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The Revolutionary Past: Decolonizing Law and Human Rights¹

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Abstract

Combining a radical revision of the historical formation of occidental law with perspectives derived from decolonial thought, this paper advances a deconstruction of occidental law. That deconstruction is then brought to bear on human rights. Although occidental law and human rights are shown in this way to be imperial in orientation, that same deconstruction reveals resistant elements in law and in human rights. These are elements which the decolonial can draw on in its commitment to intercultural transformation.

1 The Decolonial I

«Let us return to the past», wrote Verdi – but unfortunately did not set it to music, «that would be progress». ² That proposition would for many be perverse. The past is where we progress from, not to. Progress is something we are always coming to, even committed to. Its indefinite but tentacular *telos* orients, even directs, the condition of our being-together. Just who this “we”, this “our”, may be is debatable but its range is not confined to “the West”, to the Occident. And I hear there is a country which has as its motto “Order and Progress”. ³

The “decolonial” would incline us otherwise, at least as a first and essential step. The posited past here would be the Hispanic colonization of South and Central America, something taken as an origin of a modern imperialized world – an origin of what and who is to be included in predominance and what and who is excluded. Like any claim to an historically set origin, this one is impossibly exclusive, but it will serve to set this impelling decolonial tying of modernity integrally to “coloniality”. The fusion of these provides the founding force of modern occidental imperialism and its arrogation of the universal.

Let me just take for now one depiction of this imperialism and of the incipient resistance to it to be found in the decolonial. José Mariá Arguedas sets the first chapter of his *Deep Rivers* (1958) in Cusco, once the capital of the Inca Empire. ⁴ In a sense, what embeds the whole novel here are the stones, the stones of what were once Inca

¹This paper is a revised and extended version of a talk given on 4th November 2013 to the First International Seminar on Post-Colonialism, Decolonial Thinking and Human Rights in Latin America held in the School of Law of Universidade do Vale do Rio dos Sinos, São Leopoldo, Brazil. My thanks to Professor Fernanda Bragato for such an exceptional opportunity and for the generosity of the invitation. The paper also owes much to the intellectual companionship of Tara Mulqueen and Roberto Yamato.

²VERDI 1971, 169.

³The reference is to Brazil: see the note to the title.

⁴ARGUEDAS 1958.

buildings and walls in Cusco but which have now been built on by the colonists. The stones are both foundational of, yet subordinated to, imperial structures. But the same stones are radiant. They seethe, they move, talk, frolic. Their streets flow like rivers, deep rivers, rivers akin to primordial serpents. This foundational fusion with movement and change is later aligned in the novel with Indigenous rebellions, with a primal or abyssal capacity to sweep away the existent, to sweep it away in a flood, a flood of rivers.⁵

There is a seeming tendency for significant decolonial agendas to be more anodyne and to advance the resistant perspectives and action of the excluded in a relation of plurality to the occidental modern – a relation which, according to Mignolo, would recognise that the «Eurocentered narrative» of this occidental modernity is redeemable in part, having «of course, [...] its right to exist, since it corresponds with the experience of Euro-American histories, but it does not have the right to be the narrative for the rest of the world, except in its imperial/colonial dimensions».⁶ Yet to be in a plurality, for entities to relate plurally, there has also to be some commonality between them. One scenario was seminally sketched by Quijano in finding that:

First of all, epistemological decolonization, as decoloniality, is needed to clear the way for new intercultural communication, for an interchange of experiences and meanings, as the basis of another rationality which may legitimately pretend to some universality. Nothing is less rational [...] than the pretension that the specific cosmic vision of a particular ethnies should be taken as universal rationality, even if such an ethnies is called Western Europe because this is actually [to] pretend to impose a provincialism as universalism.⁷

What this imports is something rather more unsettling of “the Eurocentred narrative” – something that portends the primal dissolution envisaged by Arguedas with his Indigenous rebellions, a not unfamiliar scenario in Indigenous literatures. To “provincialize Europe”, adapting also Chakrabarty’s stunning title,⁸ would entail not only the denial of an occidental-brand universality but also a denial of the exclusion on which it is founded, an exclusion embedded, as Mignolo puts it, in the supposed «superiority of Christians and then of the whites».⁹ That would be constitutively challenging enough, but there has to be more. Making a proprietary or exemplary claim to the universal as an ontological completeness obviously excludes those that do not conform to the terms of membership, but as universal the claim must also include them in some way. Which point brings us to the next heading.

2 Imperium

The colonized and the enslaved were essential to various imperial designs. One which became widely accepted came from Francisco de Vitoria especially in his lectures *De Indis*.¹⁰ Vitoria drew on the inclusive, universal reach of scholastic natural law which he aligned with the *ius gentium* of Roman Law: «the law of nations (*ius gentium*) [...] either is or derives from natural law, as defined by the jurist: ‘What natural reason has

⁵ ARGUEDAS 1958, chapters 7 and 11.

⁶ MIGNOLO 2013, 19. The range claimed for decolonial thought and for “the decolonial turn” can be very wide: see e.g. MALDONADO-TORRES 2011. The following could, then, be read as an engagement with a significant and current strand of decolonial thought.

⁷ QUIJANO 2007, 177.

⁸ CHAKRABARTY 2000.

⁹ MIGNOLO 2013, 13.

