IDENTITY, SOCIAL JUSTICE AND CORPORATISM: THE RESILIENCE OF REPUBLICAN CITIZENSHIP

David Lehmann[1]

This is an attempt to introduce more clarity into debates and concepts relating to multiculturalism and affirmative action in Latin America on the basis of a theoretical discussion and examples from Brazil and Mexico. The underlying concern is with affirmative action as it relates to social justice. Starting out with the issues arising from the use of self-assignment in deciding on individuals' eligibility for affirmative action, the paper reviews arguments in the debate over universalism and identity-driven responses to racial exclusion.

Analysis reveals the limitations both of a pure anti-discrimination approach – described as behavioural and exemplary because it uses the punishment of acts of discrimination as a deterrent – and also the 'blunt instrument' of collective entitlements. The role of impersonal bureaucracy, expertise and the anthropological profession are explored to show the pressures of commitment to justice and the need to establish trustworthy bases for affirmative action. Nevertheless, the intrinsically political character of disputes about resource allocation and the mobilizational politics of recognition itself mean that rough and ready criteria are unavoidable.

The upshot is a politics of inclusion which has something to do with social equality but much to do with the corporatist tradition of the Latin American state already well established in the response to the rise of a working class in the first half of the twentieth century, namely a combination of opening up niches within the state for new leaderships, creating channels of social mobility for higher-achieving descendants of the historically excluded, and not least the creation of an atmosphere in which

[1] The research on which this paper is based was undertaken thanks to a British Academy Grant for the project entitled 'Multiculturalism in Latin America: a Study in the Diffusion of Ideas', 2007–2010, and the writing was supported by the Institute of Advanced Studies at the Hebrew University. Thanks are also due to the comments of colleagues in the Study Group 'Contesting Liberal Citizenship in Latin America' led by Luis Roniger and Mario Sznajder, to the other members of the group, to Peter Fry, André Cicaló, Ruben Oliven and audiences at seminars in Oxford, Newcastle, and the Annual Meeting of Brazil's Social Scientists, ANPOCS, in Caixambu, 2009.

the claims of victimhood and for restitution can be liberally deployed. It also has much to do with the *mestizaje,* which is pervasive in Latin American society and which may underlie the paradoxical and unexpected implications of affirmative action programmes and of the politics of recognition. These are societies in which republican citizenship is so deeply rooted that even policies which deploy large-scale or egregious racial or ethnic preference end up by being included within a universalistic architecture of citizenship.

Ethnic Belonging in Interpersonal and Official Contexts

Ethnic belonging is a slippery notion which translates in daily life into a multiplicity of boundaries and markers which simply cannot be encapsulated in tight conceptual definitions. Some are linguistic markers, some are phenotypical traits, others are manifested in marriage choices, in dietary preferences or dress codes, and yet others are religious in character. In daily life the criteria of belonging is entangled within numerous and often ephemeral or context-dependent individual decisions taken more or less consciously to claim one or another label to oneself or others. In daily life one emits all sorts of signals which invite others to recognize a particular affiliation or indeed discourage them from recognizing it: a name, an accent, a name changed and an accent concealed, dress and fashion and ways of wearing clothes they prescribe, one's address, or the way in which one describes one's address (Howard 2009). A phenotype is hardly a 'fact' or even a 'manipulated fact' since make-up, clothes, and accent, can refashion and attribute signification to it in accordance with the individual concerned or with others' expectations and assumptions or with the interaction between the two. The rough-and-tumble may reflect and indicate the everyday management of difference and boundaries and the personal sensibilities which are part of any person's psychology. Nonetheless, in institutional life the word 'ethnic' tends to be used as if it was not slippery at all: in Census forms, for example, or in application forms for scholarships[2] and jobs,[3] in record-keeping by the UK's National

[2] The Ford Foundation's 2009 application forms for its International Fellowship Program (IFP) in Brazil, for example, asks an applicant to choose between the following self-descriptions: 'branca, preta, parda, amarela, indigena' – 'white, black, brown(ish), yellow or indigenous'. http://www.programabolsa.org.br/down.html The same presumably holds true for its forms in other languages.

[3] It is routine in the UK for job applicants to, voluntarily, fill in a form stating their ethnicity. They have to choose from a list and can usually also add a non-listed category.

Health Service and educational institutions, ethnicity is commonly deployed in a way which implies that ethnic belonging exists independently of the needs and desires of the subjects of that belonging, as objective as age or income.

In contrast, Amartya Sen talks about multiple identities not in the sense that individuals necessarily experience conflicts and stresses as a result of their multiplicity (though they might) but rather in the sense that they inhabit a variety of social contexts (2006). This confuses the admittedly ill-defined term identity with that of social role. If we may resent or criticize the state for officially recognizing ethnicity or for dividing its citizens into fixed categories, we must also recognize that Sen's flexi-view, seen from the vantage point of a cosmopolitan intellectual celebrity, does not take into account many contexts in which individuals simply have little or even no choice but to hold to one overarching, dominant identity. We saw this in violent form in the Balkan wars of the 1990s, when individuals were forced to discover or to accept identities, which until that point may have held little interest for them. This happens in innumerable, less dramatic contexts worldwide when villagers or members of particular groups seek for example to marry, or seek to arrange marriages for their kin. Apart from such situations, or from the tight controls of village life, there are innumerable states, especially in Asia, where ethnic labels are more or less obligatory and often imposed. In China for example there are 56 recognized nationality groups aside from the majority Han, comprising one tenth of the population, and 'all citizens are registered by nationality status' (Hasmath 2010). This is the case in Vietnam, while in Indonesia, religious affiliation to one among an official list of religions is compulsory and intermarriage among people of different religions is, in principle, forbidden (Seo forthcoming).[4]

In most of Western Europe and the Americas, states take the self-identification approach. The interest of the present discussion is not only in the way the affiliation is recognized, but in the entitlements it may bring: for in Western countries – including Latin America – such an approach can bring access to government resources in the form of affirmative action and the recognition of inherited discriminated status.

