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APPROACHING EXTINCTION

(An Encounter with Alterity in Private International Law)*

The following reflection is designed as a contribution to the emerging field of Earth jurisprudence. It explores an avenue opened – perhaps unexpectedly – by private international law, seen here as an invitation extended towards the “law of the other”. Thus, various methodologies that have been employed over time to give expression, in legal terms, to varying degrees of hospitality in the encounter with cultural alterity. The ethical thread that runs through this narrative is that the imperative to give room to differing viewpoints, institutions and practices between human societies is indissociable from an injunction to protect distinct forms of natural life. Attentive to contemporary calls to decolonialise private international law, it draws its inspiration from the ontological turn in contemporary anthropology, in which the nature/culture divide is seen as the most unfortunate invention of the Moderns. In this vein, we are reminded of the existence of alternative legalities governing indigenous communities formerly rejected as primitive or uncivilised, in which there has been no such split between nature and society. However, in order to respond to the various possible objections that always attend the celebration of alterity – legal orientalism, exoticisation, or indeed cultural appropriation –, the reflection below turns back to the Western philosophical tradition and reclaims, on the terms of the law, the dual argument of responsibility and hospitality in respect of the Other.

The following reflection, based on a section of my book, *Law’s Ultimate Frontier* (2024)¹, is designed as a contribution to the emerging field of Earth jurisprudence². In the quest of a regenerative, or ecocentric, law and political ecology, it explores an avenue opened – perhaps unexpectedly – by private international legal studies, seen as the site of hospitality extended to the “law of the other”. Indeed, various methodologies have been deployed over time to give expression, in legal terms, to varying degrees of openness in respect of alterity. The ethical thread that runs through this narrative is that the imperative to give room to cultural difference between human societies is indissociable from an injunction to protect distinct forms of natural life. The plight of biodiversity on the verge of extinction is at stake here, as is the possibility of containing warfare, violence and poverty.

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¹ *Law’s Ultimate Frontier: Towards an Ecological Jurisprudence*, Hart, 2023.

² See for example, P. Burdon, *Earth Jurisprudence. Private Property and the Environment*, Routledge, 2015; C. Byrne, «Earth Jurisprudence in Africa». *Revista Catalana de Dret Ambiental*, [en línia], 2022, Vol. 13, Núm. 1, <https://raco.cat>.

Here, inspiration for an urgently needed renewal of critical legal thought can be found in the ontological turn in contemporary anthropology, in which the nature/culture divide is seen as the most unfortunate invention of the Moderns³. In this vein, we are reminded of the existence of alternative legalities, practiced by indigenous communities formerly rejected as primitive or uncivilised, in which there has been no such split between nature and society. In order to respond to the various possible objections that always attend the celebration of alterity – legal orientalism, exoticisation, or indeed cultural appropriation –, the reflection below turns back to the Western philosophical tradition and reclaims, on the terms of the law, the dual argument of responsibility and hospitality in our encounter with the other.

In this respect, eco-phenomenology – that is, a philosophical move that draws on the resources of phenomenology to express our deepening concern for the natural world – is emerging currently as an antidote to the senselessness of our ways of inhabiting the Earth. Our modern, jurisdictional and neoliberal schemes have severed subjects (our subjectivities) from their past and their surroundings, reinforced hierarchies within humanity, emptied space and instrumental time, and rendered other forms of life invisible. We have denied alterity, neglected the face of the other⁴. Initially a salutary reaction against religious obscurantism or teleological determinism, the cartesian scission of mind and body (and the avatars of the same pair: society and environment, subject and object), was gradually co-opted into the economised worldview of the “capitalocene”⁵. This is why modernity’s model of legality – the liberal rule of law, along with rights, tolerance and even new subjects – is insufficient to counteract the forces of obscurantism that distort the very values of planetary responsibility and the various pacified forms of *vivre-ensemble*, or *buen vivir* in which many of us earth-dwellers⁶ think we believe.

³ Ph. Descola, *Par delà nature et culture*, Gallimard, Folio, 2005; B. Latour, *Enquête sur les modes d'existence. Une anthropologie des modernes*, La Découverte, 2012; *Politics of Nature*, Harvard University Press, Cambridge, Mass 2004.; “Composing the New Body Politic from Bits and Pieces”, in Latour, B, Simon Schaffer, S., Gagliardi, P. (ed), *A Book of the Body Politic. Connecting Biology, Politics and Social Theory*, San Giorgio Dialogue 2017 (ed. Cini Fondazione).

