishable sequence.<sup>94</sup> The sequence was a result of the taking apart and reconstructing of reality through the use of abstract concepts – abstracted common qualities and natures (i.e. universals). The *de*-composing process thus sealed sensation into the self-same, closed totality of the linear sequence. The result was the conformity of the surrounding world with the cognitive faculties.

By contrast, the Indian's perception in its totality had an open-ended relationship with the shifting environs. It seemed to follow that his perception could only be a radically incomplete one. In other words, the Indian's speech was reflective of the incompleteness of the world he perceived. In being immersed in the immediate, perception cannot be contained within a determinate or enclosed totality. The Indian's language was therefore reflective of his psychology. The indeterminacy in his speech corresponded to the indeterminacy of the (unmediated) *given* or his constantly shifting world. Proof of this could be seen in the Indian's fusion of 'pronoun, verb, substantive, adjective, noun' into an indistinguishable continuum.<sup>95</sup> The natural man was therefore reduced to a dependence on an over-indulgent use of particulars to describe his world, something which seemed to intimate a limited knowledge of any stable, complete(-d or perfect) reality. From a theological standpoint, this could only be a considerable challenge for Dominicans considering the reliance of Christianity upon universal categories.<sup>96</sup>

From the previous argument, it is clear that the Indian's acceptance of the *given* in all its immediacy and flux is the chief problem which destabilises or de-harmonises his personality. This rendered it unrecognisable to a European ontology, which fundamentally had universality and perfectibility at its heart. The Indian was thought to be unable to think universality, let alone posit an opposing or counter-universality through the articulation of alternatives capable of contesting European categories. We can then re-term the issue as that of the radical ontological incompleteness of the Indian.<sup>97</sup>

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<sup>91</sup> In the metaphysics of Christianity the soul is the properly constructed element and the basis of difference (i.e. between man and animal-other). The universality of Christian concepts is thus based on excluding that which is man's nature from that which is not (the soul as spiritual and universal power or essence contra animal corporeality). From the Indian perspective universality exists, although it is mediated through the body which is the site of a constructed particularity and hence the source of difference, and as such can dictate qualification to a *virtually* universal personhood. This type of *immanent* Amerindian concept could not be the basis of institutions consistent with the *transcendent* universality of the Spanish Dominicans. See Viveiros de Castro (2012a), pp. 114–5

<sup>92</sup> Pagden (1993), p. 128. Note too that Rousseau and Montaigne were influenced in their 'philosophical musings' by ethnography on the Amerindians; see Staden, xli–xlii

<sup>93</sup> Pagden (1993), p. 130

<sup>94</sup> *Ibid.*, p. 132

<sup>95</sup> *Ibid.*, p. 131

<sup>96</sup> *Ibid.*, p. 132

<sup>97</sup> Viveiros de Castro (2011), p. 47

From the viewpoint of the colonist, as we have seen, a rejection of totality could only take on pejorative connotations. However, in Viveiros de Castro's estimation, we can read the Indian's inconstancy or unrecognisability as an affirmative acceptance of incompleteness. By implication, it is a rejection of the 'perfect being' or perfectibility as the basis of the institutions of society or culture. The Tupinambá, and in our case more generally the Indian's, 'philosophy affirmed an essential ontological incompleteness: the incompleteness of sociality, and, in general, of humanity.'<sup>98</sup>

The Indian's initial openness to the missionary doctrine, as Viveiros de Castro understands it, suggests the fundamental place of the other in Indian society.<sup>99</sup> The Dominican Las Casas confirmed a similar reception from the Indians in Spanish-controlled territories.<sup>100</sup> For the Tupinambá, the other was welcomed as the basis of the molecular-becoming constitutive of Indian society; stabilised social forms were jettisoned in favour of an operative openness to the other. The Indian did not subscribe to a closed definition of his own being *against* that of the other, but accepted the other as a way to re-introduce contingency into his own being. Here, the other does not reaffirm the universal scope of one's own humanity, but on the contrary reaffirms the falsity of pre-determined definitions that aspire to fixity (or transcendence). Thus, it is only through the incorporation of the other that one can properly 'exit' oneself, and so nullify the temptation to posit oneself as a stabilised, self-contained being.<sup>101</sup>

We can then interpret the Indian's initial openness to Dominican or Jesuit missionaries as embodying the harnessing of the contingency emanating forth from the encounter. The accommodation of the European 'other' (re-)stimulated the molecular-movement inherent to Indian communities. To put it in other words, Indian society can be conceptualised as the constant movement towards the outside/exteriority of the other. In moving towards the outside, the inside/interiority is continuously redefined. The indeterminacy involved in defining oneself, as one continuously seeks the encounter with the other, is the foundation for repeatedly thwarting the inception of the belief in a universal nature, in the sense of abstraction or transcendence (i.e. the nature or essence of man *as* humanity).<sup>102</sup>

Conversely, we have seen that the process of de-composition breaks down the capacity of leaving or 'exiting' oneself which the encounter with the other engenders. For the Indian, the other is inexhaustible in its potentiality to destabilise reality and perception. It is the capacity to destabilise or rupture that prevents perception from closing in on itself, from being 'completed' or perfected, and thus becoming a self-referential loop. The other preserves *the given* as a *given* or the flux of sensation which renews being. In engaging with the *given*, one must move out of oneself to leave a previous form behind. In the paradigm of de-composition, perception, in becoming a closed totality, merely assimilates the other in a bid to preserve its own stability. De-composing, in ordering the sensations of the immediate wholeness of reality (into abstract categories), negates the capacity of the other to renew the self. Experience becomes a unity in which abstracted concepts and common qualities define the nature of reality. Perception is no longer about leaving or shedding a former mode of being, but about the movement inwards which stabilises the singular subject ('personality' with its constituent elements).

We can read into the Indian's open totality of perception the desire to uphold communication with the outside. The outside corresponds to that which lies just beyond ordered de-composed experience, and that which is significant for the perception of any new, unregulated sensations. In light of this, we can consider the outside as the realm of the un-ordered.<sup>103</sup> The un-ordered is a 'residual domain' that consists of 'a superabundance of possibilities that have been levelled down to the status of the irrelevant or unimportant'.<sup>104</sup> It was the Indian's wish to maintain contact with the other that invited in and even accommodated the un-ordered within his world. Here, we start to unravel the 'strangeness' of the Indian's hidden nature – his *incognito*.

The order of experience, through the process of de-composition, ensures that what is exposed to the gaze is more or less recognisable as something due to its perfect or at the very least perfectible mode

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<sup>98</sup> Viveiros de Castro (2011), p. 47

<sup>99</sup> *Ibid.*, p. 46

<sup>100</sup> Hanke (1994), p. 73, pp. 102–3

<sup>101</sup> Viveiros de Castro (2011), p. 47; Viveiros de Castro (2012b) p. 29

<sup>102</sup> Viveiros de Castro (2012b), p. 32

<sup>103</sup> Lindahl, p. 157. Lindahl adopts for the notation 'unorderable'; however, I shall continue to use my own notation of 'un-orderable' through the entirety of this manuscript, although referring to one and the same concept.

<sup>104</sup> *Ibid.*, p. 157

of being.<sup>105</sup> What is perceived, in residing in an ordered reality, is what is relevant and important to us. That which is irrelevant and unimportant remains unperceived, i.e. is subject to the domain of the un-ordered beyond the confines of determinate reality. For the Indian, on the other hand, the realms of order and the un-ordered feed into each other in the immediacy of *the given*. The Indian sensitivity to the *given* ensures that determinate order cannot take hold of a reality in which the un-ordered remains perpetually open (as opposed to open only some of the time, which is commensurate with a determinate, stable order that only changes over long periods of time).<sup>106</sup>

The Indian's *incognito* or hidden form, as well as his disharmonious personality, is therefore a result of his relationship with the un-ordered. What is rendered relevant and important for him is as quickly made irrelevant and unimportant. To put it another way, the Indian is unknowable precisely because he sheds his form as quickly as he obtains new ones. The native's *incognito*, his mode of appearing,<sup>107</sup> has a constitutive relationship with the un-ordered. In terms of the Indian's behaviour, this can be recognised in the accounts we have noted. As the colonists and supporting missionaries considered the matter, the native's 'disinterestedness' in behaving in line with doctrine demonstrated a disregard for belief. This is also Viveiros de Castro's view, in that he sees the Indian as having a suspicious regard for belief itself.<sup>108</sup> Conversely, what is now readily apparent is the Jesuits' intuition that the Indian could only be converted once and for all when he conformed to habits that could induce a stable personality. This way, he could finally be forced to reveal himself; he would be uncovered and rendered knowable.

The inconstancy of the indigenous personality can then partly be explained by his 'a-legal' behaviour. The early colonist's initial inability to explain the Indian's behaviour and the concern over his repudiation of doctrine attest to this. Hence, it is possible to see the 'normative challenge'<sup>109</sup> issued by the native to his captors. This is the defining trait of a-legal behaviour: it is the questioning of normativity itself from a domain of experience beyond it. What is fundamentally placed into question is the 'disjunction' between legal and illegal that characterises the normativity of legal orders – in this instance the Spanish state based on dominion and the Church as the 'establishment' from the point of view of creative institutionality. The Indian's behaviour cannot properly be described as falling into this disjunction. To elaborate, the Indian's experience of the other/the un-ordered realised a gushing array of possibilities beyond the recognition of those that make up the determinate reality of the Spanish world (one could say it is beyond Albertus' mutual affordability and the management of risk this implied). The colonists' critique of the native's behaviour and associated psychology was an admittance of his 'other-worldly' order of experience. Because of the absence of a common standard of perception and experience, the Indian had no way of admittance to the Spanish world. In the latter, only certain possibilities were admissible – those that conformed to the framework of state institutions and its associated normativity. Man, after all, in order to be considered such, had to exercise his powers as a creator of artificial worlds.<sup>110</sup> In contradistinction, Indian society seemed to reject this artificial scarcity in favour of a surfeit of possibilities – those that, seemingly, could not possibly be ordered into a coherent normative legality.<sup>111</sup>

We can go further here and suggest another qualification, namely that the Indian's behaviour equates to a 'strong' form of a-legality. The strong variety of a-legality denotes behaviour that is un-ordered *and un-orderable*.<sup>112</sup> In other words, the native's very different order of experience disqualified him, in absolute terms, from being integrated into the Spanish normative framework. Here, we can invoke the colonists' pessimism once again in restating the view that the Indian could not be converted, nor his unruly habits corrected. The native's behaviour was not simply a claim to perfectibility, in this view, but an outright rejection of (normative) inclusion.<sup>113</sup> To put it another way, he refused to be contained and to seek his possibilities within the Spanish realm of experience. His behaviour marked an affirmative decision to remain separated or excluded from Spanish normativity. The so-called 'natural

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<sup>105</sup> It is the trajectory or movement of the perfect being that is understandable through constructivist recognition, due to its stable or regulated nature.

<sup>106</sup> Lindahl, p. 157, pp. 209–14

<sup>107</sup> Viveiros de Castro (2011), p. 9

<sup>108</sup> Ibid., p. 43

<sup>109</sup> Lindahl, p. 165

<sup>110</sup> Pagden (1993), p. 124

<sup>111</sup> Lindahl, p. 165

<sup>112</sup> Ibid., p. 165

<sup>113</sup> Ibid., p. 165

man' was just too inconstant, too changeable (one could say a psychotic, cut off from a determinate reality) to ever wish to accept the rules of a stabilised legal order. To paraphrase Diego de la Cruz, the inclusion of the natives would require an authority over them that the missionaries simply did not have.<sup>114</sup>

The Indian's a-legality is indeed what determines his 'strange' mode of appearance, as he seemed to emerge from the 'fringes of space and time'<sup>115</sup> on the Spaniard's horizon. In this, he took on the manifestation of 'otherness-as-strangeness'<sup>116</sup> for the colonist. His destabilised psychology, and hence a-legality, was very much an attribute of his continued link to the un-ordered, beyond the colonist's range of perception. It is therefore not a surprise that the native's realisation of a never-ending stream of possibilities could only defy the comprehension of the colonist. For the Dominican theologians who undertook the responsibilities for conversion, the colonists' claim that the native would remain unknowable was to throw down the gauntlet. Moreover, if the Indian experienced the other as a destination<sup>117</sup> that needed to be continually traversed, in the colonists' eyes the other could only appear as a strange figure openly defying the *cogito*.

### Chapter Three: The Indian's Now-Orientation

An argument closely related to the 'unrecognisability' thesis concerns the assumed deficiency of the Indian's memory and will.<sup>118</sup> We can identify this as a type of derivative argument, in the sense that it is a continuation of the scrutiny on his personality – the analysis of which was a major consideration of the Indian Question. We can subsequently trace the discussion as it shifts from the 'inconstancy' of personality to the corollary issue of the incapacity of the Indian to project himself in time.<sup>119</sup>

To pick up the thread of the argument from the previous chapter, of considerable concern to the colonists was the native's resistance to doctrine. This was documented in the written testimonies of colonists such as the Franciscan Bernardino de Sahagún, who expounded on their conspiratorial treachery. Accordingly, they did 'not give up their gods...and...continue[d] to pay them service through clandestine offerings and celebrations'.<sup>120</sup> This touched upon another worry of the colonists and missionaries, namely, the intensive and unbounded zeal of the Indian in living only for the present. This necessarily entailed forgetting the habits sanctified by doctrine and showed a lack of prudence in thinking through the future consequences of debauchery. Hence, to complement Sahagún, the missionary Francisco López de Gómora noted that the Indian was 'prone to "novelties", drunkenness, vice, and fickleness'.<sup>121</sup> The natives' lack of foresight in reflecting upon their actions was seen to result in their dire situation, as they appeared to be 'content with very little; they do not store up things for their children'.<sup>122</sup> It seemed that the Indian's unbridled appetite was responsible for the diminution of the other elements of the tripartite rationality (namely, will and intelligence).

The Indian's disposition seemed to be wholly guided by the novelties of the 'here and now', and yet his actions also suggested a strange repetitiveness. To expand on the latter point, he seemed to be caught in a cycle of 'eternal recurrence' through which the passionate excesses of drinking, dancing and vengeance held sway. Presumably from the Indian's perspective many of his intensive activities would have taken on the aspect of the 'novel', in the sense of being subject to the pre-de-composed sensual flux (the *given*) of the present. From the colonists' perspective, the native was very much stuck, or rather enslaved by his immediate orientation, moored in the present. The savage seemed to possess neither an 'obvious past' (or history, personal or societal) nor an 'imaginable future'.<sup>123</sup> His actions were completely submerged in 'now-time',<sup>124</sup> the time of the eternal present. Behaviour directed solely by the perception of the present could only be ruled by impulsive passions, since 'there is no tomorrow'.<sup>125</sup> The creative

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<sup>114</sup> Hanke (1994), p. 26

<sup>115</sup> Arens, p. 40

<sup>116</sup> Ibid., p. 157

<sup>117</sup> Ibid., p. 47

<sup>118</sup> De Castro, p. 8

<sup>119</sup> Bracken, p. 25

<sup>120</sup> Hanke (1994), pp. 126–7

<sup>121</sup> Ibid. (1994), p. 124

<sup>122</sup> Ibid., p. 128; the quote is from the colonist Chaves Y Guevara

<sup>123</sup> Pagden (1993), p. 152

<sup>124</sup> Bracken, p. 213

<sup>125</sup> Hanke (1994), p. 133; the position quoted is from the Spanish judge Juan de Montienzo and echoed by Sepúlveda, see p. 46

energies of today existed merely to be exhausted in consequence of the non-existence of tomorrow. In light of this, the colonist Antonia de Villiante summed up many of his colleagues' feelings when he claimed that if the Indian was left to his own devices, he would revert to the idleness of his present-orientation.<sup>126</sup>

The point of view of the colonist on the question of the Indian's memory can be recast as an argument conforming to what the anthropologist Christopher Bracken terms 'the tale of two sorts'.<sup>127</sup> The theory has its best-known modern source in the writings of Adam Smith, a representative of the Scottish Enlightenment whose modelling is in part an attempt to describe what divides savage man from civilised man. It theorises the disjunction that distinguishes two types of people, primarily interpreted as economic actors equipped with foresight capacities. People of the first type are able to project themselves into the future, an ability which enables them to successfully calculate the outcomes of their economic productivity. As they are future-orientated, they can attune their behaviour so it is in line with their projection. They therefore lean towards frugality, and choose to make reasonable decisions to invest in the future through the accumulation of resources. The second type of actor is stuck in the moment, in the hopeless eternity of the present. They are wasteful, consuming an excess of 'value' in a scarcity of time.<sup>128</sup> In this second, unsuccessful type of actor, we are able to recognise the colonists' depiction of the native as present-orientated.

For the successful economic actor, to project oneself in time is to realise a future orientation that can properly be described as 'anticipatory'.<sup>129</sup> To anticipate is to reduce the future to a manageable set of possibilities, so that one can proceed to choose between them. The exercise of finalising a decision between the possibilities the mind has presented one with is to logically work at negating and containing possibilities that are not chosen. Conversely, the present-orientated sort, such as the savage, can have no relation to the future, as every day is the same for them. They are today what they have always been.<sup>130</sup> The Indian could not, therefore, project himself into the 'horizon' of his possibilities as he could not perceive a determinate, manageable number of possibilities to choose between. In the reign of indeterminate possibilities, projection has no way of taking place; its condition is the prior constriction of possibilities. To be a 'savage' is then to expand the horizon of possibilities to near infinity; and to be civilised is to restrict these possibilities through continuous negation of those that are not relevant or important.

For the Indian, despite every day being the same, the day can still lay claim to the 'novelty' derived from the context of an eventful present. Hence, he can be said to be an extra-temporal being confined to a present of unmediated sensations and impressions. So it seems that he is passionate, yet disinterested. He is disinterested due to the fact that determinable possibilities can exert no influence over him. Yet he is governed by passions that entice him to indulge in unproductive labour, such as, for example, dancing. This attests to a continued commitment to experiencing a surfeit (or excess) of sensations. The excessive nature of activities such as dancing can be considered a marker denoting 'recourse to savagery' which 'bars access to futurity'.<sup>131</sup> The wasteful use of energy that accompanies immersion in a context drains away the cognitive energy that is required for the process of projecting oneself in time. As the Indian lives through a time of constant events without duration or temporality, futurity remains inaccessible.<sup>132</sup>

The act of projection is important in ensuring that the future displays continuity with the past. In other words, to fix the possibilities realisable in the future is to make certain that the future resembles the past in a predictable way. Futurity (the 'will' in the parlance of the Jesuits) and memory are therefore closely aligned; to shape a determinate future is to reduce reality to how one always remembers it. In the case of the 'prodigal',<sup>133</sup> Indian, his appetites could not be contained within this temporality, the realm proper to determinate, relevant possibilities. He thus relived the present in its perpetual novelty of impressions, and acted as if the world were created anew every day. Naturally, if the world is continually

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<sup>126</sup> Hanke (1994), pp. 9–10

<sup>127</sup> Bracken, p. 23

<sup>128</sup> *Ibid.*, p. 23

<sup>129</sup> *Ibid.*, p. 23

<sup>130</sup> *Ibid.*, p. 24

<sup>131</sup> *Ibid.*, p. 37

<sup>132</sup> *Ibid.*, p. 31

<sup>133</sup> *Ibid.*, p. 32

created afresh, one can only forget the excesses of an equally non-existent yesterday. We can impute from this that now-time appears to be the realm in which a continuous variation of possibilities is disclosed. This seems to chime with the view that the ‘savage’ had no perception of a stabilised, continuous reality. The only stability he perceived was the stability of a world of discontinuity, of a reality prone to continual ruptures.

To be civilised is to positively erase the ‘eternity’ harboured (by the savage) in the present. To be a public benefactor is to be mindful of the exhaustible nature of reality. Correspondingly, to act in a frugal manner is to be of benefit to others: he who acts frugally does not drain away the possibilities of others (through his poverty and dependence on others) but adds to it through his industry and wealth. On the other hand, the excess of the Indian, or his prodigality, intimates a movement towards savagery; it is the ‘becoming-savage of savagery’.<sup>134</sup> The surfeit of appetite of the savage can be seen to restrict the capability to *settle* on financial or economic plans (i.e. investing in the future). Overall, the basis of savagery is to conceive of a reality that is overly generous in the sensations it bequeaths.

Savages, in Bracken’s articulation, are thought to be those men who have ‘too much animal’ in them, or at least have not managed to master their own ‘animality’.<sup>135</sup> Once again, we can discern echoes of the colonists’ commentary on the Indian’s personality. The native shares in the animal’s malaise of subsisting in now-time. Like the savage, animals cannot distinguish between possibilities that seem to mesh into one, as they are immersed in their impressions (hence arises the instinctive nature of the animal). This would seem to echo the colonist’s position that the Indian occupied some penumbral realm between animal and man he assumes the outer guise of humanity but is still more animal than man beneath the surface.

Many of the colonists were quick to point out that the ‘prodigal’ Indian was loathe to do any hard work whatsoever. Doubtless, work had been long associated in monastic orders (such as the Benedictine) with structured daily activity, in contrast to the disorder of miscellaneous tasks done randomly. Moreover, work was imbued with the profundity of re-enacting Creation itself<sup>136</sup> through its conquest of nature and rendering it orderly: in creating and transforming the surroundings around him, man works within and extends the tradition of genesis. On the other hand, idleness was seen as the ‘enemy of the soul’ as it violated the injunction to save and build for tomorrow.<sup>137</sup>

The Indian, as has been stated, was guilty of the sin of wasting his life through lack of dedication to productive labour.<sup>138</sup> His unproductive, energy-consuming labour fixed itself nowhere and therefore disappeared ‘the “instant” it is performed.’<sup>139</sup> Productive labour, on the other hand, such as that lovingly pursued by the aforementioned monastic orders, fixed itself in the land. In other words, industrious labour directly resulted in the fixity of the land, in its cultivation, the directing of its fertility towards productive ends. As we have already stated in the case of Albertus, the clearing of the land and earth of their mysteries was the fundamental basis of a perfect, well-ordered community.

The inconstant Indian, however, simply could not exercise fixity over the land. The re-enactment of Creation could only be achieved through productive work which re-established fixity and order over land on an unending basis. To nullify the native’s perception, which granted him vision of the world’s continual birth, the inverse perspective that envisaged continual fixity of the land had to be planted within him. This attempt to ‘cure’ the Indian of his idleness had initially manifested itself in the colonial policy of adopting the *encomienda* system. However, this was later shelved due to the pressure exerted by the Dominicans; they decried its brutality in accentuating the death toll of the indigenous population.

By way of replacement, a number of Dominican priests pressed for colonial policy to be redirected towards educating the natives, over and above their enslavement. Both work and education, after all, could pursue the same goal, although through different means. This would be to introduce order into the Indian’s perception of reality. Education would impress upon his psyche an orientation that

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<sup>134</sup> Bracken, p. 34

<sup>135</sup> *Ibid.*, p. 35, Hanke (1994), p. 136. Captain Vargas Machuca puts it thus: ‘They must be put under the yoke like beasts and compelled with all the rigor of the laws.’ The analogy of the Indian’s lack of will or disinterestedness as being ‘vegetative’ was also invoked, alongside the claims that the savage was instinctive like animals in his appetites.

<sup>136</sup> Glacken, pp. 312–3

<sup>137</sup> *Ibid.*, p. 306

<sup>138</sup> Bracken, p. 30

<sup>139</sup> *Ibid.*, p. 31

would make the Spanish world familiar to him. His ways could then be improved by introducing to them a sense of realism. Hence, those Dominicans who held a more Augustinian position were generally more optimistic about the Indians' capacities if they could just be encouraged to learn.<sup>140</sup> Reputable theologians such as Alfonso de Castro and Las Casas instructed the Crown to go down the path of education against the colonist arguments that the inconstant Indian was beyond salvation.<sup>141</sup> Las Casas took the lead in pushing for the native to be inducted in literacy prior to baptism, so that he would know something of Spanish and Christian norms before he chose to commit himself.<sup>142</sup> The Spanish Crown's response was to direct Las Casas' pleas to Francisco de Vitoria, who was empowered to preside in judgement. Vitoria and Las Casas' views on the education of the Indian were one and the same, and thus colonial policy was recalibrated accordingly. The former's judgement sat comfortably with the Crown, which wished to distance itself from the colonists' misdeeds. Above all, the Spanish monarchy wanted to convey that the official policy was the salvation of souls, in order to maintain the Pope's consent for the conquest (for if the moral justification of conquest was lost, the Pope could always transfer his allegiance to the other Christian kingdoms in contention, such as Portugal).<sup>143</sup>

The mainstream perspective thus shifted away from the colonists' positions, to the opinion that the Indian could be liberated from his foibles, and his capacities optimised through schooling. This would give him a surer footing in his admittance to Christendom and the Spanish world. If he could be cured of his savagery, he would merely be a representative of a world that had been lost,<sup>144</sup> of impressions rendered inaccessible. Inevitably, paradise is always a paradise lost.

## Chapter Four: *Ius Gentium, Ius Civile* and *Anthropos–Humanitas*

The legality of the Spanish conquests proved to be of a supremely contentious nature, and drew within its net an array of vested interests including lawyers, bureaucrats, theologians and scholastic philosophers.<sup>145</sup> Francisco de Vitoria, a leading representative of the latter at Salamanca, was one of the most outspoken in condemning the manner in which the conquests were conducted.<sup>146</sup> Many of the administrators of the Spanish state ruminated over the conquests within the narrow, legalistic sphere of jurisdiction; this ran counter to the more wide-ranging arguments advanced by scholastic theologians such as Vitoria.<sup>147</sup> The Crown lawyers seemed to be missing a critical point, as purely legalistic arguments were blind to the ethical dimension of the affair of the Indies. The conquests threw up spiritual and moral issues that deserved to be confronted theoretically; they could not be seen to be of solely legalistic concern. In short, the Spanish administrators' adherence to a technical understanding of positive law failed to acknowledge any of the crucial normative/ethical components of legality.<sup>148</sup> Consistent with his ethical spirit, Vitoria's critique of the colonists' massacres was meant as a reassertion of the Crown's ostensible policy to save souls, as opposed to that of laying waste to Indian communities. If the Crown's intentions were in earnest, it would surely champion the view of 'bringing eternal life, not temporal death'.<sup>149</sup> After all, the salvation and 'joyful tidings'<sup>150</sup> that the missionaries saw as their duty to bring to indigenous societies had nothing to do with the colonists' actions.

