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Law in other contexts: stand bravely brothers! A report from the law wars

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Abstract

This essay argues against the two pillars of current research on law and globalisation, from the perspective of legal theory and political philosophy: first, the distinction between 'well-ordered' and 'not so well-ordered' societies; second, the sociological model of the subject as pacified, fearful and isolated (to sum up, in harmony). It is argued that mainstream legal theory and political philosophy merely reflects the actual rules of the game of competition, dispute and conflict. In contrast, this essay takes sides with the anthropological and philosophical tradition that conceives the subject as antagonistic and in state of lack, profoundly concerned with the other, whom she imitates and whose standpoint she must be able to share if she is to make sense of the world. Furthermore, it is argued that transitivity or imitation lies at the very origin of conflict and dispute; lack and antagonism remain thus at the core of society, in spite of the surface appearance of harmony that characterises post-modern societies. Because of this, any general theory of law and society that wishes to be relevant at the time of globalisation must make the experience of antagonism and violence, motivated by imitation and envy, and its containment, its object of study. To do this, it must abandon the dualist conception of subjects and societies expressed in the distinction between 'well-ordered' (more violent) and 'not-so-well-ordered' (less violent) societies that has informed its investigation to this day, in order to declare in the most general terms a critique of violence from the standpoint of the victim, as of a piece with its demand for global social and political justice.

1 The law wars: a report on the present state of legal theoretical knowledge

This essay arose from a sense of puzzlement at the paradoxical state of sociolegal and legal theoretical knowledge in the time of globalisation. On the one hand, it is widely held that processes of globalisation have resulted in the hegemony of certain types of dispute resolution mechanisms and institutions associated with market liberalism and democracy. In mainstream legal theory, societies that feature these sorts of mechanisms and institutions are termed 'well-ordered societies'. It is widely understood from this perspective that the point of theory is the justification of the procedures, institutions and mechanisms of such societies.

On the other hand, there is widespread recognition that 'the beginning of the new millennium has witnessed a groundswell of proposals for the transformation or replacement of the national and international institutions underpinning hegemonic, neo-liberal globalisation' (de Sousa Santos and Rodríguez, 2005, p. 1). Put forth by a considerable number of anti-systemic movements and social organisations, articulated as trans-national and trans-modern networks, these proposals challenge the mainstream view that there is no operative alternative to the dispute resolution mechanisms and institutions of market liberalism.

Their persistence and global span since the beginning of the millennium obliges us to reconsider the point of legal theory as understood by the mainstream. That is the starting point of this essay: to use the results of certain ethnographic projects concerning dispute resolution, the origins of modern

legal–political institutions and the responses of anti-systemic movements in order to widen the present focus of sociolegal studies and legal theory. At a more abstract level, this essay will discuss the explanatory power of the concept of 'transition', developed in ethnography, systems theory and cognitive science, as a tool to better our understanding of demands for social justice put forth by disputant bodies and anti-hegemonic movements. The centrality of their antagonism for a widened focus in social and legal theory means that this enterprise must take the shape of a critique of violence. That will be the end point of this essay. Rather than a particular interest in the justification of the procedures and institutions of so-called 'well-ordered societies', it seems necessary that social and legal theory today take into account the demand for social justice at a global scale, made operative in transformed procedures and institutions, and advanced by social and political actors that more often than not come from 'not so well-ordered societies'.

This demand, and the challenge that it entails to the hegemony of liberal democratic procedures and neohumanitarian dispute resolution mechanisms, remains unnoticed by mainstream social theory, legal theory and political philosophy because of its justificatory focus on the procedures of 'well-ordered societies'. As suggested before, I propose that this focus be widened. Moreover, since the dichotomy between 'well-ordered' and 'not so well-ordered' seems misleading in both the analytical and the descriptive sense, it is proposed here that we use sociolegal knowledge concerning not so well-ordered or 'traditional' societies coming from the sciences, mainly post-modern ethnography and the theories of self-organisation, in order to better our understanding about the origins and fate of dispute resolution mechanisms and institutions in late modern societies.

The sense of unease with the distinction between well-ordered and not so well-ordered societies stems from the fact that it leaves out any possible comparison condition that would provide sense to the justificatory enterprise. Put in simple terms, mainstream legal theory and political philosophy seem to be engaged in the justification of liberal institutions to liberal societies already convinced about their worth, with no regard for the analytical and empirical importance of the experience of multiplicity, situation and eventuality in society. As a result of this situation, mainstream legal and political theory appears unscientific, and is fast becoming irrelevant. This becomes a more serious issue when we take into account the widely recognised fact that, as a result of globalisation, the experience of multiplicity and comparison (which entails also the sociopsychological sentiments of envy and mimetic violence) takes place within societies frequently organised under the 'one legal system fits all' model. That is to say, the conflict-ridden co-existence of well-ordered and traditional societies takes place within supposedly homogeneous cultural, legal and political systems; this is an intra-national as much as a trans-national phenomenon (rather than an inter-national one). Therefore, it is a mistake to assume that the distinction works as a model of planetary conflicts of globalisation setting 'modern' societies against traditional ones (as in the deeply mistaken idea of a clash of civilizations, or the modern West v. the rest).

It is also a mistake to assume that the 'one legal system fits all' model, the 'Western' or 'modern' model of the rule of law, can act as the cause of social harmony against the divisiveness of tradition. Power and law are not the efficient cause of social order but merely a formal expression of it: laws are the formal and objective expression of the relationships between men; they do not *constitute* social relations but *declare* that such relationships exist. Thus, they are the declaration of an event or a fact, as Benjamin Constant used to say. Furthermore, what is declared is more often than not the result of a rebellious event that inaugurates the social and, in some sense, precedes it. In this sense, it is more correct to say that the model of equality under law expresses an enhanced experience of division and differentiation.

Under conditions of equality each citizen perceives the other as fundamentally similar in every respect, neither as a superior nor as an inferior; by the same principle, his association with the other does not follow the rules of custom or necessity. As a consequence, democratic societies are defined

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by the reflexive and pacifying affect that disposes each citizen towards the isolation of the mass of his equals and, because of this, 'to withdraw at home with his friends and family' (de Tocqueville, 1835/1992, Vol. II, 2, II). This is the social affect that anthropologists like Laura Nader term harmony, or more precisely, harmony ideology in a critical reference to its effects upon public life and the management of common affairs.

But this apparent indifference towards the other masks a true obsession with the fate of our neighbours. Each citizen perceives the other as his equal and simultaneously tracks him or her as a rival. This is the logic of competition and envy that modern philosophers have often described in terms of a dichotomy without resolving it: *amour de soi/amour propre* (Rousseau, 1964, pp. 221–222), master/slave (Hegel, 1967, pp. 65, 173, 229). Mainstream legal theory and political philosophy merely repeats this description in the dichotomy between well-ordered and not so well-ordered societies.

The problem analysed by these dichotomies is that of the duality in the modern conception of the subject, which coincides with the duality in the sociolegal conception of equality: on the one hand, subjects are posited as independent and incommensurable. By definition, this understanding of equality (as tolerance) corresponds perfectly to the vision of the narcissistic subject isolated from the mass of his others so dear to contemporary sociology. However, this would entail a rather poor understanding of the differentiating process of modern societies, which reduces the individual subject to an isolated expression of itself, liberated from any competition with others and any collective criteria of judgment. Thus, in order to supplement such an understanding, subjects are posited, on the other hand, as competing against one another under criteria of meritocracy and conditions of equality of opportunities (in trade, sports, politics and so on), that presupposes some common criteria to judge and compare the results. This is the dual aspect of our mainstream conceptions of equality, inseparable from the first, for under this aspect comparison with the other becomes the very measure and support of the egalitarian aspiration.

The tradition that is put to work in this essay has a very different conception of the subject, monist rather than dualist: the antagonistic subject, in state of lack, moved by the desire for the other. This subject has been called by a variety of names in this tradition. It has been called 'the poor' by Adam Smith (1982, p. 404), 'the subaltern' by Boaventura de Sousa Santos (2005, pp. 29–63) or Sylvia Rivera Cusicanqui, (1987), 'the victim' by philosophers such as Dussel and Zizek, or 'the scapegoat' by René Girard (1977, p. 76), 'the oppressed' or 'the messiah' by Walter Benjamin (1969, pp. 253–264), and opposed to 'the sovereign' body (in the political theory of controversial German lawyer Carl Schmitt). Anthropologists associated with this tradition speak in a similar vein of 'the powerful body' (José Gil, 1988) or, in the context of US civil litigation, the disputant body, the user of the law or 'the plaintiff' (Laura Nader). Such a variety of names for the subject in this tradition will be used interchangeably in the remainder of the essay.

The point of this tradition is not just to invert the platitudes of contemporary sociology, but rather, to observe that the pacified individual, narcissistic and isolated, portrayed by sociology as alone, conflict-adverse and full of himself, put another way, in 'harmony', is but an illusion produced by the rules of the game of competition, dispute and conflict. If, on the contrary, the subject is posited as antagonistic and in state of lack, or put another way, if sociological and political observation starts with failure rather than wonder, the shift in perspective follows a different sort of reasoning: contrary to what the mainstream seems to think, the individual subject is profoundly concerned with the other, whom he imitates and whose standpoint he must be able to share if he is to make sense of the world. David Hume and Adam Smith called this faculty 'sympathy'. Similarly, contemporary cognitive scientists such as Humberto Maturana and Francisco Varela speak of 'transition', striking a chord that resonates with the anthropologists' research. Transitivity or imitation lies at the very origin of conflict and dispute; lack and antagonism remain at the core of society beneath the surface appearance of harmony, even more so in post-traditional or trans-modern societies.