¹⁰ VITORIA 1991, 233 ff.

established among all nations is called the law of nations' .»¹¹ The fact that “the jurist” is unnamed and that no source is given for the text, which is from the Institutes of Gaius, indicates just how intimate, just how “natural”, this linking was for Vitoria’s audience in Salamanca – this linking of the *ius gentium* and a Christianized natural law. And for Vitoria this *ius gentium* included another category of Roman Law, the *ius inter gentes*, the law governing relations between different peoples, different nations.¹²

Unlike the more predatory and murderous of his compatriots, for Vitoria the colonized “Indians” of “the New World” had affective abilities and subsisted within the range of the *ius gentium*, as befits the all-inclusiveness of the universal. By virtue of being human and thence possessed of reason, the Indians had *dominium*; or in other words they had a mastery of property and a mastery of rule evidenced by their modes of living in some similarity to those of the Spanish.¹³ These same Indians however were also different to the Spanish, being afflicted with certain gross behaviours which they were to overcome. These defects serve to ensure the efficacy of imperial rule when combined with ways of acquiring “just title” provided also by the same obliging *ius gentium* – ways formulated by Vitoria so as to identify «the legitimate titles by which the barbarians could have been subjected to Christian rule».¹⁴ He emphasised two of these. The first emanated from a right to trade, to travel and to dwell in the countries of the barbarians – a universal right of course and a right extending beyond trade narrowly conceived to include intercourse and communication generally.¹⁵ The second was a right to proselytize: «Christians have the right to preach and announce the Gospel in the lands of the barbarians» and that even against their will, conversion being «necessary for their own salvation» with the barbarians being «obliged to accept the faith» if it were adequately presented to them.¹⁶ This right provides the limit-case where the assumed universality of a Christianized *ius gentium* breaks down. The whole of *De Indis* is a “reflection” on the injunction in Matthew (28-19): «Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost».¹⁷ And as Schmitt tersely put it: «It never occurred to the Spanish monk that non-believers should have the same rights of propaganda and intervention for their idolatry and religious fallacies as Spanish Christians had for their Christian missions».¹⁸

The *barbari* being often found resistant to these «particular» rights, «it becomes lawful» for the Spaniards «to do everything necessary to the aim of war» to ensure compliance; territorial acquisition by conquest ensued even to the point of the elimination in this «just war» of those who resisted, and Spain’s imperial domination could continue with at best marginal adjustments.¹⁹ So, the barbarians were not only included but were also in a condition of primal exclusion. That condition was confirmed in terms that even then were far from original and which were to become more pervasive with the emergence of imperial racisms. So, Vitoria found the barbarians to be undeserving of full inclusion because they were like madmen or children, cannibalistic, sexually perverted and culinarily outrageous, and well nigh

¹¹VITORIA 1991, 278.

¹²STEIN 1999, 94-5.

¹³VITORIA 1991, 239-50.

¹⁴VITORIA 1991, 252.

¹⁵VITORIA 1991, 278-84.

¹⁶VITORIA 1991, 271, 284-5.

¹⁷VITORIA 1991, 233.

¹⁸SCHMITT 2003, 113.

¹⁹VITORIA 1991, 185-6, 280-3, 291-2.

impervious to a reforming natural reason.²⁰

In all, we have in place what could be seen as incipient human rights. From the mixture of natural and Roman law there is a notion of rights that are enforceable as such and derive content from a “universal” natural law that is, borrowing Quijano’s terms, «the specific cosmic vision of a particular ethnies».²¹

3 Negation

Vitoria’s colonial template accommodated also the shift from a Christianized to a secular, or supposedly secular, *imperium*. Whilst still being a dedicated Catholic theologian and churchman, Vitoria managed somehow to reject various papal dictates to do with the colonization of the Americas and the division of the world. In rejecting the authority of the head of the «universal» church, and even though the rejection was founded on the *ius gentium*, Vitoria aligned the imperial mission with the proto-nationalist Spanish empire by way of the Kingdom of Castile and Aragon, the claims to a national sovereignty being underlined by Vitoria’s invoking here Aristotle’s conception of «the perfect community», such perfection involving being «complete in itself».²²

This shift or emerging shift from «the superiority of Christians and then [to that] of the whites», again borrowing Mignolo’s abbreviated version,²³ may seem like more of the same. Vitoria’s “human” with its universal *ius* could match the idea of the unity of the species in racist discourse. That sets an inescapable problem. How can unity be also a fundamental, a total division. But it is the very preservation of the universalized “purity” of the species that requires division, that requires dividing the pure from the impure, the exemplar from the deviant, the normal from the abnormal. Indeed, as Foucault would add, division is somehow primary: «[t]hat is the first function of racism: to fragment, to create caesuras within the biological continuum [...]».²⁴ Overwhelmingly, Foucault identified racism with a «State racism», this being a racism the «activation» of which stems from the persistence of «the old sovereign power» in its «national universality».²⁵ «State racism» became «the basic mechanism of power, as it is exercised in modern States».²⁶ Such a state, national and imperial, in the assumption of universality takes on a position of transcendence. Its appropriated sovereignty, in its «unlimited and unconditional power», Derrida found to be a «theo-logic», something that «remains a theological inheritance that has not really been secularized».²⁷ To take a provincial instance almost in passing, there is James Pelikan’s aperçu: «The business of America [meaning the United States] may be business as Calvin Coolidge once said, but it is at least as accurate and as important to assert that the religion of America is America».²⁸

A considerable problem ensues. The continuity from a monotheistic Christianity to a modernity, to this one particular modernity, is incompatible with that modernity – or at least incompatible with its constituent claim to be able to account for itself entirely and in terms of an immanent secularity, and to be able to act in those same terms. All

²⁰VITORIA 1991, 207-30, 290-1; see also PAGDEN 2003, 86-91, 1003.