⁴ Levinas’ phenomenological account of the face-to-face relation that entails an inescapable and infinite responsibility for the other (*Totalité et infini* (1961) (or *Totality and Infinity*, 1969), then *Autrement qu’être* (1974) (or *Otherwise than Being*, 1981). See R. Bernasconi, V° Levinas, *Emmanuel (1906–95)*, Routledge Encyclopedia of Philosophy 1998, <https://www.rep.routledge.com/articles/biographical/levinas-emmanuel-1906-95/v-1>; “Dialogue with Emmanuel Levinas,” in *Face to Face with Levinas*, edited by Richard A. Cohen (State University of New York Press); Corinne Pelluchon, *Pour comprendre Levinas. Un philosophe pour notre temps*, Le Seuil, coll. « La couleur des idées », 2020. For the purposes of this book, it is significant that, as Bernasconi notes « in analyses that stretch phenomenology to its limits and beyond », Levinas finds « alterity within the self ». The extreme version of this neglect of alterity (of which colonisation and various forms of servitude are the expressions, as seen above) is the fascist denial of the other in the form of a belief in the organic communion of (faceless) individuals: on the shadow cast by hitlerian biologism on Levinas’ thought and the difference between such doctrine and a phenomenology that sees the body as the site of alterity, intersubjectivity and therefore of ethics, see C. Pelluchon, *Pour comprendre Levinas*, p. 163.

⁵ J. Moore, *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism*, Oakland, PM Press, 2016.

⁶ Or “terriens” (B. Latour, *Où Atterrir? op. cit.*).

A possible avenue, then is to open our legal consciousness to the alternative possibilities of terrestrial being (corporeity) and inhabiting (dwelling-place or demeure) offered under the archè of the Western tradition itself, by the return of phenomenology as an ecological ethic⁷. This means seeing our common phenomenological experience of being on earth as the seat of an equally shared solidarity with all other forms of life, similarly struggling for survival on our planet's thin crust, the biosphere or "crisis zone"⁸. The legally elusive body – gendered, finite, somatic, bare⁹ – is a cardinal motor of this move¹⁰. *Habeas corpus*!¹¹ Eco-phenomenology, then, expresses in philosophical terms a resistance to the economisation of the world. It resonates potently within contemporary feminist theory as "eco-feminism"¹². An analogous turn is visible throughout an array of disciplines, including the "earth sciences", where our bodily existence is emphatically "terrestrial"¹³ and non dissociable from its "holobiont" or the myriad forms of life that are both inside and outside of us. Paradoxically, a recent revival of "the humanities" (political, legal, digital...)¹⁴ attempts in this vein to retrieve what is

⁷ We owe it to Husserl's phenomenology to have replaced the conventional idea of truth by that of horizon (C. Pelluchon *op. cit.*, p. 37). It postulates that reality is not an object (or an environment) external to the subject, but is perceived or experienced through consciousness. In revisiting the process through which a phenomenon is given to our consciousness, the project of phenomenology is to make visible a horizon of meaning that is generally obstructed by our habits of thought, preconceptions and prejudices.

⁸ B. Latour *ibid.*, recalling that our planetary biosphere is a thin crust where the struggle for life takes place.

⁹ As in bare life, the subject of sovereignty: G. Agamben, *Homo Sacer : Sovereign Power and Bare Life*, Meridian : Crossing Aesthetics, Stanford University Press, 1998.

¹⁰ The current turn to phenomenology accompanies or signals a return of vulnerable bodies or corporeality and their place on earth. Levinas relies precisely on this phenomenological insight in his reflection on alterity and transcendence, but with the further twist that the other is never (completely) accessible to my consciousness.

¹¹ On *habeas corpus* as a legal defence of bare life (of aliens detained as enemy combatants outside U.S. territory) see *Boumediene v. Bush*, 553 U.S. 723 (2008), deciding on a bare majority that Guantanamo Bay detainees were entitled to the writ of *habeas corpus* (protected in Article I, Section 9 of the U.S. Constitution).