Vitoria's anger at the colonists' activities was for the most part an expression of profound disagreement over the place occupied by the Indian in mankind. In his exploration of the Indian Question, the issue of understanding the native's personality was as much a theorisation of what constituted humanity's common qualities. The Crown lawyers' justifications failed to engage on an intellectual level with this problem. In the absence of history and antiquity to properly explain the Indian, Vitoria agreed that the onus was on law to describe the framework within which the native could be placed. However,

<sup>140</sup> Hanke (1994), p. 23. Bishop Ramirez de Fuensalida was also of this frame of mind: 'they will become strong Christians', p. 15

<sup>141</sup> *Ibid.*, p. 23

<sup>142</sup> *Ibid.*, p. 22, Pagden (1993), p. 99

<sup>143</sup> Muldoon, pp. 140–2

<sup>144</sup> *Ibid.*, p. 14

<sup>145</sup> *Ibid.*, p. 144

<sup>146</sup> Vitoria, p. 238

<sup>147</sup> Muldoon, p. 143; Schmitt, p. 113

<sup>148</sup> Vitoria, p. 238

<sup>149</sup> *Ibid.*, p. 110

<sup>150</sup> Hanke (1994), p. 96

the task of law was not simply to justify conquests on technical grounds, but to consider judiciously the rights attributable to the Indian, such as his right of *dominium* or self-governance.<sup>151</sup>

With this abiding concern over the rights properly held by the Indian in mind, Vitoria worked through the legal traditions of the Roman *ius gentium* and *ius civile*, as well as medieval canon law. In these traditions, the pagan or infidel's rights were upheld as part of the universal and affirmative category of *Humanitas*. The basis of this jurisprudence was the ontological notion of 'others-as-ourselves'.<sup>152</sup> Man was posited as a unity very much in line with theological orthodoxy, expressed by the maxim 'all mankind is one'. All men were therefore worthy of ethical consideration and legal rights, derived from a common point of origin or provenance, descent or genesis from the primary cause. All men had souls, which were capable of being saved, as some notion of their common creator lay latent within them. To paraphrase Las Casas, no nation existed which did not at the very least have an obscured understanding of God, and no capacity was so limited as to render the worship of Him an impossibility.<sup>153</sup>

Mankind could not but be reaffirmed as a unified category on the basis of a shared capacity or potential to act ethically. The Indian became the mirror image of the Spaniard in this regard. Here, the ethical view of inclusion of the other in a common jurisprudence is juxtaposed with the exclusionary violence of the colonist and the legal obstructionism of the Crown lawyers. For Vitoria, to re-emphasise the solidity of mankind as a universal ontological category would be a partial antidote to the blind slaughter meted out by the colonists. The colonists' failings were therefore chiefly attributed to the inability to recognise the native as sharing in the same ontological character. Therefore, any cynical attitude towards the potential of the Indian to be saved needed to be challenged. After all, Vitoria was of the opinion that the native's place was firmly within *Humanitas*.

Antony Anghie in 'Francisco De Vitoria and The Colonial Origins of International Law' provides a seminal outline of how the eponymous theologian-jurist constructed his legal system.<sup>154</sup> It is this outline we shall follow and elaborate upon in the course of the next three sections. By way of a quick sketch to commence, it is possible to consider Vitoria's legal system as made up of the following moments:

(1) Vitoria posits his legal system as a 'completed' totality – this is achieved through the adoption of the doctrine of *jus* or *ius gentium*<sup>155</sup> (the law of nations or peoples). *Ius gentium* incorporates both the Spaniard and the Indian within a common framework. The Indian is now recognised within a global legality. (2) The projection of a difference between the Indian and the Spanish is imputed to contrasting cultures. The Indian's cultural practices are now conceived of as being at variance with the universal norms or standards the Spaniard realises. (3) The difference, or as Anghie puts it, 'the gap internalised', is internal to the self-same system of *ius gentium*. (4) The Indian is judged to be of potential perfection, which can only be attained through the adoption of Spanish practices. *Ius gentium* thus also incorporates *ius inter gentium* – the law between people or nations, or a set of proto-international rules and relations.<sup>156</sup> In addition, and quite significantly, Vitoria also draws upon *ius civile* (Roman civil law) when justifying the asymmetrical nature of the relationship between the Spanish and Amerindian nations. The guardianship of minors and its associated mandate (*mandata*) is of especial relevance here. This, in essence, acts as a final justification for colonialism and will survive (as the institution of the mandate) in the reconstruction of the legal system after World War II.

Let us turn to the doctrine of *ius gentium*. Vitoria adopts and adapts the doctrine from old Roman law.<sup>157</sup> It can be interpreted as that law which 'natural reason has established among all nations.'<sup>158</sup> The

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<sup>151</sup> Vitoria, p. 244

<sup>152</sup> William Y. Adams, *The Philosophical Roots of Anthropology*, CLSI Publications (1998) p. 413

<sup>153</sup> Hanke (1994), pp. 93–94

<sup>154</sup> Antony Anghie, 'Francisco De Vitoria and the Colonial Origins of International Law', *Social and Legal Studies*, no. 5: (1996), p. 327

<sup>155</sup> I will be referring to this doctrine as 'ius gentium' henceforth, although Anghie opts for 'jus gentium'. See Anghie, p. 325

<sup>156</sup> Which can be considered in terms of *coloniality* – 'the creation of sets of states linked together in hierarchical layers' or through processes of 'ranking'; Quijano and Wallerstein, p. 550

<sup>157</sup> Vitoria, p. 278. Vitoria's sources when referring to Roman law, both 'ius gentium' and 'ius civile', are Justinian's *Institutes*, the *Codex* and the *Digest*.

<sup>158</sup> *Ibid.*, p. 325

proposition that ‘natural reason’, as defined by the Romans, was necessary for the establishment of law in all nations arose from the outcome of a pragmatic process, constituted by two stages.

Firstly, since the Romans found themselves governing diverse nations, a body of law had to be constructed in order to fit them all. *Ius gentium* was an answer to the practical problem of how to contain and unify a multiplicity of people under one rule.<sup>159</sup> The doctrine was driven by the need to bind the imperium, in its entirety, to a legalistic totality. The first stage required administrators of imperium to index all the possible laws, customs and practices existent in those nations under Roman dominion. In reality, this meant sorting and sifting through the ‘good’ and ‘bad’ laws, so as to judge which would befit the whole. Sorting through the laws of nations would eventually result in the compilation of a single, unified corpus of common law. The aggregated matrix of law would have the integrative power to bind societies together to a common order, submitting them to the set standards of the whole – of imperium.<sup>160</sup> The power of *ius gentium* would emanate from its universal validity; Roman judges and administrators would be able to draw upon it in the adjudication of difficult cases.<sup>161</sup> This first stage therefore results in an enclosed legal totality, founded upon a common and familiar point of reference.

Secondly, the Romans’ pragmatic interest in governing imperium through a common law begat an ontological foundation. The practice of compiling laws led administrators to the view that common law was rooted in a common experience. *Ius gentium* is thus the outcome of the reduction and distillation of diverse experiences into common law; there can be no ‘beyond’ of this common experience. Put otherwise, the bounded legal totality of *ius gentium* invalidates any mode of experience outside of its scope. The constitution of *ius gentium*, itself, was said to be a process that engaged the ‘active exercise’ of man’s ‘reasoning faculty’.<sup>162</sup> The construction of the doctrine as a totality took place via inductive reasoning, which manufactured the general from the multiplicity of cases. Hence, the resulting composited law could be recognised and acknowledged by diverse nations as they perceived it to be acceptable, buttressed, as it was, in their very own experiences. *Ius gentium* contained, in a sense, the quintessence of their laws. Evidently, the doctrine derived its validity and force through the universality that it bequeathed,<sup>163</sup> sought by Vitoria as the basis for his jurisprudence. The universality of *ius gentium*, alongside its bounded totality, meant the effective dissolution of normative boundaries between nations within the imperium. This was the ‘interiority’ of imperium, built through the grounding of contained, self-same experience.

The universality inherent to *ius gentium* had a further implication – one that was able to exercise an influence over medieval canon law. Despite the fact that the doctrine was developed within the confines of imperium, its validity could be projected and applied to those beyond its frontiers. It thus became a method by which to regulate relations between those within the imperium, and those without; it came to include all nations within its purview. In fact, it became the baseline rationality or minimum threshold of reason that nations or people needed to attain in order to qualify them for inclusion within the system of universal law. Meeting the baseline of *ius gentium* indicated that a nation lacked the ignorance to misunderstand the explicit rationality of common law, and was, thence, perforce subject to it. Under old Roman law, all nations met the minimum requirements needed to be subject to the laws of empire. This meant that *ius gentium* applied to, and bound, (captured) barbarians or non-Romans (Germanic or otherwise) to the universally valid laws of the Roman imperium.<sup>164</sup> The barbarian or ‘stranger’ was subjected to these laws, despite no immediate eligibility for Roman citizenship (prior to it being granted to all within the imperium in 212 AD). Citizenship was an honour limited to Romans and the privileged few who demonstrated, over many years, the requisite loyalty and devotion to the Empire. For non-Romans or barbarians, Roman citizenship acted as a disciplinary/ control mechanism; a way to pacify nations and compel them to conform to the normativity of the imperium, in return for a possible uprating in status and standing. After all, Romans conceived of Empire as an exchange (*mandatum*), in which the Roman lifestyle or *civitas* was extended to the *orbis terrarum*. That is to say, citizenship would be granted to barbarians in exchange for the obligations incurred to observe the laws of imperium.<sup>165</sup> In

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<sup>159</sup> Adams, p. 128

<sup>160</sup> *Ibid.*, p. 128

<sup>161</sup> *Ibid.*, p. 128

<sup>162</sup> *Ibid.*, p. 136

<sup>163</sup> *Ibid.*, p. 137

<sup>164</sup> Itself derived from *Koinos nomos*, the common law of humanity as conceptualised by the ancient Greeks, see Pagden (2000), p. 4

<sup>165</sup> Pagden (1982), p. 8

this respect, it can be said that ‘Imperial Rome offered a model and a means to conceptualise imperial relations’<sup>166</sup> – a model that acted as the foundation from which Vitoria articulated his own jurisprudence.

In addition to *ius gentium*, the Roman imperial model leaned heavily upon *ius civile* (civil law) in legally establishing relations with the non-Roman, something Vitoria overtly refers to in the context of natural law.<sup>167</sup> ‘Private law’, specifically family law, is particularly to the purpose here, as it illustrates the type of structural dynamic the barbarian was dragged into. Within the terms of the Roman family, the Emperor can be said to have taken on the social role of the *paterfamilias*<sup>168</sup> (head of the household) in relation to his non-Roman subjects. As such, he holds a *potestas*<sup>169</sup> (legally sanctioned power) over these subjects in the same way as a *pater* over his son in the Roman *familia*. Most appropriately, here, Vitoria’s interpretation of *potestas* directly links it, within his own context, to the Royal power of the Spanish Crown.<sup>170</sup> Through an analysis of the Roman *familia*, we can discern that its structural dynamic mirrors that of *ius gentium*, in the sense that its force and power is derived from it being a unified, and therefore legally bound entity. So, for instance, a mother<sup>171</sup> with illegitimate children, i.e. born outside of the marriage relation, was not acknowledged to be a part of the legal sanctity of the *familia*, the stable nuclear family, and could therefore exercise no *potestas*.<sup>172</sup> Likewise, illegitimate children were themselves deemed outside the power of *potestas*. However, one method in which these children, and more generally ‘minors’,<sup>173</sup> could be brought under *potestas* was to assign them a legal guardian. So, in terms of imperial relations, the Emperor could be said to ‘adopt’ the minoritarian barbarian in order to integrate him within the proper legal structure and relationships of the *familia* (i.e. imperium or commonwealth). Through his method, the minor or barbarian could benefit from the legal protection the *familia* afforded.<sup>174</sup> Furthermore, the guardian/emperor acted in an administrative capacity in managing the minor’s inheritance and financial transactions, (as the child or minor could not be said to ‘utter’<sup>175</sup> so as to conduct them himself) up until such a point in time at which the latter was acknowledged to have reached maturity. The minor or son’s ‘promise’ of inheritance was held for him within the *familia* – the only institution that could legally authorise such rights.<sup>176</sup> The guardian can be said to have taken on the role of a virtual, or model, *paterfamilias*. His relationship to the minor principally consisted of tutelage in the management of property, and can be more widely conceived of as an exchange (*mandatum*) in which the minor benefited from legal protection (or welfare) in return for ceding temporary control over his ‘estate’. Thus, inheritance becomes a future ‘promise’ subject to appraisal.<sup>177</sup>

Vitoria saw the Indian in a similar vein to how the Romans perceived the non-Roman – through the lens of the legal doctrines of *ius civile* and *ius gentium*. Firstly, the minoritarian Indian was bound, and bounded, by *ius gentium*. He was deemed to possess sufficient reason to ascertain the rules that were the product of a common framework of law.<sup>178</sup> This position was further reinforced by *ius civile*: the son or minor was deemed capable of possessing dominion (future control of the estate) due to his potentiality for reason. In this way, Spaniard and Indian could be said to share the same ontological character.<sup>179</sup> In sharing the same manner of being, they could be folded back into the same enclosed world, or totality –

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<sup>166</sup> Pagden (2000), p. 6

<sup>167</sup> Vitoria, xiv, p. 249

<sup>168</sup> The *paterfamilias*, as an essentially structural position can exist *virtually* (i.e. the position could be ‘vacant’ yet the legality of the relationships in relation to it remain intact nevertheless) as well as in actuality. See Paul du Plessis, *Borkowski’s Textbook on Roman Law*, Oxford University Press (2015), pp. 113–4

<sup>169</sup> Du Plessis describes *potestas* as the power and control over household (wives and children or *agnates*), derived from being a common male ancestor. *Ibid.*, p. 114

<sup>170</sup> Vitoria, xix

<sup>171</sup> We could go so far as to say, allegorically speaking, ‘mother-earth’ for Vitoria, thus invoking our discussion on the conjugal family in the latter part of section 1.5.

<sup>172</sup> Du Plessis, p. 119

<sup>173</sup> Minors (‘*sui generis* people’) that were placed under guardianship represented the vast majority of Roman society. These consisted of children, prodigals, the ‘mad’, women, slaves etc.; see Du Plessis, p. 139. It would seem that those of a potential ‘minoritarian-becoming’ were fit to be integrated within the legal relation of tutelage.

<sup>174</sup> Beryl Rawson and Paul Weaver (eds.), *The Roman Family: Status, Sentiment, Space*, Oxford University Press (2009), p. 46

<sup>175</sup> Du Plessis, p. 143

<sup>176</sup> Rawson and Weaver, p. 40

<sup>177</sup> Rawson and Weaver, pp. 102, 106, 111; Du Plessis, p. 139

<sup>178</sup> Vitoria, p. 250. ‘Indians are masters of their affairs and have order in their lives, and the use of reason is universal’

<sup>179</sup> Anghie, p. 327

*familia*, imperium or commonwealth.<sup>180</sup> In the *pater*'s ability, embodied in *potestas*, to capture minors and bind them to the *familia*, a structural legal relation was generated, in the same way in which Vitoria's jurisprudence irrevocably linked the Spaniard with the Indian within the same legal order. This legal order was a 'notional international community', or what Vitoria named the 'commonwealth'.<sup>181</sup> *Ius civile* formed the base of the relations within the commonwealth, as Vitoria conceded that indigenous lands could be held in tutelage, and moreover Castile could assume temporary control of property and goods until the Indian personality reached maturity.<sup>182</sup> In the encounter with the Indian, the Roman model of the protectorate and mandate came to the fore, as colonial institutions and relations, sourced from *ius civile*, proliferated.

As Vitoria would have been well aware, any legal doctrine grounded upon, in effect, the ontological equivalence between Indian and Spaniard could only be a direct assault on the colonist's ideology. The colonist judged the Indian to be a part of the un-ordered and un-orderable, and hence irremediably foreign to the Spanish world or order. In this sense, the colonist subscribed to the exclusionary Anthro-centric definition of mankind.<sup>183</sup> The colonist prejudices outlined in previous sections neatly conform to this definition. In light of this, let us then turn our attention towards analysing the various aspects of the colonist's perception of the Indian.

The Greek term 'Anthropos' 'literally means 'looking upwards'.<sup>184</sup> It signifies a category of mankind that boldly looks up to the 'ethereal heights'.<sup>185</sup> The imagery of fixing one's gaze on what lies beyond symbolises mankind's unique orientation towards a destination of 'some preordained future'.<sup>186</sup> Man can be thought of as a particularly uncommon being in his ability to hold back his perception of the present so as to enable himself to envisage what is yet to come. This future-orientation implies an ability to take hold of a unique destiny, which is inseparable from the exercise of rationality and moral judgement.<sup>187</sup> Furthermore, these capacities are closely associated with perception – the perception of 'what is in sight in the surrounding world'.<sup>188</sup> This conceptual proximity of perception and rationality can be, here, imputed to the possessive power of discourse. The linking of the ability to perceive the world with the ability to articulate what is seen attests to the salience of discursive rationality. The hallmark of discursive rationality, the ability to withhold the present in order to conjure up images of a potential future, properly distinguishes Anthropos.

As such, Anthropos not only delineates what it means to be part of mankind, but also distinctions within the species.<sup>189</sup> It therefore defines what it means to be 'other'. The other, rather than an ontological entity, exists solely as a discursive invention.<sup>190</sup> Walter Mignolo explains it in this fashion:

Who invented the other if not in the process of constructing the same? Such invention is the outcome of enunciation. The enunciation doesn't name an existing entity but invents it. The enunciation needs an enunciator (agent), an institution, for not everyone can invent the anthropos but to impose the anthropos as the other in the collective imaginary it is necessary to be in a position to manage the discourse (verbal, visual, sound) by which you name and describe an entity (anthropos or other) and succeed in making believe that it exists.<sup>191</sup>

The invented other, for the Ancient Greeks, was embodied in the figure of the barbarian. The term 'barbarian', itself, denoted a mere 'babbler, someone who could not speak Greek'.<sup>192</sup> The ability to speak Greek, a veritable master discourse, was closely associated with the psychological or intellectual capacities. The ability to *see*, to comprehend the mysteries of the cosmos, and to name it through language, invents a privileged psychology that seems to take on ontological dimensions. By implication, the other is disclosed through language's power to name and by extension possess what is sighted. This is

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<sup>180</sup> After all, Humanitas can be thought of as a planetary *familia*.

<sup>181</sup> Pagden (2000), p. 9

<sup>182</sup> Vitoria, xxvi, p. 249

<sup>183</sup> Pagden (1993), p. 120

<sup>184</sup> Cheliotis, p. 131

<sup>185</sup> *Ibid.*, p. 131

<sup>186</sup> *Ibid.*, p. 131

<sup>187</sup> *Ibid.*, p. 131

<sup>188</sup> *Ibid.*, p. 132

<sup>189</sup> Pagden (1993), p. 120

<sup>190</sup> Walter D. Mignolo, 'Geopolitics of Sensing and Knowing', *Postcolonial Studies* (vol. 14, no. 3, 2011), p. 275

<sup>191</sup> Mignolo (2011), p. 275

<sup>192</sup> Pagden (1982), p. 16; Davies, Nandy, Sardar, p. 26

a political manoeuvre *par excellence*. What is re-affirmed, seemingly beyond contestation, is that the ability to speak and to reason can only be realised within the institutions of civil society, the *polis*, precluding the barbarian beyond its frontiers from membership of the Anthropos.

Anthropos is essential for the demarcation of the *oikumene*<sup>193</sup>; it reinforces the exclusivity of a thoroughly closed world (or totality) where it is solely 'possible to be truly human'.<sup>194</sup> The exclusion of the other, in addition, reinforces 'self-inclusion'; it consolidates the closure of a world through re-asserting the validity of the joint/collective normative actions therein.<sup>195</sup> This emphasises Anthropos as a purely exceptional category of mankind, which makes distinctions within the species only through this method of discursive invention. Invention, here, connotes both self-possession (i.e. defining oneself through language and rationality) and the potential to possess others (as man's invention) as well as the natural world.

Let us now return, in order to apply this analysis, to the colonist's commentary on the Indian. For the colonist, the Indian-other was invented discursively as a stranger to order, as a sort of 'monster'. We should recall that the colonist expected to meet with all manner of 'mythical beings' in the strange lands of the Americas – 'dog-faced' men and such like. In the encounter, the colonist came across a being defying definitive classification; the native seemed to fall between stools. He seemed to signify the free reign of the animal within man, and yet his outward manifestation was pure man. In many ways then, he lived up to expectations by giving corporeal form to mythical figures that were terrifying precisely because they were at heart unknowable and un-orderable; they fundamentally resisted any common point of reference. This mode of thought can be considered a result of the colonist, in an attempt to take hold of the Indian via the faculty of the understanding, conceptually abstracting the Indian from the organic whole of his world or environment. To attempt to comprehend the Indian by divorcing him from the *given*, the realm of the un-ordered, would be tantamount to re-conceptualising him as a partial object in the colonist's method of understanding.<sup>196</sup>

Due to the other's resistance to appearing in a directly representable form, whether through not actually existing at all or existing in such a way as to forestall description, Anthropos reacts through functioning as a sort of self-defence or anticipatory mechanism. We can discern this in the solely negative terms used to describe those who can only be *indirectly* represented. As the Indian chose not to reveal himself, the Spaniard was thus forced into the management of this otherness through discourse. The native's relation with the realm of the un-ordered, the source of his obscurity, needed to be regulated at all costs. Thus the attempt to possess him discursively can be understood as a method of trying to suppress his mode of being and sensing, in the absence of any recognisable, directly representable subject. At this point, we should be reminded of the Indian's sensuous excess, the impressions through which he experienced his indeterminate world. To put it simply, he stood in *excess* of the Spanish world (stranger-as-otherness). If his link to the un-ordered could not be cut off in actuality, all that was left to do was to disqualify him from Spanish order altogether. The native would have to invariably constitute the outside or exteriority of the ordered world. Thence, to invent the Indian as other was to place him beyond the confines of both a conceptual and a legal/normative order.

With Anthropos, as we have noted, there is an over-developed 'self-inclusionary' aspect. Notice, for example, that the colonist (through a discursive function) depicts the Indian personality as incomplete or partial. In contrast, the invention of the other allows the colonist to posit himself as in receipt of a complete personality. Through this means, the colonist can obfuscate his own 'constitutive finitude'<sup>197</sup> by projecting it onto the native. To put it another way, to externalise the Indian as the stranger is to conceal and delimit the force of the 'stranger within' – that which is incubated within the very being of the colonist himself. To possess the other discursively is also to possess oneself, to determine oneself in such a way as to displace one's own finitude. To invent the other as partial is to invent the self as total – as a form that will endure. However, any subject that finds it necessary to reassure itself of its own perfection by excluding the other cannot be enunciating this position from the viewpoint of totality. It is, of course, the very fact of the colonist's partial nature that drives him to attempt to en-close the Spanish world, so as to disqualify the incomplete Indian. It would seem that the finitude which haunts the colonist's Anthro-

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<sup>193</sup> Pagden (1982), p. 16

<sup>194</sup> *Ibid.*, p. 16

<sup>195</sup> Lindahl, pp. 180–1

<sup>196</sup> See Roberto Sinnerbrink, 'The Hegelian 'Night of the World': Žižek on subjectivity, negativity, and universality', *International Journal of Žižek Studies* (vol. 2, no. 2, 2004), p. 4

<sup>197</sup> Sinnerbrink, p. 7

centric approach, bereft of the cosmological refuge in the eternity of the universe proclaimed by the pagans of antiquity, thus requires another category of mankind to salvage it.

The *Humanitas* definition or category of mankind was favoured by theological orthodoxy in Spain, including by the Dominicans Vitoria and Las Casas. In the Roman *ius gentium* Vitoria found the intimation of an ontological point of origin (the shared experience underlying common law) for humankind. This underpinned his major contribution to *Humanitas* as a developing mode of categorisation concerned primarily with the legal rights of others. However, it was in the medieval period that the most significant development of the largely Christian concept of *Humanitas* took place. The universal Church's doctrine of canon law, adopted in the thirteenth century by Pope Innocent IV, the former canon lawyer, can be considered a watershed moment for legalistic thinking on the rights of the non-Christian or infidel. In this period, Christian–infidel relations were recast, with the emphasis placed upon the inalienable rights proper to the infidel and pagan over dominion and property. Vitoria extensively drew upon this legal tradition in his critique of a popular strain of Anthro-centric thinking based upon natural slavery.

Canon law's exposition on the rights of the non-Christian was essentially an extension of moral concern to the other. It reinforced the ontological parity of all men, with the view that this meant the additional parity of legal rights. Pope Innocent IV's thoughts on the universality of the Church led him to the position that the Christian and non-Christian enjoyed this ontological equivalence. From his viewpoint, it was the destiny of all men to give a fair hearing to the gospel and to eventually become full members of the Church. There were in actuality two groups of men – those who were Christian and those who were yet to be. It must, however, be borne in mind that all men constituted one group – that of the Lord's 'flock', since Christianity sought to bring into the fold the entirety of mankind. In this sense, non-Christians were members of the Church *in potentiality* if not in actuality. The infidel can be seen as marking the 'outside' of the Church's membership, not existing within its bounds, but nonetheless still falling within the universal Church's legal jurisdiction.<sup>198</sup> The Church's main concern, after all, was for the souls common to all of *Humanitas*.

The infidel or non-Christian can be said to fall into the Church's jurisdiction by proxy of the ontological equivalence grounding *Humanitas*. So, what in actual fact qualifies the infidel for membership of *Humanitas* and the rights this entails? Innocent IV established the foundation of *Humanitas* in mankind's common point of origin as the 'descendants of Adam'. The genesis of man can be traced back to a beginning in which the 'earth and its fullness' are the sole dominion of the Lord. At this primordial point of legality, property and land are held in common as the earth in its undivided wholeness is bequeathed to mankind (comparable to the 'sunshine which warms all men').<sup>199</sup> Property only comes into being through secular struggles between Adam's descendants. It is the subsequent conflicts within mankind that make the necessity of property wholly apparent, as well as its associated demarcations of the land. The particularities of the distribution of property and land arise out of purely practical, secular considerations.<sup>200</sup> Canon law, however, concerns itself principally with God's love, which resonates with all men.<sup>201</sup>

In the early, halcyon days of human development, men are distinguished by their liberty; slavery is thus non-existent. The freedom implicit in the rights of dominion and self-governance are derived from the common law based upon mankind's common descent and consequently equal claim over the 'fullness' of the earth (the argument is in essence a Christianised version of the Romans' *ius gentium*). Logically, rights over land and self-determination can apply as much to the infidel as the adherent. As an inherent right of the infidel, it cannot lie within the Pope's authority to intervene and deprive the non-Christian of his dominion through the waging of war, simply due to the fact of his non-Christian status.<sup>202</sup>

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<sup>198</sup> Muldoon, p. 134, pp. 3–4

<sup>199</sup> Vitoria, p. 278

<sup>200</sup> *Ibid.*, p. 244. '[A]ll forms of dominion derive from natural or human law, therefore they cannot be annulled by lack of faith'. Despite Sepúlveda, Schmitt (p. 104) considers that in respect to the legal arguments of the sixteenth and seventeenth-centuries, the 'human-inhuman' distinction was not primary, although the superiority of the 'Higher European civilisation did become a standard justification for colonization.'

