
RESPONSE TO JULIETA LEMAITRE, AMY LIND, AND CATHERINE WALSH

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I am grateful that Julieta Lemaitre brought to my mind the imagery of the origins of the State, a thought that had somewhat eluded my imagination when I wrote the piece on neoconstitutionalism in Honduras, but which is of undeniable importance to the topic. I interpret Lemaitre's reference and the contrast she makes between civil war and ordinary life to be similar to the Hobbesian distinction between the state of nature and the origin of the State form. I cannot help but think that her allusion to civil war as a moment when our passions, fears, evilness, loneliness, poverty, barbarism, ignorance, and savagery have a greater chance to take the best of us, must be related to what Hobbes imagined took place before the State came to "free" us from our destructiveness. Surely, to think that the law and the "peaceful" electoral process brings out the best in us because it reduces violence and the opportunity to be evil must fit squarely in a Hobbesian conception of State and society. But it does not fit the historical record, unfortunately.

Imagine for a moment that we go back in time to identify the moment in which we participated in the original creation of the State. We would necessarily find that the inhabitants of the colony were not able to negotiate a truce with their predators to establish a State form that ended violence. The Hobbesian myth of individuals and whole communities voluntarily giving up their power to exercise violence for a state of law that incarnates morality (and monopolizes violence) because it protects them from outside predators (and produces peace) does not tally with the colonial encounter. The colony remains at the margins of the law and is subjected to unspeakable violence, even after colonial occupation ends. The concept of the coloniality of power means the perpetual authorization of terror and the theft of the colony's civility. This is why in re-founding the State certain social movements in Honduras and other parts of South America like Ecuador and Bolivia demand a peace treaty with their predators, one that will restrain the violence that has been permanently directed at them.

But what can be expected from such a truce anyway? Is the State a simple agreed-upon suspension of hostilities by opposing forces that later are kept at bay by a law that produces peace and the good life? Is the State form the necessary framework—*el estado de derecho*—that "individuals" (predators and victims alike because they are ultimately the same given the circumstances?) need to make the

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right choices, a framework that will allow reason, peace, security, wealth, splendor, society, good taste, the sciences and goodwill to dominate our lives, as I think Lemaitre is telling us?

What is to be made of the contradictory circumstances of the “transformative neo-constitutionalism” taking place in Ecuador and Bolivia, and the immediate violation of those constitutions in practice that passed it that distresses Walsh and Lind? Should we be alarmed?

Putting aside the value of the process of constitution building (as a decolonial practice, *poder constituyente*), is there something that our analytical process is not capturing? For instance, what distinguishes the separate moments in which 1) the (re) foundation of the State occurs, 2) the writing of the new constitution is done, and 3) when the new constitution is practiced as the new rule of law? Was there ever a renaissance of the State that was preceded by a moment in which the contenders (in this case, the “Left” and the indigenous social movements) agreed not to do away with the (modern/colonial predator) State, but to keep its form, however, under a new due process (and logic) of law? Phrased differently, was there a moment before the rebirth of the State could take place where the contenders could have agreed on doing away with the present State form that is predatory and murderous (“*que se vayan todos*?”), and created an entirely new form of self-government (*sumac kawsay* or *buen vivir* or *the good life*?), but decided instead to keep the old form (thinking it only needed a new law)? Was there a moment lost in which things could have been totally different, or did the moment never happen? Was the old State form, even for a moment, reversible?¹ Was there ever a choice between, let’s say, “neo-anarchy” and “neo-constitutionalism” or “strategic constitutionalism,” if you will? Was there really a moment in which the suffering of the poor and those starved of justice—indigenous or not—could become a “regenerated humanity” under a new constitution and the present State form? Can the writing of a new constitution suspend our status as a colony? Is there a decolonial turn of events at work today in Ecuador and Bolivia, one that Hondurans could emulate? Is there a specific order we should follow: undo the State first, then write a new constitution or write a constitution and then undo the State?

