Commentary

Rights between Cultures and Polities
Legal Comments on Non-legal Papers

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> *I understand your problem to be the construction of a constitution which will place the government in the hands of the Teutons.*
>
> —John W. Burgess

Franz Hinkelammert's "Hidden Logic of Modernity," Michael Shapiro's "American Ethnoscape," and Ebrahim Moosa's "Dilemma of Islamic Rights Schemes" share something in common. They take both human rights and their adverse predicaments most seriously; one does not need to be a legal expert to do so. Moreover, they write with a kind of sensitivity and depth seldom seen in the strict field of juristic thought, which typically tends to maximize constitutional principles and minimize human factors. Legal thinkers do not ever disregard the latter, but they are particularly committed to the former.Ronald Dworkin's *Taking Rights Seriously* can provide a fine illustration. Check also Bruce Ackerman's multivolume work in progress, *We the People*. The oeuvre starts from the acknowledgment of the undemocratic foundation of the United States of America. The Constitution was genuinely the business of founding fathers, excluding a vast majority from civil and political rights: women, hired workers, African Americans, non-Christians, indigenous peoples. However, Ackerman's awareness dwindles as the historic account moves forward to the present time, as he ceases to be a historian and becomes a lawyer. Thereby, he contends that the original flaws have been overcome through subsequent constitutional developments. To reach this assessment, he forgets, for instance, that the first people in time, the so-called Indian peoples, were there then—and still are.[1] The experience with indigenous peoples is a true test. *Prior in tempore, potior in iure*, so reads a well-known legal dictum: *First in time, first in right*. Otherwise, the outcome may still be colonialism. In more specific words, this is the concern shared by Moosa's "Dilemma of Rights," Shapiro's "Ethnoscape," and Hinkelammert's "Hidden Logic."

In order to provide legal comments on this set of non-legal papers—and thus test their common assumptions from a legal standpoint—a suitable question may be raised. Is there a hidden, colonialist agenda behind contemporary human and civil rights law? Does colonialism lurk at the heart of both international and constitutional law? If we take a look at the most important human rights document, the 1948 Uni-

versal Declaration, the answer turns out to be irremediably positive. There we find, though unnamed, colonialism, an embarrassed kind of colonialism that pretends to be an immaterial factor as for constitutional freedom and legal equality: "1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty" (Art. 2, the first declaring that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"). The second paragraph of the second article—the colonial clause—should not cause any surprise, for the declaring body—the United Nations—was by then predominantly constituted by American or European states, most of which were colonialist, either externally or domestically.

Yet, everybody in the business knows that since 1960 the United Nations has embraced a decolonization policy that, in fact, superseded the colonial provisions of the Universal Declaration. Is this the end of the colonial story? Did that policy conclude a period without a new (or maybe not-so-new) paragraph? Were the Americas decolonized? Did the long-lasting European and Euro-American colonizing international law draw at last to a close? This is the usual presumption in the legal field, but some critical perplexities still remain.[2]

Let us return to the Universal Declaration, a register of individual rights—freedoms for individuals—produced then, in 1948, by the very same colonialist states, to whom it was addressed. These were the polities that supposedly granted and warranted "freedom's rights,"[3] a task that depends not just on some display of political goodwill, but first and foremost on the individuals' trust vis-à-vis their respective states. What comes after 1960? What about formerly colonized people? What if decolonized states are not mapped according to peoples' identification and determination but to colonial boundaries? What if therefore decolonization leads to a polity that does not deserve the confidence of all the population involved? What about the fate of indigenous peoples in those places where no decolonization takes place, such as all but the whole American continent, from Alaska to Patagonia? What about multicultural polities? Consider the case of ongoing constitutional culture—human and civil rights culture—coming in the singular, as the one and only culture or rather "civilization," and without a real break from colonial times and minds, from Locke and Jefferson to Dworkin and Ackerman. Maybe here lies a pending point.[4]

There is another one, the most significant perhaps. Take notice of this brief pronouncement from the Universal Declaration of Human Rights: "Everyone has duties to the community in which alone the free and full development of his personality is possible" (Art. 29.1). This last statement seems truly remarkable at the heart of a register fully devoted to freedoms' rights for individuals. It goes further than the opening proclamation of a universal *spirit of brotherhood* (Art. 1), or rather, it goes to another

place. According to that paragraph on human *duties*, the individuals appear to owe their own personality and liberty to the *community* they belong to. Human individuality does not seem to make sense outside the cultural group into which the individuals are born, where they have grown up and freely remain. Is this the proper reading of such an amazing clause?