<sup>201</sup> Muldoon, pp. 7–9

<sup>202</sup> *Ibid.*, pp. 126–7

The argument of ‘all right and Lordship and property deriving from the Creator’<sup>203</sup> attests to the constituting power of God. It is this constituting power which propels *Humanitas* as a category of mankind. Conversely, the natural slavery argument expounded by Sepúlveda inadvertently questions the power exercised by God. It is this line of attack that provides the thrust of Vitoria’s rebuttal of the argument. His reasoning leads him to point out that

the incapacity we attribute to the Indians contradicts the bounty of the Creator, for it is certain that when a cause produces its effect so that it is unable to achieve its end, then there is some fault in the cause; and thus there must be some fault with God for having made men without sufficient capacity to receive the faith and save themselves.<sup>204</sup>

The ‘bounty’ alluded to by Vitoria can be read as the extensive diversity or range (‘fullness’ of the earth) of creatures/beings that make up the de-limited world. The question posed to those advocates of natural slavery is: why would God will such creatures into existence in spite of the already existing diversity of non-human creatures available for mankind to exploit? Why should such a creature as the natural slave exist at all? If the Indian (which realised a properly human form) were to be this allegedly indeterminate entity, he would certainly constitute an anomalous case in an otherwise determinate world filled with creatures of a determinate nature. As Las Casas articulates it, the consequence of this proposition is that human nature, fully determined and provided for, has ‘gone astray in the most infinitesimal part of the human lineage’.<sup>205</sup> Here Vitoria and Las Casas, who were one on the issue, echo the thirteenth- and fourteenth-century canon lawyers in their parallel arguments that the infidel could by no means be thought of as irrational.<sup>206</sup>

To reiterate, to give succour to the notion that the Indian had an anomalous nature, equivalent to that of the natural slave, would be to admit a completely unnecessary indeterminacy into the otherwise ordered world. To accept the Indian as a sort of ‘irrational barbarian’ could only threaten the perfection and overall rational plan of the universe.<sup>207</sup> To concede this indeterminacy would allow an evasive creature, with no proper place in the universe, to subsist in its own hidden realm beyond or within the earth’s ‘fullness’ or bounty. No doubt, the answer to this quandary for those who subscribed to the *Anthropos* world-view would be to exclude the Indian to some ‘outside’ of the Spanish world. This would be to express the sentiment, ‘If the Indian is not a man, it should be of no concern to us.’ Those not like-minded would immediately discern that within the world of *Humanitas*, to accept the existence of the natural slave would be to permit a disavowed indeterminacy to exist within the very framework of man.

Crucially, for Vitoria, the existence of the natural slave traces the indeterminacy of the Indian back to the Creator. To adopt Vitoria’s parlance here, the inadequacy of the effect (the Indian) runs backwards to snare the primal cause (God). The constituting power could only be much diminished in light of the Indian’s incompleteness. It would be to ascribe a disordered element, a ‘remainder’, to God; any disorder in the universe could only attest to the disorder of His plans in constituting the world – it would, so to speak, be a ‘frustration of his plan’.<sup>208</sup> The natural slavery argument could be rationalised within a Greek or Aristotelian cosmology, where the harmony of all beings contributes to the self-sustaining, eternal whole. However, within Christian theology the existence of the natural slave could only be to the detriment of the Creator. This was because the argument propounding the commonality of mankind’s nature derived its validity from the greatness of ‘God’s love’ for humanity.<sup>209</sup> Evidently, the preservation of natural slavery within Christian theology would imply that God in creating man gave preferential affection to some over others. For Vitoria, since God’s love is not limited or randomly manifested in such a fashion, all of mankind could share in the common property of rationality that is His gift. Commonality of experience emanates from God’s power to provide the same constitutional nature to all men. Put differently, upholding the constituting capacity of God is to give credence to man as an ontologically unified species.

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<sup>203</sup> Muldoon, p. 14

<sup>204</sup> Pagden (1982), p. 50. The quotation is directly from Vitoria.

<sup>205</sup> Hanke (1994) p. 77

<sup>206</sup> Muldoon, p. 21: The fourteenth-century canonist Joannes de Legnano states that God could not show ‘a lack of interest in a large part of his creation’. Vitoria put it emphatically: ‘no man can be a natural slave’. Vitoria, p. 251

<sup>207</sup> Muldoon, pp. 83–4

<sup>208</sup> *Ibid.*, p. 84

<sup>209</sup> *Ibid.*, pp. 83–4

In rejecting natural slavery (and by implication the Anthro-po-centric mode of mankind) Vitoria positions the ability to seek salvation as the main quality unifying mankind. This is a key plank of canon law. For Innocent IV, the salvaging of souls through the prospect of conversion justified the preaching of missionaries in infidel territories.<sup>210</sup> While conversion could not by any means be accomplished through coercion, rational argument would suffice to persuade the infidel to seek the Lord. Canon law dictated that peaceful methods of preaching should be privileged, over and above military coercion (for example, by crusaders), on first entering infidel societies.<sup>211</sup> A corollary of this is that no Christian nation could morally justify conquest solely on the basis of earthly reasons, whether financial, material or for the sake of raw power.<sup>212</sup> The canonist Anchorano explains the absurdity of the view: if infidels could not possess dominion due to their lack of Christianity (or their lack of grace derived from this status), all manner of sinful acts became justified in order to convert them.<sup>213</sup> The precepts of canon law stressed man's constitutional openness to rational arguments; it was this that should be appealed to above all else. The construction of, and receptiveness to, rational argument is a hopeful affirmation of mankind's capacities. Hence, conversion could only be a matter of a positive exercise of choice through will, not an imposition enforced through sheer terror. No man could be said to be beyond the pale of salvation, even if conversion was likely to be unsuccessful in the first instance.<sup>214</sup> On the Indian's part, his responsibility lay with being obliged to listen, followed by acquiescence with what he found reasonable.<sup>215</sup> Thus, the common quality unifying mankind is the positive message that all men can *potentially* be saved due to the 'persuasive probability'<sup>216</sup> of reason. Salvation, as Vitoria elaborated, depends heavily upon a universal rationality.

The tenet to privilege the appeal to the other's rationality over the use of brute force was utilised by Vitoria in assailing the colonists' exclusionary violence against the Indian.<sup>217</sup> What the native really wished for, in his ontological parity with the Spaniard, was entry into the Spanish world. Only within the normative framework of the Spanish world could he seek salvation and claim the place proper to him within Humanitas. It was within this normativity that the Indian as victim could be empowered and his rights fully respected. His path into this world would need to be smoothed out, so that he could be saved. Salvation itself can be considered as a modified form of Anthropos – the audacious gaze upwards is now re-directed to a future time, or a beyond in which space and time is finally annihilated. It is a form of future orientation that promises to annul the present suffering of the Indian in his victimhood, to help transcend his being. In such a manner Humanitas acts as a movement of inclusion – the empowerment and salvation of the other, in contradistinction to Anthropos' movement of expelling or exiling. It marks the rejection of simply excluding or annihilating other worlds, in favour of a process of absorbing or assimilating them.

In his initial analysis, Vitoria admits the Indian into his jurisprudence.<sup>218</sup> In his use of *ius gentium*, he is able to capture the native, in his exteriority, and to bring him into the sphere of jurisprudence and legality. *Ius gentium* was ideally suited to play this capturing role, in its projection outwards of the legality compiled together within the imperium. Canon law can be seen as having been an extension of this, in its very own projection of the initial rights granted to the infidels within Europe outwards to include the entire non-Christian world.<sup>219</sup> Both these elements of natural law emphasised the need to admit the other as simply an extension of the self (others-as-oneself). All peoples and nations are recognisable, being subject to the same legality and rights based upon a common experience and nature.

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<sup>210</sup> Schmitt states that the freedom of the missions was the true *libertas* of the Christian Church – that is, the true law of the Church.

<sup>211</sup> Muldoon, p. 17. Innocent IV's argument constructed in defence against its inversion (p. 13) was an implicit criticism of the Saracens' conversion via the sword. Conversion by force circumvents the practice of reasoned persuasion and so invalidated any claim to lands Muslims had over those gained in Europe. It additionally followed in the canon law tradition of questioning the conduct of the Christian Crusades.

<sup>212</sup> *Ibid.*, p. 126; Vitoria, pp. 302–3

<sup>213</sup> Muldoon, p. 113; Vitoria, pp. 244, 272

<sup>214</sup> Vitoria, p. 267

<sup>215</sup> *Ibid.*, p. 271

<sup>216</sup> *Ibid.*, p. 271

<sup>217</sup> *Ibid.*, p. 263

<sup>218</sup> Schmitt (2006), p. 105: 'Vitoria obviously treated Christians and non-Christians as equal in legal terms, at least from the standpoint of international law.'

<sup>219</sup> For a discussion of how the treatment of Muslims and Jews within European provided the foundation for rights of infidels outside Europe, see Muldoon, p. 3

The suggestion is that indeterminacy can be expelled from the world, and order reinstated in a unified mankind. This is, of course, what salvation sought to do.

In the absorption of the Indian's exteriority, or the bringing in of the outside, the universal category of Humanitas is shored up over the partial Anthropos of antiquity. The Indian, in parity with the Spaniard, moves from the domain of the discursively constructed other, into the realm of ontology, and the legal recognition this entails. By being bound by *ius gentium* and the tenets of canon law (both contributing sources for natural law, here examined separately), he thus becomes a fundamental part in constructing Vitoria's totality in which all men are bound by the rules of reason. Here it is possible to contrast the historically particular Indian of the encounter, with the universal Indian posited by Vitoria.<sup>220</sup>

In spite of the fact that Vitoria dismissed natural slavery theory and seemingly invalidated the category of Anthropos, Humanitas cannot be seen as a category that completely supplants Anthropos. In actual fact, Humanitas is that which preserves Anthropos by providing it with an extra dimension of adaptability. If we think both categories together, it is possible to see Anthropos–Humanitas as two parts of Jan Nayar's colonial ontology of totality–exteriority.<sup>221</sup>

Anthropos can be considered the first moment of this system, in which the movement of exclusion constructs the other as well as the self. In the opposite direction, the movement of Humanitas includes the other within a legal and ontological totality. The inclusion of the other effectively constructs the totality, while consolidating the universal position of the (European) self.<sup>222</sup> In other words, it is the inclusion of the excluded into a newly posited totality that completes, as opposed to denies, the colonial ontology and its ethics.<sup>223</sup> Inclusion can be considered a 'refinement for repairing partial totalities'.<sup>224</sup> In other terms, the partial totality of Anthropos is repaired so it may reclaim its lost wholeness. Yet, this can only occur when it is superseded by the relational ethics of Humanitas. Relational ethics puts the emphasis emphatically on a responsibility to the suffering other, the innocent victim subject to the detrimental nature of their social location. In terms of the Indian, this is his relation to the *given*, which threatens to subsume him. Thus, the issue was seen to lie not with the native's nature, his latent human capacities (as has been discussed), but with his continuing relation with the *given*, of which he was a victim. Vitoria himself stated that inclusion had its basis in the Spaniard's ethical, brotherly duty to help correct the barbarian's behaviour, so that he could be rendered fit for salvation and conform to the normativity of the Spanish world. With the Spaniard's aid, the native could move from *potential* to *actual* salvation. If the Spaniard did not fulfil his duties to the Indian effectively, then it was foreseeable he would continue to exist in a state beyond salvation.<sup>225</sup>

The salvation of the Indian was a pivotal method by which totality could be repaired. Totality, or the view of the world as one universe from a particular position or location<sup>226</sup> of the *dominus mundi*,<sup>227</sup> can only be thought when the discursive other (the barbarian or 'Cyclops' of Greek legend) is rendered ontological, i.e. when he becomes an ethical being carrying the potential to shore up universal normativity. The non-Christian as a *Christian in potentiality* takes on this role for Humanitas. Anthropos is still relevant here, in that its primary operation is the discursive creation of the self and the other via a political manoeuvre. This is rekindled in Humanitas with the positing of a pre-political (ontological) origin for mankind as a whole or unified species.<sup>228</sup> In effect, the exposed political moment of Anthropos is projected back to a supposedly incontestable time of constitution, dated back to mankind's common genesis or descent.

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<sup>220</sup> Anghie, p. 327

<sup>221</sup> Nayar, p. 67

<sup>222</sup> We can note here, as a point of comparison, the parallel discussions taking place in cosmology with that contemporary of Vitoria, Copernicus. With the decentering of the world, the centre of the system is consolidated and man's place in the universe safeguarded; the retention of man's 'privileged standpoint' through his capacity for reason transcends his cosmological dislocation and enables him to resolve the 'problems of construction' of the world in his favour, and to usher in a new variation of anthropocentrism. For further discussion on this, see Blumenburg, p. 80

<sup>223</sup> Nayar, p. 68

<sup>224</sup> Ibid., p. 69

<sup>225</sup> Vitoria, p. 284

<sup>226</sup> Ibid., p. 73

<sup>227</sup> Vitoria, p. 253; *dominus mundi* or 'master of the universe', also see Muldoon, p. 22: 'Roman Law had described the emperor as the *dominus mundi*...'

<sup>228</sup> Ibid., p. 79

Despite Humanitas' effectiveness in concealing the partiality of the other through gifting it a new ontological fullness, the whole method of operation can still be considered a response (similar to Anthropos in this regard) to the contingency emanating from the event of the encounter. Humanitas manages and utilises the event for its own purposes, in order to re-construct the firm grounding which Anthropos leaves exposed in its failure to completely conceal the traces of contingency. Thus, the event is more fully hidden through the promise of not just the re-assertion of an already existing universal rationality, but the positing of potential salvation as the unifying quality between worlds – or at least the promise to bridge worlds by filling in any fissures (or fault-lines) that may lie in between. What we see here is that the empirical indeterminacy that marked the encounter is subject to the universalising language of Humanitas, which 'hegemonizes and totalises, erases eventness, denies rupture and surpasses the world'.<sup>229</sup>

As the colonist was to find out, the event which marked the discovery of the Amerindian world, or the 'New World', could only attest to the contingent nature of the Spanish/European world. Initially, this could be countered by reaching out beyond the divide, but only through discursive invention and possession. This supremely political manoeuvre, borne out of the need to manage the event, and still retaining its traces, is only concealed afresh and more comprehensively through Humanitas' promise to 'reawaken' being. This involves the inclusion of the other into a seemingly depoliticised category, devoid of any grounding in the indeterminacy of experience.<sup>230</sup> The major operation of Humanitas is to effectively displace Anthropos' conceptual commitment to an exclusive rationality and normativity. Humanitas reconstructs itself through the event (or moment) by the extension of normative boundaries and the displacement of exteriority. The historical contingency that defined the Age of Discovery, a time of rupture in classical, antiquated thought, required the positing of this new universality of Humanitas.

The colonial ontology of totality–exteriority is thus built around the divisions and movements between inclusion/exclusion (Anthropos/Humanitas, expulsion/inclusion; suffering/hope) and being and non-being (subject to totality).<sup>231</sup> To render explicable the term 'non-being' we can point to those things which lack ontological parity with the self in Anthropos – namely, the discursively constructed other. Non-being is that which is unrecognisable as it is still in the process of seeking a definable form, which will allow it access to the realm of being (and recognition). It can be said to subsist on the level of 'hauntology',<sup>232</sup> as a spectral form, which nevertheless exists though its mission to (re-)discover its truly human manifestation. Humanitas' solution to non-being is to capture it through a philosophy of hope that 'in the name of the Other's *becoming out of exteriority*, affirms the sovereignty of the Self's *Being in Totality*'.<sup>233</sup> Rather than enforcing a rigid fencing off between being and non-being, non-being (existing in the imagination and through discourse) is promised the chance to enter the realm of being (the Spanish world), affirming the totalising nature of being within Humanitas. The ability of being to determine itself, paradoxically, is only available to those who have already accepted the terms of the Humanitas definition of mankind.

With respect to the above, the Indian's status seems to be that which lies upon the boundary, between the realms of being and non-being. On this threshold, there is the possibility and hope of finding being (again), of finding redemption in being subsumed within its abstract universality, or the anxiety of falling back into the frightful, inhuman domain of non-being, represented by Anthropos in its singularity (i.e. shorn of the reconstituted totality of Anthropos–Humanitas). To be on this threshold is to properly be within the confines of Humanitas and being, yet with the really existing threat of falling back into non-being. With this in mind, we can understand Vitoria's view that the Indians existed in an in-between state; they were not yet Christians, but neither were they unbelievers, as they had not had the chance to hear the Word.<sup>234</sup> The Indian's nominal rationality could be engaged through the Word, yet it was still a concrete possibility that he could reject his 'true self'. In which case, despite the Indian's universality, Vitoria never seems to quite dispel the Anthro-po-centric paradigm from his thinking. This is partly due to the important disciplinary role that it plays in his jurisprudence. The Indian, after all, could be part of Humanitas yet refuse to uphold the standards that it implies. He could still fail to live up to the normative

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<sup>229</sup> Nayar, p. 67

<sup>230</sup> Ibid., p. 71

<sup>231</sup> Ibid., p. 67

<sup>232</sup> See Jacques Derrida, *Specters of Marx*, Routledge (2006), pp. 9, 63. Derrida asserts that spectres are neither alive nor dead.

<sup>233</sup> Nayar, p. 67 (emphases in the original text)

<sup>234</sup> Vitoria, pp. 250, 266

standards of the Spanish world by choosing to wallow in the immersion of the *given*. Here, we reach another sort of threshold, this time within Vitoria's thought. Up till now, it is only the containment of the *initial* upheavals of indeterminacy released by the encounter that has been theorised. As to that, the construction of Anthropos–Humanitas meant that 'totality...is little affected' and could in fact be secured despite the event.<sup>235</sup>

## Chapter Five: The Standard of Civilisation: Recognition and Cultural Difference

In bringing the Indian into Humanitas and his system of law, Vitoria ends up squeezing him through the prism of recognition and difference. We have stated that the Indian is 're-cognised'; he is 're-presented' within a system that nominally accepts his cognitive abilities. Vitoria is then able to confirm the recognition of the ontological, abstracted Indian as part and parcel of Humanitas. However, recognising the concrete Indian as an inhabitant of a society and culture (in actuality) was far more problematic. This was an outcome of the prescriptive nature of *ius gentium*, which bound the native to a universal framework of normativity. His legal recognition within this regulatory system required his conformity to the normative standards that act as a condition of membership. Hence, the Indian's ontological equivalence is the basis on which he is subjected to this standard. And, indeed, while there was no doubting his capacity for rationality, the issue lay with the practice of such capacity. The latter would depend on the conditions of indigenous society, and whether they in fact aided or hindered his social practices.

In part due to this implicit normative standard, it became imperative to explain the vast cultural difference between the Spaniard and the Indian. Here, there seemed to be a perceived variance between the 'ontologically universal Indian' of Humanitas and the 'socially, historically particular' Indian of culture and society.<sup>236</sup> The Indian seemed to be 'schizophrenic' in that he was both 'like and unlike himself'.<sup>237</sup> In his standing as a universal being, he was bound by universal values. These values seem to have been the externalisation of the Spaniard's cultural identity, in the same way in which the *ius gentium* of the imperium acted as a method to externalise the Roman identity. Correspondingly, the Indian is said to internalise the identity of the Spaniard, as it supposedly represents his 'authentic' or 'ideal identity'.<sup>238</sup> In other words, the Spaniard represented the Indian's *maximum* potential – his 'ideal'. In order to achieve this, the implication was that the native would have to reach the standard of normativity set by the Spaniard's culture, in the concrete context and social *praxis* of his society. Therefore, if the native failed to live up to this standard, to his ideal, he was conceivably a victim of the inadequacies or imperfections of his culture and society.<sup>239</sup>

It is important to put this theoretical turn of events into context. If we recall, Vitoria has just denied the veracity of Aristotle's natural slavery theory, thus precluding the notion that there is anything psychologically or inherently the matter with the Indian. However, in casting off natural slavery, Vitoria did not sever links with Aristotle's wider psychological framework.<sup>240</sup> As a matter of fact, he took the opportunity to re-establish the importance of place for theories justifying Spanish imperialism. So then, if the Indian was not a slave due to his nature,<sup>241</sup> he must certainly be a victim of his place or geographical and social location. Pagden sees this as an introduction of the Aristotelian *ethismos* into Vitoria's thinking. *Ethismos* concerns the 'training by the community of the individual mind to perceive things as right and natural, and reject others as wrong and unnatural'.<sup>242</sup> The issue now shifts from the Indian's

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<sup>235</sup> Nayar, p. 71

<sup>236</sup> Anghe, p. 327

<sup>237</sup> *Ibid.*, p. 327, also see Bowden, p. 12

<sup>238</sup> Anghe, p. 327

<sup>239</sup> It is important to note that for Schmitt (p. 137) this is the 'first question' in international law: whether non-European peoples 'were at such a stage of civilization that they could become objects of organization by peoples at a higher stage.'

<sup>240</sup> Pagden (1982), p. 106

<sup>241</sup> Vitoria, p. 251: '... no man can be a natural slave'.

<sup>242</sup> Anthony Pagden, *The Uncertainties of Empire*, Variorum (1994), Introduction, xii

mind to his environment.<sup>243</sup> The fault seemed to lie with the Indian's education and upbringing – with those fundamental social institutions that can be said to underpin society.<sup>244</sup>

In coming to this conclusion, Vitoria, inspired by *ius civile*, made the transition from common thinking around natural slavery to a new orthodoxy that saw the natives as more akin to children. It was certainly a widespread belief that if they were not irrational, they could conceivably be 'close to mad'.<sup>245</sup> Vitoria was in actual fact equivocal on the state of the Indian's wit; although he refrained from making any definitive statements on the matter, he was far from a position of ruling out the native's lunacy.<sup>246</sup>

Nonetheless, Vitoria does cite a common analogy of the time likening the Indians to 'children abandoned in a forest'. If, indeed, the native's condition was tantamount to that of forsaken children, the onus and obligation lay on the Spaniard to treat them accordingly, i.e. in a charitable manner.<sup>247</sup> So it would seem that the native was brought into *Humanitas* at the lowest possible level psychologically, as a mere child.<sup>248</sup> It is possible to discern elements of Aristotle's psychological thoughts in this argument. These can be seen, most specifically, in the idea that the child's ontological state is one of *becoming*.<sup>249</sup> The child is in a stage of development in which everything is still at stake, one in which potentiality is still far from reaching the proper state of actualisation. In this interpretation of becoming, it is understood to be a formative stage of being as opposed to a separate ontological category. It is the *developmental form of being*, a preliminary time in which reserves of potentiality are built up or accumulated. At the level of the child, the capacities are initially honed, nurtured and forged. Becoming is essentially a temporary stage in which the capacities are mutable, receptive enough to be easily shaped, and readily primed so as to place the child on the path towards the end point of *being*. The juvenile condition of the Indian – his becoming – required the Spaniard to care for him as an adopted father. In addition, he would have to construct the social conditions conducive to the native achieving his full potential – something that curiously coincides with the dissolution of the latter's own unique identity. Here, Vitoria's tentative assessment of the Indian's condition is consistent with the doctrines of *ius gentium* and *ius civile*. The former's force derives from the extension of rationality to all, yet only ever seems to be *fully* realised in a few.<sup>250</sup>

In the foregoing argument, Vitoria located the biggest block to the Indian achieving his full potential in his culture, his *ethismos*. It was his imperfect culture that made him 'unsuited for setting up a legitimate polity'.<sup>251</sup> Damning judgements on the inadequacies of the native's culture were deduced from its supposed inability to stand up to scrutiny when compared with the developed state and culture of the Spaniard. In terms of Vitoria's system, its regulatory norms can be seen to incorporate what legal theorist Brett Bowden calls the 'Standard of Civilisation'.<sup>252</sup> This is 'the tacit and explicit assumptions that form criteria for any given civilisation to identify who belongs to their society and who does not'.<sup>253</sup> Nations that reach the standard are considered those that are 'able to show the marks of the state'.<sup>254</sup> It was with this standard in mind, embedded in the regulatory principle of *ius gentium*, that Indian societies were liable to be judged. For society to show demonstrably the 'marks' of the state would also be a prerequisite for possessing sovereignty, which was the preserve of the 'civilised' nations.

Conversely, the defining point of Indian culture was that it bore a number of *human impedimenta*<sup>255</sup> needing to be overcome in order for it to be granted the same sovereign status as the Spaniard's. Amongst the list of *impedimenta* were included: the inadequate condition of the magistrates, the primitive means of agriculture, and, *inter alia*, the lack of refined 'arts, crafts and letters'.<sup>256</sup> More generally speaking, 'absence of law' and 'enslavement in custom and tradition' were commonly seen as a

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<sup>243</sup> Pagden (1982), p. 94

<sup>244</sup> Vitoria, p. 250

<sup>245</sup> *Ibid.*, p. 290

<sup>246</sup> *Ibid.*, p. 290: 'I myself do not dare either to affirm or condemn [the madness of the Indian] out of hand'.

<sup>247</sup> Vitoria, p. 292

<sup>248</sup> Pagden (1982), p. 105

<sup>249</sup> *Ibid.*, p. 104

<sup>250</sup> Guardiola-Rivera (2011), p. 36

<sup>251</sup> Vitoria, p. 290

<sup>252</sup> Brett Bowden, 'The Colonial Origins of International Law: European expansion and the classical standard of civilisation', *International Journal of Social Sciences* (2005, no.7), p. 1

<sup>253</sup> *Ibid.*, p. 1

<sup>254</sup> *Ibid.*, p. 18

<sup>255</sup> Pagden (1994), p. 163; Pagden (1982), p. 102

<sup>256</sup> Vitoria, p. 290

‘hallmark of indigenous/“primitive societies”’.<sup>257</sup> In contrast to the Indian state of affairs, Vitoria considered civilised and ordered societies to be firmly grounded upon the organising principle of the common good. Through decision-making processes that appealed to the common good, the majoritarian nature of a law and order working for the welfare (economic interests, property, rights, etc.) of all citizens was effectively articulated.<sup>258</sup> This was the distinctive feature of Vitoria’s organising principle, only to be realised where a recognisable legal framework conforming to the standard was in place. It was, after all, the civil code that ensured order and distinction of land and property,<sup>259</sup> the absence of which foreclosed the possibility of recognisable sovereignty. Indeed, this understanding of sovereignty had its foundation in the state’s monopoly on the means of force, necessary to enforce the rights of property through divisions and demarcations of the land. To put it another way: ‘law and land’, or the control of law over land, was a definitive feature of sovereignty.<sup>260</sup>

As we have stated, it was only the developed political state that could exercise sovereignty, of which the exemplar was the ordered Spanish state. In contradistinction, the level of development of Amerindian society did not seem to be particularly far advanced (although Vitoria repudiates the suggestion that indigenous society constituted a pure state of nature). As such, descent into the menaces of disorder and anarchy were a constant and very real threat. It is an insinuation that runs through the dialogue of Spanish and Portuguese colonists in the common motif of the vengeful Indian thirsting mightily for blood in inter-tribal warfare.<sup>261</sup> With constant, ‘brutish’ civil strife à la Hobbes, the organised political or municipal<sup>262</sup> life of human civil groups<sup>263</sup> was far from being on the cards; the fact that the social forms of civil life existed in Indian societies said nothing about their quality.<sup>264</sup> In short, Vitoria’s evaluation of Indian society seemed to lend itself to the notion that indigenous social structures just did not allow for the transgression of savagery.<sup>265</sup>

The *impedimenta* could not demonstrate the Indian’s lack of inalienable natural rights. What the *impedimenta* indicated was that the native’s natural rights could not be fully upheld, within his own society, as it existed. The sub-standard or under-developed social practices endemic to primitive societies seemed to disqualify them from any tangible sovereignty. And if sovereignty could be considered to be the ‘metaphysical embodiment of the people’ by the organised state-form, primitive societies badly represented their people in failing to enforce their natural rights. This, of course, reflected terribly on those said to be ‘governing’ Indian societies.

While Vitoria was quick to affirm the Indian’s natural rights, there was an admission that these rights came with the added responsibility to enforce and uphold normative standards. Again, the argument proceeds from the canon law tradition, in which Innocent IV understood that the protection of the infidel’s natural rights came together with the right to judge by the laws applicable.<sup>266</sup> The Pope had a professional interest in the correct ordering of Christian societies, and canon law extended this interest to infidel societies.<sup>267</sup> This served to reinforce, on a global basis, the belief that only the well-ordered society could readily enforce normative standards and uphold rights, and was therefore worthy of sovereignty. For the most part, infidel societies, despite possessing the potential to exercise the same rights as Christian societies, failed in ordering their societies to a properly sufficient degree. Furthermore, intervention for corrective purposes could be justified in cases in which societies were considered to have modelled themselves on ‘Sodom and Gomorrah’,<sup>268</sup> i.e. they were perennial violators of natural rights. Taking his cue from this position, Vitoria asserted that the relational ethics of *Humanitas* legitimised intervention for the benefit<sup>269</sup> of the Indian-other.