Because of this, any general theory of law and society that wishes to be relevant at the time of globalisation must make the intra- and trans-national experience of antagonism and violence, motivated by imitation and envy, and its containment, its object of study.

To do this, it must abandon the dualist conception of subjects and societies expressed in the distinction between well-ordered and not so well-ordered societies that has informed its investigation to this day. Not in order to justify the sovereign's monopoly of violence as the cause of social harmony, but rather, in order to declare in the most general terms a critique of violence from the standpoint of the victim, as of a piece with its demand for global social justice.

On this aspect, the findings of anthropologists such as Laura Nader and José Gil – namely, that the study of the reality of dispute and dispute resolution is badly served by the model of harmony/equality, and that the pacifying use of this model becomes an obstacle to any politics of common justice – are far closer to the truth than the intuitions of mainstream legal theory and political philosophy. In the following sections, let us focus on Nader's study of the effects of alternative dispute resolution mechanisms (ADR) in the law and politics of common justice. Her case-study concerns the actual effects of the dispute mechanisms of a treaty called NAFTA (North American Free Trade Agreement) in the politics of North American civil litigation. I emphasise the response to these effects by an anti-systemic movement, the EZLN (*Ejército Zapatista de Liberación Nacional* 'Zapatista Army of National Liberation') of southern Mexico and enquire if and how the demand that has been advanced by this group (and groups such as this) can be relevant to sociolegal and legal theoretical knowledge. Given the wide span of mechanisms such as those included in NAFTA and the responses to such mechanisms by anti-systemic groups and movements, travelling on the back of the World Bank's jurisprudence and/or the theoretical practice of the World Social Forum, her findings and questions can be generalised. However, as observed already, the focus here will be on the status (within legal theory and political philosophy) of the political demands of common justice made by social subjects in the context of their refusal to enter the exceptional space of conflict management proposed under the treaty (NAFTA) and other similar legal arrangements of global governance.

In turn, this will lead us towards the mid-part of this essay to a more general focus on the question of transitivity and violence, and from there on to the possibility that social–legal and theoretical knowledge may benefit from taking the form of a generalised critique of violence, elaborated from the standpoint of rebellious entities; such is the end point of this essay. Its starting point is the observation that the legal model of equality enhances the experiences of multiplicity, envy and conflict. The study of conflict, dispute and dispute resolution must take this fact into account if it wishes to be relevant once again.

2 Stand bravely brothers! Laura and the anthropologists against the pure politics of the law

Laura Nader's *The Life of the Law* (2002) is the result of a series of ethnographic projects focusing on the current fashion of alternative dispute resolution mechanisms (ADR) in the global legal and political arena. As she reminds us, this fashion was initiated by the introduction of such mechanisms in Chapters 4 and 11 of the NAFTA treaty signed by Mexico, Canada and the United States in the context of trade and security integration in the Americas. Nowadays such mechanisms have been exported to other jurisdictions such as the UK, where large legal firms involved in trade-related dispute resolution have started to use them in the handling of their trans-Atlantic cases, and London-based law professors teach them as the last word on dispute resolution, the law of natural resources and potentially – when they are included in treaties concerning integration for the purposes of security – the treatment of armed conflict and terrorism.

Such mechanisms include the use of offshore venues, the circumventing of regulatory powers of parliaments by emergency regulation, and the creation of law-free zones or 'states of exception'

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where the law of the states involved is not applied or is replaced by ad hoc hyper-regulation. In the particular case of Chapters 4 and 11 of the NAFTA treaty, for instance, dedicated to the protection of foreign investment and dispute resolution, the signatories are committed to concur at an 'offshore' arbitration tribunal in order to resolve ensuing disputes under principles of law which may effectively suspend the application of their sovereign legalities and even some mainstream rules of international law.

As it happens, the majority of the disputes resolved through these mechanisms, involving multinational investors and 'sovereign' (well-ordered and not so well-ordered) states, concern the regulatory powers of the state. Due to a mixture of fairly established principles of international law and some radically new ideas on the definition of property, there is the possibility that when the exercise of such regulatory powers affects in any way the value of its investment, the multinational investor can claim that a 'regulatory' taking has occurred and ask for monetary compensation by the state.

As a result of the treaty's obligations states find themselves facing investors in equal conditions, which may result, and have resulted, in enhanced antagonism, the state having to pay a foreign investor a considerable amount of taxpayers' money for the exercise of its regulatory powers. The point is that NAFTA arbitrators, to return to Nader's case-study, unable to overturn domestic legislation, can award huge damages that may be nearly as crippling, 'chilling governments from acting once they realize they will be "paying to regulate"'.[1]

That is not all. Investor-to-state dispute resolution also provides a way for foreign litigants to seek government compensation for damages ordered by domestic courts in civil wrongs cases; if successful, the result would do away with the potency of the civil plaintiff acting under the modern law of torts in these cases.[2] Furthermore, conflicts that are by definition public, insofar as they involve what can be called the 'unpayable debt' that the state owes to individuals, end up being decided by private, closed-doors tribunals. The political potential consequences are not difficult to imagine.

Consider the case of Mexico under NAFTA: when Mexican President Carlos Salinas de Gortari announced that his country had finally joined the First World, in relation to the signature of NAFTA with the US and Canada, the so-called *Ejército Zapatista de Liberación Nacional* (EZLN) occupied the south of the country and declared that the whole of Mexican society was suspended in the mirror-image of its outcasts and victims, who refused to enter into the space inaugurated by the treaty.

It would be a misunderstanding to consider this event from the point of view of a mere failure of law, democratic procedure or 'representation'. Rather than representation, the logic that is operating here is one of exception and withdrawal, or subtraction. In a word: rebellion. The opening words of the EZLN First Declaration were 'we are the product of 500 years of struggle'. They used a politically charged language in order to speak to the question of the rights of women, to 'the just struggle of rural Mexico for land and freedom', to the Rights and Obligations of Peoples in Struggle, and went beyond the language of law and human rights in their explicit refusal to become the sacrificial victims of the newly proposed arrangement of trans-national governance.

As analysts, we must question this use of legal and political discourse. Where do these 'Rights and Obligations' come from? What do the Zapatistas mean when they speak of 'just struggle', 'freedom' and, crucially, 'peoples in struggle'? Why do they speak in global terms, addressing the peoples of the world and the outcasts of the nations of the Earth, rather than just their fellow Mexicans? Can their opposition to the emerging international law of trade and security mean anything in terms of political radical subjectivity, at a time when radical politics is itself in question? That sort of investigation would have to reject outright condemnation or justification, but also a form of

1 See for the source of this quotation Greider, 2001; see also Nader 2002.

2 Nader refers here to the NAFTA-related Loewen case: *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Decision of the Arbitral Tribunal on Hearing of Respondent's Objection to the Competence and Jurisdiction, 5 January, 2001.

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redescription of legal and political phenomena that would cease to make these subjects and queries problematic to us. Research does not seek to domesticate its problems, glorify them or dismiss them. It aims to achieve a superior understanding. In order to achieve such a superior perspective, the researcher would have to meet the Zapatistas in the space that they themselves have enacted.[3]

This is not the space of the political or the legal as understood by mainstream legal and political theory (conceived either as philosophy or social science). For instance, if the point of political philosophy is to justify the monopoly of violence in the hands of the state, by assuming such a perspective the investigator has already precluded any understanding of the phenomena under investigation. Thus, in respect to its discipline, field or perspective, such phenomena would be unthinkable, undeserving of attention; in a word, exceptional.

But the problem with exceptions is that they are resilient. No matter how strongly the analyst believes its object to be a non-object, it returns forcefully (usually in the form of a categorical refusal) to remind him or her of its existence. That is not all. The issue at stake in these sorts of phenomena is not recognition within the community, but rather, a break with any form of communitarianism.

The question is not 'is this a normal usage of the term law?', but rather, 'just what falls under the term law?' Postulated in this manner, the question becomes one of understanding what is lost in the enquiries about the normal usage of a term, that is, how a term is reappropriated from below. If normal research results in the average being taken for general knowledge, then we must aim for a kind of research that accounts for those events in which the exceptional, in its particular, intimate exteriority, takes on the form of universal knowledge. The emergence of the EZLN is precisely that kind of event: it is one of the clearest examples of the re-entry of lacking, antagonist bodies in the social, legal and political system(s) unleashing the beyond of modernity within modernity. Put another way, this movement beyond particularity and generality, is not an overcoming in the sense of utopian openness, bringing forth the accomplishment of a promise forever delayed. This would be to repeat the form of indefinite deferral that is the very mechanism at work in capital, empire and the judgment of Hercules. Rather, this movement is a 'small adjustment': the unexpected, uninvited *transition*, the intrusion (which, paradoxically, has the form of a refusal to enter, á la Kafka, á la Bartleby) of the Second and Third World (labour, anti-globalisation, the many-headed Hydra) into the First World.[4]

Before introducing Laura Nader's critique of the dispute mechanisms referred to in the opening of this essay, it is necessary to clarify my standpoint and the conceptual apparatus I have so abruptly introduced in the previous paragraph. As suggested above, my standpoint is less than (social) scientific, but also more than theoretical. It is historical and analytical in inspiration, anthropological in substance and critical in aspiration. It is an example of trans-positional work. Let me explain.

