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Unsettling the regime of human rights: Decolonial reflections beyond the law

Juan Martin Liotta*
Amadeo Szpiga*

Abstract:

In this article we strive to problematize and unsettle the regime of human rights, critically reflecting around their potential for decolonization. Although the discourse of human rights has been used by multiple actors for the last decades as a tool to channel social claims, the material and substantial conditions of people in the Global South have not actually improved. Human rights have not been able to dismantle the oppressive structures of capitalism, patriarchy, and colonialism, furthermore, they have been used to uphold and deepen them. Our reflections in this paper particularly revolve around the coloniality of human rights. Drawing from postcolonial philosophy, decolonial thought, and poststructuralist understandings of power, we start by critiquing the basic premises of the main trends of legal epistemology, establishing our understanding of the coloniality of law, and we continue with a deconstruction of human rights' pretended universality, problematizing their subject. Finally, we conclude that despite their potential for a strategic use in resistance, human rights will not be able to be decolonized until the ongoing structures of power that were instituted by coloniality five hundred years ago are abolished.

Keywords:

Human rights, coloniality of law, dispositif, universalism, decolonization.

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* Lawyer from the University of Buenos Aires. Master's Degree in Sociology of Law from the Oñati International Institute for the Sociology of Law and the University of the Basque Country / Euskal Herriko Unibertsitatea. E-mail: juanmaliotta95@hotmail.com

* Holds a Bachelor's Degree in Law from the Universitat Rovira i Virgili. Master's Degree in Sociology of Law from the Oñati International Institute for the Sociology of Law and the University of the Basque Country / Euskal Herriko Unibertsitatea. E-mail: deoszpiga@gmail.com ORCID: https://orcid.org/0000-0003-0837-3648

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Resumen:

En este artículo tratamos de problematizar y desasentar el régimen de los derechos humanos, reflexionando críticamente en torno a su potencial descolonizador. Si bien el discurso de los derechos humanos ha sido utilizado por múltiples actores durante las últimas décadas como herramienta para canalizar reclamos sociales, las condiciones materiales y sustanciales de las personas en el Sur Global en realidad no han mejorado. Los derechos humanos no han podido desmantelar las estructuras opresivas del capitalismo, el patriarcado y el colonialismo, es más, han sido utilizados para sostenerlas y profundizarlas. Nuestras reflexiones en este artículo giran particularmente en torno a la colonialidad de los derechos humanos. A partir de la filosofía poscolonial, el pensamiento descolonial y las interpretaciones posestructuralistas del poder, comenzamos por criticar las premisas básicas de las principales tendencias de la epistemología jurídica, estableciendo nuestra comprensión de la colonialidad del derecho, y continuamos con una deconstrucción de la pretendida universalidad de los derechos humanos, problematizando su sujeto. Finalmente, concluimos que, a pesar de su potencial para un uso estratégico en la resistencia, los derechos humanos no podrán ser descolonizados hasta que las estructuras de poder vigentes que fueron instituidas por la colonialidad hace quinientos años sean abolidas.

Palabras clave:

Derechos humanos, colonialidad del derecho, dispositivo, universalismo, descolonización.

1. INTRODUCTION

The hegemonic discourse of human rights is today at a critical juncture. The dominant juridical and ideological paradigm through which the protection of human dignity has been understood globally, since 1948, has been unmasked as, at best, insufficient and incapable of fulfilling its mythical promise of universality; and, at worst, instrumental to the architecture of the ongoing structures that perpetuate Western domination over the Global South, and ensure the constant extractive flow of resources, knowledges, and bodies from the peripheries to the center.

In this essay we strive to step into that juncture and reflect on the potentialities or impossibilities of human rights as a tool for emancipation. And when we say emancipation we do not refer to the classical liberal conceptions of freedom, but we are actually speaking of decolonization, not as a metaphor, as Tuck and Yang (2012) rightly warned us about, but as the material and radical undoing of the global pattern of capitalist power that organizes our world-system through a racial/ethnic hierarchy (Quijano and Wallerstein 1992). We speak here of a "metaphysical insurrection" (Maldonado-Torres 2019) that completely changes the way in which reality and subjects themselves are produced according to coloniality. In sum, we find it peremptory to ask ourselves: Can human rights be decolonized? Can they be strategically leveraged in struggles for decolonization? The aim of this paper is to approximate an answer to that question or, at least, to develop a cartography of critical tools, lenses, and theories that can help us navigate our way to an answer. Our objective, thus, is to unsettle the regime of human rights to reveal what lies

below, what interests have shaped its formation, and what effects, subjects and structures does power create through its operation.

Human rights have been primarily produced as a juridical category through the language of rights, or better, through a particular epistemological and ontological legal regime of truth: that of modern law. Therefore, our journey will begin by examining the formation of that which we understand as 'law', in order to disentangle and expose its modern/colonial roots and its mythical characters. We will do so by conducting a brief reading on some aspects that critical legal studies authors made regarding the hegemonic trends of iusnaturalism and iuspositivism, and then turning to a power analysis that explores the effects, realities, and subjects that law is commanded by coloniality to produce.

Once we establish our understanding of the coloniality of law, we will then turn to a more focused critique of human rights, as practice and discourse, deconstructing their pretended universality, and problematizing their subject. Methodologically, this critique will draw from diverse critical legal theories, with a particular focus on the epistemological contributions of postcolonial philosophy, decolonial thought, and poststructuralist understandings of power and Modernity.

Finally, we will address the main question and propose that, despite their undeniable force in the transformation of reality, and their definite usefulness for the resistance against various types of violence, under current conditions, human rights will not be able to be decolonized, and therefore will always pose the risk of being an obstacle for emancipation, until the ongoing structures of power that were instituted by coloniality five hundred years ago cease to exist.