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<sup>257</sup> Bowden, p. 13

<sup>258</sup> Vitoria, p. 281

<sup>259</sup> Pagden (1982), p. 91

<sup>260</sup> Fitzpatrick (2001), p. 92

<sup>261</sup> Viveiros de Castro (2011), p. 55

<sup>262</sup> Bowden, p. 18

<sup>263</sup> *Ibid.*, p. 69

<sup>264</sup> Pagden (1982), p. 79

<sup>265</sup> Bowden, p. 18

<sup>266</sup> Muldoon, p. 118

<sup>267</sup> *Ibid.*, pp. 5, 11

<sup>268</sup> *Ibid.*, p. 11

<sup>269</sup> Vitoria, p. 286

The case for intervention was further bolstered by the stark comparison between the ‘perfect’ communities or states of Spain and Europe, and those ‘imperfect’ social forms of the Indian. The perfect states were those Vitoria considered to be complete in themselves, replete with independent policy, law and magistrates like ‘Castile and Aragon’.<sup>270</sup> Moreover, only perfect communities were able to recognise each other on the terms of reciprocity, based on an equality of structural forms.<sup>271</sup> It was then incumbent upon those developed polities like Spain to ensure others reached their potential, so as to guarantee an equality of socio-political status.<sup>272</sup>

We can see here that incompleteness or indeterminacy returns, erased from the ontology of the Indian, to be displaced onto the social structures and practices of indigenous society. The ‘lack’ – a definable feature of imperfect social forms – would require filling in by the Spaniard for these societies to attain perfection. In other words, the independent identity of indigenous society would have to be dissolved and initial difference (between societies) transcended, in order for those ‘primitive’ societies to command full sovereignty, as well as potentiality. Here, the difference, internal to the system, distinguishes between those who fully assume the actuality associated with their ontological form, and those who, due to the imperfection of their societies, are impeded or held back in the realisation of their full potentiality. The burden of those who can fully exercise their *Humanitas* is to practise a responsible politics, to mend the rift between the ideal and the actual (repair damaged totalities)<sup>273</sup> – between the ontological Indian and the historically rooted, contingent Indian.

The lack of development of indigenous societies, eligible to be judged by the standard of Spanish society, could only be seen as a real concern. The source of all the problems could be traced back to the bad habits that had crystallised over time through stagnant and ossified traditions. Vitoria puts the blame squarely on the shoulders of the native leaders, the ‘early legislators’, whom he saw as responsible for the ‘concretisation’ of these bad habits.<sup>274</sup> The inadequacy and venal nature of indigenous forms of government had played the chief role in obstructing the adoption of rules of normative behaviour conducive to a well-ordered society. The governance structures and leadership of native communities had hindered the conditions that could ensure a stable order worthy of sovereignty.

Vitoria’s depiction of ‘primitive’ or ‘savage’ societies lost in tradition is an intriguing one. In his jurisprudence, the Indian had gained recognition and rights. However, this recognition also entailed the hypostatisation of cultural and ethnic difference. Recognition presupposes the ‘existence of a reified essence that is constitutive of one’s being’.<sup>275</sup> The essence of the Indian’s identity, pre-Spanish colonialism, becomes over-determined by its primitive social forms. In other words, in gaining admittance to Vitoria’s jurisprudence, the native’s contingent and partial identity becomes represented in ‘bounded and complete form’.<sup>276</sup> Likewise, primitive social forms and related cultural traits are conceptualised as rigid, enclosed social structures admitting of no fluidity and becoming fully decidable. To put it another way, the ‘*culturating* apparatus’<sup>277</sup> of indigenous society is hypostatised. Native culture(s) could be thought of as a process of supporting traditional ways of accessing and experiencing the world, as well as absorbing new methods.<sup>278</sup> This is commensurate with the Indian’s mode of openness to the other, one in which identity is genuinely transformed by embracing the contingency which emanates from the encounter with the other. In this manner of receptivity, a manifold of potential ways of perceiving reality is sustained. As we have seen, the Indian had many others in which to engage, of which we have accounted so far for the *given* of the earth, and the confrontation with the colonist. However, the process of legal recognition works precisely to oppose, and indeed foreclose, this *culturating* apparatus of indigenous society; the difference between societies can now be explained through the tyranny of a stratifying tradition within native communities.

Within Vitoria’s jurisprudence, difference is ‘captured’ through the erection of rigid dividing lines between Spanish and Indian cultures. It is the ‘lack’ on the native’s side that produces the

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<sup>270</sup> Vitoria, p. 301

<sup>271</sup> Guardiola-Rivera (2011), p. 31

<sup>272</sup> *Ibid.*, p. 35

<sup>273</sup> Jan Nayar, p. 68

<sup>274</sup> Pagden (1994), p. 163

<sup>275</sup> Bhandar, p. 7

<sup>276</sup> *Ibid.*, p. 7

<sup>277</sup> Eduardo Viveiros de Castro, ‘Cannibal Metaphysics: Amerindian Perspectivism’, *Radical Philosophy* (vol. 182, pp. 15–28, November/December 2013), p. 34 (emphasis added)

<sup>278</sup> *Ibid.*, p. 34

difference. Furthermore, indigenous society is only rendered intelligible to the Spanish state-form when its difference is explained away through differing levels of development of the *same* socio-political forms. Therefore, difference within the self-same system does not afford the native the freedom to be 'other-being'. The latter would entail the Indian's rejection of *ius gentium* and *ius civile* in their entirety, in preference pursuing and asserting his own irreducible ontological and legal/social forms. Inversely, recognition is dependent upon other-being crossing the normative boundary into the European legal system/order (the 'commonwealth'). This process perforce implies the annihilation of other-being and, correspondingly, ensures its conversion into a conforming, self-same *being*. When other-being is reduced to *being*, the ability to move unimpeded, to struggle against and flee the subsuming structures of the European legal order, is lost. The notion of legal recognition articulated and based on rights claims is unable to acknowledge the movement and continual change of social forms – a phenomenon that Brenna Bhandar associates with the ongoing formation of the subject in its relation with the environment.<sup>279</sup>

We will recall that for many of the colonists, the Indian's nomadic qualities initially inhibited recognition, due to his 'excessive' behaviour and consequent lack of stabilised social forms. The native's partially nomadic life seemed incapable of the discipline commensurate with a fully ordered civic life. Instead, he led an existence indistinguishable from the natural processes of the earth, subsumed within the *given*.<sup>280</sup> Yet, with Vitoria, the opposite seems true. Indigenous society through the prism of recognition assumes the form of a stratifying and highly traditional social order that stymies legal and political progress. On the one hand, Indian society is subject to an excessive amount of unregulated movement (molecular-becoming) incommensurate with order, while on the other it is at the behest of decrepit traditional structures blocking the development of juridical forms.

These contrasting critiques can be read as two sides of the same coin. The Indian's nomadic being, as other-being, enabled a certain capacity to flee, as well as leaving him free to assume a form un-orderable within the confines of a bounded, contained *Humanitas*. Vitoria's jurisprudence, and the hypostatizing recognition it implied, could not acknowledge this ability to flee. From the perspective of his legal system, any un-orderable aspects of 'primitive' society become markers of non-progression or under-development. The facets of Indian society that remain un-orderable are only recognised indirectly as a lack or imperfection. The Indian becomes a victim of his culpable leaders, who, rather than negating the conditions conducive to other-being and hostile to natural rights, only condone the traits of Indian societies un-orderable within the European legal order. Hence, the aspects of indigenous society that fled recognition in order to resume their relationship with the un-orderable are identified as the remains of an ossified tradition.

The sole means to represent, indirectly, the un-orderable aspects of indigenous society within a common jurisprudence was by situating it historically, as temporally behind the advanced states of Europe. Such indigenous societies would then be able to exercise their full sovereignty at such a point in time when they lost all marks of the un-orderable. Until such a point, difference internal to the self-same system was explained through varying levels of development and progression. Indigenous societies, much like the Indian himself, were immature social forms that needed the aid of the Spanish state. To put it another way, indigenous social forms were presented as in a state of *becoming*, in need of guidance to find the proper *being*. Conversely, to leave Indian societies 'abandoned' to the un-orderable and the *given* would be a deplorable act indeed. Even Las Casas, despite his praise for the lawful nature of many Indian societies, conceded that some had not reached ordered government 'as was the case with all peoples of the world in the beginning'.<sup>281</sup>

To conclude this section, let us state that the major achievement of Vitoria's jurisprudence is the effect it has of *levelling down*<sup>282</sup> the Indian's behaviour and practices from embodying characteristics of *strong a-legality* (a position given expression by the colonist) to conformity with traits proper to *weak a-legality* (elaborated through his jurisprudence). The issue is no longer related to the separate ontological form of the native or his non-being, a perspective that would insinuate an inherent foreignness to order.

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<sup>279</sup> Bhandar, p. 39

<sup>280</sup> Fitzpatrick (2001), p. 159

<sup>281</sup> Hanke (1994), pp. 75, 79

<sup>282</sup> The term 'levelling down' is used here to denote the opposite of Hans Lindahl's usage. The latter's usage represents the movement of expelling from that which is 'important' and 'relevant' to a legal order to the realm of the un-ordered. In my usage, what is captured is the moment of inclusion – in other words rendering recognisable that which was formerly part of the un-ordered, rendering behaviour 'important' and 'relevant' to the legal order in question.

The problem is relocated to the social institutions and practices of indigenous society, within which can be discerned, and acknowledged, a perceivable *order in becoming*. Upholding the Indian's rights, in fact liberating him and his society, required only the removal of the *impedimenta* of his primitive social forms. This would release, from constraints, the nascent legal order within indigenous society, so as to enable it to progress. It was only through the process of inclusion, and the constructivist recognition this implies, that the *impedimenta* or un-orderable aspects of native social forms – those aspects that can have no place within the *ius gentium*, or *ius civile* for that matter – could be filtered out. The narrative of progressivism implicit here posits a future time when a well-ordered indigenous society will celebrate the triumph of culture and normativity over the earth.<sup>283</sup> It is a triumph that will signal the full use of the Indian's potentiality, that is, of his *being*.

## Chapter Six: Resistance, Disciplinary Action and the A-Legality of the Indian

Vitoria's impetus in producing his scholarly work on the Indian Question arose from the re-examination of the natives' claims to rights; the outrages of the colonists acted as a spur in this regard. Nonetheless, the violence that the colonists meted out re-emerges in a legal manifestation, internal to Vitoria's jurisprudence. In the latter, violence is a product of the difference between Indian and Spanish cultures. Once the standards of *ius gentium* are breached, disciplinary action and intervention become necessary in order to mend the rift opened up by difference. The deviance of the native's behaviour demands regulation, and so sanctions are merited to this purpose. Put otherwise, to attenuate Indian deviancy corrective treatment was required, directed towards the goal of his moral improvement. Through this line of argumentation, we are able to see that the violence that was unjustifiable and boundless outside any conceivable jurisprudence becomes justified within Vitoria's jurisprudence.<sup>284</sup> In other terms, Anthropos seems to have been internalised; it both generates and regulates the difference that exists within *Humanitas*.

However, we should note that the violence inherent to Vitoria's jurisprudence is not solely articulated and legitimised through the need to correct the Indian's deviancy from set standards. Vitoria is also led to consider the cases in which intervention can be given a sound legal basis through the doctrine of Just War.<sup>285</sup> It was within reason that war could be legitimately declared due to the sacrifice and oppression of innocents, in which there was a need for action in order to obtain rights.<sup>286</sup> Violation of natural rights was also a valid enough reason for intervening to re-order indigenous societies, to ensure future compliance in upholding them. Moreover, Vitoria indicated that the Indian's deportment, more generally, deserved to come under scrutiny, and could provide a pretext for intervention. What seemed most open to censure, in this regard, was the Indian's exclusionary behaviour, which gave insufficient respect, and, in fact, 'offence to the law of nations'.<sup>287</sup> It suffices for us to examine Vitoria's musings on the Indian's resistance to illustrate this point.<sup>288</sup>

The Indian's stubborn resistance to the Spanish missionaries and colonists proved to be quite a bone of contention for Vitoria. The conclusion he drew was at odds with that of Las Casas, who argued

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<sup>283</sup> Adams, p. 10. In actual historical terms, as Quijano and Wallerstein note (p. 549), 'the process of peripheralization involved less the reconstruction of economic and political institutions than their construction, virtually *ex nihilo* everywhere.'

<sup>284</sup> Blomley (2003) provides a useful explication here, which bears quoting in full: 'Law tends to deflect questions of its own innate violence to the violence that makes law necessary. Yet when law is forced to confront its violences, it authorizes them "as a lesser or necessary evil and as a response to our inability to live a truly free life, a life without external discipline and constraint."' (Quoting Sarat and Kearns).

<sup>285</sup> According to Schmitt, the *respublica christiana* bases itself on the varying distinctions between types of enemies and hence types of wars, on the grounds of 'profound distinctions between human beings and on a great disparity of their status.' Moreover, Just War enables a Christian prince to pass judgment over those they subdue. Schmitt, pp. 105, 122

<sup>286</sup> Vitoria, p. 305; Muldoon, p. 149; Schmitt, p. 109

<sup>287</sup> Vitoria, p. 282

<sup>288</sup> Vitoria furnishes us with other examples that demonstrate the exclusionary deportment of the Indian's behaviour. These include the Indian's refusal to share his property in common with the Spanish, and his treatment of the Spaniard as if he was a 'stranger', in violation of the ancient law of hospitality to foreigners. See Vitoria, pp. 279–80. Interestingly, Schmitt (p. 124), in his discussion of Just War, cites a Lutheran contemporary of Vitoria, Johann Oldendorp (1480-1567), as stating that 'just war is not war, but justice, and that unjust war is not war, but rebellion.'

that the natives' actions were purely in self-defence in the face of conquistador attacks, and thus that they could not be 'justly warred against'.<sup>289</sup> Vitoria chose to uphold the right of the colonists to defend themselves, supposedly confronted, as they were, with Indian aggression.<sup>290</sup> The adoption of violent stratagems by the native held enormous significance for Vitoria, as it served to show that the former was intent on excluding the Spaniard from his world.

In response to the exclusionary resistance of the native, Vitoria opted to re-assert canon law's insistence on the rights of missionaries to preach the Word, and the obligations of infidels or pagans to deliberate upon it in a reasonable manner. Any obstruction to the business of proselytising, any block to the advancement of conversion, was enough to make just war permissible.<sup>291</sup> Evidently, the Indian's self-defence, by its very nature, was likely to result in the obstruction of some of the missionaries' activities. Nevertheless, counter-violence was seen to demonstrate the failure of reason to get through to him. It furnished further evidence of, and indeed reinforced the notion that the Indian required disciplinary action in order to make him conform to rationally sanctioned norms.

The disciplinary action warranted by the Indian's behaviour included the temporary forfeiture of property, territory and arms used against the Spaniard, and beyond that it justified the overthrow of native 'princes'.<sup>292</sup> In the precipitation into war, the Indian's natural rights were suspended till such a time in which he was deemed to be in possession of his senses. Not only did this act as a judicious punishment for his artifices, it aided in the re-assertion of his rationality through means he was considered to comprehend.

The native's violence against the colonist was, indeed, a transgressive act, in that it is through resistance that the traces of victimhood are erased. In Vitoria's initial analysis of the Indian, it was stated that his victimhood *vis-à-vis* the colonist perpetrators rendered him worthy of ethical consideration. It was the native's role as hapless victim that led to the reinstatement of his universal being in *Humanitas*. Contrariwise, once Vitoria put to one side the colonist's excesses and considered the case for just war, he looked again at the propriety of the Indian's actions against the colonists. His innocence seemed clear in light of the colonist's outrages. However, once he took up arms in resistance his guilt and culpability became clear. The native, in taking matters into his own hands, and seeking empowerment and redress through counter-violence, became a perpetrator every bit as insidious as the colonist. In such circumstances, it was for the Spanish, as possessors of the superior society, to punish the native's actions for the betterment of his society. So it seems that Vitoria had no truck with the Indian adopting an exclusionary deportment towards the Spanish, echoing as it did the mentality of the colonists.

The resistance of the Indian heralded the loss of his innocence. The more he tried to establish and assert his exteriority, the more it seemed to perpetuate and legitimise his coercion into the jurisprudential system. We can interpret this manner of resistance as the native's attempt to re-appropriate 'anthropos'.<sup>293</sup> In this self-assertive manoeuvre he affirms his other-being. As was stated above, within the colonist's discourse, *Anthropos* signified the imaginative invention of the other, as well as the complementary power to define oneself. The Indian, through the re-appropriation of *anthropos*, was now able to redefine it in his own terms, from the point of view of the 'invented other'. Thus, an inversion takes place, so that *anthropos*, itself, takes on the perspective of the other. Hence, what is denoted is the other's discursive possession of itself, that is to say, the continued invention of its own identity (in the sense of autonomous 'form'). In practical terms, the Indian-other's *anthropos* signifies the coincidence of his way of sensing the world, through immersion in the *given*, with the inexhaustible power of self-invention. In taking on the ontology of other-being, *anthropos* bespeaks the native's resistance to closure – to the category of *Humanitas* and the jurisprudential system, as overlapping and co-dependent totalities. Whereas for the colonist *Anthropos* proved a method (if inadequate) to conceal the lack at the very heart of the self, the Indian's *anthropos* can be seen to harness this lack. Thence, humanity, for the indigenous, could not be a

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<sup>289</sup> Hanke (1994), p. 92

<sup>290</sup> *Ibid.*, p. 282; Schmitt, p. 109: 'ultimately Vitoria's view of the *conquista* is altogether positive. Most significant for him was the *fait accompli* of Christianization.' Furthermore, Schmitt states that Just War in this case acquired its legal force from the missionary mandate, and grounded the framework of the *respublica Christiana* as legal thinking moved towards an equal sovereignty of (European) states over and above a spiritual power: pp. 111, 120.

<sup>291</sup> Vitoria, p. 285, Muldoon, p. 148

<sup>292</sup> Vitoria, p. 324

<sup>293</sup> The Indian's re-appropriated lower case 'anthropos' is differentiated from the colonist's capitalised 'Anthropos'.

completed nature: it was merely a transitory condition.<sup>294</sup> The lack is thereby a necessary condition for an open identity, and the native's resistance reasserted this point. It is at this point we ought to remember the indelible image (conjured up by Viveiros de Castro) of the Indian fleeing the missionary by returning to the forest, no doubt to re-engage with the contingency and flux of his fertile surroundings.

The native's other-being should be thought of as a purely affirmative ontology, unlike non-being's search for determinate being, and the progressivism of a becoming-into-being. Naturally, both non-being and becoming, in this instance, have their end point in the determinate form of *being*. However, other-being implies a fidelity to a separate type of ontology altogether. In which case, the Indian's assertion of his incomplete self-determination or fidelity to other-being could only be interpreted as a rejection of Humanitas. The native could well be accused of denying his own humanity and negating his own claim to redemption or salvation. In other words, when appropriated (or defined) by the Indian, Anthropos threatens to detach itself from Anthropos–Humanitas, and to reconstitute itself in its singularity as anthropos. With the self-exclusion that this implied, Vitoria could only attribute this audacious act of defiance to the native's wish to slide into non-being. This would entail a process of unshackling from an ontologically unified mankind. Fidelity to other-being effectively meant cloaking himself with an unrecognisable ontology, represented indirectly, for Vitoria, as the wish to revert back to non-being.

In light of the Indian's anthropos, Vitoria's argument that just war was legitimate can be read as a commitment to re-positing Anthropos–Humanitas. Let us reiterate that Anthropos acts as a disciplinary arm on behalf and as part of the wider Anthropos–Humanitas. It can act, primarily, by threatening to exclude the native, despite not actually being able to carry this out. This is due, in terms of the Spanish world, to Anthropos' inability to divorce itself from Humanitas; any separation would undo all the work put in to repair the totality ruptured by the event of the encounter.

The repair work, as has been noted, relied upon the levelling down of a strong to a weak a-legality. The Indian's enforcement of his self-exclusion, and the escalation of his actions in resistance, threatened the return of a strong a-legality. By implication, this would mean the resuscitation of the Indian's links with the un-orderable. In spite of this, the native's resistance would have to be met not so much with exclusion but with the greater force of coercion into a jurisprudential totality. Anthropos is no longer directed towards the expulsion of the 'inhuman', but towards enforcing the inclusion of those others in Humanitas who would deny their own humanity if left to their own devices. The discipline inherent to the system had to be engaged in order to save the native from himself. No group of people could voluntarily renounce their right to live,<sup>295</sup> and to repudiate one's own humanity once it was recognised amounted to a rejection of life. It was therefore down to disciplinary action, as a supreme part of the 'grand redeeming project', to fully include the Indian. The native's resistance to assimilation, alongside his fidelity to other-being, only confirmed the need for Vitoria to shore up his jurisprudential totality. In order to preserve the planetary 'commonwealth of nations', violence against non-sovereign societies was, indeed, acceptable. Likewise, in order to sustain Humanitas, what was required was to stop the Indian from entering non-being, which would otherwise enable him to vanish into the realm of mythology, or even cosmology, in anthropos.

## Conclusion

The major success of Vitoria's jurisprudence was its ability to level down from strong to weak a-legality. He managed this process in two distinct cases. Firstly, there is the case of the colonist's discourse on the Indian's unrecognisable shape. This must have been a particular bugbear for Vitoria, and it proved to be the motor spurring him on in his study of the Indian Question. The issue arose with the popular belief that the native merely assumed the guise of humanity but was in reality some 'Homo Monstruosus'. This intimated the possibility that he was a member of an altogether separate ontological order. As a consequence, the colonists' Anthro-centric thinking led them to the opinion that the native was beyond the pale of salvation; all that was left to do was to enforce his exclusion from humanity. Exclusion, for the colonist, directed itself against the Indian in the outrages of war and the tyranny of the *encomienda* system.

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<sup>294</sup> Viveiros de Castro (2013), p. 30

<sup>295</sup> Muldoon, p. 149

In response, Vitoria moved to quash the colonists' ideology by pressing the case to the Spanish state for adhering to the strictures of theological orthodoxy. Theoretically, this meant the dismantling of *Anthropos* in its singularity, through the positing of the *Humanitas* definition of mankind. By appealing to the universality of *Humanitas*, the aspersions of the colonist, as well as the potency of Natural Slave Theory, could be effectively countered. *Humanitas* entailed the extension of ontological parity to the other – which became the instrument whereby the firm grounding of the legal system could be consolidated. To put it another way, Vitoria's jurisprudence, drawn from old Roman and medieval canon law, had its force in being able to reconstitute legal totality through the bolstered universality of *Humanitas*. It was simply the case that the *Anthropo-centric* paradigm did not possess the same power to fortify totality against the effects of rupture imparted by the event-encounter. In contrast, *Humanitas* was able to contain the Indian-other: far from freely communing with the *given* (signifying the strong a-legality of the un-orderable) the native is re-conceived as patiently awaiting admission into the Spanish world. Thus, the levelling down necessitated by *Humanitas* was a prerequisite for the repair of totality, clearing the way for the supplanting of *Anthropos*.

If it was *Humanitas* that attenuated the influence of the *Anthropos*, it required something more to set about resolving the challenge posed by the native's resistance. The latter's *anthropos* proved to be a method of attack inverse to that of the colonists; his stratagem of re-appropriation through resistance can be said, so to speak, to have turned *Anthropos* on its head. The attempt of the Indian to exclude himself from the Spanish world was no less than a redirection of *anthropos* against the Spaniard. This opening allowed Vitoria to re-posit *Anthropos* as part of the wider *Anthropos-Humanitas*, as a form of disciplinary action against the native. The colonists' exclusionary violence then shifts to jurisprudence's coercion via the process of inclusion. So, just war was deemed acceptable as a way to keep the Indian within *Humanitas*; once recognised within the legal system, the native was forbidden from denying his own 'true' nature, and fleeing from *Anthropos-Humanitas*. His resistance only served to confirm the veracity of the claim that he must be saved from himself; after all, it seemed that in practice he was still to completely divorce himself from the corrupting nature of his environment. However, with the obligation placed upon the Indian to meet the normative standards implicit to a planetary jurisprudence, his strong a-legality was perforce levelled down. Both the sanctions incurred in falling below standards, and the resulting disciplinary action, were means employed to forcibly erase the marks of the un-ordered that remained in the native's society.

The outcome of Vitoria's jurisprudence is as foreseeable as it is fatal: it ultimately ends in the affirmation of internalised, disciplinary violence. The grand redeeming project that is disciplinary jurisprudence can only fully posit itself as a totality, it seems, when other-being is consigned to oblivion. It is no wonder then that the attempts of other-being to avoid capture only served to intensify the violence directed against it. The tenacity of the natives in evading capture, which went as far as to involve collective suicide in some cases (suicidal line of flight?), is hinted at in a perceptive remark by Las Casas in which he insists that they 'by their nature...are free.'<sup>296</sup>

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<sup>296</sup> Hanke (1994), p. 116

# Part Four: In Search of the Origins of International Law: Aquinas' Chain of Being, Vitoria's World-Ground Model of Natural Law, and Amerindian Dissidence

## Chapter One: The School of Salamanca and the Thomistic Theology

Arguably, of the Iberian theologians, Vitoria had the biggest impact on the intellectual landscape of sixteenth-century Spain. He was a celebrated member of the acclaimed School of Salamanca, where he held the post of chair in Theology.<sup>1</sup> The School was pivotal in developing natural law and economic theory as a major theoretical and practical approach throughout the Age of Discovery, undoubtedly accentuating its position as 'the centre of a new scholasticism, which was to have a lasting effect on European philosophy'.<sup>2</sup> This was accompanied by a revival of Thomism: Salamanca's favourite son, Vitoria, was influential in helping to transmit the doctrine from its dying embers in Paris to its leading light in Spain.<sup>3</sup>

The principal project of Vitoria, and by extension of Salamanca, was the full disclosure of the rational principles that lay behind the Christian message. However, crucially, and in contrast with the classical view that maintained the activity of reasoning as based on (Euclidian) deduction *more geometrico* and an onto-theology of indivisibles, these rational principles could be discerned through the observation of the natural world, by bringing all things within sight through a form of induction veering between realism and conceptualism. In fleshing out these rational principles and their relation to the natural world, Vitoria deferred to the methodological tools and ontology developed by Thomas Aquinas.