The concept of transition belongs to the application of the model of the cured body of the possessed, of therapeutic rituals, observed in anthropological research, to the study of the emergence of violence, acquisition and the state in tribal societies.[5] In the sense in which it is used here, the term therapeutic refers to a liminal space created in order to allow the suspension of the desire to wholeness, and to stop the spread of all-out mimetic violence. It is to be opposed to the set of (medicalised) techniques that in the form of treatment (that is, moral and educational trusteeship)

3 The argument developed here follows Laura Nader's work on the anthropology of the life of the law. The present work is located at the interface between law, theory and anthropology. For other examples of the kind of research invoked here see de Sousa Santos and Rodriguez, 2005; Rajagopal, 2003a, 2003b; Escobar, 2004.

4 The point here is that the object cause of desire in the foundational fantasy of the West is the Third World, particularly the New World. Thus, for instance, John Locke writes in the *Second Treatise on Government*: 'In the beginning all the world was America'.

5 See Gil, 1998. He observes that talk of 'tribal societies' could 'mean that it is as much about us as it is about exotic peoples' (p. ix). The concept also echoes Varela's use of the term, see ftn 7 below.

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permit the management of human conflict via the surveillance and harmonisation of the potentially disputant body. This meaning pervades my understanding of dispute resolution mechanisms among tribal societies, what will be called hereafter 'ritual justice'.

The latter ritualises the agonism of the egalitarian circuit of social exchange and debt, and by doing so allows each singular individual the production and social expression of its potency; put another way, it recognises the individual's sole right to use violence but makes it circulate in a more peaceful mode.[6] This is a thesis whose implausibility seems so obvious to us that we do not realise it is a standpoint whose possibility is not in doubt, and hence we do not consider it. One simply has to give up the standpoint of the state's legal centrality to see this: rather than pacification through harmony and integrity, which implies the pacification and integration of radical otherness, the therapeutic model referred to here teaches us that all the features we consider essential in ourselves and for others stem from the unrealisable desire to consider whole and substantial that which is virtual and fundamentally incomplete.[7]

Harmony and the unrealisable desire to be whole (to get for myself the very thing that my rival desires) will be conceived here as intricately related, and they will be seen to provide the context for the current vogue of so-called alternative dispute resolution mechanisms (ADR) in the local and global arena. Laura Nader's stance can be better understood from this perspective. Moreover, this standpoint may allow us to provide an answer to the question concerning the connection between local histories and global designs through/in the legal and political system. This question seems particularly relevant in respect to ADR, given the striking parallelism present at the local and transnational levels of its global spread.[8]

The basis for the study of the emergence of the state in the sense previously explained is to be found in a diversity of ethnographic sources: from Kuper's descriptions of the Swazi *Incwalla*[9] and Gil's account of the role of *Vendetta* in Corsican oral tradition,[10] to John Comaroff and Simon Roberts's observations on dispute settlement among the Tswana.[11] These sources are crucial in order to understand the resistance of 'justice' to complete systemic absorption (its meta-political character), at the very same time that it provides a pivot for the emergence of political systemic closure by imposing itself and controlling the social source of conflict in authoritative manner (its proto-political character).

Transition, in the sense understood here, is associated with trance and the metamorphoses of the singular body that take place in it (the becoming-animal, the becoming-object and the becoming-king's body of the body), but more importantly, with 'exfoliation'. This is 'the diversification of the space where the body molts in leaves or scales that allow the direct branching of the body with things' (Gil, 1988, p. 291). The space of the body is exfoliated or moulted so that it can enter into a relation with an object or another symbolically different space. The feeling of ubiquity described by participants in possession rituals is explained in just such a way. The same goes for historically

6 For an instance of this, see the analysis of a proto-judicial process among the Eskimos in Gil (1978, pp. 273–278). The suggestion here is that we read Nader's 'plaintiff' as a latter-day variation on the model of the powerful disputant body. In this respect, her argument against the pacifying use of ADR would be better understood as a defence of the social expression of potency.

7 See on this Varela, 2003, pp. 110–113. I have deliberately paraphrased Walter Benjamin at the beginning of the paragraph; see ftn 31 below, p. 232.

8 Incidentally, ADR mechanisms seem to challenge Boaventura de Sousa Santos's distinction between 'localised globalisms' and 'globalised localisms' even at the analytical level. For the distinction see Boaventura de Sousa Santos, 2002.

9 See Kuper, 1947; see also Beidelman, 1966.

10 See Gil, 1978.

11 See Comaroff and Roberts, 1977.

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famous experiences such as that of Saint Paul on the road to Damascus, but also for the ordinary feeling we try to express when some experience of alterity pushes us to change our predetermined direction.[12]

The property of the body to exfoliate is thus at the basis of the capacity of the body to translate forces into signs and to transfer them from one set of signs to another. Since 'power' is nothing other than the capacity to translate forces into other forces and into signs, state (legal) power can be represented as a body which inscribes certain signs and forces onto itself: the political body. This body comes about, more precisely, through the fixing of some sort of floating signifier – a sign that circulates freely in the social arena – into a 'master' or dominant signifier – a sign that takes itself as the place of inscription of all signs and forces. The king's body, for example, the sovereign, is just such a kind of signifier.

3 A ballad of immoral earnings: in a state of exception

The concept of a 'sovereign' body is central to modern legal theory. Its clearest formulation can be found in the 1920s constitutional theory of the state of exception developed by Carl Schmitt. According to Schmitt, 'sovereign is he who decides on the state of exception' (Schmitt, 1996). 'State of exception' is the constitutional legal term for a declaration of emergency followed by the suspension and/or limitation of rights and laws. It entails a reconcentration of power in the hands of the Executive who can therefore issue decrees to the detriment of the legislative function of Parliament or Congress; such decrees are known in the UK as issued under the Royal Prerogative (for instance the mobilisation of troops in a state of war) and in the USA as Executive Orders (for instance those related to the treatment of so-called illegal combatants, and the myriad regulations for Camp X-Ray in Guantánamo Bay after 9/11). This constitutional figure runs counter to the 'normal' division of powers; as such, it is considered to be a transitory measure and therefore the time of its being in force is marked as a time of transition.

Interestingly, Schmitt's theory set up to demonstrate that far from being occasional, the state of exception had the potentiality of becoming the rule. In this sense, the time of transition threatens to become a permanent feature of the modern legal system. The realisation of the normality of the state of exception, or its permanent threat, introduces a paradox at the very core of modern legality. The paradox dormant in the definition of sovereignty 'consists in the fact that the sovereign, having the legitimate power to suspend the law, finds himself at the same time outside and inside the juridical order' (Agamben, 1999, p. 161), which also means that 'the law is outside itself' or 'I, the sovereign, who am outside the law, declare that there is nothing outside the law' (p. 161).

This means that the quasi-transcendental conditions that establish any system, in this case the system of legal power grounded on the fixity of a master signifier (such as absolute sovereignty, Hart's rule of recognition, Kelsen's *Grundnorm* or Kant's moral law), always imply a beyond to it. This implication suggests that there is a differential between the space–time of the legal system (the time of transition) and that of its beyond, i.e. that they do not correspond. Put another way, this means that the space–time of the law is, to abuse Shakespeare, 'out of joint'.

Cultural critic Walter Benjamin, entering the discussion of 1920s German legal theory ensued by Schmitt's challenge (in turn, spawned by the constitutional crises of the Weimar Republic), attempted to respond to the problem of the non-correspondence of space–time by distinguishing

12 I have in mind two different but related examples. Both come from analytical jurisprudence. The first one is H.L.A. Hart's reaction after having read Wittgenstein's *Blue Book*; for the story of Hart and Wittgenstein's *Blue Book*, see Lacey, 2004, p. 140. The second one is that of one of his students, William Twining, in the colonial Sudan (2002, pp. 26–35). If we are to believe the biographical accounts, they were expressed in exactly the same way: 'scales fell from my eyes'. The phrase is a description of the experience of exfoliation.

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between the state of exception (the time of transition) and the 'real' state of exception (the time of rebellion and redemption). His reference was to distinctions contained in the Jewish legal tradition that opposes the situation of exile to that of return. The event of return, the re-entry of the exiled body that unleashes the real, is Benjamin's answer to Schmitt's logic of exception.

This is precisely the kind of event (a logic, the logic of re-entry) that took place with the emergence of the EZLN in the 1990s, referred to above. But this realisation is only the starting point of our enquiry. Further, we shall focus on the following implications of the logic of re-entry:

(1) That the non-correspondence of space–time and the antinomy of the law it founds, originates in certain events for which the body would be the seat. A small adjustment in the lexicon of therapeutic rituals concerning the body of the possessed in tribal societies, for example, allows the accumulation of forces and symbols in the emerging political body. The excess accumulated by the political body, the state, represents the surplus value of state legal power. This surplus, or standing reserve, results from the deduction of goods and forces in specific social units (other object-bodies). Among these accumulated forces is time, coded in the form of determined work for the production of more and more goods. Power becomes the power to make bodies work, and the time of society becomes one of indefinite deferral: the normality of transition that underlines Schmitt's speculation about the persistence of the state of exception. Countering this movement, re-entry must entail the decoding of coded time.