Let us not get confused. For the primitive, stammering discourse of the Universal Declaration of Human Rights, for this catalog of freedom's rights for individuals produced by and addressed to the states, *community* meant in fact *state*. At that time, international law only recognized individuals being entitled to rights and states to powers—powers that are supposed to grant rights. However, one could not directly declare that "everyone has duties to the *State* in which alone the free and full development of his personality is possible." Apart from being sexist (*his*=*everyone*), the phrase would sound a little bit totalitarian in a context marked by the defeat of Nazi and other totalitarianisms—though not all of them, to be sure. Nevertheless, provided that the Universal Declaration has never been explicitly amended, international human rights law still says that the individual owes his or her personality and liberty to the community (Universal Declaration of Human Rights, Art. 29.1).

The "individual" and the "state" were the only entitled subjects according to international human rights law. So it was from 1948 through 1960, when the Declaration on the Granting of Independence to Colonial Countries and Peoples was proclaimed: "All peoples have the right of self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (Art. 2, the first one now declaring that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation"). *Peoples* were so entitled to the right of political, economic, social, and cultural self-determination, and these peoples, those that succeeded, became "States," the self-determining polities, on their turn.

"State" with the capital letter—the granter and guarantor—and the "individual" with the lower-case initial—the grantee and guarantee— still made up the sole pair of entitled subjects. So it seemed to be once and for all until 1976, when the Civil and Political Rights International Covenant developing the Universal Declaration, after approval a decade before, came into force. The 1948 document has never been amended, but has been profoundly changed by its own development through covenants and other specific declarations.[5] Since 1976, that new fundamental human rights document came to realize that there were other collective human entities between states and individuals. Here, at last, do we meet the *community* to which the individuals owe their personality and liberty in the capacity of entitled subject? It was not exactly so. Just in the place where the Universal Declaration of Human Rights took into consideration "community" as a euphonious proxy for the state, now that the outcome of the official, relative decolonization had stressed the evidence of human multiculturalism a long way beyond states' boundaries, the Civil and Political Rights Covenant adopted another wording.

So it reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language" (Art. 27). Interesting nuances are presented in a later version of the same statement by the 1989 International Covenant of the Rights of the Child: "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language" (Art. 30). Nevertheless, the reference is always to the "*persons* belonging to minorities" or "*persons* of indigenous origin" and never to the minorities or the indigenous groups themselves as the entitled subjects.

Furthermore, at the very heart of the international human rights law, *minority* substitutes for *community* wording. In the course of the development of human rights law by the United Nations, the shift was blatantly confirmed, as the phrasing of the title shows, by the "1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities." Rights are due solely to persons. Minority peoples as such are entitled not to group rights, but to protection by states—alien states: "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity" (Art. 1.1). *Indigenous peoples* are ignored here. *Community* is missing also. For the 1948 Universal Declaration, it stands and even keeps meaning just *state* and not another kind of human group such as *minority*.

The substitution is touching. Does it make sense if it is cast over the 1948 statement on community? "Everyone has duties to the *minority* in which alone the free and full development of his personality is possible." It turns out to be meaningless. Community may be the subject of rules. Minority is the object of exceptions. Furthermore, *minority* as a group name emerged into the international human rights law from a long and winding, partly underground, colonial history. It is not a statistical, democratic measure, but a qualitative, discriminating category against colonized peoples yesteryear and present. Firstly, *minority* meant people who were legally equivalent to children, as they were deemed culturally inferior by the colonial law. Finally, it means human groups which happen not to trust their respective states as they form communities or hold cultures alien to the institutional and cultural setting of the state polity. Both meanings have in common the status of protection over entitlement. From the open colonial category to the international human rights construction, there is a historical, continuous strand of meaning. Nowadays, in Guatemala or in Bolivia, you can belong to the majority and be deemed minority if your way of life happens to be different from the state's assumptions, as in the case of indigenous people. Today, according to international human rights law, whole peoples may easily be legal minorities.[6]