¹² The return to or the body is a feature of (eco)feminist thought, that brings together both the political economy and political ecology at various junctures. At risk of oversimplification or reductiveness, we can recall several of these entwined strands, already mentioned above, that bring back the body into legal consciousness at the same time as an increased attention to the ecology. Firstly, then, various strands of feminist theory revisit the body in legal terms, tracking the ways in which social and legal imaginaries take "shape". In feminist (post)colonial legal studies, a further focus of various contemporary strains is the solidarity between the social reproductive order, the political order of empire and the economic order of extractive capital). In more specifically eco-feminist varieties, Donna Haraway's reflection on the (female) body as cyborg (*Simians, Cyborgs, and Women: The Reinvention of Nature*, 1991, republished by Routledge 2015) is apt to describe ("modern") slavery in global value chains. Indeed, innumerable other examples, of which the most obvious is international networks of prostitution, support Haraway's contention that the disregard for human – and particularly subaltern – life goes hand in hand with environmental devastation. We are reminded once more of the necessary parallelism of our attitudes to self, humanity and other forms of non sentient nature, that can and have all been subject to coloniality in different ways.

¹³ On terrestriality, see in addition to B. Latour (*Où atterrir*), H. Lindahl, *op. cit.*, p. 28 et s.

¹⁴ From the perspective of law, Judith Surkis's study of the sexualised imaginaries underlying French colonial sovereignty (encountered above) is an excellent illustration of this new focus of the new "political and juridical" humanities. The key here lies in the metaphysics of metaphor. It is supplied

left of “humanity” not only as an ethical virtue, but also as a broader vision of our “body politics”¹⁵.

Legality, as we know, was historically instrumental in the very foundation of the category of modern personhood as opposed to that of things (subject to property). This led, as we have also seen, to modernity’s forgetfulness of the body or materiality¹⁶, and, in respect of the ecology, to the ever-widening gap between self and environment. Moreover, law’s abstract assumptions about personhood claimed a universal validity, to the detriment of the world’s non modern (minor, residual, primitive) epistemologies¹⁷. One sign however that such assumptions are being shaken – whether by the development of new technologies (enhanced humanity); the decline of soul-based religion; biopolitics; feminism; racial politics; etc – is that the body is reemerging and reclaiming its legal place between persons and things, subject and object, self and environment¹⁸.

This return of the repressed body¹⁹ within the law is singularly visible on its private international front, where conflicts arise from diverse and ever moving cultural understandings of the body and its parts, reproduction, parentality, the definition of life and the meaning of death²⁰. Reproduction and surrogacy, marriage and sexuality, migration and corpses, burials and religious rites, all give rise to very variable divides between the sacred and the profane, tabous and socially accepted customs, shame and dignity, the visible and the invisible, and the very distinction between life and death. In other words, even if these questions surface before the courts in very technical guises²¹, it is here that the encounter with absolute alterity takes place in legal form. Moreover, once again, we must keep in mind that there is a necessary solidarity between the body of the human other and the organisms that compose it and contribute to its life and survival (holobiont); between humanity and nature; between individual psyche and collective consciousness; between self and other.

by Eric Santner, observing the somatic effects of the migration of sovereignty from the christic incarnation in the royal body to the body politic of the people (*The Royal Remains – The People’s Two Bodies and the Endgames of Sovereignty*, Chicago Univ. Press, 2011).

¹⁵ B. Latour et al, *The Body Politic*, *op. cit.*

¹⁶ The bodily dimension of life was long excluded from the domain of knowledge (especially legal and philosophical, or meta-physical) that has formed our modern consciousness. This did not prevent (bio)politics from revolving (invisibly) around the control of bodies.

¹⁷ On the modern conceit of universality, see below.

¹⁸ See R. Esposito, *Persons and Things: From the Body’s Point of View (Theory Redux)* (English Edition), Polity Press, 2015, observing that the body has long oscillated between person thing without finding a place. However, at the same time, technological objects appear as a form of (subjective) life, and not merely a servile function.