2. A BRIEF INTRODUCTION TO MODERN LAW

When referring to legal epistemology, there are two hegemonic trends used to study, teach, and understand the concept of law itself: iusnaturalism and iuspositivism. In this section, we will briefly describe the main ideas of these trends, their weaknesses, and our understanding of how law should be thought of within the social sciences.

The former current is mostly used by jurists when talking about how the law *ought to be*, making reference to certain values that are understood to be atemporal and ubiquitous — that is, not confined to any particular time and place, and therefore presumed to exist at every time and in every place[1] (D'Auria 2016).

Moreover, contractualism, one of the most influential trends of iusnaturalism, is dependent on the assertion of a pre-existing, free and autonomous subject: a man, raised outside a community, who chooses to pact with his fellow free men to create the state. This free and independent subject is assumed to be what Jule Goikoetxea has ironically dubbed the "mushroom man": a man that could very well have been delivered by a stork in the middle of the woods at the age of eighteen, ready to make a pact with others like him, conveniently ignoring the fact that he was raised by an ensemble of slaves and women who cooked,

[1] It is worth noting here the famous Latin aphorism taught to virtually every law student around the world: *ubi societas, ibi ius* (where there is a society, there is law).

cleaned, and ensured his livelihood (Noguera and Goikoetxea 2021, p. 42). On the opposite, and as we will further develop, we consider that it is not possible to conceive a subject who is previous to society or even language[2]. Humans are born as mammals, that is, as blank slates, not bearing any of the racialized, gendered and classed categories of Modernity. We are then socialized as subjects (i.e. man/woman, white/black, etc.). This is, the human body is disciplined within a particular society in relation with others through pre-existing institutions, or in other words, the subject is an effect of power (Foucault 1975/2022, Butler 1990).

On the other hand, iuspositivism has traditionally considered that a norm is 'law' only if it complies with a previously established procedure or a 'set of axioms'. In other words, positivists have generally understood the law as a set of norms sanctioned according to a criterion of validity or a 'rule of recognition', and by a competent authority (Hart 1994, D'Auria 2016). The legal order is thought to meet certain characteristics: it is complete, ordered, self-regulated, self-sufficient, without *lacunae.* Although contemporary iterations of this current, such as neo-constitutionalism, concede that the law does not limit its recognition rule only to a formal procedure, but that it is also bound to substantive requirements which are the fundamental rights established in the constitutions and the human rights established in international treaties, Nino (2020) claims that the lowest common denominator of the main positivist scholars is that the notion that law must be defined, identified, or described in factual terms taking in consideration certain properties which are neutral. Were this not the case, the identification of what the norm is would be completely subjective and arbitrary. Therefore, in all cases, positivism understands that law is reduced to the norm and bears a pretension of moral neutrality.

Of course, there are political and ideological tensions in the definition of who is able to "say the law" (Ruiz 2001). However, positivism lets aside all these historical, social, and political discussions by hiding them and presenting the legal discourse (both in the formation of the norm and the application of the norm to a particular case) as an unquestioned truth devoid of ideological conflict. In other words, positivism allowed the law to install a regime of truth in which it operates by upholding and manipulating power/knowledge relationships, while in turn, hiding the power relationalities that sustain its own formation. Moreover, as we will develop in the next section, positivism also allowed for the concealment of the effects that law has over the body and the subject. Departing from said positivist concept, we understand that law is not just normativity, but that law is also discourse and social practice, that it creates subjects and imprints social beliefs over bodies (Ruiz 1986).

Alicia Ruiz (2001) also points out that legal discourse exceeds the positive norm, arguing that it is actually constituted on different levels. The first level, — and the more visible —, is the final product of those institutions legitimized to "say the law" and create norms, this is: laws, resolutions, decrees. A second level is integrated by doctrine, theories and opinions, which affect and guide the legal practice and facilitate the manipulation of the first level. The everyday work of legal operators and the legal academic production is included here (lawyers, judges, professors, scholars, etc.). Finally, a third level is said to comprise the

[2] We refer here to a concept of language that attributes it the capacity to shape reality, that is, the *word* as an important *dispositif* in the construction of subjects. Words are the signs that represent *par excellence* the most genuine means of social communication. Following Bajtin, we hold the view that signs are necessarily a collective and ideologic construction that are a space for ideology and social struggles (Cárcova and Gorali 2021).

beliefs and myths which are reflected in the social imaginary. These myths and fictions have great importance, because without them the legal discourse would not have efficiency. Duncan Kennedy (1987, p. 405) would also add to these three levels the "reasoning processes", by which the law is created and applied.

On the other hand, a key element to think about the law is its character of indeterminacy. This is, the legal language embodied in the norm must be interpreted. There is no norm which could directly be applied to a particular case without the intervention of the judge that will necessarily perform an ideologically-driven analysis (Kennedy 1997). The process of defining which norm applies, and how that norm must be applied, is a process in which interpretation and thus, ideology, is inexorable. In other words, the application of the norm to a situation is not solved through a mathematical operation, but through a political and ideological process. Judges are not able to transcend their personal interests or sympathies and resolve in a fully objective procedure.

Moreover, one of the main characteristics of modern law refers to its ability to monopolize the social conflict through bureaucratic mechanisms that include the figure of the judge as an authority with magical features. Law, in turn, produces 'citizens' with rights. Thus, claims must adjust to these "rights" and those claims which exceed the rights have no place (Noguera and Goikoetxea 2021). By these means, law individualizes social conflict, and the judge becomes the subject sheathed with authority and power to establish the truth in a given discursive regime, it becomes the authorized voice who establishes the solution to all conflicts.