Aquinas' conceptual apparatus was born out of his attempt to reconcile the medieval theological theories of the Principle of Plenitude and the rational-world-ground model, while avoiding their pitfalls. The former, advocating belief in the effusive 'God of the Event', permitted the generative powers of the divinity to continually intervene in and transform the universe, thus undermining the perfection of the world. The latter deterministic model, however, effectively undermined the will of God through impelling Him to transpose all possibilities into a completely foreclosed reality. Aquinas' move was to incorporate the Principle at a selection stage in the creation of the universe, in which the Creator generates the world though actively choosing which beings to actualise in an ordered reality. Consequently, the universe that results from the selection-event<sup>4</sup>, in keeping with a God who can at least initially exercise His will, can maintain its perfection post-Creation.<sup>5</sup>

From his theological position Aquinas was able to articulate a natural law that became a means of comprehending the natural world as an ordered, unified whole. The perfection of the determinate universe consists of 'common objects' that circulate in the world through their consistent and predictable movements and relations with each other, upheld by the physical but also normative law of cause and effect. In the Thomistic tradition, the perfected natural order manifests itself as the chain of being, an

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<sup>1</sup> Pagden (1994), p. 156

<sup>2</sup> Ibid., p. 308–9; Adams, p. 141

<sup>3</sup> Pagden (1994), p. 309. Also see Walter Mignolo, *The Darker Side of the Renaissance: Literacy, territoriality and colonization*, University of Michigan Press (2003), p. 31

<sup>4</sup> This was a crucial difference between the cosmology of antiquity and that of the Middle Ages. Blumenburg (p. 374) makes the point that in Antiquity the horizon of human consciousness of the world was defined by the coincidence of the 'horizon of reality and the horizon of visibility'. While the Middle Ages held on to this paradigm, a divergence took place between the horizon of the possible and the actual. Hence, reality is the outcome of a selection that while preserving the unrestricted potentiality of the Godhead reduces reality to a form of backwardness that lags behind potency.

<sup>5</sup> A more detailed study of what is here only given in summary can be found in Arthur O. Lovejoy, *The Great Chain of Being*, Harvard University Press (1964), pp. 69–71; John Hick, ed., *The Existence of God: From Plato to A.J. Ayer on the question 'Does God exist?'* Collier MacMillan Publishers (1964), p. 84; Charles Taylor, *Sources of the Self: The making of modern identity*, Cambridge University Press (2010), p. 141; Blumenburg, pp. 375, 380–1

immense architectonic edifice that orders all creatures in a hierarchical verticality<sup>6</sup> from God downwards. Beings assume their position in this verticality according to the degree of potentiality they are deemed able to achieve. Furthermore, the chain is invested with a prescriptive force in so much as it regulates the proper relations between creatures, depending on the position they occupy. Natural law then becomes a necessary intermediary for man, between the ontological chain and the material (and cultural) reality. Through the faculty of perception, man assembles and recognises the objects around him by correctly identifying the place they assume in the chain.

In Aquinas' formulation of natural law, Vitoria found a method in which he could put the newly discovered Amerindian to the test. In indigenous culture Vitoria detected many practices and habits (such as cannibalism) that contravened natural law, revealing the native's inability to correctly order the manifold of creatures around him. Most importantly, this could only be seen as a violation of the chain's ontological ordering. In the use of Aquinas' method, that is to say his approach to natural law, allied as it is to the chain of being, Vitoria found he was able to pass judgement on the Indian, who was very much in need of corrective action in order put him back in his place firmly tethered to the rest of mankind.

## Chapter Two: Natural Law: Consistency, Normativity and the Chain of Being

In Thomas Aquinas' schema, the grounding of all things in the world can be seen as the expression of the divine light of reason. This is also the focus of his visual and spatial architectonic of the order of the natural world and hence of natural law. For in this schema God, the source of light and reason, coincides with the Good or the Right,<sup>7</sup> and thus confers a sense of things being ordered by residing in the place they properly belong to, as if reality were a canvas. Actualised order can be thought of as an emanation (in visual terms) of the Right, and the creatures placed in that order incur in exchange an obligation to preserve such an order, the just placing of beings in the chain or well-proportioned canvas. That obligation is akin to the reciprocated gaze of a spectator looking at a painting that is composed following the rules of perspective (i.e. the spectator perceives the painting inasmuch as he recognises where the objects depicted in it are placed in relation to each other).<sup>8</sup> In providing for the given order, the Godhead fundamentally acts as a 'law-giver' or 'divine legislator'.<sup>9</sup> The giving of law and order is intertwined with His form-imparting ability. The Godhead Himself is beyond all law in the sense in which a painter is beyond the painting. His self-constitution is an act of pure a-legality, or an action existing prior to legality. However, His creation of a closed, determinate world allows for the separate identity of a positive law to emerge.

To explain, we can perceive in Aquinas' model a separation of law into two domains. Firstly there is the domain of God and His law as infinite possibility or promise (the background of our emerging image of the earth).<sup>10</sup> Unrestricted (and indeterminate) possibility provides the source of generation, which is then retrospectively denoted as the basis of divine law. Once the determinate order is constructed, the capacity of a God *in excess* can no longer trespass into the domain of His creation, or go beyond the en-framing of the composed painting of reality. God subsists as the symbolic, *sui generis* head of reality, divorced from the events taking place on earth. Aquinas may well have succeeded in preserving the volition of the Creator, but at the expense of depleting His practical significance and agency in the direction of His creation. The moment of God's realised agency is restricted to His initial

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<sup>6</sup> We can consider the chain as a monumental piece of cosmic architecture. Hence, Henri Lefebvre's remark that 'Verticality and great height have ever been the spatial expression of potentially violent power' is especially apt here. Lefebvre, p. 100

<sup>7</sup> Axel Hägerström, *Philosophy and Religion*, trans. Robert T. Sandin, George Allen and Unwin Ltd. (1964), p. 254; Vitoria, p. 168

<sup>8</sup> Lefebvre is particularly insightful in his own elaboration of the perspective of the spectator in relation to the painter. The spectator's intentions will be swayed to a certain extent by the techniques deployed by the painter, but the looker will base his interpretation on factors independent of the artist's design (pp. 113–4). Such is the relationship between man's interpretation of the material world and the Godhead's original intention in producing the structure of the cosmos. Similar analogies in respect to the artist in relation to his work are deployed by Albertus. See Takahashi, p. 472

<sup>9</sup> Hägerström, p. 252

<sup>10</sup> Albertus designates this as the realm of the prime principle or the 'universally active intellect'. Its relation to the secondary realm of natural law is defined by the axiom that 'the house [as an artifact] is produced from a house [in the architect's mind]'. See: Takahashi, p. 477–9

process of ordering; He can have no more effect henceforth. The God of the Event is effectively barred from interfering in the affairs of His own universe.

The second domain – in which the jurisdiction is that of the universe, and more specifically the earth – is that of natural law ('*ius naturae*'). The natural world, as a closed totality, consists of a determined number of things. The rule of cause and effect, inherent to rationality, governs this natural world of 'common objects'. Indeterminacy thus being removed, consistency, regularity and predictability serve to characterise the relationship between all things in the universe. This is, of course, only because a certain number of demarcated possibilities are admitted into actuality (i.e. the determinate order). The principle of cause and effect is one that Aquinas adheres to throughout his theology (in his cosmological argument), and which comes to define the physical laws of the natural world. Hence, through the consistency of the objects of the natural world, we can come to understand the initial contingency (the original *cause in excess*) which begat order.

For Vitoria, that faithful adherent of Thomism, this point in the argument would become significant for the development of an embryonic, secular, international law. As Fitzpatrick notes, Vitoria follows the Thomistic path of unifying the God of the Event and the God of the natural order, and is so obliged to take on the consequences derived from this step.<sup>11</sup>

To reiterate, divine law is responsible for the creation of the earthly order governed by natural law. Natural law covers the consistency of the natural world, the rule of cause and effect that makes up the rules of physics.<sup>12</sup> The logical implication here is that the latter ends up binding the former, divine law, within its own rules. To explain, the God of the Event now becomes a part of the system of natural law, and even subject to the consistency of the natural world. He is, indeed, 'caught by "his" own creation'.<sup>13</sup> Both divine law and deity are bound by natural law, with the effects of the latter being projected back to the divinity in the final analysis.<sup>14</sup>

God's influence over His creation is exhausted as soon as His selection process, which chooses the possibilities to be transposed into a determinate reality, is concluded. His indeterminate potentiality, as soon as it is separated from determinate order, lacks the generative force of the event to resist the rational laws that govern the natural world's closed totality – of which he becomes a prisoner. Even more profoundly and paradoxically, in containing indeterminacy, God has stripped Himself of the power to ward off the laws of His creation. God, in continually thinking the infinite, has lost sight of His order. He has been condensed into a contained infinity, a dormant singularity. Despite His initial labour, in becoming part of the universe, He takes no further part in it; He has no say in its governance. He is a mere 'remainder' of the creation-event, or the 'part-of-no-part'.<sup>15</sup>

To elaborate on the implications of the above for Vitoria, let us examine his interpretation of Aquinas' natural law. Both Vitoria and the School of Salamanca theorised in natural law a supreme method for resisting change.<sup>16</sup> Natural law was conceived of as a safeguard that upheld the preservation of order on earth. In this equation, to uphold natural law was also to maintain the perfection of the chain of being.

In the Thomistic tradition, the natural order manifests itself as the chain of being. It was invested with a great deal of conceptual force and explanatory strength from the Middle Ages up until the early modern period. It provided a method of unifying the manifold of beings in the world, via an exposition of how these creatures were ordered. Through the 'comely method and proportion'<sup>17</sup> of the chain, beings from those that are purely intelligent, such as the Godhead and the angels, all the way down to the 'rudest inanimate object', were spatially arranged and linked in a rigid, hierarchical edifice. In addition to realising a hierarchical ordering in nature, the spatial arrangement acknowledged a reasonable continuity between beings. Each being was placed in its position in the chain equivalent to its delimited potentiality and power; God retained his infinite potentiality, with all creatures below Him decreasing in it by

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<sup>11</sup> Peter Fitzpatrick, 'Law Modernity and the Sacred', *Seattle University Law Review* (vol. 32, 2008/9), p. 335

<sup>12</sup> See Gustavo Gutierrez, *A Theology of Liberation: History, politics and salvation*, SCM Press (2001), p. 41 for a discussion on Aquinas' view on theology as science.

<sup>13</sup> Fitzpatrick (2008/9), p. 325, and 'Latin Roots', in *Events: The force of international law*, eds. Fleur Johns, Richard Joyce, Sundhya Pahuja, Routledge (pp. 43–54, 2011), p. 47

<sup>14</sup> Fitzpatrick (2008/9) p. 325; Adams, p. 131

<sup>15</sup> A common formulation of Slavoj Žižek's. See *The Universal Exception*, Continuum (2007), eds. Rex Butler and Scott Stephens

<sup>16</sup> Pagden (1994), p. 156

<sup>17</sup> Hodgen, p. 389

degrees. In this manner, the chain managed to withstand the hopeless confusion<sup>18</sup> that could threaten to arise if the manifold of creatures were not ordered in a clear and distinct way.

Natural law could thus become the law of ‘en-chaining’, and the method by which men could control and harness the manifold of creatures. It is the maintenance of the ‘linkages’ between creatures, and hence the proper place of each on the progressive scale, which is at stake for natural law. Natural law can then be considered to be an anticipative mechanism that locates and neutralises in advance any changes in the natural order that may adversely affect the chain and the regulated movements it allows for.<sup>19</sup>

It is these movements with which Vitoria is especially concerned in his adherence to Thomistic natural law. It would therefore be wise for us to mention at this point the motions for which the chain allows – those of *ascending* and *descending* the great ladder of being. This ‘ladder’<sup>20</sup> should not be conceived of as a two-dimensional plane, as it is more accurate to say that these movements of ascending and descending take place upon a sphere. To draw a helpful analogy, when a ship is seen to be leaving port it can be perceived to be ascending towards the horizon; and once the horizon is crossed the ship descends as it vanishes from sight. In the case of a circumnavigation, we can only deduce that the said ship completes its movement in returning to its original place. In respect to the chain of being, this means any creature that moves out of its appointed position in the order will eventually return to its rightful place. This is an example of induction, and is how the method of natural law works according to Aquinas and Vitoria. From the observation of a particular case (say, the ship leaving port) we can surmise a general law (all things ascending and descending, the orb should fall back into place). There is only a short distance separating this procedure from what common lawyers call to this day the ‘case method’.<sup>21</sup> It all hinges on the play between the emanation of life from a prime source, the Godhead who creates the natural order, and the observer who engages in a voluntary act of recognition. There is a gradation of conscious, rule-following action that proceeds from interpreting to judging.

The contrasting directions described above are, of course, both *vertical* trajectories projected upon a sphere or its flattened representation. Access to the ascending movement is the unique privilege of man. One of the means of accessing it is through an Augustinian self-transcendence, the ‘radical reflexivity’ of withdrawal from corporeal relations.<sup>22</sup> The alternative method, favoured by Aquinas, is to concern oneself with fellow creatures through participating in governance over them. In other words, it is through the first cause’s effects that we come to know Him. It is through natural law, governing the realm of ‘effects’ or common objects, that we have access to divine law, the realm of absolute contingency. Due to the diminished role of God *ex post*, man can be said to know all he needs to about the essence of things, the effects, through natural law regardless of divinity.<sup>23</sup> In other words, natural laws can be re-constituted as an ‘earthly *ius gentium*’,<sup>24</sup> that is to say a terrestrial law separated from a divinity, or the beyond.

In a sort of reversal of the creation event, it would seem that man has now been liberated from the Godhead. Or perhaps the Godhead has merely been liberated from His duties. Nonetheless, the order that man participates in can be clearly understood through natural law alone.

For Vitoria, divine law still has its place as the first precept of law. It is crucial in generating a set of circumstances advantageous to man (the manifestation of God’s affection for man). In the process of initial ordering, the God of the Event implanted in men self-evident rational principles. This enables the perception and correct interpretation of the world,<sup>25</sup> or, to put it another way, a comprehension of the operating structure of reality.<sup>26</sup> Moreover, divine law is strictly demarcated in covering only these first

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<sup>18</sup> Hodgen, p. 398

<sup>19</sup> *Ibid.*, p. 389

<sup>20</sup> Lovejoy, pp. 82–3

<sup>21</sup> The case method roughly equates with what Alexander Lefebvre terms Deleuze’s ‘critique of law’ (as opposed to what he marks out as his clinical, positive ‘curative model’ of law). The procedure of ‘subsumptive adjudication’ in jurisprudence concerns the ‘subsumption of cases under pre-existing rules’. This is the dogmatic image of law, in which all that is encountered is ‘subsumed under covering concepts’ and, by implication, cases that go unrecognised are rendered invisible or irrelevant. See Braidotti and Pisters, pp. 70, 107

<sup>22</sup> See Taylor, pp. 134–5

<sup>23</sup> Fitzpatrick (2011), p. 48

<sup>24</sup> Fitzpatrick (2008/9), p. 326

<sup>25</sup> Adams, p. 159

<sup>26</sup> Hodgen, p. 390

principles, i.e. qualities that are intrinsic to men. Hence, the first precepts are demonstrated, in this case, through the universality of the soul in men, which enables the capacity for rationality.

The ability of man to correctly perceive reality corresponds to his acting in accordance with natural law, which is subject to human affairs. Natural law can therefore be thought of as the secondary precepts (*secunda praecepta*); these abide by the laws that govern human normative behaviour, and thus culture and habit. Furthermore, it is the source of positive law.<sup>27</sup>

Moreover, natural law can be thought of as the mediator between the realm of divine intelligence and the rational soul of men.<sup>28</sup> Additionally, man himself can also be considered as a sort of mediator, and in this respect Aquinas sees him as being expertly placed in the chain of being. In terms of law, man is conceptualised as a boundary between the positive law of nature and the divine law of God. This is because, within the chain of being, he borders on the highest, most intelligent beings, as well as the lower, corporeally imprisoned, creatures. A man's soul acts as a gateway between the eternity of the divine or supernatural world and the externalised rationality of the natural world. To quote Aquinas, man is 'the *horizon* and the boundary-line of all things corporeal and incorporeal'.<sup>29</sup> His unique motion, as was stated, is *ascension*: a vertical movement upwards in self-transcendence. The 'vertical' is of course a position or direction perpendicular to the plane of the horizon. Man, as this horizon, provides for the basic orientation of these vertical movements, and more generally he is situated in such a way so as to perceive the movement of all creatures in the chain. He is therefore in such a position as to perceive the proscribed movements taking place in the chain – for example, the evil that is explicit in an inability to fulfil potential (or work), and the free-fall from one's position that results.

Humans, in exercising their rationality, can be said to conform to natural law.<sup>30</sup> In doing so, man takes on the responsibility that is implicit in his position in the chain. This 'positionality' at once makes him an ethical and political being. In being thus constituted, he is able to perceive that reality is not just subject to the rules of rationality, but exists inherently within a normative framework (all possibilities transposed into the natural order are good, derived as they are from God). Following on from this, rationality comes with the duty and responsibility to continually ensure the correct ordering of the chain.

Man thus takes on God's work in perpetually (re-)constructing or repairing the configuration of the determinate order.<sup>31</sup> In other words, he is positioned in such a way as to take on the role vacated by God. Naturally, man can only come to a discernment of his own cognitive order – rationality in the sense of a collection of ideas ordered in the mind – or 'inner assembly',<sup>32</sup> through taking up the task of regulating the external order. Aquinas' argument that you can know divine reason through His effects is humanised; man can come to know his own cognitive order only through the natural order that surrounds him on all sides.

The theory behind combining rational laws with a normative framework will require some further explanation. The natural world, as rendered by natural law, is a uniform system with its own laws governing organic matter.<sup>33</sup> Within this system, every individual part of the natural world reflects the structure of the whole.<sup>34</sup> Vitoria here sees a continuum between the physical laws of nature and normative nature of morality, as, in his view, they share the same 'immutable state'.<sup>35</sup> The *regulae*,<sup>36</sup> or norms, that structure the organic, for example the rule of cause and effect, equally apply to man as he is as much corporeal as incorporeal. Since the laws of cause and effect apply to human societies, they must also impact upon the rules governing normative behaviour. There is thus a continuum between the organic, logically deducible process of nature, and the domain of man and his culture.

This approach is an outcome of Vitoria reaffirming his allegiance to Aquinas' nominalism. The emphasis on the intrinsic rationality governing nature led Vitoria to deny the realist doctrine that the

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<sup>27</sup> Pagden (1994), pp. 159–60

<sup>28</sup> Pagden (1982), p. 67

<sup>29</sup> Ibid., p. 74; Pagden (1994), p. 158, quoting Soto (emphasis added)

<sup>30</sup> Pagden (1994), p. 158; Pagden (1982), p. 67

<sup>31</sup> It is worth noting here that Albertus was fond of the axiom that 'every work of nature is the work of intelligence', thus establishing 'work' as an ontological constant between God and the structural operations of nature. See: Takahashi, p. 451

<sup>32</sup> Taylor, p. 141

<sup>33</sup> Pagden (1994), p. 157

<sup>34</sup> Ibid., 158

<sup>35</sup> Ibid., p. 263

<sup>36</sup> Ibid., p. 158

essence or properties of things were ‘dependent on the will of God’.<sup>37</sup> Things or objects possessed their own essence, and could quite credibly exist within their own common world without being impinged upon by a *beyond* or outside.<sup>38</sup> The quasi-independence of the natural world, encased and enclosed within its own normative laws, meant it could act as its own autonomous system or structure.<sup>39</sup>

Natural law, as mediation between man and world, involves understanding the correct location of man in the system of nature. The ability to locate oneself requires correct cognition, a principle faculty of the soul.<sup>40</sup> This cognition is enabled by logical deduction, a process that is inseparable from categorisation. In order to categorise correctly, one must comprehend the proper place of things in reality or in the world, particularly in relation to oneself.

In order to explain how existing laws are natural, the law of nature works backwards – from the specific to the general.<sup>41</sup> As concerns the chain, this effectively means deducing from a creature or being’s behaviour where in the chain it stands. It requires comprehending the operating structure of reality through the correct perception of a particular being within it. Understanding the chain as a natural hierarchy is synonymous with the correct use of (re-)cognition, which perceives the distinctions between things in the hierarchy. In other words, conforming to the natural world means distinguishing between the categories that divide, cut and split it up into a spatial system.<sup>42</sup> Perceiving, from the viewpoint of natural law, ultimately means thinking *within* this stable interiority, properly demarcated by the boundaries that construct it.

### **Chapter Three: Onto-Normative Dissidence: Cannibalism, Deviancy and Abnormality *Vis-à-Vis* Natural Law**

The encounter with Indian cultures provided Vitoria with a concrete context in which to apply his Thomistic interpretation of natural law.<sup>43</sup> In examining the cultural traits of Indians, Vitoria relied upon Dominicans and colonists on the ground to furnish him with the accounts that would prove useful to his endeavours. Of the more questionable cultural traits amongst the Indians, the exemplar proved to be the practice of anthropophagy. Vitoria’s consideration of the Amerindian practice of exocannibalism, of the gastronomic or ritual variety,<sup>44</sup> in indigenous societies, provided him with the opportunity to think through what implications might result from a violation of natural law. For theologians of Vitoria’s time, not only was cannibalism a marker of a type of behaviour that was the ‘ultimate in human nastiness’,<sup>45</sup> but it also signified a profound spiritual impoverishment.

However, it is important to remember that the consideration of such Amerindian practices coincided with and mirrored ongoing European debates concerning the Christian Eucharistic rites, specifically whether the sacrificial rite should be seen as literal (bread and wine actually become Christ’s flesh and blood) or merely symbolic (the flesh and blood are really but spiritually present).<sup>46</sup> Crucially, these debates were not purely theoretical. At least since the 1551 Council of Trent<sup>47</sup> the possibility of wholly or partially abstract an empty signifier which could stand for an entire equivalential chain has been crucial for further developments in semiotic practices of exchange, whether war and peace or monetary exchanges. From a theological perspective, it is perhaps true to say that the practice in European societies of symbolic/literal sacrifice and the consumption of more or less a spiritual flesh-essence had long since outmoded the necessity of any concrete alternative,<sup>48</sup> but it may be more precise to observe that it was on its way to being replaced by a concrete money alternative (of which

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<sup>37</sup> Pagden (1994), p. 164

<sup>38</sup> The nominalist doctrine of ascribing individual essences to different forms or parcels of matter, for example celestial bodies and terrestrial bodies, had the added advantage of stabilising ‘the metaphysical ascendancy of the one Cause of all things.’ See Blumenburg, p. 467

<sup>39</sup> Fitzpatrick (2008), p. 290

<sup>40</sup> Pagden (1994), pp. 159, 163

<sup>41</sup> *Ibid.*, p. 160

<sup>42</sup> Pagden (1982), p. 86

<sup>43</sup> Vitoria, p. 205

<sup>44</sup> Arens, p. 16

<sup>45</sup> *Ibid.*, p. 129

<sup>46</sup> Staden, xxxii, xxxviii

<sup>47</sup> For a flavour of the debates see: A.D. Wright, *The Early Modern Papacy: From the Council of Trent to the French Revolution 1564–1789*, Pearson Education Limited (2000), pp. 1–20; Nelson H. Minnich, *Councils of the Catholic Reformation: Pisa I (1409) to Trent (1545–63)*, Ashgate Variorum (pp. 1–21, 2008), XI.

<sup>48</sup> Arens, p. 16

Shakespeare's plot-setting scene in *The Merchant of Venice* provides a well-known example). The issue is not, therefore, altogether 'scholastic' but consequential in the context of the globalisation of practices of exchange and reciprocity such as war and trade. It is perhaps here that the seemingly abstract musings of the natural law jurist-theologians come to bear upon the origins of international law with the fullest impact.

To return to Vitoria's concern with Amerindian anthropophagic rite, if remnants of 'pre-historic' practices could be said to exist in such cultures, then for him the Amerindian could rightly be accused of an onto-normative transgression of the natural order. Evidently, if this were the case then the native's misperception of natural law would demand further analysis.

For Vitoria, cannibalism suggested a false deduction, or a category error, within the Indian's cognition and perception (*scientia*) of the natural world and its law.<sup>49</sup> In this case, it involved a false deduction concerning what constituted food and what did not.<sup>50</sup> Man, within the scale of being, is considered a perfect being. This is because he sits at the top of the chain of being within the natural world – he is made in God's image, and so 'the closest thing the natural world has as a perfect being'.<sup>51</sup> In other words, he is attributed the highest potentiality of those creatures of the animal kingdom, and by extension the corporeal realm. This qualifies him to lay claim to dominion over his world. In order to exercise the capacities of insight enabled through the privilege of being positioned where he is, man is required to locate himself in this hierarchy relative to others. Below him, this includes all other animals that can be considered, by contrast, 'imperfect'. The term 'imperfect' denotes the more limited potentiality of the animals relative to the 'melting pot' (as a combination of the corporeal and incorporeal) that is man. Consequently, the lower position of animals in the chain authorises their utilisation by perfect men.<sup>52</sup> Likewise, animals are able to exploit the 'lowest form of organic matter' in the positions below them, such as plants. In turn plants can make use of inanimate matter, and so on.<sup>53</sup>

It is noticeable here, from the argument thus far, that the movement that has been described is of the *descending* variety. The descending movement from man to the creatures below him seems to indicate an instrumental relationship between the former and the latter. We can discern the normative import of the rule of cause and effect in this argument. The position of man in the natural world means that he is a cause *in excess* to all the natural beings below him. It is therefore within the scope of man's action to ensure the correct ordering of those 'effects' or animals. The latter, as 'effects' (subject to man's power), can be utilised by man for the purposes of maintaining the chain. Most overtly, the consumption of animals provides man with the nutrition needed to maintain his power at the head of the natural order. In this respect, animals sacrifice their agency for the benefit of those higher up in the chain. As a complement to this, man must engage in categorising and defining various species of animals, as well as their respected domains – the diversity of which so interested Aquinas. In this way, through the understanding of 'effects', knowledge of the entire order is obtained. In this instance, man's comprehension of the manifold of creatures entails being cognisant, despite the instrumental nature of the relations, of the unique animal contribution to the whole. After all, the reduction of the manifold to the monad (a single species or essence) is as much a threat to the natural order as the absurd notion of animals exercising power over man.

Normatively speaking, while engaging in practices of exchange with others and the surrounding environment man *ought* to act in a way that preserves the 'linkages' of the natural order. This involves preserving the proper arrangement and range of potentialities across the scale. Not to take up the task of ordering, allowing for the alternation of such an order, is to risk creatures falling from their position and thereby imperilling the operating structure of reality (of which man is the operator). It is only through all beings hitting their potential that a stable order worthy of a Creator is maintained. Put simply, the rule of a disciplinary normative system would be reciprocity, or exchange, without alterity.

In man's relation to man there holds an ontological parity (only the angels and the Godhead have a higher ontological status). This ontological equality is manifested through the linkage that binds all men together to their unique position in the chain. In other words, all men take up the same position. The issue with the Indian's cannibalism is that it attenuates the robustness of the linkage between men.

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<sup>49</sup> Pagden (1994), VII, p. 22

<sup>50</sup> Ibid. VII, p. 3

<sup>51</sup> Ibid. VII, p. 23

<sup>52</sup> Ibid. VII, p. 23; Vitoria, p. 210

<sup>53</sup> Pagden (1994), VII, p. 24

For perfect beings such as men to consume other perfect beings is to transgress the natural order by doing damage to the linkage *across* a position. Full reciprocity is therefore the rule governing exchange relations between men, political or economic. Perfect communities recognise each other and submit their relations to the rule of reciprocity, through treaties, as Vitoria was keen to point out. Other communities remained perfectible.<sup>54</sup>

Ontological parity between those of the same position effectively maintains the equivalence between rank and potentiality. To this end, cannibalism can be thought of as a manifestation of disordering. It decomposes the parity of potentiality or ‘solidarity’ across a position, effectively weakening the positionality of man. There can be no linkage between men in a world where ‘everyone is a potential meal for someone else’.<sup>55</sup> The onto-normatively dissident, anti-social<sup>56</sup> side of the Indian is seen to come to the fore here. In fact, according to this schema, it is this facet of their imperfection that threatens to turn them into hostiles of all mankind.

