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The right to reclaim lost bodies: recovering evidence, memory and land in law and literature

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ABSTRACT

This paper argues for the right to reclaim lost bodies, understood through three interrelated dimensions: recovering evidence of destroyed bodies, rediscovering memories of Indigenous peoples erased from history and culture and resisting legal fictions that deny original land rights. Together, these dimensions propose a renewed human rights framework capable of confronting the enduring consequences of colonialism, including shaping national identities, dispossessing legal subjects and destroying bodies. This argument is developed through literature and legal cases. It begins with the disappearance of the body of Juan de Moraes, an eleven-year-old boy killed by police in Rio de Janeiro in 2011; examines the erasure of Indigenous presence in Brazilian cultural history, including in the work of poet Gonçalves Dias and culminates in the contemporary legal struggle over the original land rights of the Xokleng nation. The paper proposes that reclaiming lost bodies is a form of justice rooted in hope, hospitality and memory. Drawing on alternative human rights methodologies inspired by Costas Douzinas, Ronnie Warrington, Edward Said, and recent scholarship on memory, alterity, and self-determination, it explores how justice might be delivered beyond legal limits, across aesthetic and ethical boundaries, in the oldest human act of returning bodies to the living.

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Introduction

Colonialism has shaped the world we live in and built up unequal and unjust capitalist societies. In this paper, I discuss the relationship between colonialism and capitalism by examining how these historical and continuous systems have been imposed by legal and aesthetic strategies of memory building, which include creating subaltern legal subjects, stealing indigenous lands and destroying bodies. To confront these stratagems, I wish to claim *the right to reclaim lost bodies*. This right has three dimensions. It consists of recovering evidence of destroyed bodies; rediscovering memories of indigenous people that were erased from history and culture; and resisting legal fictions that attempt to dismiss original land rights. Claiming this right might help overcome foundational

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injustices of human rights and rethink the relationship between justice and ethics. It might also shed light on the results of abstract jurisprudence in producing liberal conceptions of human rights that are disembodied – and often devoid of relevance for those who suffer most.

Douzinas' and Warrington argue that justice must be associated with *hope* to achieve a just society, and that this association would be the best response to abstract claims of neutral justice produced by *liberal jurisprudence* – a category that could include scholarship as diverse as John Rawls, Ronald Dworkin and Herbert Hart (Douzinas & Warrington, 1994). Douzinas and Warrington have suggested that this hope can only be achieved through an emphasis on *alterity*. They have argued that a just society presupposes our capacity to reject the world as it is and to develop hope – a hope that some agency might intervene and deliver justice to this society. Moreover, looking and caring for the other is the way forward to deliver justice beyond the limits of the law, transgressing the borders of neoliberal aesthetics and authority (Douzinas & Warrington, 1994). To follow their steps and take their theory further, I will argue that this *hope* has to take the material form of *hospitality*, as proposed by Edward Said (2003). In critical legal theory, the paradoxical relation between gifts of friendship, and claims of superiority (Douzinas, 2013) has been traced in parallels with the etymological relation between *hospitality* and *hostility* – as pointed out by Jacques Derrida (2005).

To find hope and hospitality in justice after the dismissal of Western ethics in modern legal theory, I will look for theological archetypes of Christian texts and philosophical forms of Greek literature. This is a strategy to deconstruct Western conceptions of law and human rights using their own language and culture (Valverde, 1999) – one that is embodied in Natural Law and Western philosophical ideas (Fitzpatrick, 2013). This road will eventually take us through the emergence of modern state bureaucracy, and the exclusion of social and economic justice from contemporary conceptions of human rights. *The right to reclaim lost bodies* will help us deconstruct and reclaim human rights as a secularised conception of justice that emerges from the ancient Right to Bury the Dead.

The alternative method developed in this paper is to take law and literature as equally important for human rights research (Cadava, 1995; Ginzburg, 2013).[1] Both are constituted by texts that employ fiction to build conscience and, only secondarily, reality. Just like Public Law, which can be understood as a 'trope,' (Loughlin, 2000) I want to look into *human rights jurisprudence* as a historical, ancient narrative, composed of poetry, political discourse, religious rituals, national assemblies, archetypes and charters. But I also want to propose that human rights might be the only substantive idea of justice that we currently have. In taking this route, this paper will be able to trace back neoliberal social inequality to colonial practices of war, slavery and land appropriation. This will help to produce a truly intersectional approach to human rights, one that could account for the contemporary consequences of African slavery, Whitewashing of mixed-raced people, and the stealing of indigenous land. What I will not do in this paper is dwell on the debate between the decolonial and the postcolonial, colonialism and dependence theory, and nationalism and internationalism (Barreto, 2018).[2]

Instead of starting with a conceptual and abstract definition of justice, I will do what lawyers usually do: start with cases, something that challenged courts, judges and police officers in real life.[3] I will first look into the disappearance of the body of Juan de Moraes,

an eleven-year old boy killed by police officers in 2011 in Rio de Janeiro. Secondly, I will investigate the whitening of Gonçalves Dias, Brazilian greatest national poet whose indigenous mother's origin was erased from literature and history. Thirdly, I will discuss the current legal procedure against the original land rights of the Xokleng nation, and the *Time Frame* thesis raised before the Brazilian Federal Supreme Court (STF). What these cases have in common is their entanglement in a colonial and neoliberal trope, one that is foundational, and capable of institutionalising subjects and producing a subaltern mode of subjectivity (Mirzoeff, 2011). A trope is a special kind of narrative, which can be illustrated, and can be modernised, and yet maintain its initial characteristics. And this trope, I argue, has been developed in the disappearance of bodies, erasing of memory and dispossession of land.