In sum, we believe that it is insufficient for social sciences to work with iuspositivist or iusnaturalist understandings of law, which we find reductionist. In this sense, we argue that the hegemonic concept of law is contingent; what has been generally understood as law, globally and for the last five hundred years, has not always existed. Conversely, we argue that it emerged in a concrete historical moment (i.e. Modernity), and was based on a particular *episteme* or system of knowledge (i.e. European reason). In fact, we argue that that European *episteme* is precisely what has imbued the dominant concept law with its ethnocentric characters, with the aim of imposing itself through violence and domination all over the world, under the banners of universality, rationality, and civilization.

3. LAW, POWER AND COLONIALITY

Then, what *do* we understand as law? How does law operate? If law is not a natural phenomenon that must be discovered, nor a rational and sterile operation that stems from the sovereign, from where does law derive its capacity to shape reality? As many critical legal scholars have pointed out (Ruiz 1986, Fitzpatrick 1992, Wolkmer 2017), we cannot undergo a critical analysis of law without referring to the question of power.

Following Foucault, we understand law as a modality through which power is exercised. This is done by the law through the organization of a heterogeneous ensemble (i.e. *dispositif*) comprised of discourses, social practices, myths, and norms. These elements that constitute what has been described by Peter Fitzpatrick as "the mythology of modern law" are what allows the *dispositif* of law to ensure its own reproduction and supremacy, and imbues it with power:

> Thus modern law emerges, in a negative exaltation, as universal in opposition to the particular, as unified in opposition to the diverse, as omnicompetent in contrast to the incompetent, and as controlling of what has to be controlled, (...) Law is imbued with this negative transcendence in its own myth of origin where it is imperiously set against certain 'others' who concentrate the qualities it opposes. Such others are themselves creatures of an Occidental mythology, a mythology which denies its own foundation. (Fitzpatrick 1992, p. 10)

Agamben (2011) states that to every *dispositif*[3] corresponds a process of subjectivation. The *dispositif* needs a subject upon which it can exercise its power. Therefore, it emerges with the objective of producing concrete subjectivities (i.e. persons, citizens, populations) while legitimizing power/knowledge relationships. That is to say, the law is not only the visible exercise of coercive and repressive state power, but it functions as a technology (in the Foucauldian sense) that —mostly in an invisible manner and through a disciplinary and normalizing power— brings objects and subjects into being and infuses them with meaning, ultimately constituting reality itself, and producing individuals as subjects.

Contrary to dominant conceptions of law, as we have hinted to in the previous lines, we argue that the law does not arise from a pre-existing subject with the aim to regulate or control society, but that "legal systems rather generate the subjects that later will come to regulate through their legal-political structures'' (Lerussi and Sckmunck 2016, p. 75). In sum, and as Alicia Ruiz brilliantly puts it: "without being apprehended by the juridical order we do not exist, and after being apprehended we only exist according to its mandates" (Ruiz 1986).

However, this process of subjectivation and apprehension does not happen in a vacuum, or in the same way in every part of the world. Conversely, it occurs within a unique geopolitical relationship of forces: capitalist, racist, colonial, and patriarchal power relations. As Castro-Gómez points out, the concept of 'disciplinary power' in Foucault can be corrected and expanded in relation to the concept of 'coloniality of power', since "the panoptic devices erected by the modern state are part of a broader structure, of a global nature configured by the colonial relationship between centers and peripheries as a result of European expansion" (Castro-Gómez 2000, p. 92).

The creation of global structures enacted by law occurs, then, as Fanon would say, within "a world divided into compartments, Manichean"[4] (Fanon 1963), it happens in a "world of apartness" (Madlingozi 2018). Nelson Maldonado-Torres picks up this idea to develop his concept of *coloniality of being*, which has been theorized by many authors as a colonial ontological line. A division that separates our world through an existential abyss, according to a racial and ethnic hierarchy, "saving" the colonizers (whose humanity is manifest and indubitable), and 'condemning' *others* (the colonized) to an "ontologically inferior mode of subjectivity" (Maldonado-Torres 2019, p. 93). Thus, the law acts through this line,

[3] Different English translations of Foucault's work (and of fellow scholars employing the notion of dispositif, such as Agamben) have used concepts like "apparatus", "device", or "deployment", to refer to this machine or ensemble of elements, thus focussing "on either the practice or the materiality, unlike the notion of dispositif which covers them both" (Bostan 2022, p. 144). We have decided to employ the original term in French, with no translation, to faithfully convey its complete meaning, that is, both its practice and materiality.

[4] The term "Manichean" is used here figuratively, as used by Fanon, as a synonym of the "dualist" character of a philosophy, outlook, or worldview. The term is often used to suggest that the worldview in question simplistically reduces the world to a struggle between good and evil, or in this case, colonizers and colonized.

conferring complete legal subjectivity on the 'saved' and sentencing the *damnés de la terre*[5] to a legal non-personality (Fitzpatrick 1992, p. 93), or at most, to an incomplete legal subjectivity.

Antony Anghie explains in detail the relationship between law, universalism and colonialism. At an early stage of colonization, the process was guided by Francisco de Vitoria's logic of law (Anghie 2004). De Vitoria pointed out that, despite their "unsoundness of mind" it was not possible to justify the indigenous people's subjection under "divine law", since they had "reason" in their own "primitive" way, a fact shown in their social practices of material exchange, marriage, politics, and so forth (Waswo 1996, p. 745). If the colonized had indeed the capacity to reason, then they must be bound by *ius gentium*, which was the "universal law" of the peoples. Since natural law no longer served as a logical justification for colonization, the universal reason of *ius gentium* offered the ideological coverage for the Spaniards to 'correct' and sanction those colonized peoples whose cultural practices violated this 'universal' normativity.