Within the chain of being no man can possess another ‘absolutely’.<sup>57</sup> All men, possessing the rationality gifted by divine law, should not therefore reduce others to tasty morsels. To do so is to behave in an un-human way,<sup>58</sup> and to perceive others in a purely instrumental manner (as simply corporeal) that is a rejection of unique human potentiality. To see other men in this way is to see them as beasts, as taking up positions below what is proper to them. By implication, cannibalism also amounts to a refusal to take up one’s own position, i.e. that of the human in the chain.

Other aspects of the Indian’s culinary habits are considered by Vitoria in his continued scrutiny of the former’s cultural traits. With respect to the chain, the Indian perpetuates a sort of double transgression. The first transgression is at the higher end of the scale of being – treating other perfect beings as foodstuffs. However, there is in addition a secondary fault. This concerns a violation of the scale at its lower end.<sup>59</sup> Indians, as was their wont according to the Spanish colonists, nourished themselves on all manner of delights including assorted creepy-crawlies, insects, serpents and exotic vegetation (roots, berries, etc.). These lower creatures were seen as being almost indistinguishable from the soil of the earth – that which the earth produces.<sup>60</sup> These pure creatures of the earth, which were thought to spontaneously reproduce themselves within the confines of the ground,<sup>61</sup> were closely associated to the raw matter of the soil.

Due to the position of man, Vitoria argued that it was legitimate for him to treat the animals below him instrumentally. However, it is, for the most part, only the animals directly below man in the chain that are worthy of consumption. The creatures that the Indian is accused of eating fall at the very bottom rung of the ladder. The issue here concerns the *distance* between the position of man and these creatures at the very bottom (almost indistinguishable from inanimate matter). These creatures are almost ontologically insignificant for man. To even consider them worthy food, or available for instrumental use, is to denigrate man as a higher being in the chain. It is to commit man to a *descent*, and to refuse to take seriously his role in keeping in order that which surrounds him.

The perception of man, and the ability to deduce correctly, are enabled by ‘natural institutions’ or political structures and posited laws legitimised through natural law. Natural institutions are those that are compatible with the natural order; the former intimate the latter or project beyond themselves to the chain of being. Natural institutions are therefore a sort of microcosm of the wider natural order. In Vitoria’s view, these institutions and political structures are governed by natural law and are principally majoritarian. It is primarily consensus that decides what is right and wrong; God could not fail to implant rationality in men (commensurate with the first precepts), so consensus could only be the actualisation of these proper deductive processes.<sup>62</sup> Consensus is then bound up with man’s ability to perceive the natural

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<sup>54</sup> Vitoria, p. 278

<sup>55</sup> Arens, p. 32

<sup>56</sup> *Ibid.*, pp. 140–1

<sup>57</sup> Pagden (1994), (VII) p. 24

<sup>58</sup> *Ibid.* (VII), p. 24

<sup>59</sup> *Ibid.* (VII), pp. 25–6

<sup>60</sup> *Ibid.* (VII), p. 27

<sup>61</sup> *Ibid.* (VII), p. 26

<sup>62</sup> *Ibid.* (III), p. 162

world correctly.<sup>63</sup> It is also linked to socio-political structures, and thus, for example, consensus can only emerge in the *hominum consortia* such as cities.<sup>64</sup> The ability to visualise an environment correctly is intrinsically linked to the political unit of the city in a way that evokes the role of the urban planner or architect as described by Henri Lefebvre. These specialists, utilising reduced models, produce an order that is imposed on a place from above. This was the practice adopted by the Spanish for designing colonial cities in the Americas in the years after the conquest, and was in line with the code of urban space issued at the time: the Orders for Discovery and Settlement – a collection of official instructions circulated to the founders of colonial cities from 1513 onwards. These administrative regulations set out a plan and detailed how urban space ought to be organised in order to maintain political authority and a stranglehold over inhabitants. The plan was geometric in its rigidity, positing a clearly defined centre and a grid extending outwards in a hierarchical fashion.<sup>65</sup> In transposing a design for the model city over the world, what this effectively denotes, in the context of natural law, is that all men are potential ‘planners’. Natural law can therefore be seen as the true perception of the dividing and intertwining, enforcing boundaries which make up the order of natural institutions or structures. They are outcomes and manifestations of the ontological parity holding between all men.

For Indian societies to be considered as in line with the wider natural order (and to therefore fulfil their potentiality), they had to be made up of these identifiable natural institutions. It was difficult for this to be the case, however, when a common motif of Spanish colonists and missionaries (one shared by Vitoria) established a ‘symbolic equation’ between the practices of cannibalism and carnal deviancy in Indian communities.<sup>66</sup> It has already been stated that there exists an ontological transgression of the scale of being implicit in cannibalism, but just as significant for Vitoria was the perceived deviancy of the perverse sexuality and lasciviousness of the Indians, especially the women. Both, generally considered together, are markers of those who do not follow conventional morality.<sup>67</sup>

So, in Vitoria’s analysis of the family institution – a prime exemplar of the ‘natural institution’ governed by natural law – structuring divisions are of paramount importance, even more so than deed and function.<sup>68</sup> Paternal authority was a given in the family, as was the obligation for the father to educate his sons and sustain a monogamous relationship with his wife.<sup>69</sup> The deviancy of Indian men and women was seen as a supreme threat not only to the family institution, but to indigenous society and subsequently to mankind as a whole. The deviancy, in practical terms, consisted of Indian men keeping polygamous relationships and practising bestiality, sodomy and incest.<sup>70</sup> All these transgressions suggested the ‘dissolution of the natural relations of the sexes’, and a ‘direct assault on the social fabric as [bad as] sedition and political unrest’, the ‘inversions and perversions of the natural order of things’.<sup>71</sup>

The Indian was duly painted as an enemy of consistency and stability. Vitoria discerned in indigenous societies the subversion, to the point of disintegration, of the structured social relations making up natural institutions. The displacement of dividing lines and resistance to the categorisations of natural law meant that the native’s cultural life existed against the natural order and its enabling structures, in a state of continual transgression and inconsistency.

Vitoria’s judgement on the inadequacies of the Indian family is, of course, paralleled in his criticism of the wider legal, cultural and political structures of indigenous society. At the heart of this was the native’s hermeneutic fault in reading and perceiving the distinction between ontological scales existing in the natural world. By extension, the fault also implied an inability to comprehend the proper ordering of majoritarian/normative political structures.

The Indian is subject to the first precepts, which dictate that all men have rational souls. However, it is the secondary precepts he falls foul of, which focus on the synonymy of normativity with culture. The habits composing the native’s world, such as cannibalism, implied that he could not realise an adequate political and normative structure. His failure to ‘syllogize correctly’<sup>72</sup> meant that any

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<sup>63</sup> Pagden (1994) (III), p. 162

<sup>64</sup> Ibid. (III), p. 165.

<sup>65</sup> Lefebvre, pp. 151–2

<sup>66</sup> Arens, p. 146

<sup>67</sup> Ibid., p. 158

<sup>68</sup> Pagden (1994), (III) p. 161

<sup>69</sup> Ibid. (III), p. 161

<sup>70</sup> Ibid. (VII), pp. 25, 28; Vitoria, p. 212

<sup>71</sup> Pagden (1994) (VII), p. 28

<sup>72</sup> Ibid. (III), p. 162

indigenous political and social structures, made up of performative habits, could only exist *against* the order of the natural world.

Contra the natural order, the Indian world was portrayed as a fundamentally anti-social one.<sup>73</sup> Despite the traces of order that Vitoria located in indigenous societies, he also identified significant problems, namely the lurking ‘dis-ordering’ habits which imperilled the chain of being in its entirety. The inability of the native to gain a proper understanding of the position of man in the chain, and his role as ‘en-chainer’, placed him in danger of free-fall from this position. This free-fall was synonymous with the transgression of natural law. Moreover, the Indian can be said to have introduced an element of instability to reality itself. In such circumstances he could only be met with disciplinary measures. Only through sanctions could the positionality of man be reaffirmed and the accepted movements of the chain restored. Of course, the native *could* be left to that hell which is free (as a sort of residual *underworld*<sup>74</sup>) from order, rank and position, riddled as it is with ‘fugitives’ and ‘deviationists’,<sup>75</sup> but this would certainly not have been a theological position acceptable to Vitoria.

## Chapter Four: Positionality and Amerindian Spatial Politics

One of the unresolved tensions of the chain was whether it could successfully facilitate the clear-cut distinctions between beings that both Aquinas and Vitoria had hoped for. Natural law could only function where the demarcations between creatures in the chain were easily perceivable, as Vitoria’s critique of the Indian’s dietary habits effectively demonstrated. Through Aquinas’ theorisation of God’s selection process, the chain had acquired an ontological foundation, largely based on numbers.<sup>76</sup> In other words, the chain was constructed through the reduction of infinity to a limited number of ‘common objects’ or things that laid the basis for the ordered world. Measurable metrics allowed for the world to be modelled in the stable manner it was for natural law.

However, an alternative view persisted, born out of the conflict that made up the very nature of Neo-Aristotelianism. The main source of this conflict stemmed from the need on the one hand to maintain clear and distinct boundaries between beings, and on the other to articulate the very real continuity existing in the natural world. The latter view places the emphasis on the chain merely as a representation of the ‘infinitely delicate shadings off of everything into something else’.<sup>77</sup> Were this representation accurate, any clear division between beings would seem to be erased by the ‘fluency’ and ‘overlappingness’ of the real world.<sup>78</sup> The logical outcome of a theory that advocated a stringent continuity between beings was the tearing down of any perceivable and distinct borderline distinguishing the very different positions creatures held in the chain; difference almost seems to dissolve into nothing, as the medieval Principle of Plenitude<sup>79</sup> returns in a new incarnation.

According to Alexandre Koyré, the Principle of Plenitude and the infinite universe it proposed represented the destruction of the ‘finite, closed, and hierarchically ordered’ world advanced by those medieval theologians such as Aquinas, whose restriction of the Principle was designed to ‘limit its applicability’. The Principle returned during the renaissance through such theologians as Nicholas de Cusa (1401–1464), Giordano Bruno (1548–1600) and the astronomer Thomas Digges (1546–1595). For the latter two, Copernicus’ de-centring of the world provided the opportunity to re-establish the Principle and reassert its radical conclusions. Prior to Copernicus, de Cusa argued that the ‘interminate’ universe lacked precision and was in effect boundless; there could not be any univocal and objective representations of the cosmos, as within each being the uniqueness of individuality and the contraction of the ‘entire wealth’ of the universe coincides. In general terms, he states that the infinitely great (the maximum) and small (the minimum) overlap in being able to foreclose the possibility of representation. For Bruno, there was neither centre nor periphery to the universe – instead he favoured an infinite

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<sup>73</sup> Arens, p. 155

<sup>74</sup> As Blumenburg puts it (p. 468), medieval scholasticism did not permit any more than a ‘cosmic underground’ to be isolated from the ‘scale of cosmic agencies’.

<sup>75</sup> Hodgen, p. 404

<sup>76</sup> Taylor, p. 127

<sup>77</sup> Lovejoy, p. 57

<sup>78</sup> *Ibid.*, p. 57. Henri Lefebvre (p. 87) speaks of the ‘ambiguous continuity’ that in actual fact exists between spaces seemingly separated by enclosures, walls or visual boundaries.

<sup>79</sup> A.R. Lacey succinctly describes the principle, referred to briefly in chapter one of this Part, thus: ‘[The] Principle that the universe, to be as perfect as possible, must be as full as possible; must contain the greatest profusion compatible with the laws of nature...’ See *Dictionary of Philosophy*, Routledge (1976), p. 163.

universe, completely lacking in hierarchy, with a plurality of worlds and a superabundance of matter and possibilities. Hans Blumenburg depicts Bruno as attempting to build an alliance between German Protestantism and Copernican metaphysics, while drafting in astronomical observations from Digges' work (although he went far beyond the latter's suggestion that man simply practice 'pious renunciation of his share and claim to the world' in light of the vast amount of the world that remains hidden from him). Blumenburg describes Bruno's universe as a 'chaos of metabolism' in which the world metamorphoses from one formation to another so as not to 'congeal in contingent givenness'. The Earth, then, takes on a position of immanence in relation to all the stars in the heavens, as the totality of the open universe stymies any transcendent notion of man. Interestingly enough, Bruno would re-emerge as a sort of bogeyman for German Idealism and as a precursor to the lurking threat of Spinozian 'pantheism' which Kant attempted to block.<sup>80</sup>

Clearly, the Principle of Plenitude, the infinity of the cosmos and the 'pure' continuity between creatures was unacceptable to those such as Vitoria, leaving little room as it did for distinctly perceivable positions along the chain. However, the Thomistic position still held on to the importance of maintaining the manifold in all its glorious diversity.<sup>81</sup> After all, the widest range of creatures and potentialities, demonstrating the ordered perfection of a natural order that reflects the power of the Godhead, was clearly preferable to the reduction of species to the monad. In professing the desire for a weaker, more limited form of continuity, the relatively distinct borderlines between beings, as well as a wide array of creatures, could still be preserved. Inadvertently, this Thomistic view opened up the prospect of a politics that contested the spatial arrangement of the chain itself. There appears a difference between, on the one hand, Aquinas' chain in its delimited ontological form, and on the other the material chain<sup>82</sup> in its actuality – as really existing in the natural world, consisting of a continuity between an unknown number of beings.

The Thomistic position is thus indebted to the interminable labour and toils of man to prevent intellectual capitulation. Man is mandated to construct and engineer the edifice of the chain along the lines of the 'architectural principle'.<sup>83</sup> It dictates that the ongoing construction work on the chain should be accomplished by going back to the original ontological 'blueprint'. It is clear that these terms suggest man's role as an urban planner, compelled to construct 'to proportion, scale, rhythm' and to follow various orders or instructions.<sup>84</sup> This planning work requires social praxis in order for the chain to be held together as a unit, as 'only action can prevent dispersion, like a fist clenched around sand.'<sup>85</sup> This is of crucial importance, as in the realm of social and material reality the number of beings is open-ended, or, at least, evades any definitive closure. There are thus opportunities for 'new arrivals' to disrupt and interrupt the operational workings of the chain. For example, the discovery of new creatures previously unimaginable is enough to push the spatial arrangement of the chain temporarily into disarray. In other words, the deviation of the world in its material actuality could mean the appearance of 'gaps' in the chain – the inconsistencies and disorder provoked by creatures that do not live up to their potentiality. The random mutations and loose ends which appear in the DNA of the chain demand negotiation. For man to combat this, he is ensnared in an ongoing project to re-build the interior – to ensure through the sweat of his brow the 'positive nature'<sup>86</sup> of all the terms of the chain.

We can say here that the repair work of man is mediated through the 'interpretosis'<sup>87</sup> of natural law. Natural law operated through the correct reading of the 'book of nature': the right way to interpret and experience nature was to read it back to some original unity. In a sense, as Claire Colebrook relates,

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<sup>80</sup> For more on the significance of these figures for the argument advancing the infinity of the universe, see Alexandre Koyré, *From the Closed World to the Infinite Universe*, John Hopkins University Press (1979), pp. 5–57 and Blumenburg, pp. 356–384, and pp. 380–84 for Bruno's foundational influence on German Idealism.

<sup>81</sup> For Albertus' position on the cause of a diversity of natural phenomena, built upon by Aquinas, see Takahashi, p. 477

<sup>82</sup> See Blomley (2007), p. 15, for an interesting parallel with our present discussion on the chain of being. In the context of the early seventeenth-century Enclosures, the importance of law was 'attached to the proper arrangement of material objects'; that is, hedges, fences and gates in relation to fields. The hedges here function as a 'formidable material barrier' and 'yet this materiality made it vulnerable to 'breaking' and leveling' (p.16) in the same vein as the chain of being's very real and precarious materiality.

<sup>83</sup> Hodgen, p. 389

<sup>84</sup> Lefebvre, p. 159

<sup>85</sup> Ibid, p. 320

<sup>86</sup> Massey (2005), p. 84

<sup>87</sup> Colebrook (2002), p. 134

‘every experienced affect’ can be ‘read as the signifier of some original scene’.<sup>88</sup> Hence, in perceiving and sensing the manifold of beings, we could read them as signifiers that intimate a ‘lost’ ontological founding act. In this case, our sensations of objects are referred back to the scene of the original event – of God’s selection and ordering of the universe, the liberation from an un-ordered eternity. God’s selection process was the act that constituted the original ‘unity’ of the manifold, that which is ordered into the chain of being. Man’s work here seems to be as endless as that enacted by Sisyphus; it is incumbent upon him to continue to retrieve the ‘lost event’ in attempting to reconstruct the perfection of Creation. In his toils, he is lead on by his desire to overcome his ‘lack’ – the alienation that divorces him from the first act of Creation via the selection-event. God Himself has disavowed his agency post-event, and so it is left to man to reconnect to an absent Father through his interminable repair and en-chaining work. As God liberates the universe through the founding ontology of *rational* numbers (orderable integers or with a divisible ratio between them), it is for man to ensure that material reality continues to conform to Geo-metrics.

The force of natural law is felt through its obstruction of the ‘pure continuity’ that seems to place the chain in grave danger of dissolution at every moment. Pure continuity depicts a perception of reality in which all things have blurred into one – into the monad. The monad as pure continuity cannot be considered to be the assimilation of the many by the one essence so feared by Aquinas; rather, it is an infinity (or ‘immensity’) concentrated into a singularity. It is what Deleuze calls ‘pure difference’,<sup>89</sup> a difference of a highly, densely concentrated sort, to the extent in which it becomes inextricably difficult to prise distinct entities apart. Natural law kicks in at this point in order to mount a defence of the borderlines and fault lines between beings. It involves the process of limiting uncontained difference through the ‘contraction’ of perceptions. The process of contraction reduces difference, as natural law reduces pure continuity, to the ‘set’. Hence, pure difference is contracted to the common circulation of objects<sup>90</sup> that exists in the world; there is a minimisation of difference to that which is orderable. In this contraction, the perception of things as stabilised and determinate can only be considered provisional. The process of holding entities in a stabilised form takes on a definitive duration.<sup>91</sup> However, natural law, through the unique task of man, aims to extend this contracted perception of the manifold indefinitely. When perceptions are narrowed to the level in which things assume an orderable quality, borderlines between the positions in the chain can be (re-)erected. The importance of natural law is that it sets the contraction at such a level as to defend against the destabilising influences of pure continuity, in addition to securing an optimal level of diversity compatible with the stability and security of the chain.

The repair work of man dictates the need to capture and absorb new kinds of beings, in order to place them in their most appropriate position in the chain. This is the ongoing work of man’s perception and interpretation, as he conforms to natural law by ensuring the consolidation of the chain. In perceiving new beings, thoughts are ‘rallied and drawn together again, that they may be known’<sup>92</sup> within the ‘inner assembly’ of the mind of man. Obtaining knowledge requires the ‘taming’ of as yet unseen objects, to ensure that they confirm and affirm the *transcendent* conception of the chain (contra the immanent justice of the shaman; see below). Man passes through the common world of objects so as to compare the ontological chain with its really existing state. To reduce reality to the former is to ensure that objects are ‘spatially imprisoned’<sup>93</sup> and the movements of beings heavily restricted. This involves the political work of man: in governing the world, he is implicated, in a necessary way, in the process of ordering the manifold of beings into a coherent spatial arrangement or organisation. The work of governance, the

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<sup>88</sup> Colebrook (2002), p. 134 (emphasis added)

<sup>89</sup> Ibid., p. 126

<sup>90</sup> Although the renaissance period is very much a remote precursor to the early 19<sup>th</sup> century form of industrial capitalism and 20<sup>th</sup> century consumer capitalism, it is still possible to discern the beginnings of economic theories relating to commodities in this period. In natural law, the common circulation of objects subject to physical laws, an embryonic ‘commodity world’ as Lefebvre (p. 337) would have it, is a flow which governs ‘space as a whole, which thus attains [to] the autonomous (or seemingly autonomous) reality of things, of money.’ In this instance, the autonomous world of natural law divorces itself from divine law. Lefebvre goes on to define the economy as ‘the linkage between flows and networks guaranteed...by institutions’ (p. 347). In natural law a valuation of creatures based on their exchangeable or comparable potentiality distantly echoes the ‘material’ chain of commercial transactions in modern capitalism.

<sup>91</sup> Colebrook (2002), p. 126

<sup>92</sup> Taylor, p. 127

<sup>93</sup> Doreen Massey, ‘Power-Geometry and the Progressive Sense of Place’, in *Mapping the Futures: Local culture, global change*, eds. Jon Bird, Barry Curtis, Tim Putnam, George Robertson, Lisa Tickner, Routledge (1993), p. 61, and *Space, Place and Gender*, University of Minnesota Press (1996), p. 146

stewardship of creatures, involves constructing social and material reality in such a way that it accords with the representation of the chain. The interconnection between the representation of the chain and the social and political practice of man's ongoing attempts at ordering the world, suggest the quality of space as a 'concrete abstract'<sup>94</sup> in Lefebvre's terms (in the same manner as commodities). In this instance, the chain is abstract in its transcendent mode, but this also implies the perpetual inscription of a particular structure of social relations onto material reality or culture. In other terms, space is always produced as a social product in any given context.<sup>95</sup> Production also entails reproduction through the 'sustenance of continued reinforcement'.<sup>96</sup>

To abide by natural law is to experience perceptions in their heavily contracted mode. These perceptions, extended indefinitely through duration, attempt to depict a time of the non-event. The Creation-event, which sets determinable reality in motion, becomes re-enacted as a protracted representation given validity by the universal legality of natural law. Thus, in the encounter with as yet un-ordered objects, perception reproduces these objects, stripped of their novelty, as elements seeking refuge within the 'protective closure'<sup>97</sup> of the chain. Every disparate element evokes the nostalgia of man, who sees all elements as signifiers of the 'lost origins' that brought him into being. Hence, all elements awaiting ordering have as a matter of course their disruptive dimension suppressed.

In the perpetual annexation of beings, those which await ordering (recall here Pope Benedict XVI's controversial statement on his visit to Brazil, that the natives were 'waiting for' the arrival of the Europeans) go through the process of en-chainment. This is part of the de-politicised operations of managing the linkages that constitute reality. However, the *modus operandi* of man is such that power comes into play to enforce and police the correct ordering of the chain. Man is in the perfect position to exercise power, in that his capabilities and 'causal force' are far in excess of those of the creatures below him. In this investment of power, the chain itself comes to assume the form of what the geographer Doreen Massey identifies as a power-geometry<sup>98</sup> – a geometry or structure which expressly prohibits the inter-transformability of its constituent cosmic parts. Policing the ordering of the chain coincides with the maintenance of relations of subordination and domination,<sup>99</sup> resulting in all creatures of the manifold yielding to man. There is thus a distinction to be made within the power-geometry between two groups: those who are in a position of control and initiation in relation to flows and interconnections, and those who are 'imprisoned' through being on its receiving end. The former, or man in his majoritarian mode, can exercise both mobility and communication in order to regulate those of others.<sup>100</sup> The latter's (the creatures below man) consequent lack of influence only serves to reinforce the power ordering the chain as a whole. Thence, it would seem that man's sole concession to the creatures below him is to preserve them in their diversity – commensurate with maintaining the lavish cosmic expansiveness and solidity of the chain.

Since all beings could be ordered within the chain, Aquinas was induced to express the view that nothing could be foreign to it.<sup>101</sup> By implication, nothing unforeseeable or 'strange' may arise to disrupt or interrupt it. However, the hiatus or 'time-gap' that exists between objects appearing on the scene and being placed in the chain creates the opportunity for contestation. This involves drawing out the more 'unstable' dimension of spatiality, which, while cohering within the arrangement of the chain, occurs at a level beneath the contracted perception associated with natural law. Hence, the provisional stabilisation of the manifold is always at war with objects/beings that strive to withdraw themselves from the chain, or arrive unexpectedly on the scene.<sup>102</sup> Objects, which absent themselves by immersing into pure continuity, or emerge all too suddenly into the field of perception, seemingly from nowhere, continually put a spanner in the workings of the chain. This is essentially the reason why man must resort to force – to

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<sup>94</sup> According to Andreas Philippopoulos-Mihalopoulos (2010), law can be seen in the same terms – that is, as a concrete abstraction.

<sup>95</sup> Lefebvre, pp. 129, 137

<sup>96</sup> Ibid, pp. 320–21

<sup>97</sup> Massey (2005), p. 167

<sup>98</sup> Ibid., p. 100

<sup>99</sup> Doreen Massey, 'Politics and Space-Time', *New Left Review* (1/196, pp. 65–84, November–December, 1992), p. 81

<sup>100</sup> Massey (1993), pp. 61–3

<sup>101</sup> Taylor, pp. 275–6

<sup>102</sup> Ben Anderson, 'Review of Doreen Massey's *For Space*', in *Key Texts in Human Geography: A reader's guide*, Phil Hubbard, Rob Kitchin, Gill Valentine (eds.), (August 2008), chapter 26 (pp. 227–35), p. 231

invest the geometry of the chain with his power and ability to police positions, to ensure the stability of existing interconnections.

Where this power-politics is forced to reveal itself, opportunities to contest the arrangement of the chain become apparent. The Indian was uniquely situated to challenge the chain by tapping into the perceptions that go undetected from the point of view of natural law. This is because he was in a state of temporary free-fall from his position, which released him from the chain and weakened the linkages between him and his fellow men. This free-fall is the outcome of the nonconformist disposition of the Indian; he resisted the standard of perception demanded by natural law, and refused to assume that work which is proper to man. He was effectively 'on strike' in the most generic terms.

In Vitoria's terms, the Indian's 'anti-social tendencies'<sup>103</sup> made him a sort of permanent transgressor of natural law. His transgressive behaviour was ascribed to a misanthropic world-view (*mis-use* or *mis-appropriation* of anthropos). Vitoria discerned the signs of this world-view in the native's inhospitality towards the Spaniard. The correct disposition towards fellow men entailed the 'seeking out of linkages'.<sup>104</sup> Men must not, therefore, treat their fellows as foreigners or strangers,<sup>105</sup> but as a welcome opportunity to affirm a common humanity and strengthen the linkages between men (*Humanitas*). Conversely, men should not act like a 'wolf to his fellow man'.<sup>106</sup> Furthermore, the seeking out of social relationships naturally has its economic expression in the reciprocal interest embodied in trade and commerce.<sup>107</sup>

The Indian's repudiation of natural law then took on two fronts: the inability to comprehend the correct ordering of the chain (in practising cannibalism and so on), and the spurning of the linkages which connected him to a wider humanity. He became an outsider, and even worse, an outlaw hostile to mankind in his fundamental transgression of natural law. In not being able to take up an initial position in the chain, he found himself within that hiatus which defines the time of free-fall, prior to the onset of corrective discipline, and, furthermore, integration. It is the temporality in which a being awaits re-positioning and re-ordering. In such a scenario, another option was available to him. He could take the opportunity to wander and roam away from his position – to seek alliances with the creatures that were positioned lower down in the chain. With his dis-location came the promise of tapping into another mode of spatiality, one which could be directed towards interrupting the ongoing (re)production of social and material relations necessary for the smooth running of the chain.