In contrast to these cases, and the colonial and neoliberal trope they reveal – and are part of – I want to reflect on the deliverance of bodies as a form of justice. To claim and deliver back lost bodies might be one of the oldest forms of justice deliverance in Western history. Was justice done when the Trojan King Priam approached Achilles to take back his son's body? Is it possible to do justice to Juan? *The right to reclaim lost bodies* is an attempt to bridge the distances between the aesthetics and ethics of justice, which could help us find answers to these questions.

The right to reclaim lost bodies (1): against the destruction of evidence

In July 2011 two police officers invaded a slum during the evening. This was a poor community in the outskirts of Rio de Janeiro. They were supposedly searching for a thief who was reported as living in that area. However, once they invaded the slum, they did what police officers historically do in the region, since colonial times: they opened fire, unrestrictedly, against people living in the area. Those who were shot had committed no crime, except living in the same area and having the same skin colour as the burglar they were looking for. But after shooting an 18-year-old boy and a 15-year-old adolescent, they realised they had gone too far: they had also killed an 11-year-old boy.

We do not know, to this day, if Juan de Moraes died at the scene. What we know is that the 18-year-old boy lost a leg, but survived, as well as the 15-year-old teenager. They saw the police officers put Juan's body into the back of their car. And both joined the Witness Protection programme that I used to coordinate in Rio de Janeiro back then (De Matos & Sepúlveda, 2016). This only happened, I need to say, after these kids were publicly accused by the same police officers of selling drugs and shooting back at them – something that further police investigation found out to be a baseless accusation. The police officers reported engaging in a shoot-out with several people, but there were absolutely no signs, no evidence and no witnesses that could confirm that this had happened. But Juan's body disappeared. For 16 days, no one knew where his body was.

Juan's body was later found in a pig shed. Those police officers tried to get rid of the boy's body by taking it to a nearby city, believing that the starved pigs would make all evidence of their evil deeds disappear. But the pigs did not complete their job. After several DNA tests, the scientific police – a rare species of police officers in the larger part of the world – confirmed that the human remains found in the area were what was left of Juan's body. This finding was only possible because of huge public pressure

on the State authorities. There were several human rights movements and MPs who called for solutions to the case. The public pressure that started as a small demonstration led by Juan's parents in their neighbourhood resonated in two strategic places: the Rio de Janeiro State Council and the Church-based NGO, *Rio de Paz* (Guerreiro, 2016). These two places echoed the desperate cries of Juan's parents for justice, in a way that could not be ignored.

On the 7th of July 2011, I organised the ceremony that buried Juan (RJTV, 2011). Both police officers accused of his killing were arrested. But I never really recovered from this injustice. I have tried to exorcise these memories, but I could never really turn this page (De Matos, 2020). Nothing seems to be enough to heal me from this damage – on which, I need to say, I am probably among those who suffered the least. I find this case to be a brutal injustice, but not only so: I think what happened in that small slum in the outskirts of Rio, might shed some light on our understanding of justice. There are at least two issues that haunt me in this case that need some reflection, that we shall now turn to.

The first thing that strikes me when dealing with such a case is feeling powerless to face such pain. Justice, in our current understanding of the term, does not seem to be able to heal our pain. Modern justice is currently considered something to be administered legally and separated from ethics. It does not seem to have the power to heal wounds. It is more likely that in dealing with the legal system, justice will hurt people further rather than heal them. Perhaps this is why justice does not have a face, nor looks at people: the image of justice that emerged after liberalism and the Enlightened revolutions, keeps its eyes shut so it won't see the damage it does (Construindo Memória: Seminários Direito e Cinema, 2009).

The second issue that emerges from this case, is that in reclaiming lost bodies, we might be dealing with a foundational aspect of so-called Western civilisation. The right to bury our dead, the right to cry for those we lost, is probably one of the first human feelings about injustice, the injustice that we all feel when facing death – or the death of those we love. Death supposedly leaves us with bodies to cry over. But, as the legal case of Juan's disappearance reveals, even this right, the right to cry for those we lost, cannot be something we take for granted. And history as we know it – which for most of the time has been understood as the history of Western societies – might have actually been developed in parallel with claims to this same right: *the right to reclaim lost bodies*.

In the Trojan War, told in one of the oldest books written in Europe, we see perhaps for the first time this kind of pain, when King Priam loses his first-born son (Homer, 1887). Prince Hector is killed by the warrior Achilles who drags away Hector's body and keeps it for himself. The pain that King Priam felt is perhaps similar to the one that afflicted Juan's parents. And while King Priam went directly to Achilles to reclaim his son's body, Juan's parents organised a demonstration in the slum where they lived, claiming the exact same right: the right to bury their dead (Eilbaum & Medeiros, 2016). But this right is often denied to those that are not even recognised as enemies, or those who are not considered as human beings (Agamben, 1998; Douzinas, 2023). When there is no reciprocity in the image of those who are opposed, or engaged in war, this ancient right has been denied.