The opening article of the Civil and Political Rights International Covenant reads just as the second one from the Declaration on the Granting of Independence to Co-

lonial Countries and Peoples: "All peoples have the right of self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." It is not a mere replication since this statement stands firstly for political rule through the human rights discourse and finally, thanks to the Covenant, for true human rights entitlement, for the right of *all peoples* to *self-determination*, granted by international law. Are they—all *peoples*—the subjects of such a decisive right? Does the new generation of *states*, thus constituted under the sign and rule of the United Nations' decolonization policy, correlate to *peoples?* Does the right to political, economic, social, and cultural self-determination, which has been granted by international law since 1976 if not since 1960, actually extend to *all peoples*? If it is not so, what may be the reason? Do not *all peoples* actually mean *all* of them? If otherwise, is there any kind of an explanation? As regards indigenous peoples, the picture is somewhat clear. As a matter of both fact and law, you meet a colonialist double standard in past and present international field.[7]

Check the main international regulations in force on indigenous peoples, the 1989 International Labour Organisation Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *peoples* "who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions" (Art. 1.1.b), and who self-identify as such (Art. 1.2: "Self-identification as indigenous . . . shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply"). Yet "the use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law" (Art. 1.3), the right to political, economic, social, and cultural self-determination to be sure. Here you meet at present the double standard.[8] The reason may still be colonialism. It is undoubtedly so in the outstanding case of the International Labour Organisation approach.[9]

The double standard is coming closer up to a turning point. Since 1994, the United Nations human rights bodies have taken into serious consideration a formal Draft Declaration of the Rights of Indigenous Peoples which contains the following statement: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (Art. 3, which follows these previous ones: "1. Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. 2. Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity"). If this declaration succeeds, would it definitively be the legal end of the colonial story? Yes and no. Yes in fact and not at law, let alone the ulterior development of the draft itself. Why is it nec-

essary to say that *indigenous* individuals and peoples are legally equal, while other individuals and peoples do not, by any means, need such a specific declaration? You keep in mind and still apply a double standard discriminating against indigenous peoples.

Remember the colonial paragraph that still remains in the Universal Declaration of Human Rights. After declaring everybody free and equal (Arts 1 and 2.1), the clause adds that submitted people are free and equal too (Art.2.2). Is it wishful thinking? It is a double standard, the spearhead of the discrimination against colonized peoples. Why did one need to mention them after referring to *everyone*? In spite of the 1960 proclamation (Art. 1: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights…"), the original clause did not intend to discontinue colonialism. Now that the discontinuation is mandatory, there lies the origin of the double standard in the human rights international law.

Even today, after all the developments—both underdevelopment and overdevelopment—of human rights law since 1948, international order is still embedded in the paradigm defined by the exclusive pair of legal subjects; namely, the *individual*, who is entitled to rights, and the *State*, which is entitled to powers. *Minority* as such is not the subject for entitlement but the object for protection. *Peoples* do not exist outside *states*. Is it a matter of anthropological predicament? I mean, is it a matter of cultural determination, the way the human being is conceived and constructed in human community, among human communities, or even, such as may be the case as for the states, without any communitarian human factor?[10] Yes and no. It may actually be an unconscious cultural predicament somehow, but it is also a politically determined approach. If the Universal Declaration of Human Rights wishes to establish that *everyone* is entitled to rights "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" in the context of a colonial world, it has to pretend that personal freedom and human equality are irrespective of colonialism, that the individual can—and must—be free and equal even if she or he belongs to a non-free and impaired people or community. Does this make sense? It makes policy and even polity, meaning the right to self-determination is not for everybody and not for all peoples.