In the following centuries, positivist authors continued to mark the Manichean distinction between civilized and uncivilized countries; European modern nation-states had the exclusivity in creating international law rules, because of their sovereignty. On the contrary, non-European countries and other 'entities' were not considered to be sovereign and thus were excluded from the formation of law. In those cases, in which a European country signed a treaty with a non-European country, its conditions and interpretation were clearly favoring the former:

> The history of violence and military conquest which led to the formation of those treaties plays no part in the positivist's approach to the treaty. Moreover, the positivists, on the whole, accepted the treaties as expressing clearly and unproblematically the actual intentions of the non-European party. (Anghie 2004, p. 73)

Positivism was also a great tool at the moment of establishing the titularity of European countries over the land of non-European peoples. A clear example of how law legitimized European supremacy is the Conference of Berlin of 1884-5 in which most of the African territories were given the legal status of colony, therefore eliminating pre-existing forms of organization; or the doctrines that emerged after the conquest of the Chartered companies, such as the British and Dutch East India Companies. In sum, positivist law has accompanied the necessities of the European countries and was quite pragmatic to adapt itself and legitimate situations of domination (Anghie 2004).

This more violent and repressive facet of law, the one that has legitimized and legalized colonialism with sheer impunity over the last five hundred years, however, began to be paradoxically overshadowed by a less explicit and excluding face, much more efficient in the expansion of law itself, and in the reproduction of the modern/colonial world-system. As we mentioned above, we speak here of law as a modality of disciplinary power, as

[5] In French, "the wretched of the Earth", the title of Fanon's *magnum opus*, and a key concept of Fanonian ontology: the wretched of the Earth are the colonized peoples, those subjugated and condemned to an inferior mode of subjectivity according to a racial/ethnic hierarchy, and thus deemed not fully human.

opposed to the repressive one; constitutive, against the negative; a power that, through law — and without ceasing to enslave, kill and pillage — educates, civilizes and creates.

The theoretical concept of *dispositif* serves to illustrate how this exercise of power that we call 'law' becomes blurred and does not always generate situations of coercion or exclusion, but even recognizes and grants rights (such as human rights), and in this process, regulates and disciplines humans to shape them into a certain type of subjectivity, depending on the position one holds with respect to the abyssal line of being. Thus, the *dispositif* of law produces legal subjects susceptible to colonial government, and at the same time confers meaning to the rights that are granted to those subjects, transforming reality in that very same operation. The *dispositif*, then, allows modern law to "install, sustain and legitimize the violent technologies of capitalism, racism, and patriarchy, under an apparently benign gesture of recognition of rights" (Szpiga 2022, p. 150), including and especially, *human* rights. If we truly want to conduct a critical analysis of human rights, we must not focus only on how they are used to oppress and exclude, but on the violence they enact through inclusion and universalization.

4. THE COLONIALITY OF HUMAN RIGHTS

The thinkers of the Grupo Modernidad/Colonialidad have developed the concept of coloniality to explain what characterizes modern European colonialism from other forms of conquest and domination. As defined by Aníbal Quijano (2014, p. 67), coloniality is "one of the constitutive and specific elements of the global pattern of capitalist power" whose cornerstone is the imposition of a "racial/ethnic classification of the world population" that operates ubiquitously in each "plane, scope and dimension, both material and subjective, of daily existence and at a social scale."

Therefore, coloniality is an 'ontoepistemic' regime (Andreotti *et al.* 2015), not necessarily derived from, but constitutive of modern colonialism. These scholars have also described coloniality as the "hidden face of Modernity" (Mignolo 2000), which operates by establishing a racial hierarchy through the imposition of "abyssal lines" (Santos 2007) that split up the world population into colonizers and colonized peoples, those who are saved and those who are condemned.

Coloniality does not only operate on the realm of being, but it also separates and classifies knowledge according to a colonial standard in which the European episteme is presented as superior, rational, scientific and universal (Lander 1993). This division operates in such a way that the realities and practices existing on the other side of the abyssal line, that is, in the colonies, are not able to question the universality of the theories and practices that were developed in the metropolis, on this side of the line (Santos and Sena 2019, 65).

García-López and Winter-Pereira argue that law has its own specific coloniality, because "although the colony disappeared, the way of organizing the community through the law existed", and "[w]hile the Latin American peoples became independent states, in Europe new ways of producing, interpreting and applying the law were established, which were soon imposed on these new states" (García-López and Winter-Pereira 2021, p. 163). It is useful to apply the analytical category of coloniality to law, — not just as a byproduct of the coloniality of knowledge, being, and power —, but as an integral and constitutive element

of law itself, insofar "law is a way of knowledge, it is a form of power and it is a way of being." (García-López and Winter-Pereira 2021, p. 164). As the authors brilliantly sum up, and as we have been insisting throughout these pages: "law produces subjects, produces truths and produces power. Or to put it another way: subjectivation, veridiction, jurisdiction." (*ibid.*)

So, if we can speak of a coloniality of being (Wynter 2003, Maldonado-Torres 2007), power (Quijano 2014), knowledge (Lander 1993), and law (Lerussi and Sckmunck 2016, García-López and Winter-Pereira 2021), then we can certainly speak of a coloniality of human rights. The decolonial perspective has been identified by Maldonado-Torres (2017, p. 118) as "a missing point in the recent literature on human rights and decolonization, and one to which the analysis of coloniality and the decolonial turn have much to contribute."

If human rights have been articulated through the language of rights, that is, through the grammar[6] of modern law, then they inevitably must have imported some of the mythical features of law that are instrumental to colonialism and capitalism.