This is usually the case in history when vengeance is executed without any limits. It happened when all-out war was unleashed and people fought each other without

recognising themselves in the pain they inflicted upon their enemies. This is what the Greeks did to the Trojans after they mischievously got inside the city: they murdered and exterminated all citizens, servants and slaves in Troy, without any consideration of their deeds, responsibility or innocence. This practice, which we now have a name for – *genocide* (Convention on the Prevention and Punishment of the Crime of Genocide, 1948), is something profoundly embedded in human history, especially in colonial times. Although genocide is a fairly new legal term, something that was born alongside our current notion of human rights, the practice it represents has already been described in the Old Testament and in other sacred texts.

However displaced in time and space these practices might seem to be, in places like Brazil, India, South Africa and the United States of America, we often hear about targeted killings against minorities, of actions that remind us of genocides. These are often violent practices that can take many forms: mass murder, lynching, public executions, and the burning of people and buildings (Da Silva, 2001). They all follow traces of recent colonialism, when the colonisers exercised unlimited violence against certain ethnic groups. But I want to follow the traces of injustice here as a police investigator would do, when following a lead at a crime scene (Ginzburg, 2013). I believe the patterns that are foundational to this kind of injustice – some of which we see in Juan's case – are those that involve a degree of fake evidence, biased trials, execution, torture, and the destruction or disappearance of bodies.

The founding case of what we now call genocide – and which partially defines our current understanding of human rights – is possibly what happened when the Nazi State targeted its own citizens, a minority of Germans who were Jews (Moyn, 2010). The Holocaust that happened in Nazi-Germany was the leading case for the emergence of the concept of genocide and its supposed antidote: the notion of human rights as we have it today. But important as these definitions might be historically and legally; two issues must be noted. The first is that these conceptions do not apply for violations of human rights that are regularly perpetrated by the state or state agents on the national level. They also do not account for most colonial state actions. In reality the concept of genocide is repeatedly denied application for institutional practices that follow legal procedures – such as police violence against minorities on daily basis (BBC News, 2021). Secondly, it is necessary to note that these are negative conceptions of justice. As Heller argues, these conceptions do not help define what justice is but actually define what it is not (Heller, 1998). They conceptualise injustice instead, and there might be good reason for doing so.

Perhaps there is another major foundation to these kinds of injustice that determines *the right to reclaim lost bodies*. Most definitions of justice and injustice available today have some influence from Christian theology, which overlaps with Natural Law (Ellul, 1969), Roman Law (Fitzpatrick, 2013) and Ethics in many aspects. Perhaps the biggest foundation of injustice in Western societies is the Crucifixion: the negative theological incident in which one could see an absolute expression of injustice. The Crucifixion of Christ defines a pattern we still see today in many parts of the world: an innocent is arrested, subject to a biased trial (or no trial at all), tortured, executed, and her or his body disappears. This is perhaps the Western foundation of injustice. And here we see the first challenge to a legal conception of law that could include ethics. In the Christian narrative, the only hope for their theological perspective is *resurrection*. There is no living ethics for Christians without hope for resurrection and recovery of the body.[4]

Losing the body, in Walter Benjamin's words, is also losing the memory of history (Benjamin, 1999). Recovering from this loss is an act of resistance to claim memory over tradition: an act not to conform to defeat when the victory of the enemy will threaten the very existence of the dead (Benjamin, 1999). But secularly speaking, *the right to reclaim lost bodies* is fundamental to building up an ethics of law and human rights that does not abandon justice. It occupies a position in historical materialism where the right to memory is associated with the moment of danger – in a Benjaminian sense. Perhaps the right to the lost body is the most fundamental right – or the real foundation of human rights that we could find today. But there are other ways in which bodies might disappear, and could possibly be reclaimed. And we shall turn to them now.

The right to reclaim lost bodies (2): against the erasing of memory

Another known colonial strategy to conquer has been that of erasing memories. Just like the violent practice of destroying evidence of a crime, which includes disappearing with bodies, and burning religious or cultural places and documents, many cruel and creative practices have been developed to erase the memory of those who were colonised or enslaved. These have been useful in many different colonial projects, such as in the dispersion of African slaves who spoke the same language into different colonies by Portuguese slave traders (Saes, 2020); the assimilation of mix-race children according to rules designed by the Spanish colonisers (Berrueco, 2009); or the complete segregation of natives from their sacred places and original land in South Africa (Maylam, 2017). These strategies have been developed for two main reasons. The first, relates to the necessity of erasing a particular ethnic identity – in contemporary terms, this is to make it impossible for a people to achieve what we now call *self-determination* (Xanthaki, 2007). When the very existence of language or traditions threatened the colonial or national project, those whose culture and existence were considered dangerous have been subjected to genocidal practices (Neuenschwander Magalhães, 2021). The second reason is to take away power and property from particular groups or subjects. This aims at conditioning and controlling the social and economic position of the colonial subject in the new capitalist societies that were created after independence. When conquest is almost complete, apartheid practices and/or assimilation of subaltern subjects are implemented – usually in a way that would make it difficult or impossible for those who suffered them to gain access to power, property and even to dignity (Sihlangu & Odeku, 2021).