(2) Re-entry or 'transition' always takes the form of a requirement for justice; not this or that (ideological) conception of justice but a perennial requirement for justice, its universal declaration, as confronted with the imperatives of power. That is, the part of justice that resists ideological and/or systemic absorption. 'Where does the universal declaration of justice come from? ... The requirement for justice, hardly founded in natural or positive law, finds its origin in the emergence of people into society (their transition from particularity and generality into concrete universality). The protojudiciary processes of certain stateless societies would only be the return of mechanisms at the origin of the beginnings of social relations. This is to say that it is in the nature/society connection that justice is born' (Gil, 1988, p. 280). These mechanisms have to do with the establishment of the circulation of singular forces or potentialities in the communal circuit and the commencement of the system of exchanges (the first controlling the second). 'Potentialities' refer here to direct relations between a body and its environment considered from the perspective of the system itself.[13] 'Exchanges' occur along circuits (of goods, services, speech, beings) ruled by reciprocity; such rules are indeterminate and thus, the possibility of conflict is inscribed in the indeterminate space opened up by such rules to the social expression of affects. Conflicts or disputes are translated into a break in the exchange cycle, and dispute resolution – marked by flexibility born out of indeterminacy – aiming at restoring the cycle, attempts to do so by producing juridical values (modifications of quantities exchanged: goods) and allowing debt (the affirmation of specified embodied potentiality: persons). The relation between these two levels of exchange is inversely proportional. The two-level and proportional nature of exchange is crucial to understanding that every requirement of justice is about the affirmation of embodied potentiality (what the ethnographer calls 'honour' or

13 That is, the environment as it impinges upon a body and is made significant by such a body. The body valorises such encounters (impingements) as having effect or not. The result is 'affect', an excess of meaning in respect to the perspective that constitutes the world of the cognitive agent. Affects (signified forces) are expressed in such terms as 'ambition', 'vanity and self-regard', 'pride', 'desire of self-enhancement by display', etc., and circulate as such. The circuit of affects, giving place to exchanges of know-how regulated by norms of reciprocity, we will call culture, or, the nature/society connection. See on the cognitive aspect, Varela (2003, pp. 28, 96–97), in particular his use of the terms 'transitions' and 'intentions'. Notice also the use of affective terms, like those cited before, in Malinowski (1926, p. 58).

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'prestige') as much as it is about the (re)establishment of values. This observation is important for the fleshing-out of what Laura Nader calls 'the justice motive',[14] a key concept of her conception of the life of the law.

(3) Judiciary dispute processes aim at the affirmation of the potency of bodies in the communal circuit and the continuation of the system of exchanges, and in particular at the maintenance of the agonistic context for the formation of debt (the surplus of a gift in relation to a counter-gift as an exact translation of individual honour), for the circuit of debts denies the accumulation of goods and disallows potency to found itself upon such accumulation.[15]

Equality is here that of not being able to accumulate, of not having. Disputes are thus defined, narrowly, as a takeover without any obligation for return.[16] 'There is conflict because the victim has been denied his exchange capacity for giving or deploying potency (on the basis of the item that has been "taken" from her. The agonistic exchange context thus finds itself overturned' (Gil, 1988, p. 271). Injustice takes the form of the statement 'he has accumulated to the detriment of my potency or honour', that is, to the detriment of my possibility to take part in the agonistic exchange that would allow me to control processes or change everyday life by means of the law.

It must be remembered that law, in the sense it is being used here, refers to the norms that open up a space for the social expression of forces, or the indetermination of behaviour. This is the set that Malinowski described as a second group of norms or 'civil law' (1926, p. 80). Thus 'law', in this sense, is the exact opposite of pacification; proto-judiciary dispute processes correspond to a sort of agonistic ceremony that re-establishes the circulation of power in the specified bodies of individuals, against its abstract singularisation in a (single) body. Justice is 'first of all the right to singular potencies' (Gil, 1988, p. 279), and thus it is universal in respect to the social relation: 'If justice recreates social links with the same solidity (or the same fragility) that they had before the conflict, is this not because it puts into action originary mechanisms of the general social relation?' (p. 279).

If justice is the right to 'singular potencies', and such potencies can be freely expressed only in the social space of conflict or dispute, exchanges and debt (and/or their ritualised form in the proto-judiciary process of dispute resolution), then pacification – understood as the political deduction or extraction of singular potency and the disavowal of agonism in dispute resolution – is profoundly unjust, in the sense that it allows for accumulation without return and the quieting of powerful bodies.

This clarification allows a better understanding of what lies at the basis of Laura Nader's critique of what she calls 'harmony ideologies' and the centrality of the role of the plaintiff in her observations.[17] The plaintiff, and in particular the civil (subaltern) plaintiff in the context of torts law and corporate power in the USA (personal injury actions by workers, passengers and pedestrians), is a specification of the affirmative, specific powerful body fighting political extraction in the post-industrial revolution nation state and/or the global marketplace (Nader, 2002, pp. 171–211). It also helps us to understand the stakes in Schmitt's theory of the sovereign and the *nomos*, after the

14 See Nader, 2002, pp. 15, 170. Her use of the term is related to the work of social psychologist M.J. Lerner (1975, pp. 1–19); also with Sapir's work on linguistic drift (1921), and less directly with Karl Llewellyn's treatment of drift (Llewellyn and Hoebel, 1941, pp. 274, 278).

15 See Gil, 1998, p. 270. Contrary to what happens with economic exchanges after the emergence of the state, in the logic of debt it is the surplus of the goods given and of expenditure that becomes a surplus of potency; see on this Bataille, 1998.

16 It may be interesting to observe here that in international law the customary rule regarding takings of property is, precisely, that of no taking without compensation, although nowadays there is a move to strip the rule of its agonistic context.

17 See Nader, 2002, pp. 32–34, 53, 164. For an analogous theorisation, this time in the realm of human rights, see Baxi, 2002. Notice the centrality of the affective notion of 'suffering' in Baxi's (counter-)historical theorisation of human rights.

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connection between the local crisis of the Weimar Republic and the global arena became clearer: the new *nomos*, set to replace the Westphalian concept of law, is precisely one of pacification and hegemony at a planetary scale.[18] But that new *nomos* was announced already in the taking of the New World by European powers in the fifteenth and sixteenth centuries; from this perspective, the single most important cross-cultural misunderstanding spawning the modern *nomos* (what Schmitt called *Ius Publicum Europeum*) can be seen in relation to the exchange of gifts between the American indigenes and the newly arrived Europeans; particularly as considered (or ignored) by political authorities and missionary courts.[19]

4 I read about tank battles: on the use of force

Walter Benjamin understood the role of the (subaltern) plaintiff all too well. One of his early forays into the problem of law's nature dealt with the question of the state's exclusive right to the use force in relation to the lack of potency of individuals. Almost eighty years on, ethnographer José Gil shows the actuality of his analysis. He writes:

> In the reverse of tribal justice, which considered misdemeanours, or at least conflict, as a sort of normal illness in the social body, all violent acts are henceforth banned from society. *A dual culpability will weigh on this domain*, that which deals with the damage caused and that which is attached to the right to violence. The main culpability is to have violated the exclusive right of the state (i.e., to have stolen violence from the state), which makes everything prejudiced, guilty of being guilty. A strange process begins. Because potencies are deprived of symbolic counterparts, surfaces for social investment, they disappear; buried in the ideological bazaar of fantasies and the discourse of the state: it becomes a matter of 'instincts', 'animal drives', 'passions', 'vices', 'bestial nature' – in short, the criminal body. Elsewhere we see emerging little by little the search for intention as the principle of responsibility … where honour used to control violence came to be placed the whole arsenal of evil and the crimes of a now profound conscience, an abyss, *a well of guilt for having failed to remain vigilant over the body*. Now the aporias of justice also begin. (Gil, 1988, p. 287)

In his 1920 'The Right to Use Force', Benjamin (2000, pp. 231–234) set up to review the arguments of Herbert Vorwerk concerning the right to use violence, published in the *Blätter für religiösen Sozialismus*. It is a short piece, four pages in the English edition of Benjamin's *Selected Writings*. The style is that of a brief commentary following the citation of the key propositions in the argument. However brief, it holds a key insight when compared to Gil's statement, but also in relation to Nader's claims. The point is, in both cases, Gil's and Nader's ethnographies, to emphasise that the context of dispute resolution after the emergence of the state is in the antipodes of that of tribal ritual justice. More plainly, that dispute resolution has become impossible after the emergence of the state insofar as the original dispute, the foundational inequality, i.e. the differential between the accumulation of forces by the state and the loss of potency of singular bodies, will remain unresolved. In this context, every form of dispute resolution, including those that go under the label of being 'alternative' (to the state's law) become varieties of law-preserving violence and, ultimately, part and parcel of a programme of pacification which consists in the permanent vigilance over the body.

However, this should not be understood as a negative judgment on their part. The very realisation of the context of post-state dispute resolution throws light on the centrality of the disputing body, a centrality that was already at the core of findings in ethnographic accounts on the nature and

18 See Nader, 2002, p. 5. For Schmitt on *nomos* and pacification as the basis of modern international law, see Koskenniemi, 2001, pp. 47–57.

19 On missionary courts, see Nader, 2002, pp. 29, 31, 126–128).

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social function of justice. Even when reduced to an object of surveillance, the disputant body remains the 'limit concept' of modern-day legal theory and practice, for it reveals the latter to fall prey to an unrealisable desire for wholeness. In accordance with this insight, law is torn between its desire to dispense of the disputant body, to 'dissolve the people' in order to become whole, and its dependence on the creativity of the disputant body for its own reproduction and existence. This is the 'double guilt' referred to by both Benjamin and Gil: law is guilty of failing to be whole and hence doubly guilty of failing to do justice to the disputant body.