As a part of law, human rights are not a natural and eternal entity, or a mere act of legislation, but are the product of a specific context which represent particular values and reflect specific power relationships. In particular, human rights were created after World War II by Western powers that shaped them according to their interests, thus imbuing them with a clear ideological content (Donnelly 1999, Wolkmer 2017). In that sense, human rights as we know them exist only as part of the specific colonial epistemic regime of liberalism and the ontological standpoint of the individual, and thereby are "integral to liberalism, democracy, individualism and progressive change, all of which happen to be typified in the West" (Fitzpatrick 2001, p. 209).

At this point, it is important to conduct a thorough analysis that problematizes the regime of human rights, a regime that purports to be universal (or, at least, universalizable), that assumes a homogenous human subject as the bearer of rights, and that is perfectly compatible with the enactment of the worst violence, as long as it's not enacted against the regime itself.

4.1. DECONSTRUCTING THE UNIVERSALIST FAÇADE

The act of making certain rights 'universal' implies the violent exercise of hierarchizing some values over others. Those hierarchized values represent a European understanding of societies, and are imposed over other cosmologies for example, those ones which think of 'rights' — if it is even possible to employ that term — in a communitarian modality instead of an individualistic one. It is not possible to understand the process of imposing European

[6] Ruth Wilson Gilmore employs the concept of "grammar" to explain a technology of epistemic coloniality, which we think is fully applicable and illuminating to the topic we are discussing. She states: "[t]he Western Academy produces formal grammars — rules of thought — theological, philosophical, philological, scientific, economic. These grammars (...) form the discursive ordering force for the structure in dominance, and ultimately the constituent ideologies of 'nation' (culture, race, and so forth) within the borders of state" (Gilmore 2022, p. 101).

values over all cultures without considering the colonial perspective that we have described: the European sense of superiority over the rest of cultures.

The universalization of human rights could be understood as a symbolic act in which Europe gives the Global South countries the gift of civilization (Fitzpatrick 1989, cited in Merry 1991, p. 890). It is a paternalistic relation between the 'developed' countries or the 'advanced' societies, and those deemed 'underdeveloped' or 'infant' countries. A discursive operation that hides power relationships and a particular model of state, economy, and society. This process is accompanied by a powerful narrative that naturalizes this worldview and also brings the solution by devising certain biopolitical mechanisms that can 'cure' the 'sick' nation (Pahuja 2004).

There is nothing universal in saying that all humans must have access to "hearing by an independent and impartial tribunal" (Art. 10, Universal Declaration of Human Rights). On the contrary, it is a reflection of liberal values that arise from events that had taken place in Europe. Indigenous communities in Abya Yala[7] do not resolve their local disputes by appealing to a modern judge. This article of the Universal Declaration clearly reflects the universalism of European liberal values, and the "occidental appropriation of the universal" (Fitzpatrick 2001, p. 190), which implies a process in which the West analyzes the Global South through its own cultural lens. But this is not a mere process of analysis, it is also a process in which the subject of the South is created through the logic of the North.

As we mention in the last section, law acts a *dispositif*, insofar produces and shapes the subject through practice, discourse, beliefs, institutions, etc. The non-Western subject is constructed mirroring the Western subject and is judged by a Western standard. In this sense, critiques of the universalist (gendered and racialized) construction of the subject have been brilliantly developed by decolonial feminists, such as Yuderkys Espinosa (2022) or Françoise Vergès (2021), who criticize white European feminism for reinventing and homogenizing the category 'woman' according to its own values and norms. According to this vision, the situated understandings of gender and womanhood in the South are ignored on the grounds of belonging to an inferior civilization. As a consequence, the reproduction of a racist logic is achieved which informs public policy. For example, the legitimation of islamophobia, the ban of the headscarf, or even the military interventions in Afghanistan, always wielding a purported defense of women's rights.

Back in 1947, the American Anthropological Association issued a poignant letter sharply critiquing the forthcoming Universal Declaration of Human Rights, highlighting the issue of cultural differences and relativism. Among other points, it pointed out that: a) individuals realize their personality through a particular culture; b) it is not possible to measure differences between cultures by qualitative evaluation techniques; and c) standards and values are relative to the culture from which they derive (American Anthropological Association 1947).

[7] We employ the expression "Abya Yala" to refer to the American continent, such as their indigenous peoples have historically used to self-describe, in opposition to the colonial expression "America", notwithstanding the existence of specific names for the regions they inhabit (e.g. Tawantinsuyu, Anauhuac, Pindorama), *cfr.* "Abya Yala" in *Enciclopedia Latinoamericana*, Available from: http://latinoamericana.wiki.br/es/entradas/a/abya-yala

In sum, the act of imposing certain values that have a particular development in a historical context to different cultures is an act of violence that hides power interests. The legal human rights discourse imposes values while creating the conditions for Global South states to become its offenders, insofar they are alien to many local communities. The export of human rights as a means for development, also translates into the imposition of a model of a modern national state, a model of capitalist market economy, a model of justice, a model of individualistic resolution of conflicts, as Fernando Coronil (1995, p. xiv) brilliantly states: an "imperial alchemy that turns a Western particularity into a model of universality."

4.2. TO BE OR NOT TO BE: PROBLEMATIZING THE SUBJECT OF HUMAN RIGHTS

One of the most evident limits of human rights is related to their subject: they take for granted the humanity of those who they are supposed to protect, but they do not establish it nor demonstrate it (Maldonado-Torres 2019, p. 180). If we return to the idea of coloniality of being, and the condemnation of large sectors of the world population to an ontological modality of non-humanity, then it is clear to see why human rights are not *really* designed to guarantee the dignity and integrity of "all members of the human family" (Preamble, Universal Declaration of Human Rights 1948). But as we have stated before, our interest does not lie in the exclusions that the concept of human rights enacts over different groups of people.