To put it another way, you may say that there is colonialism strongly embedded in the international human rights law. Furthermore, you also meet a colonial setting in domestic constitutional laws. Take a look at the constitutional history of the United States, I mean the complete one, the one without blind spots, not the partial, short-sighted narrative of the constitutionalist kind. Pay attention to the dark side regarding indigenous peoples.[11] The history runs from Marshall Court constitutionalist—yet still colonialist—jurisprudence until the so-called Indian self-determination federal policy under the United States powers all the way through the trodden trail of broken treaties. You meet *nations* without the rights of nations, *peoples* deprived of the defining right of peoples.[12] *We the people*, this American subject, is in the plural only for individuals. *Taking rights seriously* means to take into serious account personal rights and constitutional powers, and this is all.[13] It is not otherwise for other states throughout the Americas, Latin and Anglo, continental and islander.[14]

I am aiming to highlight the actual legal record, which is in line with the philosophical, literary, and religious evidence from the trilogy of our non-legal papers. After all, the enduring double standard of international human rights law ties in with the assumptions shared by Hinkelammert's "Hidden Logic," Shapiro's "Ethnoscape," and Moosa's "Dilemma of Rights." The original Spanish title of Hinkelammert's paper reads "*La inversión de los derechos humanos*," "The Inversion of Human Rights." This is the point. Non-legal pieces may lecture on law to legal people. I appreciate the invitation to comment.

Law is not an isolated phenomenon, though average legal experts with autistic minds may disregard the colonial past and the present framework of law itself, even if constitutional.[15] They surely suffer from a cultural predicament, without a need to share the determination involved, or even to be aware of its implied purpose. Let me paraphrase Hinkelammert. Law in general (he says Locke in particular) "establishes a categorical frame in order to constitute reality itself. It constitutes reality, and therefore it is never refutable. If this categorical frame is assumed, reality is the way law says it is. It cannot be shown otherwise so that a critique of his categorical frame cannot be performed. And this critique never can show a reality different from the one that assumes the categorical frame as constitutive of reality itself sees."[16]

Academic jobs are so divided into concentrated specialties that we, academic workers, run the risk of autism. Crossreading is always advisable. I dare say that sometimes it ought to be mandatory for due qualification. Something legal may be learnt from non-legal papers. Of course the reverse is true as well.[17] Let us finish with some telling evidence, namely a passage from a letter written near the end of the nineteenth century by John W. Burgess, then-dean of the Political Science Faculty at Columbia University, to Sanford Dole, who led the coup that overthrew the Hawaiian polity and came to head the first colonialist government in Hawai'i: "I understand your problem to be the construction of a constitution which will place the government in the hands of the Teutons, and preserve it there, at least for the present."[18] Present is still here. Future lies only on the horizon. Even now, the biased construction defines the international point and the constitutional task, though the *Teutonic* juristic experts do not know the secret any longer.

NOTES

1. R. Dworkin, *Taking Rights Seriously*, Harvard University Press, 1977; B. Ackerman, *We the People, I, Foundations, II, Transformations*, Harvard University Press, 1991-1998, to be continued, taking on the threshold into specific account women, Afro-Americans and Indian peoples. The latter may be missed from scratch even by historians who have studied indigenous law: John Phillip Reid, *Constitutional History of the American Revolution*, University of Wisconsin Press, 1986-1993.

2. Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society*, Cambridge University Press, 2003.

3. Just as a way of taking rights seriously, let me talk of *freedom's rights* as the very basis of freedom's law: R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Oxford University Press, 1996.

4. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge University Press, 1995; Duncan Ivison, *Postcolonial Liberalism*, Cambridge University Press, 2002.

5. They are available on the Internet in the authoritative site of the United Nations High Commissioner for Human Rights: http://www.unhchr.ch/html/intlinst.htm.

6. B. Clavero, "Minority-Making: Indigenous People and Non-Indigenous Law between Mexico and the United States," *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno*, 32, 2003, 157-272.

7. Patrick Thornberry, *Indigenous Peoples and Human Rights*, Manchester University Press, 2002; Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity*, University of California Press, 2003; S. James Anaya, *Indigenous Peoples in International Law*, Oxford University Press (1996), updated edition forthcoming.