Nader's powerful case against the pacifying use of ADR, what she calls 'harmony ideology', is based precisely upon the recognition of the failure of the state towards the disputant body. To the extent that the state *does* fail to repay its debt to singular bodies, she is correct. However, she does not see that this failure is necessary, that the state is less concerned with justice than it is with its own reproduction and survival.

Put another way, Nader does not seem to consider the extent to which the failure of the state towards the plaintiff is of a piece with its failure to be whole. In any case, and here one must part ways with her conclusions, the life of the law seems to be determined by the creativity of the disputant body as much as it is by the law's own will to power; the same holds for ADR.

In other words, ADR becomes an instance of the state of exception in the context of (post-)state dispute resolution, for it is both outside and inside the law. The implications of the paradox thus introduced have already been highlighted. It will suffice to emphasise again that, if this is the case, then the discourse of harmony does not correspond to the reality of alternative dispute resolution. At the very least, such a discourse should always be considered suspicious when used in relation to ADR, for it obscures the unresolved character of the original inequality that allowed the appearance of the state in the first place.

It also obscures the fact that every requirement of justice issued by a disputant body returns us to a justified indictment of the system as such (the 'universal declaration'). Thus, there is a fundamental antagonism between the disputant body and the state that is never done away with, no matter how much rhetorical energy is invested in the 'selling of ADR' and/or in legal reform.[20]

To this extent, Nader's analysis of the arguments put forward during the Pound Conference in 1976 – the official launch pad for the contemporary ADR movement – is correct. The fact that the same arguments are present in contemporary attempts to sell ADR in the UK civil jurisdiction can only be received with a healthy dose of scepticism. Between Chief Justice Warren Burger and Lord Woolf the only difference seems to be in the deepening of the desire for wholeness in the legal system.

Further, ADR demonstrates the normality of the state of exception insofar as, on the one hand, it is an instance of its appearance beyond the realm of constitutional law (in civil law, as Schmitt predicted) while on the other, it lays bare a structural feature of legality as such (Schmitt's *nomos*). That this structure is associated, theoretically and practically, with the experience of colonialism is a finding that we owe to the re-entry of anthropological observation into the legal system; an observation that must not go unnoticed.

The effects of this irritation in the system are just beginning to become apparent. To start with, we have to ask what the connection is, if any, between local ADR and international ADR in the present context. Nader's findings suggest that there is a connection, and that such a connection must be found in the intersection between law and colonial cultures. It could be argued that this is the single most important contribution of Laura Nader's 'user theory' to the study and practice of law in modernity, from the perspective of its natural history. We shall try to pursue this set of problems keeping in mind what we have learned from our parallel reading of 1920s German legal theory. It is in this spirit that we return to Benjamin's 'The Right to Use Force'.

20 On the 'selling of ADR' and the Pound Conference, see Nader, 2002, pp. 47–54.

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Reading Benjamin's piece in relation to Gil and Nader is a fruitful experience. The more nuanced developments in the argument can be useful in order to try to answer the question concerning the connection between the local, the global and the universal. Here, we will deal only with two of them.

First, there is the question of the early appearance of a distinction between spatio-temporal orders in relation to the law in Benjamin's piece. Benjamin claims that this difference in temporalities is the 'subordinate reality which the law addresses' (Benjamin, 2000, p. 231). We have already seen in relation to this point that the difference or non-correspondence of space–time founds the antinomy of the law, and also that such a differential was the consequence of certain events for which the body is the seat. Those events included the accumulation of force in the political body as opposed to that produced by and circulated amongst specific individual bodies.

Tellingly, that is precisely the connection that Benjamin explores: following his distinction between the time of transition in which state law exists ('the violent rhythm of impatience') and the cyclical time of return ('the good (?) rhythm of expectation'), Benjamin moves onto the possible combinations of the right to use of force by the state and by the individual (p. 231).

Let us suggest that we understand the time of return in a sense equivalent to the space of agonistic exchange (dispute), debt, prophecy and gift – justice and proto-judiciary processes – as described by ethnographers such as Gil and Nader. That is to say, as a reflexive structure of expectation and causal production animated by the inevitability of failure. In such a structure the past and present connect with the future (as an expectation) and back to the past (as the causal production of the future). Crucially, the expectation and the causal production do not respond to some meta-law, but rather, are always affected by the actual possibility of failure. Benjamin exemplifies this point in relation to Jewish theology, by explaining that the return of the messiah would be missed or ignored. His re-entry will amount to nothing more than a small difference, a contingency. But that contingency is necessary, it makes all the difference.

Put another way, Benjamin's standpoint in political philosophy is that of justice as the right to singular potencies, and in particular the potency of the lowest element in the present order, ignored and missed by the present organisation. The re-entry of such an element makes all the difference. It is important to notice that such an event is posited as occurring in the future, as impinging upon us from the future, as a projection. And because it is a projection, the image of our expectation, we can make it happen. The point is to reduce these visionary expectations to practice. This is, to put it in the terms of our case-study, the power of the victim–plaintiff as the destructive/generative mechanism of the legal system. This standpoint is persistent throughout Benjamin's critical work; it can be found again in the later Eighth Thesis of the 'Theses on the Philosophy of History', which begins 'the tradition of the oppressed …' (Benjamin, 1999, pp. 253–264). Such a standpoint allows the bringing forth of the connection between the local and the global in the universal.

As we will see, using for our purposes an analogous standpoint taken by certain recent developments in the humanities and the social sciences in Latin America (particularly concerned with the rise of ADR in the trans-national regional arena, after the signature of NAFTA), that connection has to do with the ways in which peoples engage with the difference in temporalities inaugurated by the discourses of modernisation and development, or, put another way, with what anthropologists call 'the denial of coevalness'. This is the 'persistent and systematic tendency to locate the referents of anthropology in a time which is different from the present of the producer of the discourse of anthropology', or law, or economy.[21] It entails the denial of multiplicity, and the affirmation of oneness and wholeness as a given. Hence, it also entails the denial of conflict, or its containment through the various apparatus of conflict- and dispute-resolution that ultimately amount to a form of moral and educational trusteeship and surveillance.

21 The reference is to Johannes Fabian, 1983, p. 31.

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The point is that the denial of coevalness has become the regional (and now planetary) hegemonic ideology in dispute resolution with the rise of trade-related and security-related ADR, including the use of force in instances of multilateral and unilateral intervention or protection. The case in point is dispute resolution under Chapter 11 of NAFTA, a legal recipe that is becoming global, first through the international law of natural resources and investment protection, and second, nowadays, also through aid and security-related measures and policies, from sanctions to occupation. The first, a supposedly marginal aspect of international law, is the equivalent in the transnational arena of US anti-trust law in that it is becoming rapidly de-differentiated and is effecting a basic shift (led by the Chicago school of economics) in the kinds of questions that count and that lawyers therefore perceive as relevant to legal analyses.[22] The connection with colonialism becomes just all too clear from this perspective. We will come back to this point.

Second, out of the four 'critical possibilities' or propositions on the question of the right to the use of force by the state and/or the individual distinguished by Benjamin, it is the fourth, apparently the most counter-intuitive, that counts for us: Benjamin's fourth proposition seeks 'to recognize the individual's sole right to use force' (2000, p. 232). Of course, this proposition is counter-intuitive only from the (liberal) standpoint of the state legal system, but it makes sense when considered from the standpoint of the victim–plaintiff or that of tribal ritual justice, taken alternatively by researchers such as Nader or Gil.

Moreover, it is worth noticing that Benjamin associates this standpoint with stateless societies (today's 'rogue' or 'failed' states) even though he is thinking about state societies, and to the logic of gift and debt (Benjamin, 2000, p. 233): he argues that the monopoly over force (that characterises state societies as opposed to stateless societies) is 'a gift bestowed by a divine power' (p. 233). The 'divine power' referred to here is onto-social rather than onto-theological.[23] More important, because it is an absolute gift (a gift with no possible counter-gift, bestowed by divine power) the monopoly over force creates an *absolute debt* and therefore, an absolutely agonistic context.

Put another way, Benjamin is saying that the only difference between state societies and stateless (rogue or failed) societies, is that in the latter, the individuals have recovered and asserted their right to the use of force. However, crucially, this is a minimal difference since such an event haunts forever state societies, and it does so from the very outset, from within, since that is precisely the event present (and hidden) at their foundation; a minimal difference indeed, very little ... almost nothing. In the more general language of anthropology, this is to say that the individual (as a concrete universality) is fundamentally against the state, to paraphrase Pierre Clastres, for the latter's debt towards the former is absolutely unpayable.[24]

This realisation is crucial in many respects: as a basis for a critical discourse and practice of human rights, as a critical argument against the use of ADR in the context of harmony ideology or pacification, as an explanation of the relative autonomy of the legal system and/or the imbalance between legal power and social power, as a counter-argument in respect of the proposition according to which 'in a constitutional state, the struggle for existence becomes a struggle for law' insofar as state–legal recognition will never amount to the lack of potency introduced in society by its own emergence. Benjamin writes in this respect:

> It is quite wrong to assert that, in the constitutional state, the struggle for existence becomes a struggle for law. On the contrary, experience shows conclusively that the opposite is the case.

22 For Nader on the law in economics movement, see 2002, pp. 106–108.

23 Compare this to the following proposition found in the ethnographic work of Laura Nader: 'As one plaintiff put it: "The act of God (which the defendants had argued against these practicing Christians!) was when people banded together for a right and just cause through the processes of law"'; see 2002, p. 185.