²¹QUIJANO 2007, 177.

²²VITORIA 1991, 301.

²³MIGNOLO 2013, 13.

²⁴FOUCAULT 2003, 255.

²⁵FOUCAULT 2003, 239 ff.

²⁶FOUCAULT 2003, 254.

²⁷DERRIDA 2005, 105, 107, 118.

²⁸PELIKAN 1971

of which is starkly incompatible with a resort to transcendent determination – or at least incompatible with determination by way of a positive transcendence.

There was, however, a fateful alternative. Instead of a positive reference, a negative universal reference was and is resorted to and the intimations of it were already at the core of a Christianized imperialism. A Christianized humanity corresponds to the unity of the species characterizing racism. But both were a prelude to and force of division. And with the negative universal reference, division is the more stark. The entity elevated in negation becomes what certain alterities, certain “others”, are not. Or it becomes not what certain alterities are. Being “purely” negative and being universal, the division and exclusion are complete. What is beyond the universal can only be utterly beyond. Hence there is racism and the irreducible alterity of the relegated race. Yet that very appropriation of a universality has, as universal, “also” to be all-inclusive. So the negative universal reference generates an antithesis but then includes that antithesis with-in itself. The now-included take on an operative part with-in the universal scheme whilst still being excluded from it. There is a consistency to this. Whilst the exclusion in its completeness is an utter denial of independent being, so also is the completeness of the inclusion. To resolve, in a way, what is still for them an impossible positioning, the excluded are required in an entirely conformist way to progress, or reform, or in some other way achieve full inclusion. Like the Christian “salvation”, this achievement is necessarily indefinite.

Here we should return to Foucault, if too briefly.²⁹ His idea of racism was an expansive one. The idea and its operation are integral to the pervasive conjunction of biopower and disciplinary normalization as Foucault conceived of them. And to his instances of these we should, along with Escobar, add the verities of “development” and the “abnormalities” they proscribe as well as the “normalization” they prescribe,³⁰ to say nothing of the innumerable disciplinary imperatives issued as “structural adjustment”, “conditionalities”, “poverty reduction strategies”, requirements attached to trade, aid and debt relief, and programmes installing the rule of law in conjunction with measures of security and counter-terrorism – the list could go on. As with the negative universal reference of racism “proper”, biopower and discipline created the “abnormal”, the “anomaly”, the deviant, and these provide the formative force of the normal and the conforming.³¹ The abnormal and such are both “interior and foreign”, subjected to “an inclusion through exclusion”.³² What is more, with the negative universal reference the criteria of normality assume an untouchable positivity. They become possible and persist in-themselves, there being no positive counter to challenge them, to challenge their elevated essence, except such as may be allowed by the protocols of their own formative knowledge. Subject to that intimate exception, the negative universal reference not only enables the posited to persist in-itself but to do so in a way that transcends and formatively draws into itself the illimitability beyond it.

Finally, we come to the culminating stage in the advance of the negative universal reference. In its negativity, such a reference erects no enduringly positive bounds. Not only does this make possible the illimitability of biopower and a disciplinary power, its exclusions are likewise and necessarily uncontainable. So, the abnormal is not confined to the abnormal. Savagery is not confined to the savage. Animality is not confined to the animal. Inhuman conduct to the inhuman, and so on. “We” are all

²⁹A more detailed engagement can be found in FITZPATRICK 2013.

³⁰ESCOBAR 1984, 387, 388-9.

³¹E.g. FOUCAULT 1979, 229.

³²FOUCAULT 1970, xxiv; and FOUCAULT 2001, 78.

prone to regress and sin, and we have to be incessantly on guard against it and ever enhancing of virtue.

4 The Decolonial II

The story so far, would suggest that I am positioning the narrative in a way that will prove critical, negatively critical, of human rights as the successor to the *ius gentium* and natural law (merging later into natural rights). That may turn out to be so, if not entirely so, but a more oblique positioning to do with decolonial thinking has also been going on. This positioning does not involve any objection to the concerns of such thinking. But there is an immediate problem with the contrary tendencies in decolonial thinking. By way of exploring these tendencies, we may come to envisage a decolonizing of the West and in the process begin to envisage a different law and a different human rights.

Back to the beginning now. We saw that the decolonial espoused what Mignolo refers to as a “delinking”,³³ a setting apart from the universalizing pretension of an Occident that would encompass and represent the other, not only to determine the conditions of relation to the other but also to determine the other’s very being and in the process to contain it within certain delimiting categories. The delinking from this is not complete, and it could hardly be so. What is involved is said to be, rather, a relation of plurality. Consistent with this plural relation, and as we saw, for Mignolo the «Eurocentred narrative» of an occidental modernity «of course, has its right to exist since it corresponds with the experience of Euro-American histories, but it does not have the right to be the narrative for the rest of the world, except in its imperial/colonial dimensions».³⁴ But what if, we can now add, those dimensions were inseparable from the narrative? And would not the decolonial concern to link coloniality and modernity at least suggest such an indistinction? And would not the indistinction be confirmed in the generative range of the negative universal reference? And if an occidental modernity so constituted had now and instead to exist in a responsive relation of plurality, what would be left of its “Eurocentred narrative”? Aptly enough: nothing. In the result, the pluralism of decolonial thinking would lead us to the revolutionary scenario of Arguedas’s *Deep Rivers* and a sweeping away of imperial dominations.³⁵