I take both from Walsh and Lind that currently the process in Ecuador and Bolivia is rather imperfect and incomplete, but worthwhile. Neoconstitutionalism, says Walsh, is just a strategy, a tool for change we must use with caution. As for now, the (modern/colonial predator) State can claim some mixed victories, as we witness with the breaking of the most important clauses of the new constitutions (i.e. the duel between the “rights of nature” and the Ecuadorian Mining Law or Evo Morales’ attempt to build a highway through TIPNIS without consulting the indigenous communities living in the land). Should we not suspect that when we choose

¹ These questions and the core of my analysis are inspired by J.M. Coetzee’s brilliant analysis of the origins of the State in his novel *Diary of a Bad Year* (2008).

“strategic constitutionalism,” (in a kind of Spivak way as in “strategic essentialism”) we are preserving the (modern/colonial-predator) State form, and we are unintentionally playing into the hands of the “strategic legalism” that still rules the colony, since its inception? Can the writing of a new constitution at the national level undo the status of colony that we maintain at the global level which does not grant us sovereign powers or juridical equality? Because it seems obvious that the (modern/colonial-predator) State was not undone and re-founded as decolonial in Ecuador or Bolivia, we should take Walsh’s assertion that the “turn to the Left” does not imply a decolonial project. We should also give more thought to Lind’s suggestive observation that “the “Left” and “Right” trajectories are converging now more than before. I think we might have a consensus in these matters with Lind and Walsh. Where I still take issue is with Lemaitre’s liberal assumption that the recourse to the law is by definition limiting the recourse to violence, broadening the “choices” of individuals, and bringing out the best of us. Most interesting is that this is a position that contradicts her earlier insights on legal fetishism in which she attributes the law much less power (Lemaitre, 2007).

Let me make my point by using the concept of “strategic legalism,” a term coined by Peter Maguire in his book *Law and War* (2001). In this book, Maguire makes a compelling case about how the United States of America’s State formation process relied on a view of the law that separated it from any moral or ethical consideration. From the foundation of the country on the basis of the genocide of Native Americans, to the enslavement of Africans, and later the colonial wars against Spain in Cuba and the Philippines, the gradual reduction of the convictions of the Nazis in the Nuremberg Trials, Jim Crow laws, the Vietnam war, the Central American wars, and we can add the mass incarceration of African-Americans and Latinos and the war on terror today, the law of the US State (presented to us as the beacon of democracy) sees no link with the rules of morality. The logic of the law that has operated within the USA’s State formation process has been pragmatic: what can be justified legally doesn’t have to be justified morally. The law has been used as a political tool as any other; the law has served as a political tactic, a strategy, at every point in the history of the nation and its relations with other nations in the world. Legalism at its best reflects what Judith Shklar, a prominent US political scientist, identifies as “an ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships that consist of duties and rights determined by rules” (cited in Maguire, 2001, p. 52). At its worst, the law in the US has been stripped of any capability of producing political justice; ethical principles not only exist in tension with legal principles, they are rendered useless. Interestingly, to the extent that the law functions for the necessities of the State and not for a moral community, the State does not need the consent of the people or, for that matter, the international community. It can make use of the judicial machinery to quell any controversial political problem that threatens the matters of State power. It can frame political matters as issues of symbolic justice in legal terms and betray them in a non-judicial manner, mitigating or reversing the original public

sentences through clemency or paroles as it did with Nazi criminals, or vice-versa, applying non-judicial jurisdiction to matters that need to be subjected to the courts, like Wall Street financial crimes during the current Great Recession.

In the context of the war on terror, according to Juan Gabriel Tokatlian (an Argentinean professor of International Relations), the US has moved on to an era of postlegality (2012). In contrast to South America, a region that allegedly now expands civil liberties for its citizens as with the new constitutions of Ecuador and Bolivia, the US State manipulates, breaks, or disregards internal and international law with little accountability from inside and excessive military deployment outside its borders. In the postlegal era, with recent laws such as the National Defense Authorization Act, all US citizens, independently of their race, can become indefinite detainees and are killable with impunity just like colonial subjects before them. What Tokatlian understands as postlegality today is very similar to the concept of strategic legalism that Maguire uses to describe the history of law and war in the US. Both describe a State form that puts the right of the State to kill and maintain economic power before the law and a State form that uses legal terms to enable the disregarding of the law, i.e. in the context of the war on terror today, torture is called “enhanced interrogation techniques,” the clandestine kidnapping of foreign nationals is called “extraordinary rendition,” and extrajudicial executions of US citizens and foreign nationals are justified in the framework of “hostilities” and “enemy combatants.” The only thing that sets postlegality apart from strategic legalism is that postlegality no longer makes a distinction between US citizenship and colonial subjecthood. This might be an interesting turn of events, but the point that should not escape us is that the law appears disconnected from any kind of moral consideration and is what has made the US State form viable.