24 See Gil, 1998, pp. 308–309; see also Pierre Clastres, 1977.

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> And this is necessarily so, since the law's concern with justice is only apparent, whereas in truth the law is concerned with self-preservation. In particular, *with defending its existence against its own guilt.* In the last analysis a normative force always comes down in favour of existing reality. (Benjamin, 2000, p. 232)

What does it mean to say that every struggle for law becomes a struggle for existence? What does it mean to say that normative force is on the side of existing reality? It means, on the one hand, that the absolute debt in favour of the individual plaintiff makes him/her/them the creative force of the (post-)state legal system, always unleashing the real against repeated attempts to pacification; while, on the other hand, the legal system will claim authority (self-efficiency out of the impossibility to repay its debt to society) over and against the affirmative victim–plaintiff. Thus, if on the one side dispute resolution provides the creating force of the legal system, if it is 'the life of the law', as Nader says incarnated in the figure of the civil plaintiff (exercising law-making violence, to use Benjamin's parlance), on the other side it is a constant threat to its integrity (it is law-destroying violence) and thus it obliges law to engage in pacification (law-preserving violence) *against its own guilt.*

Laura Nader's user theory of law correctly emphasises law-making potency at a time of widely spread efforts to quiet the plaintiff, but in doing so she pays less attention to the necessity of the other moments of the society–law dynamic, the darker ones if you like. She forgets that law is affected by a desire to be whole. (Post-)state law is a failed integrity, a 'failed one'.[25] In that respect her conception of the law may be less nuanced than those found in Schmitt or Benjamin. But we will not pursue that issue here; what matters is to examine whether or not Nader's critique of dispute resolution allows us to learn something else about the actual moment of the sociolegal dynamic; about the actual *nomos* of the law.

5 Ballad of sexual dependency: ADR on steroids. The NAFTA case

The signature of NAFTA sent shock waves throughout the Americas and the rest of the world. Formally a multilateral trade agreement, its greater repercussions were soon to be felt at many different levels: from the word *maquiladoras*, never before heard of, entering the vocabulary of activism and the media with the force of a natural phenomenon to the rise of the first trans-modern guerrilla movement. The gesture of the EZLN seemed counter-intuitive: first a (failed) attempt to exercise the individual's sole right to use force, it successfully reinvented itself as a call for tribal/ritual justice aiming straight at the heart of modernity and the state.

None of the more Westernised models for the understanding of modern law and politics, of dispute resolution, seemed to account for such a possibility: to change the very terms of our discussions on economic, political and even sexual dependency in the direction of a backwards leap in time. 'Modernity' was supposed to have sublated traditional societies, or at least to be in the process of doing so; that 'tribal justice' could still have a place in the modern order of things was simply non-processable information. Terms such as 'anachronism', 'pre-modernity', 'backward societies', 'primordial violence' and 'uneven development' only masked the impotence of the experts' apparatus of knowledge.

But it was not the first time this happened: the descent of Shining Path from the high planes of Ayacucho into Lima and the extent of the hold over southern Colombian territory by the *Fuerzas*

25 I have borrowed the notion of 'failed one' from both Ernesto Laclau and Slavoj Zizek. The reference to the former is to an unpublished lecture delivered in June 2003 at the IV Graduate Conference on Political Theory at the University of Essex. Slavoj Zizek's notion of the failed one, or as he says 'fragile absolute' can be found in his *The Fragile Absolute* (2000, p. 128) in connection with a critique of law and human rights that, against a common trend in mainstream political philosophy, engages with the historical legacy of non-sacrificial violence and the sacred.

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Armadas Revolucionarias de Colombia (FARC) had previously caught Latin American social scientists off guard. Legal anthropologist Sylvia Rivera Cusicanqui,[26] whose fieldwork in the High Andes had taken her back and forth between Colombia, Peru and her native Bolivia, had been warning long ago about the need for a switch of standpoint as a condition for the understanding of these phenomena that seemed unthinkable at first. Lawyers and politicians only paid attention when the bombs started exploding.[27]

Her point was simple: by placing these phenomena in a time that is inferior to our present we are not merely avoiding conflict, but we are actually denying its existence. It is not the case that we would simply prefer to avert confrontation (that which presupposes from the start that 'we' are peaceful, harmonious, i.e. civilised) but rather, that we have stripped existing reality from its normative force.

It is the same lack of potency in our societies that explains both the appearance of such phenomena as Shining Path (FARC, EZLN or the Palestinian resistance) and our inability to relate to their existence. This lack at the heart of our societies is an enduring consequence of colonialism, for it is our very standpoint, our perception of ourselves – our will to see ourselves from the outset in the image of the civilised, our rival/model – that blinds us from the truth. The screen that has been set in front of our eyes has the form of a denial of coevalness and multiplicity. The mechanism at work in such an elaborate deception, and that Rivera Cusicanqui associates with the (gendered/literate) Andean post-colonial *persona*, is the same that Franz Fanon described as 'transitivity' in the context of North African decolonisation. Put another way, what social scientists were missing, what they keep missing, is the connection between the local 'we' and the global 'them', and the fact that they are both incarnate in the same *persona*. Hence the call for a switch of standpoint in the form of a denial of the denial of coevalness.

That call has been answered. In the years following the aforementioned events, sociologists, anthropologists, activists, plaintiffs and lawyers developed conceptual frameworks and policy-oriented strategies that took into account transitivity, the affirmation of coevalness and the absolute character of conflict from a world-historical perspective.[28] Among them, perhaps the most fruitful in terms of explanatory power and plaintiff/base activism, have been the concepts of 'trans-modernity' and 'coloniality of power'.[29] From the perspective opened up by such concepts, a series of events that for many were simply unthinkable (e.g. the fall of socialism, globalisation, 9/11) started to make sense. Clearly, explanation did not lead to justification, but rather to careful appreciation of geo-historical antagonisms arising with the emergence of the state in (post-)colonial contexts: the unpayable debt. Particular attention was given to the way in which such conflicts were being

26 Her work pertains to the notion of law in the context of post-colonial modernity, in particular the role of patriarchalism and literacy in the construction of a gendered conception and practice of the law.

27 'The "legal system tends to react to attempts to destroy it by resorting to coercion, whether it be coercively to preserve or to restore the right order." This statement is correct in itself, but it is a mistake to explain it with reference to the internal tendency of the law to establish its authority. What is at issue here is a subordinate reality, which the law addresses'; this is Benjamin, 2000, p. 231.

28 For the emergence of this perspective in the context of Latin American traditions of thought, see Mendieta, 2003.

29 'Trans-modernity' is a term coined by the philosopher Enrique Dussel. It refers to the double aspect of modernity, which displaces the traditional but remains haunted by it, and the two waves of agonistic modernisation resulting in the emergence of the Atlantic circuit. 'Coloniality of power' and 'modern coloniality' refer to ongoing processes of accumulation by dispossession as the engine of modernity. Practices associated with or interpreted through these notions include indigenous plaintiff and political activism (e.g. Colombia v. U'wa, anti-FTAA activism, the World Social Forum) and the setting up of network-academic projects such as subaltern legal studies in the context of the emergence of the Indigenous University in Ecuador or the coloniality of power studies group. See Dussel, 1997, pp. 1–35, and Lander, 2000.

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resolved: analysts found dispute resolution mechanisms wanting, more a stronger form of pacification than dispute processing, leading to increases in violence.[30]

Notice that the form of causality that is implied by terms such as 'emergence' or the notion of an unpayable debt, is retroactive. Retroactive causality is the mechanism at work in the EZLN invocation of the micro-worlds and the micro-identities of the Mexican Revolution and the 500 years of indigenous resistance against colonial rule in order to provide a meaning for its actions. It entails that there is no prime mover, and therefore no hierarchical ordering of being, no (temporal) primacy or priority, no linear continuity, no origin and no genealogy, no myth of inheritance, no self-constitution, and hence no transcendent realm of action. Therefore it entails also the denial of the denial of coevalness in space and time. Put another way, it entails the reality of a simultaneity of practices of temporality and spatiality and hence the inevitability of world-historical conflict. The point is that faced with this conflict, the state legal system is impotent, the unpayable character of its debt to society revealed. Its reflex-like reaction is to (re)claim authority over the plaintiff and to engage in pacification.

Back to NAFTA: Chapter 11 contains a series of rules for the protection of foreign investment in the context of the treaty. As I said before, it is a heady mix of fairly well-known principles of international law concerning the protection of property and some radically new ideas about what may count as expropriation and what the mechanisms for the resolution of potential disputes may be. The central situation under consideration by this body of regulation is that of the taking of the property of a foreign investor by a state, a situation that is of particular importance in the supposedly marginal but hugely important field of the (international) law of natural resources.

The law of natural resources deals with the circulation and exchange of the forces of nature signified as 'resources' or standing reserve, and in this circuit states, corporations and individuals inevitably clash. Put another way, this is the site of the translation of natural forces into signs; what once used to be the reserve of the magical–religious establishment.