Perhaps being, or the prospect of being, in a plural relation with a refractory occidental modernity has led to decolonial thinking becoming somewhat infected by it. Whilst the colonization of South and Central America was significantly formative of what became an occidental modernity, it is saying too much to assert with Quijano and Wallerstein, along with many others to the same effect, that «The modern world-system was born in the long sixteenth century. The Americas as a geosocial construct were born in the long sixteenth century. The creation of this geosocial entity, the Americas, was the constitutive act of the modern world-system».³⁶ From where could we pronounce so confidently and completely on the situated origin of “the modern world-system” if not from a position beyond the world – from a position adopting the universal comprehension, a quasi-transcendence of the same kind as that arrogated by an occidental modernity? By way of a sharp contrast, the decolonial is often situated on its side of the plurality as intensely “local” with some pointed emphasis

³³MIGNOLO 2007, 453.

³⁴MIGNOLO 2013, 19.

³⁵ARGUEDAS 1958.

³⁶QUIJANO and WALLERSTEIN 1992, 549.

on “Indigenous” groupings.³⁷ And would it be too mischievous to suggest that the decolonial shares the occidental orientation towards constituting itself negatively – specifically, in an opposition to postcolonialism? This “darker side” of the decolonial would chastise postcolonialism for being confined to the academy, too reliant on Western intellectuals, and concerned largely with the West.³⁸ By way of a happy acceptance of these criticisms of postcolonialism, I will now short circuit much of them by bringing a postcolonial perspective to bear on the Occident itself and in a way that will prove empathetic with the decolonial, the exercise being one oriented towards a decolonizing of the West.

This is where we come, at last, to Verdi’s return to the past, a return which can prove as revolutionary as the insurgent deep rivers of Arguedas. In a resolutely postcolonial vein, one impelled by postcolonialism’s revolutionary orientation towards history, I shall set this return in an occidental academic engagement but one that seeks to integrate prime decolonial concerns.³⁹ The modern Occident’s negative universal reference in its very universality negates its own past and generates itself in a constituent rejection of that past – a rejection, an exclusion, which is also and inevitably an inclusion, this included past being one beyond which the modern has progressed, and continues to progress *ad infinitum*. Let me now set that abrupt synopsis in the promised return to the past and then extend this to an understanding of law.

5 Periodization

This engagement involves the intense concern of late with historical periodization, a concern which has been most conspicuous in scholarly resistance to the relegating of a medieval age which thence provides the constituent contrast to a modern age.⁴⁰ That resistance connects periodization with postcolonialism both in a resistance to relegating the colonized as medieval and in a seeking «to undermine a series of Western myths of origin, history, identity, and temporality».⁴¹ What more specifically is to be undermined here is the invention, an “imposition”, of an encapsulated age against which a modern age is putatively set – not just a supposedly status-ridden, oppressive medieval or feudal age but also the like attributions to various “non-Christian”, barbaric or savage peoples excluded from a universalized civility.⁴² In the process these periodized oppositions, or strands of them, can become blended. The medieval and the religious will usually be packaged together for example. And periodized oppositions can also be part of or fused with other venerable expedients. So, progressivist and teleological histories will typically operate as sequenced or streamed periodizations.

In all and to borrow from Kathleen Davis’s searing analysis, periodization «results from a double movement: the first, a contestatory process of identification *with* an epoch, the categories of which it simultaneously constitutes [...]; and the second a rejection of that epoch identified in this reduced, condensed form [...]».⁴³ In this way modernity is «defined [...] *toward* the Middle Ages», a period it «will never let go».⁴⁴

³⁷MIGNOLO 2013, 21.

³⁸MIGNOLO 2007, 452, 463.

³⁹See YOUNG 2001, 4 and MIGNOLO 1995, 327-9.

⁴⁰COLE and VANCE SMITH 2010.

⁴¹KABIR and D. WILLIAMS 2005, 2. And see generally DAVIS and ALTSCHUL 2009.

⁴²FASOLT 2004.

⁴³DAVIS 2008, 30-1 – her emphasis.

⁴⁴COLE and VANCE SMITH 2010, 24 – their emphasis.

In sum, the definition entails the invention of an encapsulated age as modernity's constituent alterity. And that invention, Davis again, does not involve «simply the drawing of an arbitrary line through time, but a complex process of conceptualizing categories which are posited as homogenous and retroactively validated by the designation of a period divide». ⁴⁵ The division is not simply found. It is made. And it is not (only) a complete division. It is “also” an inclusion – a remaking, a reinvention and thence an inclusion.

To effect such homogeneity periodization assumes an all-encompassing ontological comprehension, one which relegates other conditions to a contained historical specificity. So, for Davis, the «secularization» conceived in opposition to the «religious» Middle Ages «turns political difference into temporal distance» thereby setting apart the religious as «spiritual» and relegating anything political about it to a terminal past. ⁴⁶ This manoeuvre enables «the sublimation of theology in the ‘world’», ⁴⁷ a theology which embeds various deific substitutes in and as modernity. For example and as we saw, it embeds a sovereignty which Derrida often found, in its «unlimited and unconditional powers», to be a «theo-logic», something that «remains a theological inheritance that has not really been secularized». ⁴⁸ The intrinsic claim of a modern sovereignty to this “secular” transcendence results in its unsettled relation to law, to a rule of law.