I want to focus on a historical case that happened in literature, as an example of this practice. This is the erasing of the indigenous origins of Brazil's most famous national poet and Patron of the Brazilian Academy of Writers (ABL), Golçalves Dias. It is a known fact that Dias was the son of a Portuguese man with a woman whose origins are not clear (Thompson, 1945). A significant part of his official biographers refers to his mother as being of 'mixed race.' (Academia Brasileira de Letras, 2024) However, there are also older publications where she is described as 'indigenous.' (Amoroso, n.d.) But what is striking is that, even if she was to be considered as indigenous (or native-Brazilian), her actual origins would still have been erased from official history – as it still happens to so many Brazilians. And the erasure of her memory, or the memory of her people, might have been a condition of possibility for turning Dias' work into 'one of the two authors that imprinted a national character into Brazilian

literature.' (Academia Brasileira de Letras, 2024) This was certainly accomplished more by the literary criticism at the time, rather than by the efforts of Dias himself, whose poetry certainly reflects this loss of memory, and the loss of his mother.

What we do know about his mother is that she was married to his father until their union was considered as not valid, illegal. In some accounts she worked for him before becoming his wife (Couto, 2021). When Dias was six years old, his father abandoned her, took Dias with him and married – or joined (Amoroso, n.d.) – a wealthy Portuguese woman. What is questionable, however, is which of the marriages were legal. Dias was further prohibited from meeting his biological mother, and only saw her again when he was fifteen. According to more recent and local historiography, his mother was expelled from her own house and died in poverty (Couto, 2021). His personal story of losing his mother and the memory of his origins is an embodied history that has repeated itself many times, and affected millions of Brazilians. It is his European stepmother who financially supported his studies in Coimbra, where he would write his most famous poem.

Gonçalves Dias is certainly more famous for his *Song of Exile*, 'Canção do Exílio,' a poem that inspired Brazil´s national anthem. It is recognised as 'by far the most popular poem of all time in Brazil.' (Enslen, 2022). Most of his work includes poems that are considered to contribute to literary movements that incorporated 'Indianism' as part of 'National Romanticism.' However, I propose that this reading of his work ignores the forced separation from his mother and the erasing of his Indigenous origins. And I want to focus on two of his works that might challenge this assumption. Dias' life and work can probably be interpreted, psychoanalytically, as a response to this loss – losing the body of his mother and the memory of her native people.

It is significant to note that in 1858, Dias published the 'Diccionario da lingua Tupy, chamada Lingua Geral dos indigenas do Brazil,' (Dias, 1970) one of the first dictionaries that translated that important indigenous language, Tupi, to Portuguese. He also significantly composed his most epic poem, *I-Juca-Pirama*, recounting the violent wars among the Tupi and Tupinambá people, who were once the two largest indigenous nations in the land and now are a very small minority in Brazil:

My death song, hear,
Warriors, I plea:
A child of the forests,
The forests raised me;
Warriors, descended
From the Tupi. (Amoroso, n.d.)

This poem is about the war cry of a Tupi warrior who was captured by his enemies, who are also indigenous people. When an important warrior was captured by his enemies, he could be submitted to an anthropophagic ritual: his enemies would eat his flesh and gain his strength. It was considered an honour – only the most powerful captives who were about to die would be eaten, after weeks of ritual and debate. Yet, the main character of this poem stops the ritual with an appeal. He speaks up and shares with his enemies that his father was blind and he was the only person who could take care of his father and guarantee the old-man's survival in the jungle. *I-Juca-Pirama* then turns out to be a poem about a son who defends the life of his father, who needs to be

cared for. Mostly important for the aims of this paper, this poem seems to be another piece of strong evidence that reveals Gonçalves Dias' investment in a native culture that was taken from him. His entrepreneurship in the Tupi language might be interpreted as a search for lost memories and belonging, a search for an identity – one that was erased and prohibited – and for his mother's people's.

What I found really interesting in this case, is the fact that the erasing of Dias' indigenous origins has been so profound that its absence has not been noted enough – not even in the specialist literature consulted. His writings might have played the role that 'bereavement objects' (David, 2022) play in the memory building of traumatic absences – but this has been completely overlooked until now. And perhaps, this disappearance of his mother's indigenous origins was precisely the condition for him to become one of Brazil's most important national poets. Perhaps, the triumph of the colonial project after the independence war of 1822, was dependant not only on the disappearance of (the bodies of) indigenous people – who had by then faced unprecedented systematic extermination and displacement (Nascimento, 1980), but also on the erasing of their memory.

We have seen similar disappearances more recently in Brazil affecting both indigenous people and African-Brazilians – both in literature and in law-making (Lissovsky & De Matos, 2018). One such occasion happened when Abdias do Nascimento, the (supposedly) first African-Brazilian Senator to be elected in 1982, claimed that he was certainly not the first to be taking the seat: his predecessors had their pictures whitened in the hall of the Congress (Westin, 2021). It is no coincidence that Nascimento's greatest legal contribution as a member of parliament was the approval of a bill that extended to *Quilombolas* – African Brazilian's who freed themselves, resisted slavery and conquered land – the same original land rights that were granted to Indigenous people. As a politician who was also an academic, he justified this position in his own words:

> As Quilombismo searches for the best world for Africans in the Americas, it knows that such a struggle cannot be separated from the mutual liberation of the indigenous peoples of these lands, who are also victims of the racism and wanton destructiveness introduced and enforced by the European colonialists and their heirs. (Nascimento, 1980)

In fact, it might be possible to claim that even the modernising discourse of Brazil as a 'racial democracy' (Edmonds, 2007) that emerged in Brazilian social sciences in the 1930s, also worked – consciously and unconsciously – to erase the memory of Indigenous people and African-Brazilians (Da Silva, 1998). Even if the praise of 'mestiçagem' (the mixture of races) was important to depart from Brazil's scientific and biological racist tendencies in the early twentieth century (Costa, 2001), it was still a way to invent new racial categories that would contribute to erasing minorities ethnic origins and whitewashing their memory.