No wonder then, that the first step following decolonisation in the heavily politically invested projects of state building included the nationalisation of the natural resource industries. We have learned already that the state seems to occupy the place reserved for the magical–religious establishment by making itself the site of inscription of all potencies; today, however, it seems that the state must share its place, increasingly, with the foreign investor in the form of the multinational corporation. We have also learned that the monopoly on legitimate violence overturns the regime of exchange. Thus 'we could be led to believe that this "division" that magical–religious potencies installs between gods and people *tends to reproduce itself in the heart of society,* and this would be partly true, but it does not happen without some essential changes' (Gil, 1988, pp. 253–254, 280). Another way to put this is to say that after the debunking of the place of the sacred in tribal societies, men will become gods for each other.[31]

30 See Guardiola-Rivera *et al.*, 2000.

31 René Girard (1977, p. 76) explains this in the context of the demise of the magical–religious by the legal–political during the French Revolution. According to him the previous acceptance of the Divine Right of Kings structured a certain kind of (magical–religious) transcendence that underwrote other forms of social differentiation. This very tangible presence of the King was offset by his status as a quasi-divine figure (the instantiation of an 'immense spiritual distance' between him, his subjects and the rest of the population). 'When this divine right was abandoned with the overthrow of the monarchy, another equally secular theology took its place: "idolatry of one person is replaced by hatred of a hundred thousand enemies: Men will become gods for each other"'. The point is that, absent the absolute figure of the sacred–external mediator, mediation becomes 'internal'; that is, men start to look at each other as models and rivals and violence spreads as a result of the combination of competition and emulation, involving valuable objects only secondarily. The primary variable is the desire/envy of other that makes objects valuable in the first place. See on this Fleming (2004, p. 30). It is important to remember that one of the decisive elements in the overthrow of the monarchy in Europe is the discovery of societies without state (that is, without Kings) in the Americas.

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On the other hand, experience tells us that the extraction and circulation of natural forces, and their accumulation in the form of a standing reserve, brings power. There is of course some truth in this common sense; however, only when considered in the context of the monopoly of violence, the overthrow of the sacred and the reproduction of division within society, can we understand the importance of the role played by states, investors and individuals in the regime of the exchange of natural resources and the centrality of the body of rules that regulates such an exchange in post-traditional societies.

NAFTA's Chapter 11 is just such a kind of regime. Its particularity derives from the peculiar nature of its conception of standing reserve (or 'property' object of a nationalisation) and the mechanisms it introduces for the resolution of disputes which, when combined, produce a legal recipe like no other for the withering away of the (civil) victim–plaintiff. Some may say the withering away of law as we know it.[32]

It was only after the Methanex and Metalclad cases attracted the attention of the media and the public that the wider implications of the dispute resolution mechanisms included in NAFTA's Chapter 11 were confronted. On 17 November, 2001, a journalist named William Greider posted an article on the website of the US weekly *The Nation* under the provocative title 'The Right and US Trade Law: Invalidating the Twentieth Century'. The article sparked an ongoing debate on the internationalisation of ADR and globalisation in the context of trade ideology, which suggested that the stakes of the question concerning the direction of the law and extra-legal processes were higher than previous analyses had ventured.[33]

Methanex v. The United States originated in the mid-1990s in California. The facts are not unlike those of the 'civil wrongs' cases that appear in Nader's literature, in Jonathan Harr's novel *A Civil Action* or in the Hollywood film of the same name in which John Travolta plays the leading role: a group of neighbours notices high levels of pollution in the water sources; the alleged culprit is a Canadian company called Methanex which may have been spilling an unregulated chemical component called MTBE in the water sources.

After the fact-finding phase is completed and pollution is confirmed, the state government acts quickly in order to ban the substance. Then something in the script goes wrong; the corporation sues the state under Chapter 11 for the violation of investors' protection provisions. Methanex Corporation, which manufactures methanol, the principal ingredient of MTBE, claimed that banning the additive in the largest US market violated the foreign-investment guarantees embodied in Chapter 11 of the North American Free Trade Agreement.

Under Chapter 11, foreign investors from Canada, Mexico and the United States can sue a national government whenever a company's property assets, including the intangible property of expected profits, are damaged by laws or regulations of virtually any kind. This doctrine, the brainchild of Chicago law in economics professor Richard Epstein, is known as 'regulatory takings'.

'The company did not take its case to a US federal court. Instead, it hired a leading Washington law firm, Jones, Day, Reavis & Pogue, to argue the billion-dollar claim before a private three-judge arbitration tribunal', Greider says, 'an "offshore" legal venue created by NAFTA' (Greider, 2001). The nature of these tribunals has allowed the relatively obscure doctrine of 'regulatory takings' – which has consistently been rejected in US courts – to become a rising paradigm in international property law.

32 At least of law in the sense described by Nader (2002, pp. 171–198). The point is that the ongoing reactionary revolution in the regime of natural resources threatens to make factually impossible the kinds of 'civil wrongs' cases described so passionately by Nader and others. Put another way, the doctrine of 'regulatory takings' which, according to some, as we will see, is at the basis of the ongoing revolution on the notion of property, could be understood as the most radical project of 'legal wholeness' to date.

33 See for instance Nader, 1978, pp. 78–95.

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Metalclad v. Mexico, a similarly argued case involving a waste-processing multinational corporation facing stringent environmental measures in the Latin American country, was also decided by a private 'Chapter 11' arbitration tribunal. The tribunal awarded the multinational $16 million dollars of Mexican taxpayers' money. In 2001, there were eighteen cases pending under NAFTA. In a letter sent to the then US Trade Representative Robert Zoellick, twenty-nine major multinational corporations urged him to push for the same NAFTA investor provisions in the Free Trade American Agreement (FTAA) negotiations: the way forward is going global.

The letter claimed the necessity of 'providing protection from regulations that diminish the value of investors' (quoted by Greider, 2001). Asked to comment on the content of the letter, former deputy NAFTA negotiator and USTR civil servant Charles Roh exclaimed: 'if they are doing that, they're going to put Middle America on the barricades alongside the environmentalists' (Greider, 2001).

Not every day can an obscure legal theorist such as Richard Epstein be charged with the accusation of having the potential to spark a revolution. The point is that NAFTA arbitrators, unable to overturn domestic legislation, can award huge damages that may be nearly as crippling, 'chilling governments from acting once they realize they will be "paying to regulate"' (Greider, 2001). Not only that, as mentioned before, investor-to-state dispute resolution provides a way for foreign litigants to seek government compensation for damages ordered by domestic courts in 'civil wrongs' cases; if successful, it would do away with the potency of the civil plaintiff acting under the modern law of torts in these cases.

Furthermore, conflicts that are by definition public insofar as they involve the 'unpayable debt' that the state owes to the individual, end up being decided by private, closed-doors tribunals.

Interestingly, the arguments used to sell 'regulatory takings' and alternative dispute resolution mechanisms always link foreign investment protection to ethical issues regarding security and corruption: there is great corruption and political instability in 'their' countries, hence the need to protect 'our' investors. Whether or not Mexican courts are actually 'notoriously corrupt'[34] becomes irrelevant. Even more ironic, not even US courts have been deemed to be 'neutral' enough, and thus the cases have been taken to the 'offshore legal venue'. What is of interest to us here is the manner in which a global (in this case hemispheric) design of pacification is linked to a local history, through the imaginary construction of the other as 'unlike us'. Franz Fanon, writing in the context of the struggle against colonisation, described this mechanism with the term 'transitivity'. His analysis provides a way of clarifying Nader's association between the rise of ADR and what she terms the 'therapy paradigm'. This association explains, in turn, the parallelism between the domestic and the transnational forms of alternativity in dispute resolution: there is a particular philosophy of history at work here, one of time unleashed and projected towards the future in linear, branch-like form. The analysis of a particular case of the pacifying use of ADR bring us back, full circle, to the non-correspondence of space–time and to the state of exception where the missionary courts of then and now situated their jurisprudence.

6 Solidarity song (finale): a critique of violence

In *Black Skin, White Masks*, Franz Fanon demonstrated how colonial subjectification involved the pathogenic incorporation of the white other as Ideal-ego. According to Fanon, as the black subject entered the phenomenal world of the white gaze, he was rejected at the level of body image and differentiated in comparison to the exemplary white subject whom he then attempts to emulate and compete with. As a result of this process the white double is then interiorised as ideal-I by the black

34 Dan Price, top trade lawyer at Powell Goldstein and chief US negotiator of NAFTA, cited by Greider (2001) as explaining investor-state provisions to the US Congress.

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subject, which results in an obsessive neurotic formation, a friend/enemy relation, resulting in widespread violence. Thereafter the black subject becomes engaged in constant self-reproach and despair, always trying to become what he/she can never become, condemned to an illusion of transcendence.

'Transitivity' is therefore a case of the rival/model dynamics that we discussed before in the context of Girard's explanation of the results of the overthrow of the monarchy. The persistence of this generative mechanism is indeed remarkable: it can be used as a basis for a better understanding of similar latent transfers that transpire in today's broader politico-legal field. Certain unreflective scripts, such as human rights cosmopolitanism and ADR (as we have seen in the NAFTA case) can be seen as imposing transitivism in more or less benign ways, by assuming the relative other as mimicking the liberal civilised subject's moral gestures at the imaginary level. Such scripts do not reflect upon the spread of mimetic violence that follows the inscription of the law (as human rights, rule of law and ADR) at a planetary scale.