¹⁹ « Le retour de ce qui a été refoulé constitue l’histoire souterraine et taboue de la civilisation et l’exploration de cette histoire ne révèle pas seulement le secret de l’individu mais aussi de la civilisation. » (H. Marcuse, *Éros et Civilisation*, Paris, Le Seuil, 1955 (reprint 1971) p. 23.). Similarly, E. Santner (*op. cit.*) has explored the theme of the somatic return of the repressed in the individual and collective psyche, in particular in respect of the sublime royal or imperial body comes back to haunt the (somatic) body politic of the sovereign people or (see P.G. Monateri, *op. cit.*) the elusive corporate bodies of contemporary capitalism.

²⁰ The conflicted body politics of the conflict of laws caused by international surrogacy agreements (often associated with same-sex parentality) is one clear illustration of gender trouble (J. Butler) and the links between sovereignty and sexuality (J. Surkis), evoked above.

²¹ This is of course too wide an area to be able to provide concrete examples. But the latter occupy a large amount of space in standard text books and casebooks on private international law.

The question is how to revisit and draw from these experiences of legal “body conflicts”? Here then is the cue to turn to Emmanuel Levinas’ phenomenological approach to the “face of the other”²². The “face” of the other is to be understood, in phenomenological terms, as the other’s singular, vulnerable corporeity. Importantly, this phenomenological apprehension of the other (or “others”, *autrui* rather than *autre*) is ethical and not cognitive. Here, the essential point is that our encounter with alterity thus understood opens a horizon from which flows our ethical responsibility, our obligation to respond. Levinas describes this horizon, made visible by the presence of the other, as “split” because the other is beyond representation²³. The argument developed below is that this depthless vista opened by alterity resonates powerfully, in legal terms, within the shadow ethos of the conflict of laws. In this respect, according to Levinas and in dialogue with Jacques Derrida’s own account of hospitality (to which we shall also return²⁴), our responsibility is to welcome in the other in on their own terms, or “in their own language and all that it entails”. The latter reference undoubtedly includes the “law of the other”, foreign law²⁵. Clearly, the injunction to defer to the law of the other entails a radical decentering, a full reversal of the traditional relationship between host and guest. In this substitution resides the deep meaning of private international law’s residual jurisprudence.

As suggested above, moreover, there is a powerful ecological potential in this understanding of our “split horizon”. The responsibility that flows from the encounter with alterity extends potentially beyond the sole human other to englobe animal life and indeed the entire natural world in all its vulnerable corporeality on Earth’s fragile crust. As Corinne Pelluchon has suggested, there is ample room in Levinas’ thought for an eco-phenomenological reading of the encounter with radically other forms of life²⁶. In terms of the law, the ethical idea of responsibility obviously resonates strongly with various (public and private, comparative) legal incarnations of duties of care, obligations towards others, and sanctions of neglect. However, what I have called the “shadow version” of the conflict of laws²⁷ is a far more promising place to look for more significant echoes of levinassian responsibility. As we shall now see, it displays deeper traces of the aporetic incommensurability of alterity (§ 1) and its correlative ethical imperative to make way for the law of the other (§ 2). It allows us to envisage the substance of law’s last judgment in the shadow of extinction (§ 3).

²² This is an important break with Husserl. See C. Pelluchon *Les Lumières à l’Age du Vivant*, Paris, Le Seuil, 2021, on the important point that the face or phenomenality of the other is to be understood on an ethical register (the other is in excess of representation) and most emphatically not riveted to the (modern) biological body, meaning blood, race or heredity (p. 162).

²³ “L’horizon se fissure parce que *autrui* est en excès sur sa manifestation” (C. Pelluchon, *op. cit.*, p. 39).

²⁴ Derrida J., *Hospitalité*, vol 1, *Séminaire 1995-96*, Paris Seuil, Bibliothèque Derrida, 2021; *De l’hospitalité* (dialogue with Anne Dufourmentelle), Calmann-Levy, 1997.

²⁵ Indeed, Derrida evokes, literally, the existence of a “conflict of laws” (between natural and positive law) at the very core of hospitality as seen above.

²⁶ C. Pelluchon, *op. cit.*, p. 95 et s.

²⁷ In a nutshell, this shadow version, that has always haunted official methodologies, consists in applying foreign law on its own terms, that is, without the mediation of one’s (the forum’s) own legal categories.