These facts help raise different questions on the birth of independent nation states after European colonialism. In the present case, one should ask: what legal arrangements make the distinction between Brazilians and Indigenous (Native-Brazilians) people? Are Brazilians the colonised or the coloniser? Are they the oppressed or the oppressor? (Freire & Macedo, 2018)[5] How many Brazilians actually know their indigenous origins? Indigenous people in Brazil usually call Brazilians who help their cause 'parentes' (relatives), as a way to acknowledge the lost or unknown origins of those who have lost

their language, culture and history. And this is an act of *hospitality* that might challenge the consequences of colonialism, and one that I want to turn to now.

Edward Said's work helps us identify at least one colonising act that can take place among the colonised, which might answer some of those questions. According to Said, the dispossession of a colonised people can reach a higher level when these people would lose not only their lands, but also their enemies. Said claims this is the case of Palestinians, who were exploited by all nations around them to such a level, that at some point, even their enemies were taken from them. Not only did most Arab nations not historically help Palestinians in their dire need, but they used Palestinian claims as a political pretext to develop their own international strategy. In doing so, they took away from Palestinians their enemy: the State of Israel, which was then invading their territory (International Court of Justice, 2023; Said, 1999).[6]

This perspective might perhaps shed light upon the deliberate acts of genocide and memory erasing that took place in Brazil, and are still important in shaping the relationship between Brazilians and their country's Indigenous people, as well as with African-Brazilians. Are Brazilians really the colonised who faced the Portuguese colonisers in their Independence war of 1822? (Bethell, 1985; Vieira-Souza & De Matos, 2021)[7] Or were these acts of war a process in which the descendants of the colonisers took the reins of a new country and even stole from the colonised their very enemies? Is this a process that ended long ago, or is it still ongoing? (Domingos Neto & Moreira, 2023) I am certainly not going to answer these questions and do not wish to undermine the importance of any independence process against colonial rule. But I believe Said's work might help us face colonialism and the regimes which descend from it – in whatever form they might take.

Said suggests that the best weapon to face colonialism is *humanism*. In his most famous work, he claims that all colonisers intend to historicise and determine, themselves, who are the colonised – and to build up the identity of those as dependent on the colonisers. To face this problem, he claims, it would be necessary to understand literature and art as human literature, and not as Western, Oriental, German or Brazilian literature, but as human art. This perspective would depend on *hospitality*, which Said defines as our capacity to recognise and host – as if we were offering them a place in our own house – different authors in their own place and time. This would be the condition to interpret authors on their own terms (Said, 2003).

Although Said's proposal here is mainly focused on literature, I wonder what its' consequences would be if these ideas were to be applied to our main topic here: *the right to reclaim lost bodies*. If we are to host people and their art in their own languages, terms and contexts, this certainly includes accepting their own interpretation of who they are. This might help to understand current developments in the *right to self-determination*, the *right to memory and reparation*, and to rethink its consequences for colonialism, human rights, and public law. Would this notion of hospitality help in resisting the process of erasing memories and establishing the colonisers' view of history and of its (previous) subjects? Said's proposition of hospitality in literature, if developed to its full force, might help resist what Paulo Freire's has denounced by observing education in Brazil: that sometimes the oppressed can only see the world in the way that is understood by the oppressor – and as such, is bound to repeat its practices and oppress others (Freire & Macedo, 2018). This is perhaps, what is necessary to consider in responding to the questions I have raised here before on who are the colonised and the coloniser in the Brazilian case.

In hosting the foreigner on their own terms, we might be building a bridge between the two paradigmatic shifts of constitutional hermeneutics in the twentieth century – that occurred post-1945 and later in post-1968 – which helped develop the current notion of human rights. In recognising and interpreting human beings on their own terms, we might be getting closer to a legal hermeneutics that is humanist and humanising. Hospitality, in the terms proposed by Said, might be key to opposing assimilation and racism. This is different from a cosmopolitan reading of the term that might be used to masquerading Western claims of moral superiority to the detriment of an idea of human rights focused on the oppressed (Douzinas, 2007). This change in the understanding of hospitality could influence constitutional courts and inform international human rights and public law beyond cosmopolitanism (Douzinas, 2000). Those are the institutions that can produce the legal and constitutional discourse that has protected minorities and resisted white supremacy – even when litigation has been taken as tactical, not strategical (Madlingozi, 2023). But legal experience shows these can never be taken for granted. We shall turn to this now.