6 Law

Law of a supposedly pre-modern, of a medieval, variety joined the medieval itself in being fictively recast and contained and thence relegated as the polar opposite of a surpassing modern age and its enlightened law. “Feudal” is the label applied in this standard periodized relegation of law. Feudal law, in this rendition, is a law essentially compromised in its being an entirely compliant instrument for exercising power over the comprehensively subjected, and as such it retrospectively comes to provide the characteristics of a whole society or era. ⁴⁹ All of which is to ignore the diversity and the wide generative range of the “feudal” both generally and when it comes to law. ⁵⁰ And it is to sidestep the quality of the relation of law to ruling powers, a relation that went far beyond being merely subordinate to them, and a relation that would undermine the standard modern notion of law as a product of sovereign assertion. Typically, the power of the prince was more attenuated than that invested in modern sovereignties. And law was incapable of being ultimately contained within the power of the prince. Not only was the reach of Medieval law often more extensive than that of the prince, such law was also seen as utterly pervading the social. Law «became the most crucial and vital element of the whole social fabric», and that «fabric» included «governmental principles and ideology», the whole being seen as a rule of law of «a far wider scope and framework than [...] its modern successor». ⁵¹ Yet, a seeming contradiction: the law was also seen as dependent on other elements of a medieval sociality. Law could not, to take a conspicuous example, «contradict divine law» and its derived contents were oriented in terms of Christian beliefs. Yet further: this same law

⁴⁵ DAVIS 2008, 3.

⁴⁶ DAVIS 2008, 133.

⁴⁷ DAVIS 2008, 84.

⁴⁸ DERRIDA 2005, 105, 107, 118.

⁴⁹ BERMAN 1983, 295.

⁵⁰ RYAN 2010, 509.

⁵¹ ULLMANN 1975, 28

was also ascribed “secular” qualities that set it apart from any such endowment and preserved its unifying coherence as law. Contradiction now compounded: this same unifying entity is characteristically described in “modern” jurisprudential scholarship as a «jumble of different sorts of law» and as hardly deserving the name «legal» at all.⁵²

Far from there being a jumble, Grossi, among others, would see law as taking on «a unified shape throughout the Middle Ages», see it becoming an «integrated plurality», and see also the legal pluralism of «the late Middle Ages» as «both unified and, at the same time, plural».⁵³ Law was the integrating element of the commonality, of the plurality of communities embedding the plurality of laws. Law was a working of the community of communities. Such law had to create «concepts which are entirely abstract, that is, non-existent for human senses», and yet this same law «had a peculiarity [...]: the intellectual process itself of describing in technical vocabulary very different experience of real life [...]».⁵⁴ Hence, this same unifying law was characterised by «openness», by a «capacity of absorption», and in particular it had to be adaptable in its capacity to absorb a huge diversity of sources of law including, but also well beyond the range of, the Christian and the religious generally.⁵⁵

There is a remarkable resemblance between this picture of medieval law and postcolonial, as well as poststructural, ideas of law generally. Postcolonial law can be seen as an aporetic combination of law as capable of determinate self-realization and law as “abstract” or vacuous and thence infinitely responsive, the aporia itself being generative of law in its singularity.⁵⁶ This law, again like the medieval, is identified with and matches the constituent conditions of society or community itself.⁵⁷ With unforgivable brevity now, these conditions of law and of sociality could be mapped onto the idea of the decolonial – the decolonial taking as it does the “delinking” of being and thought in its finitude from the quasi-universality, the positivized norm, of an occidental *imperium*, and realizing that delinking in a responsive relation of plurality – a “pluriverse” rather than a universe.⁵⁸ In all, and bluntly, law is decolonial. Or, in a more restrained vein, in its ability to extend beyond its appropriation by an occidental modernity, law is intrinsically capable of being decolonial.

7 Human Rights I

Can the same be said of that legal artefact known as human rights? Human rights, in a way, pose an ultimate challenge to law and to the decolonial. They claim explicitly, and foundationally, an operative universality whilst being, and inevitably being, a particularity. Negative critiques of human rights on this score are of course legion.⁵⁹ In its classic mode, this critique would find that human rights are based on an at least complicit acceptance of Western norms of individuality, responsibility and sociality – norms fusing the aspirant and the actual and in turn assuming a transcendent

⁵²TAMANAH 2008, 377 and DONLAN 2011, 15.

⁵³GROSSI 2010, 21, 35, 37.

⁵⁴CONTE 2012, 482-3.

⁵⁵ULLMANN 1975, 49.

⁵⁶FITZPATRICK and DARIAN-SMITH 1999.

⁵⁷DERRIDA 1997, 231.

⁵⁸MIGNOLO 2011, 72.