We know that, historically, women, children, queer, Black, Brown and Indigenous, and differently-abled people have not had, and still lack, access the full enjoyment of 'rights'. The logical response to an operation of exclusion — and what a large part of progressive movements and academia strive for — is an operation of inclusion, equity and diversity. What is of interest for a decolonial problematization of human rights, is to understand how, as paradoxical as it may sound, through inclusion, integration, and assimilation, certain discourses perpetuate and uphold the colonial lines that divide our world. Following critical legal scholars and decolonial thinkers, we see human rights as a language that codifies what it means to be human, the law then becomes part of what García-López and Winter-Pereira (2021, p. 262), drawing from Butler and Quijano, have described as the "matrix of legal-colonial intelligibility."

In that vein, we argue that the pervasiveness, ubiquity, and hegemony of the human rights discourse have come to colonize the very same understanding of humanity, for:

> [I]f being human is the intrinsic ground of entitlement to rights, and if human rights inhere (...), in being human — in behaving or aspiring as a human being — then those who do not behave in accordance with or aspire to human rights must not be human. (Fitzpatrick 2001, p. 208)

The poietic power of law finds here one of its maximum expressions: if the subject cannot exist outside the legal order's apprehension, and if that legal order is equated with a liberal, Western-centric, capitalist, modern modality of existence, then it follows that those beings or populations that reject the sacred gospel of human rights and do not aspire to live according to those standards are, at worst, savage and inferior, and at best, sick, underdeveloped, and immature. In this sense we can observe one of the most insidious successes of coloniality through human rights: the channeling, restricting, and limiting of all possibilities for liberation and decolonization.

5. CONCLUDING REMARKS: THE MASTER'S TOOLS

The mythical and symbolic force of the human rights discourse has made it extremely difficult, or virtually impossible, to imagine a world without them; for a world without human rights can only be a world without humans. Nevertheless, we must recognize that human rights have been claimed by the colonized peoples and the dehumanized to make their voices heard and resist particular forms of violence, enacted especially by the state and transnational corporations (Burgos 2015, p. 41). Our aim here is not to disregard those struggles as naive or counter-revolutionary. Our objective is not to propose a radical abandonment of human rights as a tool for resistance, but to strategically re/think, reflect and foster a debate on how to transcend the structures that build our world through a particular set of power relationships.

We consider that the discussion regarding human rights must take into account other issues and not advocate only to its field. A complete panorama of what law is and the values it represents must be taken in consideration at the moment of thinking about human rights, otherwise we might be in serious risk of having a narrow or self-referential view. If we do not consider the colonial, modern, and capitalist characters of law, we will never be able to conduct a full analysis of the (im)possibility of emancipation through the tool of human rights.

We dealt with our understanding of human rights, the issue of universality and the issue of the subject. We argued that the modern/colonial and capitalist pattern is present in the Universal Declaration, together with a Manichean logic of civilized/uncivilized countries and subjects. This question affects the Global South by shaping and creating subjectivity and delimits who, and under what conditions, is afforded the ontological category of human being, and its corollary "developed nation".

This discussion is not just philosophical or theoretical. On the contrary, these problems we are pointing at have clear material and practical consequences. The discourse of human rights has been used as an argument to justify imperial military invasions throughout Middle Eastern[8] nations, as well as to legitimize and legalize racist practices towards non-Western peoples and their practices. Furthermore, the legal logic of human rights overwhelmingly considers states as the only agents capable of committing violations, implying that many important actors, which in many cases have as much power as states, if not more (i.e. oil or mining companies that pollute rivers, or fashion companies that systematically employ child and slave labor), cannot be found personally guilty of breaching human rights. International Financial Institutions, such as the International Monetary Fund or the World Bank are neither accountable for their actions in terms of human rights, creating hunger and administering death through the constant conditioning of Global South nations' economies, unquestioned and with sheer impunity.

This paper is not (and did not intend to be) exhaustive of all decolonial approaches to human rights; conversely, it must be thought of as a starting point to re/think the colonial relationships that are reproduced through the human rights discourse. Many other lines of inquiry that have not been addressed in this text have arisen, and are very much worth

[8] We use the Anglo-centric term "Middle East" to refer to the westernmost region of Asia, including the peoples of the Maghreb, Bilad al-Sham, and Mashriq.

exploring in future works. This implies, for example, the disciplinary system that developed mechanisms for the control and surveillance of public policies in the name of 'human rights', a structure supervised by international organizations, states, international NGOs, among other actors. A control mainly conducted by the Global North over the Global South states, and implies the production of reports, the constitution of a sanctions lobby, etc. This structure does not problematize structural dominance issues, but it reproduces them, and is quite selective in what to report and how to do it. Also, another issue that should be thought of is the paradox of recognizing social, economic and cultural human rights while deepening a neoliberal system that weakens the state's ability to improve the material conditions of people's lives, and multiplying poverty. The critiques made by the human rights discourse are not aimed to end structural oppression, but to softly reduce damage and make it less visible, in order to reproduce the capitalist, racist and patriarchal colonial system. With their paternalistic and self-complacent ethos, they aim to pacify, reconcile and reform, and in doing so, deviate from decolonial struggles for liberation. If human rights actually disrupted power, they would have already been banned.