The right to reclaim lost bodies (3): against the dispossession of lands

There is at least one other way in which bodies have disappeared in favour of the colonisers against the colonised. I refer here to the development of legal tricks that would fictionally erase the presence of indigenous peoples from their lands. Perhaps the most famous example of using legal fictions to take control of collective and individual lands during colonial rule was the doctrine of *Terra Nullius*, which was extensively used by the British Empire (Mabo v Queensland, 1992; Watson, 2002). But many other similar doctrines, which legally recognised vast amounts of natives' land as empty or not used, were developed all around the world to justify the dispossession of lands during and after colonialism. In the Portuguese – and later Brazilian – Empire, a recurrent legal concept that was repeatedly used to legitimize the conquest of Indigenous lands and later also to deny access to land to African-Brazilians (and European immigrants) was 'Terras Devolutas,' which is still recognised as a valid legal concept in the twenty-first century (República Federativa do Brasil, 1850).[8] However, I want to focus this section on the most recent legal trick perpetrated against Indigenous Land rights in Brazil, which is a striking example of the third way in which bodies have disappeared in Western societies and Modern States. *The right to reclaim lost bodies* is also a fundamental right to recover stolen lands.

The 'Time Frame' thesis was the central argument of *Extraordinary Appeal N. 1017365*, brought before the Brazilian Federal Supreme Court (STF) in 2021. This legal procedure revolved around land possession rights of the Xokleng nation to their traditional lands, from which they were expelled during the first decades of the twentieth century. Nevertheless, the STF decided, before deciding the case, that its own decision would have 'general repercussion' and impact all present and future cases concerning traditional indigenous lands occupied by non-Natives (RE 1017365, Número Único: 0000168-27.2009.4.04.7214 (STF), 2016). It would also impact current procedures of original title claims (APIB, 2021; Giraldes & De Matos, 2021). The argument revolved around art.231 of the Brazilian Federal Constitution, which is the main guarantee of Indigenous people's rights, since the return to democracy and the enactment of the

constitution in 1988. The article states that: 'Indians shall have their social organisation, customs, languages, creeds and traditions recognised, as well as their original rights to the lands they traditionally [occupied]' (CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL, 1988).

Contrary to this, the *Time Frame* thesis proposed the following legal fiction: that these original rights guaranteed in art.231 could only be considered legally valid and binding for lands that were occupied by Indigenous people after the enactment of the new Federal Constitution of 1988 or if the said lands were reclaimed before the courts before the 5th of October 1988. This was understood by jurists and academics as an attempt to subvert the very constitutional order, and to.

> erase the past of Indigenous people's (including the past that was imposed and demarcated by colonization), imposing a 'final solution' on them: instead of restitution (the demarcation of Indigenous land) for a violent loss (the stolen land), they were to be imposed a capitalist (land) market life style and the compulsory abandonment of their ancient ways and indissociable relation with their territory and particular life style. (Ruben & Juliana, 2021)

Fiction, as Giraldes and I have claimed before, is a narrative genre that is dear to most jurists – particularly to those associated with power and, in the present case, to those representing agrobusiness and landowners' capitalist interests. For this particular kind of legal fiction to have any chance of producing material consequences, not only bodies, but also a few important legal documents and historical facts needed to be erased from memory and history. Here it is important to note how the three aspects that constitute *the right to reclaim lost bodies* connect in the present case.

In Brazil, one of the main strategies available for Indigenous peoples to reclaim their original land rights is precisely to find and present evidence of bodies and memories – something usually achieved by recovering archaeological evidence, amongst other kinds of evidence. This has happened even in dense, urban and coastal areas, where European colonisation first arrived, but where it is still possible to find *Sambaquis* – ancient structures, built from seashells – that can be found all around the Brazilian Atlantic coast. Finding such places has been consistently proven as a successful strategy for indigenous land rights claims in Brazil (Figueiredo, 2012). Such has been the case when the *mbya* (Guarani) people successfully claimed part of the ancient Camboinhas beach in Niteroi, Rio de Janeiro (Domínguez & Luoma, 2020; Pissolato et al., 2012).

For indigenous original land rights claims, finding ancient burial sites is, perhaps, an action that fulfils the three aspects of *the right to reclaim lost bodies*. It involves finding evidence of bodies, recovering memory and culture, and reclaiming land possession. The *Time Frame* legal fiction, if it were to be accepted by STF, would endanger all three aspects, perpetrating and perpetuating the corresponding three crimes of colonialism and capitalism against these people's rights: destruction of bodies, erasing of memories and stealing of their original lands.

The dangers faced by STF in deciding this case were also three-fold. First, they would be legalising all the crimes and violence committed against indigenous people in Brazil by those who historically killed for land: Portuguese colonisers, Brazilian army, local police, farmers, miners, lumber companies, and local courts – and the combined forces of all these (Giraldes & De Matos, 2021). Secondly, they would be erasing the constitutional history of the country, which had previously provided for original land rights since the

Crown Statute of 1680; turned those rights into constitutional rights since 1934; and consolidated those rights under legal and cultural pluralism in Articles 231 and 232 in the current Federal Constitution of 1988 (Cunha, 2018; Luoma, 2023).[9] Finally, by deciding against the will of powerful landowners in agrobusiness, they would be challenging the majority of members of parliament in the Brazilian National Congress. In doing so, they would be putting to the test the *separation of powers*, one of the pillars of Western democracies, in its current form, after 1945: that the Judiciary, the 'least dangerous branch of power,' (Bickel, 2011) should have the final say in constitutional matters, especially for defending minorities and underrepresented groups against legislative and executive powers.