⁵⁹For a recent and passionate instance that would situate the lines of critique that now follow, and more, see HOPGOOD 2013.

elevation exemplifying the negative universal reference.⁶⁰ So, more situated critiques would view human rights as giving effect to economic hegemonies usually seen as neo-imperial, and countless instances have been adduced of the “promotion” of human rights as part of “programmes” of aid and development so called. Even more pointedly, human rights have been constituted and sustained in a sharp and enduring division of the peoples of the world. In a like vein, such rights have a weighted history, one that continues to endow them with content. So, and for instance, Pagden would trace a genealogy of human rights to Roman law, and especially so with the resort to Roman law and the *ius gentium* in the colonization of the Americas, that legacy being sustained in the subsequent European adoption of “natural rights”.⁶¹

This genealogy could be extended, but no matter how or whether it is brought to bear, human rights involve a resort to the natural and to a surpassing hold on humanity similar to that evoked by the *ius gentium* in conjunction with natural law. «It is [...] impossible», Fukuyama tells us, «to talk about human rights [...] without having some conception of what human beings actually are like as a species» – without some constitution of «human nature: the species-typical characteristics shared by all human beings qua human beings». ⁶² Then he would add that «there is an intimate connection between human nature and human notions of rights, justice, and morality» before cautioning that «the connection between human rights and human nature is not clear-cut, however». ⁶³ In a more resolutely tautological offering, Donnelly tells us that «human rights are literally the rights one has simply because one is a human being», before going on like Fukuyama to concede uncertainty.⁶⁴ The notes of uncertainty are certainly explicable, as we shall see.

There have, of course, been numberless efforts to construct the human in terms of essential and distinguishing qualities, not least in relation to human rights. None has secured general acceptance, perhaps because if “we” take the human to be our encompassing essence, there is a problem in being able to stand apart from it and thence encompass and know it. Hence, going back again to the negative universal reference, human rights have been more confidently designated in terms not so much of what must be taken but rather not taken to be definitively human. The human of human rights must not behave inhumanly, must not be too backward, too traditional, too much of “nature” but, rather, be able to stand apart from, dominate and “civilize” these elements. But given our inability to encompass the human, the search for it can only be interminable or, more expediently, pitched in terms of a “progress” that somehow renders the human as both existent and still to be (fully) attained. The “human” creature that has emerged from this search has been a labile one whose confident criteria of self-identity have come and eventually gone, or assumed an irresolute half-life, whether these criteria are espoused as a positive marker of the human or, more typically, as its negation, – criteria to do with abnormality, race and gender, various corporeal and genetic endowments, monstrosity and the sub-human, culture and language, rationality and *dominium*, among others.⁶⁵

In all, and given the account so far, such rights come to provide the ultimate

⁶⁰This is evoking the earlier account of the negative universal reference and the reliance of that account on Foucault. It may add a perspective to suggest that the distinction between fact and norm, that of the is/ought variety, is not sustainable here where the norm is not (yet) existent and is more a desideratum ever awaiting realization.

⁶¹PAGDEN 2003.

⁶²FUKUYAMA 2002, 101, 128.

⁶³FUKUYAMA 2002, 101

⁶⁴DONNELLY 1985, 9, 21.

⁶⁵See generally BOURKE 2011.

instance of the instrumental or pragmatic appropriation of law within an occidental modernity. So situated, and adapting Robert Williams' description of law in «the colonizing discourse of Renaissance Spain», human rights become and are «the perfect instrument of empire», of a globalized *imperium*.⁶⁶ Yet we could now go on to say that human rights as the perfect instrument of something are also its ultimate undoing, or even its transformation.

8 Human Rights II

Intimations of that transformation could be found in a multitude of instances where human rights have been drawn on effectively in the cause of the oppressed. Notably, Upendra Baxi has accommodated such instances in a conception of human rights as plurality – a plurality made up of «resistances and struggles» against the «dominant and hegemonic» position assumed by or through a monist, quasi-religious and «universal» human rights.⁶⁷ Not without a touch of paradox, Hopgood charts «a neo-Westphalian world» in which Human Rights (uppercase) now lack that coherence once bestowed by the Occident, but what remains operative and even enhanced are «[l]owercase human rights, a nonhegemonic language of resistance allied to a variety of causes and motivations», with this involving «a more sustainable space for human rights as locally owned and interpreted principles for political action».⁶⁸

The obvious response to human rights as plurality is that human rights would have no content beyond the distinct and scattered instances of their insistent and resistant application. But can there not be a “beyond” of a plurality? And that would seem to be an impelling question for the decolonial also. As we saw when engaging with the plurality of the decolonial, any plurality has to have its commonality. Without it the entities would not be relating plurally. There would be a mere dissipation of them. Could that commonality, then, import a “universality” of the human of human rights – import a turning to one (in terms of the etymology of “universality”), import what, returning to Quijano, «may legitimately pretend to *some* universality».⁶⁹ Perhaps we can come to this by making the concern with the negative a rather more “positive” one. Faced with the utter exclusiveness of various occidental regimes – regimes of thought and rule such as racist regimes – we could assert that humanity is that which cannot be ultimately excluded.⁷⁰ This does not insinuate a completeness of inclusion. An illimitable inclusiveness, whether incipient or otherwise, would dissipate any idea of the human at all. What is involved, along with Levinas, is the impossibility of ever being «sufficiently human», of an enduringly settled, essential «human».⁷¹ Yet, an inclusive determinacy remains imperative.

The distinction, and indistinction, between this inclusion and exclusion could be intimated in Derrida's concern with the unconditional and the conditional, and most aptly when he relates this concern to hospitality. As against a Kantian preconditioned hospitality, Derrida would set an unconditional hospitality, a law of unconditional

⁶⁶R. J. WILLIAMS 1990, 59.

⁶⁷BAXI 2006, xv, 23, 26, 47.

⁶⁸HOPGOOD 2013, xiv, 178.

⁶⁹QUIJANO 2007, 177 – emphasis added.