We began these pages with the assertion that decolonization is not a metaphor. It is the radical assumption that another world is possible, perhaps not a world devoid of power relationships or social conflict, but a world that transcends the racialized, gendered and classed categories imposed by coloniality and law. Audre Lorde warned us about the impossibility of using "the master's tools to dismantle the master's house" (Lorde 2007) and we must take that word of advice with all seriousness. Human rights have demonstrated an astonishing ability to reproduce with one hand that which pretends to fight against with the other, a paradoxical capacity to "bring order through the constant infliction of violence" (Fitzpatrick 1992, p. 108).

Under present conditions, it has become increasingly clear to us that the possibilities for the decolonization of human rights are extremely narrow, if not non-existent. However, this is not a defeatist call for despair, but an open invitation to employ the critical theoretical and epistemological tools which we have tried to compile throughout this article, with the objective of rethinking that which presents itself as natural, undoing that which appears as immutable, and fracturing that which speaks of itself as unified and universal. We must embrace decolonization's incommensurability with the promises of Modernity, and look beyond the law, towards other grammars that accomplish the protection of dignity promised by human rights, but outside the biopolitical paradigm (García-López 2018, p. 675). A task only achievable through mechanisms and strategies that seek the abolition of the power structures of coloniality.

REFERENCES

Agamben, G., 2011. ¿Qué es un dispositivo? *Sociológica (Méx.)* [online], 26(73), 249-264. Available from: http://www.scielo.org.mx/pdf/soc/v26n73/v26n73a10.pdf [Accessed 4 August 2022].

American Anthropological Association, 1947. Statement on Human Rights. *American Anthropologist* [online], 49(1). Available from: https://www.jstor.org/stable/662893 [Accessed 4 August 2022].

Andreotti, V. de O., *et al.*, 2015. Mapping interpretations of decolonization in the context of higher education. *Decolonization: Indigeneity, Education & Society* [online], 4(1), 21-40. Available from: http://representing-education.gertrudecotter.info/wp-content/uploads/2016/08/andreotti-stein-ahenakew-hunt-decolonization.pdf [Accessed 4 August 2022].

Anghie, A., 2004. *Imperialism, Sovereignty and the Making of International Law.* Cambridge University Press.

Bostan, C., 2022. *Games of Justice: Ethnographic Inquiries on Space, Subjectivity and Law in Northern Kurdistan* [online]. PhD dissertation. Lund University (Media-Tryck). Available from: https://portal.research.lu.se/en/publications/games-of-justice-ethnographic-inquiries-on-space-subjectivity-and [Accessed 4 August 2022]

Burgos, M., 2015. Apuntes críticos a la razón liberal dominante de los derechos humanos. *El Cotidiano* [online], 194, 41-55. Available from: https://www.redalyc.org/articulo.oa?id=32542592005 [Accessed 4 August 2022].

Butler, J., 1990. *Gender Trouble: Feminism and the Subversion of Identity*. New York/London: Routledge.

Cárcova, C.M., and Gorali, M., 2021. *Semiosis y derecho*. Ciudad Autónoma de Buenos Aires: Astrea.

Castro-Gómez, S., 2000. Ciencias sociales, violencia epistémica y el problema de la 'Invención del Otro'. *In:* E. Lander, ed., *La colonialidad del saber: eurocentrismo y ciencias sociales. Perspectivas latinoamericanas* [online]. Buenos Aires: Clacso, 88-98. Available from: http://biblioteca.clacso.edu.ar/clacso/sur-sur/20100708034410/lander.pdf [Accessed 4 August 2022].

Coronil, F., 1995. New introduction. *In:* F. Ortiz, *Cuban Counterpoints*. Durham/London: Duke University Press.

D'Auria, A., 2016. *La crítica radical del derecho*. Ciudad Autónoma de Buenos Aires: Eudeba.

Donnelly, J., 1999. The social construction of international human rights. *In:* T. Dunne and N.J. Wheeler, eds., *Human Rights in Global Politics*. Cambridge University Press.

Espinosa, Y., 2022. *De por qué es necesario un feminismo descolonial.* Barcelona: Icaria.

Fanon, F., 1963. *The Wretched of the Earth*. Trans.: C. Farrington. New York: Grove Press.

Fitzpatrick, P., 1992. *The Mythology of Modern Law*. London: Routledge.

Fitzpatrick, P., 2001. *Modernism and the Grounds of Law*. Cambridge University Press.

Foucault, M., 2022. *Vigilar y castigar: el nacimiento de la prisión.* Madrid: Siglo XXI. (Originally published in 1975).

García-López, D.J., 2018. Has de tener un cuerpo que mostrar: el grado cero de los Derechos Humanos, *Isegoría* [online], 59, 663–682. Available from: https://doi.org/10.3989/isegoria.2018.059.16 [Accessed 4 August 2022].

García-López, D.J., and Winter-Pereira, L., 2021. Emancipación, descolonización y uso del derecho, *Anduli* [online], 20, 253-268. Available from: https://doi.org/10.12795/anduli.2021.i20.14 [Accessed 4 August 2022].

General Act of the Berlin Conference on West Africa, 1885 [online]. 26 February 1885. Available from: https://loveman.sdsu.edu/docs/1885GeneralActBerlinConference.pdf [Accessed 4 August 2022].

Gilmore, R.W., 2022. *Abolition Geography: Essays Towards Liberation.* London/New York: Verso.

Hart, H.L.A., 1994. *The Concept of Law*. Oxford: Clarendon Press.

Kennedy, D., 1987. ¿Son los abogados realmente necesarios? *Barrister* [online], 16, 403–18. Available from: https://duncankennedy.net/documents/Photo%20articles/Son%20los%20abogados%20realmente%20necesarios.pdf [Accessed 4 August 2022].

Kennedy, D., 1997. *A Critique to Adjudication*. Cambridge, MA: Harvard University Press.