Initially, the Brazilian STF did the right thing. Nine of the Supreme Justices voted following Edson Fachin, who reported the case before the court and proposed the *entrenchment* of Indigenous People's constitutional rights. Only two members of the court – who were recently appointed by the Bolsonaro administration – voted against this position. However, cases like this can sometimes expose the foundational paradoxes that underline modern law and the modern state, challenging basic notions such as *Separation of Powers* and *Human Rights*. This is precisely such a case, and as a consequence, on the same day when STF finally formed a majority against the *Time Frame* thesis, the Brazilian Legislative Power (The National Congress) approved legislation to make the *Time Frame* thesis legal on the federal level.

Currently, there are two pieces of legislation which, according to The Articulation of Indigenous Peoples of Brazil (APIB), might jeopardise their victory in the Supreme Court and, in their own words, risk 'legalising indigenous genocide' (APIB, 2024). One such piece is Federal Law N. 14.701/2023, and another is a bill which proposes to amend the Brazilian Federal Constitution and insert the *Time Frame* thesis in the constitutional text, revoking their original land rights guaranteed in articles 231 and 232. These laws could be, of course, later subjected to judicial review before STF who could, then, declare them as unconstitutional. If this happens, the court would be consolidating not only the constitutional paradigm of Post-1945 human rights, but also reinforcing recent constitutional changes in Judicial Review in Latin America, such as what happened in Colombia recently (Benítez-Rojas, 2022). Afterall, is it not the role of the last interpreter of the Constitution to protect minorities from majority rule and power?

However, STF has recently placed a request for a conciliation chamber to be formed on the issue. This has not taken indigenous land lawyers by surprise, but it does prove a point. Colonial conquest cannot be completed, without destroying the most basic right, *the right to reclaim lost bodies*. For property to be consolidated in late capitalism, it is necessary to destroy all evidence of bodies, erase memory, and fictionally legalise stolen land. How are we to make justice out of this? Are we supposed to reconcile the victims of genocide with the demands of those who have not only killed their ancestors, but also denied their self-determination rights, erased their memories and taken their land? Are we to reconcile new legal fictions with old colonial lies?

Conclusion: a final critique on twenty-first century human rights

The right to reclaim lost bodies is itself an alternative methodological strategy to take back human rights historical concepts and legal provisions from the hands of those who are the most recurrent violators of human rights such as government agencies and nation-

states. This strategy consists in revealing the historical links between destroying evidence, erasing memories and stealing land. But in doing that, the method developed here attempts to bridge law and literature to find evidence, question the whitewashing of memories and protect access to indigenous land. This might be accomplished by bringing decolonial perspectives to live within and clash with commonly accepted notions of justice and human rights. In claiming this right, we are acknowledging that what we now call human rights is more than a concept, it is also a movement. It is an international movement of nation states, international courts, civil society organisations, indigenous nations, all kinds of minorities and individuals.

What we want to avoid is the neoliberal discourse that has recently taken over human rights on the international and national level. This has produced a soft, dehydrated notion of human rights in liberal democracies that persistently tried to make them compatible with permanent social inequality and deep structural racism. It added evidence to the 'paradox of human rights', as critical legal theory formulates it: the more human rights are legally accepted, the greater the possibility that they will be violated or not fulfilled (Douzinas, 2013). If human rights can be understood as a movement, as Moyn suggests, this movement urgently needs to produce a critique of the neoliberal notions of human rights that are compatible with the consequences of colonialism: brutal social inequality, structural racism and military interventions disguised as *humanitarian* action (Moyn, 2010). This means that it is necessary to find a conception of justice that would challenge these notions.

But justice is a concept that is historically very hard to define. The most ambitious definitions we can find today are old and were devised before the invention of the modern state. Some of these definitions take us back to Aristotle, and to the ancient pre-Socratic philosophers, who defended justice as the sum of all virtues. Most importantly for the argument here, justice is usually defined in the negative, in the form of a denial. Douzinas and Warrington claim this is the case, for example, in most of Greek philosophy, as well as in the Old Testament (Douzinas & Warrington, 1994). The problem we face when defining justice – and I propose that, also in defining human rights, is that most definitions are in the negative, in the form of a denial or an absence, such as the absence of a body.

This is possibly the result of an idea of justice that is completely disembodied or, as Ronald Dworkin puts it, is understood as 'the most abstract political concept of all' (Dworkin, 2004). The modern idea of justice is built upon the creation of the subject of the law as a rational and abstract being: an individual built in the logic of modern institutions and with no regard for class, ethnic or gender differences – almost as a *persona*, a fictional character or, as Douzinas suggests, someone using a mask (Douzinas, 2000b). This conceptual abstraction and disembodiment of justice is perhaps a relevant clue to search for an ethics of law capable of delivering justice – and to search for an ethics that is capable of recovering lost bodies.

Terry Eagleton challenges these abstract conceptions of justice on two grounds. First, he argues that neither state authority nor the law it authorises can be independent of ethical values. Second, he contends that there can be no Marxist ethics capable of critiquing injustice from a position entirely outside Western moral philosophy and Christian theology. Eagleton's striking propositions can be summarised as such: if our idea of justice is not capable of ethically recognising evil, then, we are bound to let the Red

Kimmer escape from the same hook where they have impaled young children (Eagleton, 2010). These disturbing propositions lead us back to the historical difficulties in building up a theory of justice – or a concept of law – in the classical jurisprudential debate.