Nader's argument on the relation between ADR and the therapeutic paradigm, and the sort of widespread passive violence that results from it, can be understood in this sense. According to her, representatives of the therapy community who have played an important role in the debates over ADR (but also international lawyers, as we have seen) emphasise a certain ego-ideal which clearly corresponds to the attributes of the civilised, literate *persona*: self-aware, harmonious, avoiding polarization, always in place, in control of his emotions, a moral manager of conflict, a gentle civiliser of nations. This is a long cry from the social expression of affects involved in tribal ritual justice; however, in a reversal of sorts, this *persona* is usually presented as 'traditional'. Nader writes in relation to the work of linguist-cum-therapist Deborah Tannen: '[She] holds that Americans argue too much and we ought to stop arguing and emulate Asian traditions (Asians, by the way, do not have state democratic traditions) that avoid polarization and focus on harmony to manage conflict' (Nader, 2002, pp. 148–149). The reversal involved in Tannen's argument is of course a case of orientalism, but the transitivist mechanism is still in place: the ego-ideal is to be mimicked. Nader's judgment on the matter is straightforward:

> One might call [this] position Machiavellian or categorize it as a form of conflict prevention. I would prefer to call it a cop-out, an avoidance of root causes by means of human management techniques. The United States went through this same ideological movement at the turn of the century – again pacification – a movement not too far from Roger Fisher's 'getting to yes' (1981) through negotiation practices. (pp. 148–140)

After reading this passage it is worth remembering how months before the breakdown of the peace process in Colombia, the conflict resolution process involving FARC and the government in 2002, Roger Fisher was invited by the office of the then President of Colombia in order to guide official negotiators to get the stubborn *guerrilleros* to 'say yes'. The picture of Roger Fisher and/or his trainees' harmony discourse – 'negotiate', 'strike a deal', 'let's get to a win-win situation here' – would be a sad, even laughable case of transitivism not least because it revealed something more alarming at work in that particular case: that this was never a conflict resolution situation but rather one of pacification. Indeed, never has harmony seemed more coercive than in the years following the breakdown of the peace process in Colombia.

This anecdote – which is really an amateur exercise on participant observation – is not digressive: what interests us here about Nader's position on the role played by the therapy paradigm in the rise of ADR is the possibility of a generalisation concerning two phenomena that seem over-present and under-theorised in her rendition of a user theory of law. First, the increasing presence of what she calls 'human management techniques' in the legal system, and second, the issue of pacification. The contention here is that these questions hold the key for understanding the connection between the local and the global that lies behind the planetary spread of the ADR phenomenon.

'Pacification' is, on the one hand, related to the role played by therapy talk in the discursive articulation of ADR as part and parcel of 'a reactionary law reform movement':[35]

> Relationships, not root causes, and interpersonal conflict resolution skills not power inequities or injustice were, and still is, at the heart of ADR. In ADR, civil plaintiffs are perceived as 'patients' needing treatment, and when the masses are perceived in this way, policy is invented not to empower the citizen but to treat the patient. (Nader, 2002, p. 141)

At a deeper level, pacification relates to transitivism as the mechanism through which the other is constructed in the image of the ideal-I, but also, to the containment of the political potential of the masses. We have learned with Fanon that this mechanism is at the core of the colonial enterprise. More generally, following Girard and Zizek, we have learned that this is the generative mechanism of our 'law and order' arrangements, based upon sacrificial violence and unable to contain it. At this point, the connection between the local story and the global design becomes all too clear: the rhetoric 'our courts are too crowded, and our lawyers and people are too litigious; the solution has to be the multidoor virtuous agencies of settlement or reconciliation', symmetrical to 'our investors must be protected from their corrupt courts; the solution has to be the virtuous agencies of arbitration' gets translated into 'we are unlike them', a proposition that takes a whole different meaning whether it is uttered by the subaltern or the hegemon, as Gil, Fanon, Girard and others carefully explain.

That proposition becomes the very criterion for the determination of one's province at the same time that it defines what lies beyond and is excluded from that province, and the desire to encompass (as victim–scapegoat) the excluded outside. It sets in motion a logic of inclusion/exclusion that constitutes the very space of judgment. It is 'the judgement of Hercules',[36] the 'sovereign decision' in the language of Carl Schmitt. The sovereign body and the ideal-I incarnate in the political body emerging out of the modified possession ritual, in the accounts of ethnographers, presenting itself as the place of inscription of the potency of singular bodies.

'But the hegemonic elements of this control are far more pervasive than the direct extension of state control' (Nader, 2002, p. 141). The term 'human management techniques' refers to a set of strategies that make the sovereign's decisions not only accepted but indeed desired; the interiorisation of the ideal-I, as explained by Fanon in the context of colonisation, the capacity of the (political) body to exfoliate through rhetorical oratory techniques, as explained by Gil (1988, pp. 187–194), and the rival/model dynamic explained by Girard, go a long way to explain the phenomenon of the co-existence of widespread violence and voluntary servitude in our societies of law and order . Nader refers to it with the terms 'hegemony' and the perhaps clichéd but nevertheless effective 'mind colonisation' (Nader, 2002, pp. 5, 117–121).

Decision is taken in the state of exception by a desired sovereign body. As we know already, the term 'state of exception' refers to the law being in force without significance, a condition that expresses both the (use of) accumulated violence of the state (or *Gewalt*) and the affective response of

35 See Nader, 2002, p. 140. The context of Nader's statement is the analysis of the hegemonic discourses at the 1976 Pound Conference that launched the ADR movement in the US. The law reform movement is 'reactionary' in respect of the civil rights movements of the 1960s.

36 In 1776, US President John Adams proposed the judgment of Hercules to be the seal of the United States. The reference is to the mythical figure with whom the architects and rulers of the circuit of the Atlantic identified themselves. It meant territorial centralisation, imperialist ambition and economic progress. The identification was in relation of opposition to the many-headed Hydra, which, in turn, identified a motley crew of sailors, slaves, pirates and women who resisted the imposition of order in the Atlantic and, while doing so, invented the modern definition of 'freedom', possibly by reference to tribal justice. These two figures are the persistent mythical lexicon of modern law to this day: the first one lurks behind the judge protagonist of Ronald Dworkin's story titled, adequately 'Law's Empire' (1986); the second is the basis for Laura Nader's plaintiff as the life of the law.

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people under threat, in emergency. The response to that condition by the resistant disputant body can only take the form of a critique of violence (*Kritik der Gewalt*).

As we have learned before – thanks to Benjamin – this sort of critique seeks to comment on the structural origin of the law in the constitutional 'state of exception', the law's term for foundational sacrificial violence. But it is very important to acknowledge that the object of such a critique is not just in the past. Recent appeals to the law's originary resort on sacrificial violence can be seen, for instance, in the current arguments concerning the 'justification' of torture in the context of 'the war on terror'. Thus, a critique of violence operates by revealing the logic of exclusion and surrogate victimage at work in the functioning of the law and its location in a time of transition, suspension or 'missing time'.

According to this logic, that which is excluded is not, for this reason, simply without relation to the rule since the rule maintains itself in relation to the exception in the form of suspension. Put another way, the rule maintains itself (and reintroduces order in the social) by subtracting the exceptional element from the society and focusing on it the violence of the whole of society, represented by the state. In order to do so it introduces in society forms of internal differentiation or mediation, more often than not in the form of distinctions between what is normal or standard (and is thus on the side of society) and what is pathological (and becomes the outside of society).

When used as norms these distinctions go by such names as 'guidelines' or 'standards', and the particular force of a standard is its formality, i.e. its being empty from any content: they are formal, empty (master) signifiers. Having become an empty signifier that is also a living value within society, a standard takes the form of a transitory rule in perpetual change (its destiny to replace and be replaced, disposed of) and psychically desired (it is asked for by the people at risk). As standards, these rules are shaped by our desires and thus indicate what such desires may be, eventually yielding the rudiments of the fantasy that founds us as 'people at risk, asking to be defended'[37].

Insofar as time is central to this fantasy of risk/security, let us consider first the desire of instant gratification realised in the proliferation of legal standards. Just like vending machines, fast-food restaurants and dot.com banking, standardised law (law in a state of suspension) promises the abolition of waiting time and thus acquires a messianic feature: that of overcoming, in an instant, the imminent threat.

But that is not all. This law is also marked by an attitude of appealing availability. One is reminded of the final line in Kafka's *Before the Law*: 'No one else could enter here, since this door was destined for you alone'. This law offers more than the abolition of waiting time: it says that you will be served, catered for and waited upon. Finally, the consumer of the law, the body that defines its power in accordance with the standard, is catered for via the fantasy of making the law; it emerges with little or no effort (power becoming the capacity to identify oneself with the standard; in the case of war-time suspension, for instance, by watching TV depictions of the war going on in some place between fantasy and this very pressing reality).

The rise and expansion of value-standardisation, spectacle and the power of policing the body, amounts to a generalised form of suspension, a hallucinatory visual world where instant gratification is paramount but short term, and the need increases quantitatively. This leads to unpleasure (Freud), destruction tied up in the will to know and fear of retaliation (Klein) and ultimately to a paranoid–schizoid position that deposits its own aggressive desires in the other (Girard). The end result is an impoverished ego, which can only 'recover' by reclaiming that which has been cast out. This is the sense in which our talk about the discovery of a logic of exclusion/inclusion at work in the schema of suspension must be understood.

37 The reference here is to Michel Foucault's *Society Must Be Defended* (1997/2003), which traces the rise of the power of police-knowledge (biopolitics) and exceptionality (the normal and the pathological) in the language of 'blood' and 'culture' (what I call 'singularities').

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A critique of violence, such as the one proposed and espoused throughout this paper, relates this logic and the entire schema of suspension to a historical ontology of the present and its actual transformation via the re-entry of the other (the cast out, the innocent victim or scapegoat), not as 'reclaimed' or included (as in our ideological landscapes of multiculturalism) but rather, as the rebellious, powerful claimant.

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