Lander, E., 1993. *La colonialidad del saber: eurocentrismo y ciencias sociales. Perspectivas latinoamericanas*, Buenos Aires: CLACSO.

Lerussi, R., and Sckmunck, R., 2016. Colonialidad del Derecho. *Sortuz: Oñati Journal of Emergent Socio-legal Studies* [online], 8(2). Available from: https://opo.iisj.net/index.php/sortuz/article/view/813 [Accessed 4 August 2022].

Lorde, A., 2007. The Master's Tools Will Never Dismantle the Master's House. *In:* A. Lorde, *Sister Outsider: Essays and Speeches*. Berkeley: Crossing Press, 110-114.

Madlingozi, T., 2018. The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Decolonisation?, *Critical Legal Thinking* [online], April 6. Available from: https://criticallegalthinking.com/2018/04/06/the-proposed-amendment-to-the-south-african-constitution/ [Accessed 4 August 2022].

Maldonado-Torres, N., 2007. Sobre la colonialidad del ser: contribuciones al desarrollo de un concepto. *In:* R. Grosfoguel and S. Castro-Gómez, eds., *El giro decolonial: Reflexiones para una diversidad epistémica más allá del capitalismo global* [online]. Bogotá: Iesco/Pensar/Siglo del Hombre, 127-168. Available from: http://ram-wan.net/restrepo/decolonial/17-maldonado-colonialidad%20del%20ser.pdf [Accessed 4 August 2022].

Maldonado-Torres, N., 2017. On the Coloniality of Human Rights. *Revista Crítica de Ciências Sociais* [online], 114. Available from: https://doi.org/10.4000/rccs.6793 [Accessed 4 August 2022].

Maldonado-Torres, N., 2019. De la colonialidad de los derechos humanos. *In:* B. de S. Santos and B. Sena, eds., *El Pluriverso de los Derechos Humanos.* Ciudad de México: Akal.

Merry, S.E., 1991. Review: Law and Colonialism. *Law & Society Review,* 25(4), 889-922.

Mignolo, W. D., 2000. The Many Faces of Cosmo-polis: Border Thinking and Critical Cosmopolitanism. *Public Culture* [online], 12(3), 721–748. Available from: https://doi.org/10.1215/08992363-12-3-721 [Accessed 4 August 2022].

Nino, C., 2020. *Derecho, moral y política: Una revisión de la teoría general del derecho.* Ciudad Autónoma de Buenos Aires: Siglo XXI.

Noguera, A., and Goikoetxea, J., 2021. *Estallidos: Revueltas, clase, identidad y cambio político.* Barcelona: Bellaterra.

Pahuja S., 2004. Global Formations: IMF Conditionality and the South as Legal Subjects. *In:* P. Fitzpatrick and P. Tutti, eds., *Critical Beings: Law, Nation and the Global Subject.* Burlington: Ashgate.

Quijano, A., 2014. Colonialidad del poder y clasificación social. *In:* B. de S. Santos and M.P. Meneses, eds., *Epistemologías del Sur (Perspectivas).* Madrid: Akal.

Quijano, A., and Wallerstein, I., 1992. Americanity as a Concept, or the Americas in the Modern World-System. *International Social Science Journal* [online], 44, 549-557. Available from: https://www.javeriana.edu.co/blogs/syie/files/Quijano-and-Wallerstein-Americanity-as-a-Concept.pdf [Accessed 4 August 2022].

Ruiz, A., 1986. La Ilusión de lo Jurídico. *Crítica Jurídica* [online], 4. Available from: https://revistas-colaboracion.juridicas.unam.mx/index.php/critica-juridica/article/view/2906 [Accessed 4 August 2022].

Ruiz, A., 2001. *Idas y vueltas: Por una teoría crítica del derecho.* Ciudad Autónoma de Buenos Aires: Editores del Puerto.

Santos, B. de S., 2007. Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges. *Review* [online], 30(1), 45–89. Available from: http://www.jstor.org/stable/40241677 [Accessed 4 August 2022].

Santos, B. de S., and Sena, B., eds., 2019. *El pluriverso de los derechos humanos.* Ciudad de México: Akal.

Szpiga, A., 2022. Nacionalizar e imperar: La concesión de nacionalidad española como tecnología de asimilación en el dispositivo jurídico-colonial de la Hispanidad. *Antropología Experimental* [online], 22, 143–160. Available from: https://doi.org/10.17561/rae.v22.6447 [Accessed 4 August 2022].

Tuck, E., and Yang, K.W., 2012. Decolonization is not a metaphor. *Decolonization: Indigeneity, Education & Society* [online], (1)1, 1-40. Available from: https://clas.osu.edu/sites/clas.osu.edu/files/Tuck%20and%20Yang%202012%20Decolonization%20is%20not%20a%20metaphor.pdf

Universal Declaration of Human Rights, 1948 [online]. Dec. 8, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). Available from: https://www.un.org/en/about-us/universal-declaration-of-human-rights [Accessed 4 August 2022].

Vergès, F., 2021. *No todas las feministas son blancas* [online]. Santander: La Vorágine. Available from: https://lavoragine.net/wp-content/uploads/2022/01/no-todas-las-feministas-son-blancas-2.pdf [Accessed 4 August 2022].

Waswo, R., 1996. The Formation of Natural Law to Justify Colonialism, 1539-1689. *New Literary History*, (27)4, 743-759.

Wolkmer, C., 2017. *Teoria crítica del derecho desde América Latina.* Ciudad de México: Akal.

Wynter, S., 2003, Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation--An Argument. *CR: The New Centennial Review* [online], 3(3), 257-337. Available from: https://doi.org/10.1353/ncr.2004.0015 [Accessed 4 August 2022].