The modern bourgeois state was supposedly built on Enlightened notions of reason and rationality. To make this possible it was necessary to separate all ancient values, divine or metaphysical, from the *praxis* of power. This is why the modern capitalist state was created after a separation between religion and authority, which was followed by the divorce between law and ethics. A series of *differentiations* would follow these two separations: legality and morality; validity and value; form and substance (Luhmann, 2004). These would eventually lead to the foundation of judicial institutions that were completely separated from ethics and morality.

Perhaps the greatest expression of this kind of development was Hans Kelsen's defence of justice as a moral concept, alien to any positive law and legislation. Kelsen developed a notion of positive law whose validity is completely independent from any idea of justice (Kelsen, 1998). This jurisprudential move was crucial for the consolidation of the bureaucratic modern state that was built by the end of the nineteenth century – and also to consolidate many forms of late and settler colonialism, as a success. But such changes would not escape some collateral damage, including political and juridical ones that would later cripple the twentieth century emerging notion of human rights.

Justice became an issue to be applied to rights and property alone, and ethics was to be concealed in the individual consciousness. This is the change that would make possible the emergence of a notion of human rights completely focused on the individual and not concerned with colonialism and its consequences: social justice, class division, racial discrimination or economic conditions. It is no coincidence, then, that some of the most shocking atrocities against humanity in the twentieth century were committed by bureaucrats who, in their defence, argued for the neutrality of ethics in fulfilling their legal duty and administrative responsibility (Arendt, 1999).

Nevertheless, the new modern bureaucracy with its red-tape power and black-letter law also has a disturbing theological archetype (Jung, 2014; Matos, 2024).[10] I am referring here to those bodies of sadistic people who enjoy exercising small bureaucratic powers. We know them: those who delight in asking for an additional form to be handed in, or who have pleasure (almost of sexual nature) in hiding and retaining information, writing Hansard or checking if the regulations were all fulfilled. But they are not new in history. The most striking archetype of the modern bureaucrat is those people portrayed in the New Testament, in several dialogues with Jesus. In these passages of the Christian Bible, they attempted to trick Jesus by challenging the legality of using his ability to help people in need. They are those who ask: 'Is it lawful to heal on the Sabbath?'[11] These are bureaucratic exercises of power that are disembodied in both ethics, land and law: they help the perpetration of injustice in refusing to see the body, the person and the human in those who suffer its power.

When justice is completely separated from ethics, what then? What is the result of this differentiation? The result is the liberal bureaucratic exercise of power. In the ancient regime, authority was based on divine or traditional models. The absolute power of the Prince was once a justification of the means by the ends. The liberal and capitalist modern state authority, however, is justified and made legitimate by the choice of its (legal) subjects (Arendt, 1989). In these conditions, where justice and authority are

dependent on individual subjects alone, there are no ends: it is a state where the means are independent from the ends (Agamben, 2009). Justice has abandoned any substantive idea of value; there is only process, procedure and form(s) to be administered.

But it is dangerous to claim that human rights should include social justice. In reclaiming lost bodies, it might be possible to challenge the limits of Lady Justice's abstract and colonial blindness, and it's supposed absence of bodies. In turning the twenty-first century notion of human rights – which is inspired by Natural Law – against the more aggressive and conservative versions of capitalism, we might be finding parts of the notion of justice that were obliterated in Western culture, law, theology, and society. *The right to reclaim lost bodies* might help us bring ethics closer to justice, and deliver human rights that accommodate social and economic justice. Reclaiming incarnated, real, and material bodies might be a way to challenge the new and the old legal infamies, instead of legitimising the infamy of today with the infamy of yesterday (Marx, 2024). To oppose these infamies, we might need to actively work to find bodies, recover memory and protect land rights.

Notes

1. To develop this method, I have based my own research on the work of historians and scholars who have dealt with aesthetics, ideas and *similarities* in different historical contexts.
2. These methodological proposals, although formulated here for the first time, are not entirely original. There are important works that have produced and used similar methods.
3. The use of legal cases I have been involved in, either as a state official or a legal advisor/, is an attempt to provide evidence to this discussion, and build up *human rights jurisprudence* from actual, factual, practical, legal, and lived experience of human rights and its violations in the Global South.
4. I Corinthians 15:19.
5. In his most famous work, Freire argues that in the first steps of the struggle for liberation, there is a very high change that the oppressed will act like the oppressor – because they do not know the world outside what they have been taught by the oppressor.
6. This argument was perhaps made more accurate recently by the fact that it was South Africa, and not neighbour countries, who defended Palestinians in the International Court of Justice.
7. There have been many efforts in answering this question.
8. Article 188, in the Brazilian Federal Constitution of 1988 states that all public and emptied lands must be given in compatibility with Brazilian agrarian policy and the National Plan for Land Law Reform: 'A destinação de terras públicas e devolutas será compatibilizada com a política agrícola e com o plano nacional de reforma agrária. In the first Brazilian Republican Constitution, in 1891, the notion appears in art. 64, and is regulated in the same way as the property of 'mines.' Its origins seem to be the Brazilian Empire's Land Law Act of 1850: República Federativa do Brasil.
9. This position would also go against all the reports of the National Commission of Truth. The fact that transitional justice has never been the main issue for reparation and protection of indigenous rights in Brazil corroborates the argument that land law cases are still the most important legal strategy for these people's rights.
10. My use of Carl Jung's notion of archetype here is strategic.
11. Matthew 12:9–10.

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