⁷⁰BOYNE 1990, 152-9.

⁷¹LEVINAS 1991, 128. See also HEIDEGGER 1993, 224-7 – although for Levinas the connection would not be felicitous: LEVINAS 1969, 45-8. In terms of the analysis which now follows in the text, such references do themselves remain questionable by setting the human essentially against the animal. But Levinas here would be amenable to the analysis and to the gist of this present paper in describing the reduction of «the other to the same», the subordination of alterity to essence, as an «imperialism»: LEVINAS 1969, 39, 43, 87.

hospitality, an imperative of illimitable responsiveness to the other. «Only an unconditional hospitality can give meaning and practical rationality to a concept of hospitality. Unconditional hospitality exceeds juridical, political, or economic calculation. But no thing and no one happens or arrives without it».⁷² Yet this conditional or conditioned hospitality is also imperative: «*the unconditional law of hospitality needs the [conditional/conditioned] laws, it requires them. This demand is constitutive. It wouldn't be effectively unconditional, the law, if it didn't have to become effective, concrete, determined [...]*».⁷³ In sum, «[p]olitical, juridical, and ethical responsibilities have their place, if they take place, only in this transaction [...] between these two hospitalities, the unconditional and the conditional».⁷⁴ “The law” thence would be an unconditional law of utter responsiveness to the other, a responsibility, to revive an old usage. This could only be a law incapable of containment. Yet, without more, such a law would be a mere dissipation. So, that law would depend for its realization on the conditional and conditioned “laws” to give it determinate effect. The determinate laws, in turn, depend on the unconditional law, the responsive law, for their own continuing existence. Through this route we have returned to a dynamic of legal formation found in medieval conceptions and a decolonial rendition of law – a dynamic supposedly subsumed within the surpassing positivity of “modern” occidental law.

Turning now to the notion of rights, rights can be rendered as normative claims on the futurity of a being-together in community. Such rights have always to be able to transcend any delimitation, always able to become responsively other than what they may presently be. A right, that is, generatively trajects beyond any conditioned or conditional determinacy. That uncontainment is the impelling element of a right's being, in the conventional designation, “general and universal” – of its surpassing any determinacy. The human, the humanity of rights, thoroughly embeds this responsiveness of rights. Coming from within the secular human, the community of the human, we are not able to occupy some comprehension beyond it, to encompass and contain it – to decree what its “nature”, including its human nature, may “universally”, ever-assuredly be. In the spirit of the decolonial, this perspective would open on to a human rights ever beyond ultimate affirmation, an ever-resistant human rights. Perhaps the decolonial may also take us through such an opening and towards a realization of such human rights.

9 The Intercultural

As we saw at the outset, the decolonial would counter an occidentalized universalism by “delinking” from it and setting it within an “intercultural” plurality. In turn, this plurality could connect to the depiction of human rights just offered by drawing on Menga's cogent unfolding of “interculturality” through which a culture involves a «basic and constant translation», one that is actual and involving and one through which we both appropriate and absorb another culture whilst maintaining a «*responsivity*» to it, including what remains «alien» of it.⁷⁵

In decolonial terms, with the “interculturality” of plural relation cultures would both in themselves and in the relation combine two seemingly different capabilities.

⁷²DERRIDA 2003b, 149. Perhaps something more of the force of the unconditional here could be sought in traditions where hospitality is, or was, close to the unconditionally imperative. For Kant's limiting perspective see e.g. KANT [1795] 2003, 15.

⁷³DERRIDA 2000, 79 – his emphasis.

⁷⁴DERRIDA 2003b, 130.

⁷⁵MENGA 2012, 256, 257, 258 – his emphasis.

With one, the distinct culture has to be able to maintain its “delinked”, limited being. Yet, with the other there must also be an incorporative orientation towards the illimitable, towards something of a universality. The very ability of a culture frequently to embed the universal for its adherents is testament to a culture’s having some universal orientation, to its extending incipiently beyond any existent. For the decolonial, this universality cannot, of course, be of the encompassing, appropriative kind from which the decolonial would itself effect a “delinking”. Which means that the decolonial cannot claim this universality, this illimitability, for any particularly realized or realizable entity. Yet, if distinct cultures are to be in a relation, and as we saw earlier, there has to be some existent, some delimitable commonality embedding that relation. Yet further, that existent quality, if it were merely existent, would leave the only commonality available as one where all of the cultures in relation were the same as each other and their difference in plurality would be lost. Yet still further, if the commonality were simply illimitable, this would amount to its dissipation, to an utter failure of commonality. Hence the seemingly paradoxical price of a culture being distinct yet in a relation of plurality with other cultures is some being-in-common inhabiting and delimiting each culture “in” its very distinctness.

It would be as well to stress an element of unoriginality in my account of culture. It accords readily enough with frequent descriptions of culture and cultures. So, cultures are found to relate «in contexts of hybridity, creolisation, intermixture».⁷⁶ Or, cultures are «overlapping, interactive [...]» they are «densely interdependent in their formation and identity».⁷⁷ And the ability of culture to extend in a receptive and protean way beyond itself is reflected in such characteristic descriptions as its being «open, syncretic, and unstable».⁷⁸ That receptive and protean extension does «not point to any inevitable action of affiliation», but still there is “in” the culture a repetitive orientation towards current resolution.⁷⁹

That still leaves the practical challenge of how in some way to grasp the intercultural, and how to grasp particularly its ultimate receptiveness, grasp what could be seen as its unconditionality, and endow it with «meaning and practical rationality», as Derrida would have it.⁸⁰ Perhaps observations of the demotic may help.