The Indian as 'social bandit' in his movement of free-fall, and in his dis-located position outside natural law, adopted the form of a *Renegado*<sup>108</sup> ('Renegade', hostile) in relation to humanity. *Renegados* were those Spaniards, and more generally Europeans, who renounced their loyalty to Christianity, as well as their nation. For the most part, the transformation into roguery was achieved through converting to Islam, essentially becoming an apostate, but it could also be achieved by turning to piracy, or becoming a corsair. The *Renegado* was widely scorned as a sort of 'becoming-Moor' or 'becoming-Turk' ('turn'd Turk'). It was precisely because of their status as a 'becoming-other' that they were seen as the worst sort of traitor – a creature 'of hellish mystery'.<sup>109</sup> The becoming-other of the *Renegado* implied not only turning one's back on civilisation, but effectively declaring war 'against the world'.<sup>110</sup>

The *Renegado* freed himself from his various allegiances, in order to take a radical new direction against his former countrymen. In a similar vein, the Indian adopted his position of free-falling, of other-being, to become a rebel towards humanity in the same way in which the *Renegado* was an enemy to civilisation. In other words, he was in rebellion against the entirety of the 'natural world' as ordered by natural law. In a similar manner to the pirate, he simply did not submit to the laws which humanity makes for its own security<sup>111</sup> – those which consolidate the favoured position of man in the

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<sup>103</sup> Pagden (1994) (VII), p. 24

<sup>104</sup> Vitoria, p. 279

<sup>105</sup> Pagden (2000), pp. 7–8

<sup>106</sup> Vitoria, p. 280. Also see Schmitt (2006), p. 95: 'For Hobbes, the state of nature is a domain of werewolves, in which man is nothing but a wolf among other men, just as "beyond the line" man confronts other men as a wild animal. The axiom *homo homini lupus* [man is a wolf to man] has a long history, which, with the land-occupation of a new world, suddenly became intense and virulent. In his *relectiones*, Vitoria explicitly opposes his *homo homini homo* [man is a man to man] formula to old *homo homini lupus*, which referred back to Plautus and Ovid.'

<sup>107</sup> *Ibid.*, p. 278

<sup>108</sup> See Peter Lamborn Wilson, *Pirate Utopias: Moorish Corsairs and European Renegades*, Automedia (2003)

<sup>109</sup> Wilson, p. 12

<sup>110</sup> *Ibid.*, p. 22

<sup>111</sup> *Ibid.*, p. 52

chain of being. If humanity's major work was to seek to preserve its position in the chain by being an en-chainer, the Indian, like the pirate, could be thought to subscribe to 'an extreme case of the zero-work mentality',<sup>112</sup> making light of the significance of man's place in the chain.

The position of the *Renegado* would have excited jitters in the rulers of European nations, exactly because it withstood the interpretosis that operated through natural law. The becoming-other of the *Renegado* seemed to be a disavowal of origins, an act of defiance against the very selection-event that constituted the origins of nature; it was an affirmative manoeuvre to disregard the 'correct' interpretation of the world. And in many ways this is what it was: becoming-other denotes an expansion outwards of perception, from the contracted shell it assumes in natural law. The *Renegado*'s becoming-other necessitated a severance from origins, and in doing so he appeared to be infected by a disease or virus, which disseminated itself in all its immediacy. In fact, Islam was this very 'moral plague'<sup>113</sup> which spreads through one's own ranks in uncontrollable fashion. Likewise, the *Renegado*'s piracy, an unsettling case of going rogue, indicated the transformation of many well-skilled sailors and captains into foreign agents 'other' to the law. With respect to the Indian, Vitoria's insinuation of the danger of his 'becoming-wolf', put otherwise, a foreigner to man's position in the chain, alluded to the more generic worry of the uncontainable and un-orderable nature of becoming-other. This is further reinforced with the concerns over the Indian's consumption of lowly creatures at the very bottom of the chain. The spontaneously spawning and proliferating unseemly beings of the soil (beetles, roots, etc.) seemed to bespeak some 'nameless horror',<sup>114</sup> which, like the *Renegado*, belied a point of origin. The horrid creatures of the earth, along with the wolves of the night, appeared to hint at some extensive causal powers outside the bounds of the chain and the perception of natural law. For the free-falling Indian, and this was Vitoria's worry, becoming-other in alliance with these creatures could provide a way out of the chain.<sup>115</sup>

## Chapter Five: Perspectivism and Shamanic Flight

The Indian's ontology (other-being) provided a method of liberating the manifold from its spatial imprisonment in the chain. In unifying the manifold of beings into a distinct order and scale, the chain suppressed a multiplicity of perspectives.<sup>116</sup> The perspectives of the various beings of the manifold act as potential points of resistance which could be redirected towards that which grounds the chain – the contracted perception of natural law. Hence, with Indian Perspectivism, a challenge is issued to the solidity of the spatial arrangement. The Indian's manner of perception entails the reading back of pure continuity into the chain – the turbulence or interruption that scrambles its explicit ordering. Moreover, Vitoria furnishes us with concepts that are ripe for subversion. In this subversion, the Indian's own ontology encounters and radicalises (deconstructs) the concepts that are used in grounding the chain as representation.

From within the chain of being, the consolidation of subjectivity could be said to be the unique prerogative of man (as horizon). However, the Indian's overriding concern was quite different; in his free-fall, he had in mind the liberation of all those creatures installed in their position below man. Those en-chained creatures are restricted to their designated (delimited) potentiality. This contrasts with the Indian mode of Perspectivism, in which ontological parity is extended to *all beings*. The manifold of beings, all possessing the same ontological status, is imbued with the same 'cognitive disposition',<sup>117</sup> or soul that resides in man. In other words, in Indian cosmology, the same spirit animates all and runs through the entire universe. With the chain, we will recall that the soul resides solely within man in respect to corporeal creatures, and in a purer form for the intelligent beings above him – angels, and so on, all the way up to the Godhead. The low creatures below man are granted their own restricted potentiality, but lack the ordered cognitivism that is the unique property of the soul. While orthodox theologians like Vitoria argued for the extension of ontological parity, at the level of the human being, to the Indian, the latter's cosmology takes this a step further in granting it to all non-human beings.

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<sup>112</sup> Wilson, p. 152

<sup>113</sup> Ibid., p. 13

<sup>114</sup> Deleuze and Guattari (2012), p. 272

<sup>115</sup> Ibid., p. 276

<sup>116</sup> Viveiros de Castro (2012b), p. 34

<sup>117</sup> Viveiros de Castro (2013), p. 24

From the standpoint of Amerindian Perspectivism all beings have personhood or a ‘mind-in-common’, not in the sense of a hive-mind but rather in the sense of a hypothetical origin in which everything was human, or better yet, nothing was not human. A considerable number of Amerindian cosmologies entertain the notion of a primordial humankind presupposed as the only matter with enough plasticity for the world in all its differing multiplicity to come to be formed of it.

However, let us also note at this point the differing ways in which Andean and Central American indigenous Amerindian tribes incorporated a multiplicity of perspectives and different ways of understanding spatiality into their cosmologies. Beyond the Amazon Basin, we can look at the classical Nahuas (or the Aztecs), who inhabited the lands that now make up Mexico and El Salvador, as well as the Incas, with their empire centred in what is now Peru.

Firstly, let us take a look at the Inca worldview, which was informed by such conceptions as the ‘Pachamama’ and ‘Kamay’. We can start to comprehend these notions with reference to the Andean natural environment and its relation to Inca mythology; an exemplar being the assembling of the grand stonework of Machu Picchu out of its surrounding rocks and mountain ranges. The stonework of the city and its temples seems to recall the Inca narrative of the creator-god Con Tiqui Vivacocha, who is said to have fashioned some of the first human beings from great rocks. Interestingly enough, Con Tiqui, himself, assumes the form of an enigmatic and formless primordial figure – as a man without bones – arising out of Lake Titicaca.<sup>118</sup> In other myths, the Incas are said to have been called forth from caves by the mythical founder of the first dynasty of the Kingdom of Cuzco, Manco Capac.<sup>119</sup> The image presented in these creation stories of the emergence of the first people, hewn from rocks or appearing from caves, not only suggests the intimate proximity between the Incas and their environment, but it also points to the living forces behind what is commonly seen to be the ‘materials’ or resources of nature. This is apparent, for instance, with regards to Con Tiqui and even Manco Capac; mythical characters that literally materialise out of water. In fact, according to Omar Riveria, this connection between the natives and their natural environment can be deemed an ‘erotic’ one and crystallises itself through the Incas’ relationship with Pachamama.<sup>120</sup>

Pachamama can be considered as the world, in the form of a ‘given arrangement of time, space and matter’ that ‘admits change, even cataclysm.’<sup>121</sup> Put otherwise, it is pure relationality or the cosmic relations between ‘natural’ forces that generate space and time – an example of which can be thought of as the primordial relationship between earth and water, one that sustains all other cosmic relations. Pachamama also encompasses ‘historical’ forces (i.e. originating in man or his ancestors), but in essence is disruptive of the nature/culture disjunction as neither concept was recognised by the Incas.

The significance of cosmic interrelations has already been alluded to, as in Inca mythology it is a reoccurring theme underlined by the manifestation of gods from water, and peoples from the rocks and caves, and Con Tiqui’s punishment of rebellion by holding back the rainfall.<sup>122</sup> The last myth referred to also highlights an important dimension of Pachamama: in signifying the relationality of the world or cosmos, it also intimates the interplay between presencing and withdrawal – the means by which natural forces operate. These forces were ‘supportive’ of the Inca world, but were radically unpredictable and required a kind of romantic coaxing through their incorporation into the build environment, as opposed to the imposition of an alien ‘form’ upon them. To refer back to the stonework of Machu Picchu, the crafting of sacred rocks facilitated the presencing of natural forces/cosmic relations embodied in these rocks through the interface of the stonework, which did not imply a representational aesthetic. This presentation of natural forces in architectural design was subject to the notion of ‘Kamay’, in the sense of being ‘irrespective of form’ and thus exceeding ‘both visual form and stable structures of meaning’.<sup>123</sup> So, we may even say that Inca stonework was meant to incorporate the eventfulness of natural/cosmic forces or relations, rather than to negate it through seeking to control or manage it. The implication of this is was to preserve the contingency of cosmic forces, and the erotic relations the Incas enjoyed with them was an attempt to seek their consent and cooperation, which also demanded accepting the eventuality that

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<sup>118</sup> Juan de Betanzos, *Narrative of the Incas*, trans. and ed. Dana Buchanan from the Palma de Mallorca manuscript, University of Texas Press (1996), p. 7

<sup>119</sup> *Ibid.*, p. 7

<sup>120</sup> Omar Rivera, ‘Towards a Future Andean Technology (From a Tentative Phenomenology of Inka Stonework)’ in *APA Newsletter*, Vol. 11, no. 1, Fall 2011, pp. 8–14, at 12

<sup>121</sup> Omar Rivera, p. 12

<sup>122</sup> Betanzos, p. 8

<sup>123</sup> Rivera, p. 8

these forces would at times withdraw themselves or refuse to cooperate. The Incas therefore conserved their connection to the ‘cosmic source’ that is Pachamama through permitting the instability of the cosmos to manifest itself within their communities through natural forces operating on their own terms: that is through a response or reciprocity that is fragile and uncertain, the very opposite of the solidity of a binding contract.<sup>124</sup>

We can draw out from Inca cosmology the idea that law cannot simply be seen as a technology of power seeking to impose itself upon the cosmos as is the case of the ‘power-geometry of the chain of being and its associated natural law. The relationality of Pachamama admits unpredictably and a non-negotiable requirement to pragmatically submit to this, in opposition to a natural law in which an instrumental mentality is decisive in controlling the mechanisms of the natural environment and the relations between creatures, both ontologically and practically. So unlike the law of the chain of being, which minimises the resistance of nature, Inca cosmology sought to harness this resistance through means of incorporation and erotic entanglements.

To turn to the Nahuas, if we examine the Nahuatl creation myth through a few primary texts,<sup>125</sup> we are able to uncover the fundamental cosmological questions that occupied them. These concern the temporal origin of the universe, the constitution of its spatial structure, and the role played by the sun in thus constituting it. Indeed, in dealing with the latter question the Nahuas came to identify themselves as the ‘people of the sun’ such was their admiration for what they perceived to be its generative capacity as it traversed the sky along its circular route.

It is, of course, the sun that gives rise to temporality and defines the passage of the ages in Nahuatl cosmology.<sup>126</sup> The sun is closely associated with the supreme God Ometéotle, the source of cosmic energy and the origin of natural forces. As the first and most powerful divinity, he is the result of his own self-constitution. He is also a complex entity: as a dual-being encompassing both masculine and feminine features he constantly alternates between the role of ‘lord’ and ‘lady’; the former is attributed to his generative power exercised during the day over the earth and the latter to the pure beauty of the night sky with its ‘skirt’ of glittering stars.<sup>127</sup> The Nahuatl narrative *Historia de Mexicanos* states that he conceives four sons, collectively entitled the *Tezcatlepacas*, each of whom is aligned with a primordial element: water, fire, earth and wind.<sup>128</sup> The sons, as gods in their own right, come to establish the law of the cosmic cycle by determining the first four ages of the world.<sup>129</sup> These ages are characterised by the ascendancy of one god/element over the others, and it is the struggle between the prevailing god and his fellows that propels the cyclical evolution of the world; that is, the stationary sun demands the struggle between elements to stimulate its cycle. Thus, the god/element prevailing in his/its own delineated age only assumes a ‘precarious’ or ‘unstable’ position in view of the inevitable upheaval that marks the transition to a new earth/sun. The fifth age, which the Nahuas equated with the contemporary period, is unique in utilising the entire assembly of the elements that individually distinguished the previous four ages. Adding more details to the story, the Nahuatl myth *Leyenda de le Soles*<sup>130</sup> alludes to the four gods sacrificing themselves in order to reanimate the sun and to furnish it with its perpetual motion, leading to the age becoming known as the ‘4-movement-sun’,<sup>131</sup> suitably emphasising the significance of movement for the Nahuas’ comprehension of the world.

In this fifth age, the sun is sustained indefinitely through its continuous cyclical motion, and this movement can be understood, more precisely, as emerging through the spatialisation of time. The four sons, as compensation for their world-prolonging sacrifice, divide the age temporally amongst themselves. Not only do all the gods/elements take it in turns to rule during this one age, they scatter and

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<sup>124</sup> Rivera, p. 13

<sup>125</sup> These primary texts are: the sun myth *Leyenda de les Soles*, *Historia de les Meicanos*, *Historia de los Mexicanos por sus Pinturas* and the *Annals of Cuauhtitlán*. These original texts are transcribed in Miguel León-Portilla, *Aztec Thought and Culture: A Study of the Ancient Nahuatl Mind*, University of Oklahoma Press (1963)

<sup>126</sup> The narrative is primarily captured in *Leyenda de les Soles*.

<sup>127</sup> *Annals of Cuauhtitlán*, line 3: ‘she of the starry skirt, he whose radiance envelops things/ Lady of our flesh, Lord of our flesh’. Miguel León-Portilla, p. 29

<sup>128</sup> *Historia de los Mexicanos por sus Pinturas*, lines 1–5, León-Portilla, p. 33

<sup>129</sup> *Historia de Mexicanos*, line 1: ‘the four assembled and said it would be well to organize what was to be done and to establish the law to be followed.’ In *Leyenda de los Soles*, lines 1–33

<sup>130</sup> *Leyenda de los Soles*, line 40–42

<sup>131</sup> *Leyenda de los Soles*, lines 40–41: ‘The fifth Sun, its sign 4-Movement/ is called the Sun of Movement because it moves and follows its path.’ León-Portilla, p. 39

occupy a quadrant of the world and in so doing provide time with an orientation or direction. In other words, the elements each take up a quarter of the sky or the four corners of the Aztec universe<sup>132</sup> (North, South, East, West) through which the sun passes on its course throughout the day. The four gods in their transformation unfold the universe by ushering in a new space-time, where spatiality is now defined by a dynamism, the likes of which is unparalleled compared to that which came before. These gods or cosmic forces utilise the earth as their 'field of action'<sup>133</sup> and in the process regenerate it as a world in which movement, maintained by its spatial orientation, is vital to life.

In tying the ages of the universe to the cyclical motion of the sun and by implication the oscillation between night and day, the Nahuas' cosmology was open to the dynamism inherent to a contingency that always returns just as the new day appears once again on the horizon; it is a contingency in the Nahuas' universe that is embodied in the destructive as well as creative nature of the solar forces. The fixation on 'return' here is crucial, as it precludes the temptation to perceive law in terms of linear progression, or with the verticality of the above/ below relationship. (In fact, the Nahuatl myth depicts the earth as surrounded by the 'celestial waters' that display continuity with the heavens as they merge on the horizon.<sup>134</sup>) This manner of thinking is not so much preoccupied with imputing protective boundaries to law in order to shield it from the unknown, as is the case with the chain of being, where stability is synonymous with order that perpetuates itself through space and time, but more with revealing the profundity attached to the beginning of a new cycle. Hence, the fifth age is a novel cycle that incorporates, equally, the perspectives of the gods or the potency of the elements that reigned exclusively before. In fact it is the equitable division of the age between the gods/elements that allows for the continuous motion of the sun within the one era, thus provisionally averting its destruction. In this complex assembly of the age, in which no power dominates for long and the array of potentially conflicting perspectives keeps the law in motion, the overriding principle of law becomes struggle. Moreover, if each of the first four ages is marked by the reigning god striving to identify himself with the life-giving traits of the sun and the conflict with his fellows this implies, they are also marked by his ultimate demise as the sun averts capture by concealing itself and initiating the start of another cycle. The sun, as a moving point of orientation, intimates the adaptive nature of a cosmic law (as is the case with the elements or gods which seem to be animated only insofar as their quadrant is occupied by the sun) in which dynamism and movement is only possible with the struggle to keep up with the sun of a new day.

To return to our discussion of Amerindian Perspectivism, perhaps more significant than what it posits as commonalities, is the means by which it conceives that difference is generated and perceived. In many ways this is the integral aspect of Indian ontology, in that it expressed a way in which one could tap into the pure continuity/difference lying in a perspectival dimension beneath that of the ordered chain. In its articulation of difference, Perspectivism radically inverts the corporeal/incorporeal or mind/body disjunction. In terms of natural law, the mind/soul is the element that is constructed through the onset of perfect normative structures and cultural habits, which enables the soul to flourish and develop (becoming into self-same being). Thus, as the argument went, the native with his lack of developed cultural institutions was hindered in his spiritual development for he lacked 'will' and had appetites in excess. This is another way of expressing the alleged inconstancy of the Indian soul. Conversely, within Christian theology-infused spatial models, all beings subsisting on earth have an equivalent corporeal form but the question is whether they have the sufficiently balanced, tempered, developed soul. There is therefore a strict parity or equivalence between all earthly forms when it comes to corporeality, as opposed to the variability of intelligence and willpower.

In contrast, with respect to Amerindian Perspectivism, the body is not given, but manufactured. The differing perspectives of a creature hinge upon the way in which its bodily position is constructed.<sup>135</sup> By bodily position here, we must understand the position taken up by the creature's assumed corporeal form in relation to other creatures. In the case of the chain, we can refer to the bodily position that lower creatures take up in relation to the creatures below and above them in the chain. Hence, the 'shape' or body of a creature will depend on its relationship to the creatures around it. This helps to explain why the

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<sup>132</sup> Léon-Portilla, p. 46

<sup>133</sup> *Ibid*, p. 48

<sup>134</sup> *Ibid*, p. 48

<sup>135</sup> Viveiros de Castro (2013), pp. 23–4

dualism of ‘predator’ and ‘prey’ was so prevalent in Indian cosmology,<sup>136</sup> and particularly for Perspectivism. The perspective of various creatures depended upon how it related to others. For example, a predator will have to ‘expand’ its perspective in order to comprehend and remain responsive to the movements of its prey. The predator’s bodily position – its department, agility and shape – accords with the perspective it must take in relation to its prey. It is these ‘intensities’, for the most part associated with the predator, which indicate a sensitivity to difference requiring the ‘wide lens’. In adopting a perception more conducive to the complex flow of the ‘sensible’, creatures start to tap into the potential world of other animals.<sup>137</sup> Predatory animals are able to see more by remaining fully immersed within the present – they can perceive the events and singularities that constitute a fuller continuity of nature. Animals then perceive solely through becoming, as opposed to being. They have an invisible side (Viveiros de Castro calls this the ‘prosomorphic’ side<sup>138</sup>) to their character, which can be ascribed to a receptivity to becoming that induces continual modifications to its bodily position. We can say that the shape of the predatory animal shifts as it comes to reflect the continuity around it.

Since there is a sheer diversity of animal bodies, innumerable differing perspectives are generated. However, these lie concealed behind a bodily position. In which case, to comprehend the perspective of a creature, one must come to occupy its point of view.<sup>139</sup> This can only occur if one in turn occupies its position – its corporeality within the chain.

To disrupt the workings of the chain, the Indian had to form alliances with the creatures stationed lower down, below man. This essentially meant negotiating relationships with non-humans, and implied adopting their perspectives.<sup>140</sup> From the standpoint of Perspectivism, all non-humans are *virtually* persons. That is to say, there is nothing to stop any being whatsoever from revealing itself as a person. Furthermore, it is experience which acts as the sole criterion for personhood – in other words, it is dependent upon the ‘transontological intensities’<sup>141</sup> derived from bodily position. Hence, it is the relationship with becoming that determines a being’s personhood – indicative of an ability to tap into the continuity of nature. This much broader definition incorporated many creatures of the manifold within its purview.<sup>142</sup>

Animals that have attained the status of persons assume perspectives that could potentially be adopted by the Indian. Moreover, we can state that a multitude of hidden animal worlds<sup>143</sup> reside within the chain. In this context, it was the Indian as shaman who was best placed to make the quantum leap into these concealed worlds. The shaman can be described as a cosmic politician who set out to adopt other perspectives, with the aim of incorporating non-human views into the making of administrative decisions.<sup>144</sup> Moreover, shamans were migratory figures who ‘dis-accommodated’ themselves from their own home-world so they could comprehend an alternative point of view with the required clarity, that is to say without the interference caused by the default human perspective. Thence, the shaman’s purity of vision allowed him to remain open to the transformative perspectives of others.<sup>145</sup> This qualified him to play the role of a representative or delegate on behalf of non-humans (most specifically predatory animals). After acting as an ‘active interlocutor in trans-specific dialogue’<sup>146</sup> the shaman returned to his tribe to recount his travels, so participating in an exchange of points of view.

The perennial return and travel to and from location (trans-locality) contributes to the shaman’s ‘psychologically flexible’ and ‘deliberately destabilised’ character; through disassociation, he acquired powers to pass ‘into other states of consciousness’. With the honing of these capacities, he obtained certain insights specific to himself, for example, the ability to reside ‘simultaneously in different places’.<sup>147</sup>

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<sup>136</sup> Viveiros de Castro (2013), p. 24

<sup>137</sup> Colebrook, p. 126

<sup>138</sup> Viveiros de Castro (2013), p. 25

<sup>139</sup> *Ibid.*, p. 24

<sup>140</sup> *Ibid.*, p. 21

<sup>141</sup> Viveiros de Castro (2012b), p. 32

<sup>142</sup> *Ibid.*, p. 15

<sup>143</sup> *Ibid.*, p. 21

<sup>144</sup> *Ibid.*, p. 25

<sup>145</sup> Tim Ingold, ‘Bindings against Boundaries: Entanglements of life in the open world’, *Environment and Planning* (vol. 40, pp. 1,796–810, 2008), p. 1,808

<sup>146</sup> Viveiros de Castro (2013), p. 25

<sup>147</sup> David Macauley, ‘The Flowering of Environmental Roots and the Four Elements in Presocratic Philosophy: From Empedocles to Deleuze and Guattari’, in *World Views* (vol. 9, pp. 281–314, 2005), p. 285

The shaman's flight to other animal words, simultaneously occupying the position of animal in the chain and potentially that of man (albeit in temporary free-fall), was prohibited by natural law. His method of 'working' was proscribed as an attempt to descend to the lower creatures in order to harness and release potentiality from its en-chained position.<sup>148</sup> To permit such a move was to risk the shaman deploying the hitherto contained potentiality of animal agents against the operators of the chain. In other words, if the unlimited, expansive potentiality of animals were to be realised, the links between creatures in the chain would all but dissolve into pure difference. The actions of the shaman were that of a political dissident – the *Renegado* – who contests the spatial arrangement of the terrestrial chain from the position of the un-ordered.

The treason inherent to the shaman's actions had its roots in his insistence in reading the 'book of nature' differently. He interpreted the circulation of common objects rather differently from the 'contracted' perception favoured by natural law. In the orthodoxy of natural law, all beings below man were objects that could be used instrumentally for the greater benefit of holding the chain together. These objects had a common trajectory as they were beholden to the law which governs the movement of physical entities – that of cause and effect. The trajectories of these objects were predictable, and kept strictly separated from each other, so as to be easily contained and out-manoeuvred by the cognitive capacity of man. All circulating common objects could therefore be imprisoned spatially, and made to conform to a representation. The shaman's reading can be considered to be the inverse of the method deployed by natural law. In his perception, an object can be thought of as an 'insufficiently' interpreted subject. To properly gain knowledge of an object, one must be able to convert it into a subject. Thus, beings below man are worthy of personification; one needs to read their unique trajectories, articulated as narratives or personal histories. It is also worth noting at this juncture that the 'readability' of space in the conventional sense of natural law only serves to conceal a deeper understanding of space as 'deceptive and tricky'. While space can be designed in such a way as to render it 'perfectly' readable or transparent – that is, linked visually to a particular socio-political formation<sup>149</sup>, an alternative would be to read the world not as a set text but as a rough texture (see below). Hence, natural and urban spaces are more accurately portrayed as 'over-inscribed', in that 'everything therein resembles a rough draft, jumbled and self-contradictory. Rather than signs, what one encounters here are directions – multifarious and overlapping instructions.'<sup>150</sup>

In giving up the majoritarian narrative of man,<sup>151</sup> the shaman came to acutely discern the manner in which 'lower' life forms move through the spatiality of their world, from their own point of view. This was an implicit rejection of the positionality of man, in favour of a counter-positionality that denied an original fountainhead of subjectivity (God's selection process), in order to affirm the irreducible subjectivities of the beings of the manifold.

By way of illustration let us to go back to the perspective of the predator. We can imagine the movements of the predator as a symbiotic weaving and interweaving through space in the immediacy of the present, attuned with the trajectory of its prey. The predator's method of constructing the space-time of his world generates social relations in excess of the predictable relations of cause and effect that ground the chain. Its intensive movements in response to its social relationships (the perspective of the prey, for example), constructive of its corporeality, remain unrecognisable and uncaught by the stunted perceptual net of natural law.

Hitherto, in this initial account, we see that the shaman's actions were overtly political (Deleuze describes a whole politics of becoming-animal). In disclosing non-human worlds, he facilitated the real emergence of space-time structures (or 'dimensions') that could attempt to separate from the chain, with the goal of eventual supersession. Evidently, each position in the chain could potentially posit itself as its own reality or world entire. This notion was hostile to the view of man as the horizon, as a centre that binds together and unifies the diverse trajectories of objects. Objects that become subjects threaten to scatter and evade the bindings of the chain. We shall return to this point in due course; however, firstly, let us elaborate upon the shaman's mode of travel or flight between worlds.