The point I am trying to make here with this apparent excursus on the US State form is one that Achille Mbembe has already made in his article *Necropolitics* (2003). His concept of necropower helps me understand the particular situation of Honduras in all of this. Since I share with him the doubt that we can understand politics using the concept of reason that Lemaitre seems to accept, or the belief in society’s capacity for self-creation through simple recourse to institutions inspired by specific social and imaginary significations (2003, p. 13), I prefer his view of necropolitics to describe the origins of the State and the current situation of Honduras. Instead of developing a reading of politics as the dialogue of reason that produces the good life, a form of politics that never applied to the colony, it is preferable to operate with a concept of politics that derives its meaning from the State’s right to kill: in other words, politics understood as the work of death (bringing out the worst in us?) and not of reason (bringing out the best of us?). This is admittedly not an uplifting definition of politics. It is however one that explains the role of race and racism, misogyny and femicide, heteronormativity and homophobia in the coloniality of power that serves not only as a classification system, but also as a system of distributing death and the conditions of possibility of

the murderous function of the State. From this perspective, the Hobbesian imaginary of the State emerging out of the necessity of putting an end to war and death in a community besieged by bandits appears in its inverse form: a community that surrenders its sovereign power to bandits that put in place the State form to abrogate to themselves the right to kill; to perpetuate war and/or a form of politics that is warlike because it is what sustains the bandits in power and makes their rule irreversible. Of course, the archetype of this form of politics is the colony, the plantation system, the Nazi regime, apartheid, Palestine, the war on terror, Haiti, Honduras, but it now encompasses the entire planet. It is as Mbembe says “the *nomos* of the political space in which we still live” (2003, p. 14).

There are moments in history when the conflation of war and politics becomes transparent; where the formation of terror underlying the State is impossible to hide. This is the situation of postlegality in the US where it is perfectly legal to talk about the murder of foreign leaders on TV or for aspiring politicians to talk about the murder of the President with impunity, and, of course, Honduras that since the coup two years ago has become “the murder capital of the world” with a murder rate four times that of Mexico, and where most of the murders are committed by organized crime, the police, and the military (NPR, 2012).

Since the coup, in Honduras, Congress has passed a law that will splinter the national territory into segments composed of “*ciudades modelos*” or model cities that will function with “new rules that will give more choices to people, and more choices to the leaders of the country.” This new spatial arrangement will be “more efficient and investment friendly” than the rest of the country and will only abide by its own rules. It will make of Honduras a transshipment hub and logistic corridor to link the Atlantic and the Pacific Oceans. It will end poverty and a system of bad rules (Critt, 2011).

Another form of territorial fragmentation taking place in the country that began before the coup, but that now has fully consolidated is the division of the country into narco-regions. Entire regions of the country are under the control of drug cartels (Mexican, Colombian, and Honduran politicians, military, police), serving as the transshipment hub of 60% of the illicit drugs that are later consumed in the US (the US consumes 90% of the world’s illicit drugs) (Aljazeera, 2012).

To this dispersal and segmentation of the territory we should add the two new US military bases in Honduras (La Mosquitia and Guanaja) which raises the number to three US military bases that the country harbors. The territory of Honduras is 112,090 square kilometers, the size of Louisiana. In this splintering of the landscape the re-foundation of the State in Honduras is fully underway. The Resistance Front has become a political party, factions of the feminist movement have defected from the Resistance Front, and last night Jose Manuel Zelaya, the deposed president in the 2009 coup, announced in a TV interview that he and his

wife are in a list of candidates to be murdered before the next presidential elections (Zelaya, 2012).

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