The first is a case study offered by Gerd Baumann with his intense observation of the diversity of cultures and of the idea of culture in “multi-ethnic London”, a London where he finds people able to juggle and connect many different cultures and able consciously to «reify culture at the same time as making, re-making and thus changing it».⁸¹ Culture thence becomes an «ever-changing ‘complex whole’ [...] through which people engage in the continual process of accounting, in a mutually meaningful manner, for what they do, say, and might think».⁸² When geared towards present purposes, the elegance of Baumann’s study lies in its showing that the “intercultural” is an integrating, even a fusion of distinct cultures and of their commonality. Whether the same could be said of human rights may be debateable.

That issue could be refined in a further visit to the demotic, this time to the communities where the Women’s Courts in and around Delhi, the Mahila Panchayats, were established by women quite outside of the formal legal system. Typically,

⁷⁶WILSON 1977, 9.

⁷⁷TULLY 1995, 10-1.

⁷⁸KUPER 1999, 13.

⁷⁹R. WILLIAMS 1961, 295, p.295.

⁸⁰DERRIDA 2003b, 149.

⁸¹BAUMANN 1996, 12-3 – emphasis on “culture” taken out.

⁸²BAUMANN 1996, 11.

proceedings are taken against men for domestic violence or to claim maintenance. As well as drawing on «local idiom», there is a general reliance on «equitable notions of jurisprudence and women's rights», and that reliance extends to the Convention on the Elimination of All Forms of Discrimination Against Women, a convention characteristically described as a bill of rights for women.⁸³ This scene would probably accommodate Baxi's localized resistant human rights as well as Hopgood's «lowercase human rights», also resistant and «locally owned and interpreted».⁸⁴ Yet there are also here elements of commonality in which the Convention imports something of Human Rights in the uppercase. The convention indiscriminately provides an opening to possibility beyond the existent, and beyond contrary modes and laws whether local or national. It is one point in a generative oscillation and not simply something stuck in a primal delimitation. Doubtless also the «locally interpreted» version of the convention would incline its role towards decolonial commonality – towards its integral relation to others and not, or not only, towards being distinct and quasi-universal. Yet the decolonial, as well as the intercultural, would still not be fully effective since the impact of the Women's Courts on the Convention in its «universal» guise would hardly be significant. The intercultural is effected not through some remote reference, but through the commonality it generates.

Something closer to a «practical rationality» of the intercultural may be found in that combining of «interculturality and decolonization» manifested in recent constitutional innovations in South America, pre-eminently «the constitution of the Plurinational State of Bolivia».⁸⁵ The prospect hardly seems propitious given the formative force of «modern» constitutionalism enshrined in the *Déclaration des droits de l'homme et du citoyen* and its decreeing that «[t]he Principle of all Sovereignty resides essentially in the Nation. No body nor individual may exercise any authority which does not proceed directly from nation» (Article 3). Aligned with other contemporary constitutional changes, the Declaration set the political relation as one between the unitary sovereign nation and the citizen/individual. And indeed the heft of the new «Andean constitutionalism» is what has been called the «re-founding of the state».⁸⁶ The refounded state, taking Bolivia as exemplary, is envisaged as «a social unitary state of plurinational and communitarian law».⁸⁷ As such, it embeds constitutionally a plethora of rights, some similar to the distinctly Human (uppercase) variety but extending also and abundantly to social and cultural rights, the rights of groups such as the Indigenous, and rights of participation in the state system, and all matched to a considerable extent by correlative duties on the part of the state.⁸⁸

A lacuna remains. The demotic force of the intercultural and the decolonial remains elusive. This is something Dussel searches for in his *Twenty Theses on Politics*, a search fuelled largely by the history of South America.⁸⁹ Whilst a theoretical wonder in its advancing the imperative of a participatory «people» who affirm a surpassing «Will-to-Live», there is a scarcity of practical exploration when it comes to «the effective institutionalization of the political project that has been germinating».⁹⁰ Dussel comes closest to the effective in two scenarios: one is the recognition of an osmotic process in which «the demands of movements [...] progressively incorporate those of other

⁸³MAGAR 2001, 44, 55.

⁸⁴See notes 67 and 68 above.

⁸⁵BALDI 2013, 1.

⁸⁶BALDI 2012, 3.

⁸⁷ALCOREZA 2013, 1

⁸⁸A conspectus can be found in ALCOREZA 2013

⁸⁹DUSSEL 2008.

⁹⁰DUSSEL 2008, 75, 78, 90.

movements into their own»; the other comprises the need in the participatory state for «the *electronic* revolution in order to reduce almost to zero the time and space required for citizen participation». ⁹¹ The two could be seen as connected.

Intercultural connections and collaboration could obviously be facilitated by drawing on “the electronic revolution” to discover, to form and to effect them through such means as social media, complexity theory, “big data” and culturomics. And even as it could be conveniently sceptical to conclude that the invested force of the occident in such means is predominant, this would be to forget the extensive adoption of social media within the erstwhile Third World. Such media have of late been conspicuously successful in the revelation and affirmation of that which is more «sufficiently human». ⁹²

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⁹¹DUSSEL 2008, 72, 132 – his emphasis.

⁹²LEVINAS 1991, 128, and text above note 71.

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