8. For another sign of double, rather redoubled standard, check the very site of United Nations High Commissioner for Human Rights, where you find the ILO Convention not trough the identification of peoples themselves but at an item pigeonholed *Employment:* http://www.unhchr.ch/html/menu3/b/62.htm.

9. Luís Rodríguez-Piñero, *Between Policy and Law: The International Labour Organisation and Indigenous Peoples,* Oxford University Press, forthcoming.

10. Clifford Geertz, *The Interpretation of Cultures,* Basic Books, 1973; James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art*, Harvard University Press, 1988.

11. Scan a deeper history of the Americas under a European sign: Walter D. Mignolo, *The Darker Side of the Renaissance: Literacy, Territoriality, and Colonization*, University of Michigan Press, 1995.

12. David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice,* University of Texas Press, 1997; Vine Deloria, Jr. and D.E. Wilkins, *Tribe, Treaties, and Constitutional Tribulations,* University of Texas Press, 1999.

13. Check C. Geertz, *Available Lights: Anthropological Reflections on Philosophical Topics,* Princeton University Press, 2000, 256: "By rights, political theory should be (...) a school for judgment, not a replacement for it—not a matter of laying down the law for the less reflective to follow (Ronald Dworkin's judges, John Rawls's policy makers, Robert Nozick's utility seekers), but a way of (...) participat[ing] in the construction of what is most needed, a practical politics of cultural conciliation". On the referred authors, Ackerman also included, see Laura Kalman, *The Strange Career of Legal Liberalism*, Yale University Press, 1996. Add now Justine Burley (ed.), *Dworkin and his Critics: With Replies by Dworkin*, Blackwell, 2004.

14. Donna Lee van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America*, University of Pittsburg Press, 2000; Marco Aparicio, *Los pueblos indígenas y el Estado. El*

reconocimiento constitucional de los derechos indígenas en América, Centro de Estudios de Derecho, Economía y Ciencias Sociales, 2002; Cletus Gregor Barié, *Pueblos indígenas y derechos constitucionales en América Latina. Un panorama*, Comisión Nacional para el Desarrollo de los Pueblos Indígenas, 2003.

15. B. Clavero, "Claiming for History: An American Hard Case," *Rechtsgeschichte*, 4, 2004, 28-37.

16. As Hinkelammert refers to Locke's paradigm concerning both peoples' and individuals' human rights, let me add J. Tully, *A Discourse on Property: John Locke and his Critics*, Cambridge University Press, 1980; Robert Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest*, Oxford University Press, 1990; Barbara Arneil, *John Locke and America: The Defense of English Colonialism*, Clarendon Press, 1996; and even B. Clavero, "Freedom's Law and Oeconomical Status: The Euroamerican Constitutional Moment in the 18th Century", *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno*, 30, 2001, 81-135.

17. Hinkelammert writes: "[US] government has not ratified the declaration of human rights of the UN or the corresponding convention" (an accurate translation from the original Spanish, available on the Internet, http://www.filosofia.cu/eventos/Pasos85.htm: "[E]se gobierno no ha ratificado la declaración de derechos humanos de la ONU ni la correspondiente convención"), yet the United States are deeply embedded and involved in the drawn approach to and evolution of the international law, including the Universal Declaration of Human Rights that is not submitted to ratification. As for the insightful Moosa's paper, alongside the comparison with Islamic approaches and as a counterpoint there may still be some background that implies an idealistic view on the human rights legal record, let alone the philosophical kind. The third man conveys a pattern of cross-cultural reading: M.J. Shapiro, *Methods and Nations: Cultural Governance and Indigenous Subject*, Routledge, 2004, duly advising to begin with the *loci of enunciation*, "the historically and territorially complex spaces that articulate the political relevance" of one's work. Me, I am like John Locke, a plain European white male. I cannot qualify to discuss Islamic religion and law as much as European colonialism and sexism.

18. Quoted by M.J. Shapiro, *Methods and Nations*, 3. As for the legal issue, Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law*, Princeton University Press, 2000; connecting with the continental record on indigenous affairs, Ward Churchill, *Perversions of Justice: Indigenous Peoples and Angloamerican Law,* City Lights Books, 2003, 73-123.