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<sup>148</sup> See Hodgen, p. 434

<sup>149</sup> Lefebvre, p. 144

<sup>150</sup> Ibid, p. 146

<sup>151</sup> See Gilles Deleuze, *Essays Critical and Clinical*, trans. Daniel W. Smith and Michael A. Greco, University of Minnesota (1997), p. 1

The shaman's travel took him through the 'twilight zones'<sup>152</sup> of nature in search of alien worlds. Bearing in mind the indeterminable number of beings capable of personhood, the shaman seemed to voyage through a veritable galaxy<sup>153</sup> of worlds. As mentioned, the shaman is said to 'travel', and this concept is fundamental to divining the method he utilised in the discovery of new worlds. Travel is the skill of practically seeking out 'different openings in the fabric of the world'.<sup>154</sup> It is a disposition of expectation, in encountering the strange, the new and previously unknown. It can be considered the mode of becoming-other (the form of the 'other' being a non-human person) of the shaman. The threshold between worlds that the shaman occupied can be rightly identified as the borderline between creatures in the chain of being. In natural law, one perceived the borderline as a strict barrier between differing ontological zones. From the viewpoint of Indian ontology, the borderline became a launch pad to another world; furthermore, to use a more fitting analogy, the borderline can be considered a passageway between worlds. Aquinas' 'passageway' through the world of common objects (non-human beings) led to the contemplation of the world beyond, as well as of the Godhead.<sup>155</sup> The Indian, however, made use of this passageway for very different ends. The passageway through non-human beings does not end with the *maximum* of God's potentiality, but with a *maximum of pure difference*<sup>156</sup> extracted from the never-ending travel between a countless number of potential worlds. After all, the very purpose of the shaman's voyages was to experience a maximum of encounters.<sup>157</sup> Moreover, he could travel through worlds at such a gathering pace that everything blurred into one; perception was overwhelmed by pure continuity. In using the passageway as a sort of 'wormhole', the Indian trespassed into ontological zones in which man had no business being, unless it was for the instrumental ends of reasserting order. To put it in other terms, we can say that the Indian had transgressed the bounds of the chain by travelling, and vanishing, beyond the horizon to a place especially reserved for the Godhead. The task for majoritarian man was to ensure that the Indian was forced to complete a circumnavigation of the chain and so return to the place he had vacated, that is to say to take up the position appropriate to mankind (as the 'horizon').

For the shaman to engage in this prohibited act, that is to take on the perspective of the animal, he must travel the forbidden path along which the animal's life unfolds. The path is the line of 'intension'<sup>158</sup> in which the animal's life unravels. It is the constant shifts in bodily position that are enacted by the animal, in the ongoing construction of its corporeality. The changing form of the animal can be thought of as inseparable from its sensitivity to the other creatures in its immediate milieu. To put it another way, we can suggest that predatory creatures welcome the event of the encounter, because that is indeed what they live for. For the Indian to traverse the path of animals is then to unleash the flow of becoming that overcomes the static points and positions within the chain. Perspectivism returns untrammelled movement to both the animal and the Indian himself, who cannot be held at checkpoints as the mode of being proper to them is to drift along paths.<sup>159</sup>

In traversing animal worlds, the shaman took the opportunity to build alliances. In these 'free floating' or fluid alliances (alliance-becoming), he was best placed to link animal worlds to that of his own through a relationship of immanence, based upon ontological parity. What the shaman depicted back to the Indian world was not the 'position' occupied by the animal, but its changing corporeality – the 'paths' the creature takes. To 'abduct' the subjectivity of the animal (becoming-animal), in order to depict its becoming, is to harness a force and direct it against the capturing capabilities of the chain. It is a process of un-shackling animals from the distinct gradations of the scale.

In travelling along paths, the shaman reaches intersections where one animal world encounters another. At these intersections, he switches paths, and makes the jump from one world to the next. In such a manner, the Indian continues from one encounter to the next,<sup>160</sup> and his travels start to 'take on speed'.<sup>161</sup> The borderline between creatures becomes an indefinitely extended line that weaves through

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<sup>152</sup> Lovejoy, p. 56

<sup>153</sup> Deleuze and Guattari (2008), p. 275

<sup>154</sup> Buchanan and Lambert, p. 102

<sup>155</sup> Lovejoy, p. 84. Exercising governance over creatures is a way of using them as a 'means of passage' in contemplating the Godhead.

<sup>156</sup> Colebrook, pp. 13–3

<sup>157</sup> *Ibid.*, p. 133

<sup>158</sup> Deleuze and Guattari (2008), p. 270

<sup>159</sup> Ingold (2008), pp. 1,806–8, also see Deleuze (1997), p. 1

<sup>160</sup> Deleuze and Guattari (2008), p. 275

<sup>161</sup> Ingold (2008), pp. 1,806–8.

all the beings of the manifold, as one world gradually transforms itself into another.<sup>162</sup> In this maximisation of encounters, the shaman becomes imperceptible and invulnerable to the capturing capabilities of the chain, manifested through stabilised positions, distinct ontological zones and heavily regulated movements. Therefore, every Indian encounter with an animal world disrupts the ongoing maintenance and repair work of man.

In becoming-imperceptible, the shaman comes to assume some of the ‘invisible’ traits of the animal. The discrete nature of the animal’s becoming is adopted as the becoming-animal of the shaman. In other words, the shape-shifting capacities of the Indian, his ability to widen perception beyond the point in which it bursts through its contraction in natural law, ends up annihilating ‘otherness’ itself (we can suggest here as an aside that the shaman seems to reach the ‘exit velocity’ required to leave a system or normative order).<sup>163</sup> What this indicates is the onset of pure continuity between worlds. The shaman becomes inexorably immersed in the multiplicity of perspectives garnered from the animal worlds he roams through. In the words of Deleuze, he meets with an ‘infinity of modifications’<sup>164</sup> in his traversal of alien worlds.

This method of travel as becoming-imperceptible is crucial to an explication of the Indian’s epistemology – ‘magical observation’.<sup>165</sup> The native’s mode of gaining knowledge of a specific being, in his capacity of observer, entails an understanding of what the observed being can tell him about other beings. In the terminology of possible worlds, to come to a comprehension of a particular animal’s world is to consider where it overlaps with the worlds of other creatures. In other words, what is paramount in observing an animal is to tease out its relations with others. This brings us back to the view that the Indian’s mode of knowledge involved treating the observed as a subject, a person one can relate to, and who furthermore has their very own relations. Thus, there were no ‘inanimate objects’ in Indian ontology, as all things were engendered through processes and social relations imperceptible to a default human perspective. The native was driven to personify ‘objects’, to disclose his becoming – that which was his being-in-common.<sup>166</sup> To lay bare the relations that give rise to a being means, to some extent, becoming imperceptible in the role of observer.

The observer’s becoming-imperceptible occurs through a process of intensified reflection,<sup>167</sup> in which the observer ‘merges’ with the observed. For the observer to accrue knowledge, he must include the observed being within himself. Likewise, the observed includes the observer within itself. In this manner, the boundary between a being’s perception of itself and the other’s perception of it is ‘suspended’.<sup>168</sup> We can see here that ‘becoming-known’ is a shared process in which both the observer and observed are called upon to participate. As it is the same ‘soul’ that runs through everything, the observer’s knowledge of the observed can also be thought of as an attainment of self-knowledge, and vice versa. This is because what is perceived in the observed being is the pure continuity between the entire manifold of creatures, inclusive of the observer. So, for example, even the ‘rudest inanimate object’ can project outwards the relationships that constitute it; the object could be part of an animal’s world and so utilised as part of its culture.<sup>169</sup> Thus, to come to know a being necessarily involves becoming-imperceptible; to travel to one world initiates an unstoppable traversal through all other worlds. It is the perception of pure continuity which draws out the being-in-common, the ‘same soul’ of the manifold.

The major contribution of natural law to the ontological ordering of the chain was to ensure that not only was travel between worlds forbidden, but all alien worlds remained inaccessible. The grounds for maintaining the containment and inaccessibility of possible worlds are hinted at by the previous argument. That is to say, once a non-human world is entered, travel is not easily stemmed, but only continues its unstoppable acceleration through a proliferating number of worlds. What was even more concerning for those advocates of natural law following in Aquinas’ steps, such as Vitoria, was that the Indian’s alliance with predators insinuated an inversion of the natural order of things. As the ‘primordial

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<sup>162</sup> Deleuze and Guattari (2008), p. 276. Deleuze calls this line of becoming through multiplicities or worlds a ‘fiber’, while Ingold prefers ‘tissue’.

<sup>163</sup> Colebrook, p. 132

<sup>164</sup> Deleuze and Guattari (2008), pp. 280–1

<sup>165</sup> Bracken, p. 148

<sup>166</sup> *Ibid.*, p. 148

<sup>167</sup> *Ibid.*, p. 148

<sup>168</sup> *Ibid.*, p. 148

<sup>169</sup> Viveiros de Castro (2013), p. 23

takes on human form',<sup>170</sup> the Indian becomes allied with predators – such as (were)wolves – that are traditionally signifiers of evil<sup>171</sup> because they occasionally wander into the privileged domain of man in order to prey upon him. Both beasts and Indians shared and participated in the widest possible perspective through which the guerrilla tactics<sup>172</sup> of evasion (becoming-imperceptible) and resistance (disruption) can inflict damage on the capturing apparatuses of the power-geometry.

## Chapter Six: Meshworks Unchained

Through the shamanic exploits of travelling, and trespassing on the domains of the 'lower creatures', an outside of the chain of being is effectively opened up. In disclosing an outside of natural law, the Indian exercised a mode of political dissidence comparable to that of the *Renegado* or the pirate by offering an alternative to the normative standards of 'civilisation'. The Indian's dissidence initially encompassed a two-fold process: of withdrawal from the position taken up by man in the chain, and of building alliances with those creatures below man. Indian Perspectivism extended ontological parity to all beings, which was considered an outright refusal to consolidate the subjectivity of man through the reduction of the other as far as possible to an object. This, in itself, constituted a violation of the ordering of the chain, and could be seen as an incitement to mutiny and insurrection through 'arming' the creatures of the manifold with their own agency (i.e. subjectivity).

The open insurgency<sup>173</sup> that the Indian tried to provoke has its organising principle in an alternative form of autonomy to that prescribed by natural law for man. While for the latter, man's potentiality is realised through his capacity for ordering the world around him, the Indian exercised his autonomy, and potentiality, through maximising his encounters with the unforeseeable – with as many others as possible. These encounters prevented the onset of a contracted, default human perspective. In travelling at such a pace beyond that which natural law denotes as perceivable and recognisable, the Indian actualises a 'forbidden moment' in which not only are positions 'occupied', but corresponding creatures are empowered to rise up through their chains. The process of un-shackling from the chain, leading to the uprising of creatures, intimates a 'movement outside and beyond'.<sup>174</sup> The animal surge that rises up and along paths, beyond that of their position in the chain, can be thought of as a moment of liberation from the power-geometry.

In travelling between positions – along the borderline between creatures – the Indian draws out Temporary Autonomous Zones.<sup>175</sup> When traversing the borderlines, the place where creatures intersect, he generates liberated zones in un-shackling the animals he comes across from their position. These autonomous zones could be thought of as places in the chain where non-humans had been dislodged from their attachment to the chain by virtue of their unforeseeable encounter with the Indian (the event). The Indian-inspired Temporary Autonomous Zones incorporated non-human worlds or space-time areas which had previously been contained and concealed within the ordering of the chain. In the same manner as the pirate, sailing the high seas and coming across clandestine islands or 'Pirate Utopias'<sup>176</sup> in which they could seek refuge from the law, the native, in discovering alien worlds, generated liberated enclaves within the chain. From the standpoint of natural law, these zones appear as a manifestation of disorder that creeps into under-policed sections of the chain. Disciplinary action from man, in his majoritarian mode, is the chief initiative through which order can be re-asserted, and conceivably requires the invasion of non-human ontological zones. Conversely, the native's zones embody a 'recurring autonomy',<sup>177</sup> which move on and vanish, to evade the violence of majoritarian man prior to the rewiring (resetting) of the power-geometry. The autonomy of majoritarian man is exercised over spatiality, in order to make it conform to the ordered arrangement of the representation. However, the shaman's exercise of potentiality through flight and travel means he seeks to always occupy an autonomous zone somewhere; and in these zones non-humans possess as much agency, in their virtual manifestation as persons, as man in his capacity as the chain's horizon.

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<sup>170</sup> Viveiros de Castro (2013), p. 26

<sup>171</sup> Arens, pp. 140–1

<sup>172</sup> Hakim Bey, *T.A.Z.: The Temporary Autonomous Zone, Ontological Anarchy, Poetic Terrorism*, Automeia (2003), vii

<sup>173</sup> Bey, p. 101

<sup>174</sup> *Ibid.*, p. 97

<sup>175</sup> *Ibid.*, pp. 93–147

<sup>176</sup> See Wilson, pp. 187–204

<sup>177</sup> Bey, (Introduction) xi–xii

It is important that we now ask what these zones actually reveal. Firstly, let us refer back to the Indian's use of the borderlines as an indefinitely extended superhighway, intersecting with the plethora of paths taken by various creatures. We can say that where the borderline intersected with the byways of others, it became hopelessly entangled – a *meshwork*.<sup>178</sup> The entanglement of paths between beings (becoming, or alliance-becoming) can be thought of as a scrambling of the chain ('creating a situation of *indeterminacy*', as Hans Lindahl would have it<sup>179</sup>), whereby what was previously perceived as ordered is considered to have become completely un-ordered. The a-legal element here is suggested by the fact that entanglement can be considered an interruption, as well as contestation, of the interconnections and differentiations<sup>180</sup> that order creatures of the chain in a progressive scale. The ordering of the chain dictates its normative prescriptive force, that which is directly challenged by its becoming-entangled – thus *depleting* its claimed normativity.<sup>181</sup> Hence, actions which aid in making conspicuous a process of entangling, which re-order the interconnections of the chain in ways which cannot be initially accommodated, qualify not only as a transgression but as a move that could potentially result in the transformation<sup>182</sup> of the chain as a whole. In other words, ordered parts of the chain transition into something altogether strange or other-worldly – into *terra incognita*.<sup>183</sup> Entanglement is then the very opposite of enchainment. In which case, in lacking the Indian's wider lens and ability to travel, opening up those possibilities invariably foreclosed by the ordering of the chain, majoritarian man finds he is unable to navigate the meshwork.

The density of the meshwork is derived from the entangled paths of beings, which constitute 'tissues' of lines. Autonomous zones, generated through the process of un-shackling and de-positioning, provide the conditions for the uncompromising 'relational field'<sup>184</sup> of the meshwork to appear on the scene. The Indian's power in liberating creatures from an ordered spatial arrangement, and being able to make sense of, or to experience, the meshwork, is an outcome of his Perspectivism. For the Indian, we can restate that the body is the element that is constantly being shaped. The body is constructed through a tissue of lines, which weaves and interweaves with its surroundings. Hence, the animal's corporeality is a perpetual process of interaction and encounter with the paths of others. The tissue of lines that is formed through the entanglement with others ensures the corporeality is by its nature receptive to an infinite amount of modifications. The shape-shifting nature of corporeality is the consequence of lines/paths being woven together. Thus, the bodies of the manifold of creatures aid in the reciprocal construction of each other; the body 'grows along the multiple paths of entanglement in the *textured world*'.<sup>185</sup> Additionally, the Indian deduces that large predatory animals in their travels adopt a bodily position that is best suited to experiencing, and perceiving the meshworks. They are overdetermined in coming to signify the resistance of beings of the manifold to the ordered spatiality of man. This is because they fiercely resist and guard against the imposition of an encroaching spatial arrangement.

Within the meshwork, no 'pure' objects can be said to exist. This is due to its being populated with an infinity of subjects which form, re-form and rise up without breach of the pure continuity between beings.<sup>186</sup> Creatures can be understood as moments which fleetingly rise up through the meshwork, only to be re-submerged in pure continuity, as opposed to taking up fixed positions, such as in the chain. Needless to say, these subjects can be perceived by those who themselves are becoming-imperceptible (such as the shaman in flight). Within the zones in which the meshworks emerge, the common circulation of objects of natural law (including, crucially, the legal-naturalistic understanding of exchange-related liberties, as in Luis de Molina's<sup>187</sup> theory of pricing, free will and grace in *De Iustitia et Iure*) is supplanted by the being-in-common of pure continuity (and difference). A continuity of commons rather than trade shows up here as the model for an alternative international law.

The physical laws of cause and effect simply cannot penetrate and prise apart the unrecognisable subjects that cohere in the meshworks. As opposed to the genealogy of natural law, which traces back

<sup>178</sup> Ingold (2008), p. 1,805

<sup>179</sup> Lindahl, p. 36 (emphasis in original)

<sup>180</sup> *Ibid.*, p. 32

<sup>181</sup> *Ibid.*, p. 36

<sup>182</sup> Bey, p. 33

<sup>183</sup> *Ibid.*, p. 132

<sup>184</sup> Ingold (2008), p. 1,805

<sup>185</sup> Ingold (2008), p. 1,808 (emphases added). To add to this, Lefebvre (pp. 116, 150, 222) states that space as a texture is neither 'object' nor 'subject' but rather a social reality.

<sup>186</sup> Ingold (2008), p. 1,806

<sup>187</sup> See Hamilton for a biography of Molina, pp. 180–4

effects to their original cause, the meshwork is the embodiment of an ‘overflowing middle’<sup>188</sup> of multitudinous paths which become entanglements, and as such render it ‘anti-genealogical’.<sup>189</sup>

Alongside the autonomous zones in which meshworks start to surface, there exist many more regulated parts of the chain in which the spatial order persists, and beings remain attached to the chain. In the latter zones, repair work, policing and the violence of man keep the meshworks at bay. A more limited or restricted continuity holds sway – that which is compatible with natural law. However, the threat of the meshwork to natural law remains, as it seems to herald the return of the immanence that the chain is designed to expel. In other terms: the firm grounding of the chain is in danger of being submerged by the open seas, the vastness of the desert, and the thick texture of the Amazon forest. The risk for mainstream, anthropocentric and exchangeist international law is, in this respect, a shift in the geography of (socio-legal, Europo-epistemic, onto-theological) reason – one in which the Amazon becomes the (epi)centre of the world. Put otherwise, this would mean a shift from the geo-politics of reason (exemplified by Albertus Magnus) to biospheric reason in the (re)connection between Nature and Law.

To conclude, the introduction of an ‘immanent humanity’<sup>190</sup> between all beings of the manifold, imported via the Indian’s transgressive acts of arson against the chain, points towards a social universe with a vast, uncontainable array of social relationships, actors and perspectives. The meshwork, as the realisation of the flow of creatures released from the chain, seems to give a perceivable form to those interrelations – the immanent spatiality that seems to emanate forth from the earth.

## Conclusion

The conceptual apparatus that is the chain of being, which dissolved the immanent connection between humans and the earth and then attempted to discipline or regulate the conflicts between humans resulting from that division, had its foundational proponent in St Thomas Aquinas and its highest point of elaboration in the thought of the sixteenth-century jurists and the theologians grouped under that so-called School of Salamanca. The basis of Thomistic/Scholastic theorisation of the chain lay with the inadequacy of rival theological doctrines to keep out an immanence that threatened to creep in. In this thesis, we have identified immanence with the a-legality of the un-ordered seas and deserts, and ultimately with the texture of the becoming-Amazon of the planet. From the latter’s perspective (Amerindian Perspectivism) we have explored and conceptualised a shift in the horizon of international law, from the geo-politics of reason and the disciplining of the resulting conflicts between humans, towards ‘Anthropolemics’. This can be considered to be the questioning of the conflict(s) that result from the division between Human and Earth (the latter being reduced to the former’s interest-object, or ‘resources’), which are often understood as conflicts over resources and for progress or development.

In this conclusion, let us summarise the lessons drawn from our exploration of the conceptual apparatus of the chain of being and the Great Divide (between Creator and Creatures)<sup>191</sup> as the alleged ground and foundation of the traditional ‘disciplinary’ practice and theory of international law, and project some lines for further investigation of the shift towards anthropoleemics of international law in the Anthropocene.

Popular medieval theories such as the Principle of Plenitude and the rational-world-ground model simply did not deal effectively with those vestiges of immanence<sup>192</sup> from Aristotelian cosmology that continued to linger and threaten from within the emergent Christian view of the world and its conflicts. In many ways then, the chain was forged in the ongoing battle of purging medieval Christian theology of the more unpalatable aspects of Aristotelian thought. In that context Aquinas committed himself to one of the central projects of natural law theory – the strengthening of the Neo-Aristotelian framework of clear and determinate distinctions between beings, and correspondingly weakening the hold of an Aristotelianism of immanence, and eternal or infinite nature. In his adherence to the former framework, Aquinas could be considered to be following in the tradition of his teacher and mentor Albertus Magnus, from which he developed the notion of the chain of being.<sup>193</sup>

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<sup>188</sup> Macauley, p. 285

<sup>189</sup> *Ibid.*, p. 306

<sup>190</sup> Viveiros de Castro (2013), p. 26

<sup>191</sup> Viveiros de Castro (2012a), p. 152; Viveiros de Castro (2012b), p. 40

<sup>192</sup> They unwittingly put creatures on a par with the Creator. See Lovejoy, p. 73

<sup>193</sup> See Wey Gomez, pp. 256–7

In its Thomistic mode, natural law seemed to intimate a direction of travel – a movement towards a fully integrated spatial system of the natural world, and by implication a movement away from a disordering immanence signified by an un-orderable nature. The function of the chain was then to act as a bulwark against an anticipated outside – to defend against the return of an expelled immanence. Hence, the chain would have to be configured as a power-geometry in the sense of a cartography and a moral-normative perspective. What that involved was the co-option of man's power, utilised and directed to the enforcement of the natural order (as conceived of by natural law). With the obsolescence of the God of the Event, the humanistic foundations of natural law allowed Thomistic theology to cast man as the major force in policing the spatial arrangement of the chain.

The salience of the chain as a conceptual architecture was evinced during the legal Valladolid Debates, as well as the recourse of the School of Salamanca's legal-theologians, such as the likes of Vitoria or Luis de Molina, during the Age of Discovery. It proved a method through which the previously unknown Indian could be placed, so as to bring him into the framework of European thought.<sup>194</sup> Moreover, he could be drawn 'into the European order'.<sup>195</sup> In being placed ontologically in the chain, the Indian was obliged to engage the same ordering capabilities as the rest of his species. Since man's burden lay with his toil in maintaining the chain, the Indian had to pull his weight in the collective endeavour.

This was, of course, where the issues arose for the Indian. In his analysis of Indian cultures, Vitoria concluded that the Indian's transgressive activities violated natural law; they demonstrated an inability to cognitively order the natural world. And indeed, in the Indian's cosmology we find a transgressive mode of natural dissidence to the spatial ordering of the chain. The Indian's Perspectivism, alongside the shaman's travels and flight, hinted at a dissident mode of legality that burst the confines of natural law's contracted perspective. At the heart of this was the Indian's compulsion in seeking to travel through as many alien worlds as possible. This implied not only a process of dis-accommodation, of withstanding the onset of a default human perspective, but also a recurring moment of return from the beyond. Thus, the shaman could be thought of as a political dissident and outsider; in returning from having gleaned alternative perspectives, he was best placed to destabilise the constitution of society. Correspondingly, to hold off a majoritarian perspective, the shaman simply could not grant himself leave to remain in society. Through such procedures, he promised a radical de-humanisation and de-centring of legality.

In revealing the paradoxical and complex texture of the world the Indian's cosmology lent itself to a rebellion against the well-ordered spatiality of natural law (as well as its posited version). Hence, in his travels, the shaman appeared to be groundless; no stable foundation could take root in the movement between the entangled paths and byways of the world. Clearly, this manoeuvre could only be interpreted from the emergent standpoint of international law as an assault on Anthro-Eurocentric representational schemas. Hence, the Indian's dissidence enabled an outside of natural law to re-emerge, but on this occasion not from within the genealogy of Western ontology, but from without, i.e. as the enemy of mankind. The lurking danger of immanence returned once again. It was no wonder then that for Vitoria the anticipatory power-geometry of the chain allowed for the legitimisation of violence and disciplinary action against indigenous societies, in order to uphold the stability of the chain. In spite of the suppression of Amerindian cultures, the potential of the Indian's dissidence enacted through unshackling others from the spatial order, forming alliances with non-humans, and harnessing the power of the earth, remains unabated today. The 'vanishing' (becoming-imperceptible) Indian remains a symbol of rebellion – an outsider who made the power of the outside his own.

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<sup>194</sup> Hodgen, p. 387

<sup>195</sup> *Ibid.*, p. 387

## Concluding Remarks

It was very much the moment of encounter between the principal Iberian missionaries of the sixteenth century and the Amerindian that spawned the primary dualism of our manuscript – disciplinary and dissident modes of international law. Thus, it is fitting that we once again invoke the radical dualist metaphysics of Amerindian cosmology in these closing remarks for our final explication of the relation between the two modes.

In our structural analysis of international law, a persistent third term appears between the disciplinary and dissident. It is this mediator, which we have termed ‘immanent’ or liminal justice, that intimates the fundamental finitude of all legal institutions. The immanent law of justice takes up its standpoint between the inner being of positive law and that which constitutes its outside. It is necessarily a case of a collective-subject (*demos*, *ethnos* or alliance-becoming) seeking its own emancipation and, indeed, deterritorialisation. We have had opportunity to make reference to, in this regard, the people-nation, the Indian as appropriator of anthropos, and the shaman as carrier of non-human perspectives. The collective-subject, in its various manifestations, can be said to occupy the fold-line, rendered visible, between modes of law, as it effectively expropriates the ‘cut’ between inside and outside, which is seemingly concealed by institutions of the disciplinary alliance-structure. In occupying this fold-line where justice is thought to properly reside, identified by Hans Lindahl as the ‘fault-line’ from which normative challenges are issued, the collective-subject can be thought to exist within the intensity of the situation (the struggle) while simultaneously projecting outwards the infinite possibilities of a horizon-in-perpetual-motion. In this fashion, the collective-subject can look back in order to perceive the transitory nature of the interiority of law, which is seen to overtly uphold relations of injustice.

In radical terms, the third term connects disciplinary institutions to the flows of cosmic multiplicity – of the triadic-outside. The structure of a positive international law is thus always in the process of being broken down through the experimentation, events and encounters induced by the collective-subject in search of justice. It involves the creativity of justice as struggle, which re-produces and re-creates law in its multiplicity, namely, in its dissident mode. This uncontained triadic-law not only detaches itself from the horizontal plane of transcendental law, it brings forth the un-orderable from within the very heart of legal institutions themselves. The ordering of spatiality and temporality, the limits and the thresholds of normativity, set and reset by disciplinary institutions, are contested in the instance of their confrontation with the un-ordered and un-orderable appearing in the guise of the stranger (xenomorph) or of a strange other-worldly order (xenonomy). So it would seem that international law is inevitably destined to come face to face with that which seems to it most strange, yet is most familiar – the a-legality of the earth and cosmos. In this encounter between cosmos and planetary law, the horizon of international law does not necessarily recede to the minimal (Kantian) duality of anchoring object and subject (as articulated in Part One), but extends indefinitely outwards and out of itself to embrace the eternal permutations of the stars.

Finally, let us say that the questions stemming from the encounter with the Amerindian continue to return and haunt international law from the Scottish Enlightenment right through to Kant in the guise of the stranger and other personifications of those hostile to the human – concerns still alive today in relation to the development-security complex, the un-ordered in the terrorist, migrant and refugee. In a sentence, international law can be conceived of as no more than the continuous negotiation of the space between the sky and the earth, with ‘us’ and ‘them’ trapped in the middle.

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