[4] Strictly speaking – for the reality is a little less rigid than the formal position implies – 'an Indonesian citizen is not allowed to not have a religion, to marry somebody who has a different religion, to build a place of worship without consent from not only the state but also from the religious majority, or to proselytize other citizens' (Seo forthcoming).

The use of racial categorization by self-description for the purpose of resource allocation and to reduce discrimination requires resources and may also provoke political and media-based disputes on a large scale.

In Brazil, in July 2010, the 'Estatuto da Igualdade Racial' (Law no. 12,288) came into force. The Statute contains far-reaching provisions for introducing affirmative action and implicitly will require racial monitoring throughout government, especially in the fields of education and health. Once the very general exhortations of the Statute have been translated, through secondary legislation drawn up by the Executive, into practical provisions, these measures will potentially be of great benefit to large numbers of individuals, who could in theory make an infinity of claims for special attention. Yet, the racial identification, which will be the passport to the affirmative action they promote, is explicitly defined as self-ascribed (*auto-declaração*). But it may also have only incremental effects, depending on the secondary legislation and bureaucratic politics.

This is similar to the US but somewhat different from countries where not one but several variables – language, religion, ancestral geographic origin and more – contribute to ethnic identity. In essence, however, the problem is the same: people who are free to describe themselves as black, white, brown or mulatto, or as Jewish, Muslim, Afro-Caribbean, may try to use this discretion or freedom to gain a passport to special treatment, to exemptions or benefits, though the claims may be denied or subject to negotiation.

The emission of such signals of belonging is part of daily life, indispensable to the most elementary procedures of social interaction without which social life would become intolerably stilted, if not impossible. Yet in many Asian countries – the majority in demographic terms – populations would mostly find it absurd to express doubts about the objectivity of ethnic identity. If we were to take those cases as our starting point we might well then ask why it is that in Western Europe and the Americas there is an ambivalent obsession with race. On the one hand, there is deep resistance to the public portrayal of racial differences other than colour or phenotype, while on the other there is (a) an obsession with affirming and recognizing the purely cultural dimensions of what are often racial differences as well as the cultural dimensions of ethnicity, and (b) an inclination to deny the legitimacy of racial differences in other spheres by assuming that they are a consequence of racial discrimination – which may or may not be accurate or realistic. France, where official statistics do not even tabulate racial or ethnic origin, since such procedures would be scandalous and unconstitutional, nonetheless acquired in 2007 a brazenly

titled *Ministère de l'immigration, de l'intégration, de l'identité nationale et du développement solidaire*; in the UK there is much variation, for the state has not centrally regulated this array of practices: sometimes ethnic criteria are applied in a roundabout way, as when a university runs outreach programmes to encourage ethnic minority applications, but does not apply an ethnic criterion to any particular candidate. (This falls under the definition of affirmative action.) Instructively, one proposed though not implemented French response to discrimination has been the adoption of anonymous cv's which do *not* reveal the name (implicitly, of course, the Arab name) of applicants. This would satisfy the French ethos of impersonality, but it is designed only for those with distinctive names. In the UK, by contrast, job applicants are routinely asked to describe their ethnic affiliation for statistical purposes, to enable organizations to show they are keeping track of their openness to minority applicants. (The individual responses are presumably not revealed to appointing bodies, but the statistics are used to raise awareness of possible racial discrimination or bias in the organization as a whole or to demonstrate fulfilment of equal opportunities guidelines). In the UK there is also an organization called the Black Police Officers Association, which is treated as a valid interlocutor by the police authorities and other official bodies: such recognition of racial interest in a security agency would be regarded as subversive in France and probably any Latin American country.

Social scientists who write in English live in a political culture which, in daily life, imposes two contradictory values: it is a world of committees, appointments and recommendations, where pressure not to label or prejudge a person's ethnic belonging, their age, sometimes even their gender, is juxtaposed with the pressure to recognize the disadvantages afflicting a person deriving from ancestral and contemporary discrimination or simply social exclusion. The ritual commitment on every institution's job advertisements to equal opportunities and sometimes 'especially' to women and ethnic minorities, goes together with a process in which information on a person's background is treated as not relevant – because it might prejudice the decision. The decision-maker has to navigate between two potential kinds of racism: to label a person is to risk essentialism – a polite word for racism – while to ignore the extent to which a person's socio-economic situation is a result of ancestral discrimination is itself also a type of discrimination. In this context, convention dictates that individuals are permitted flexibility of choice of ethnic affiliation – a flexibility which allows changes over time – even while being entitled to benefit from affirmative actions which are built on the

assumption that such preferences constitute not just a choice but an identity, and one that is fixed and unchanging. Yet, it is a constitutive element of ancestral discrimination that an individual is not free in practice to get rid of the identity in question: it is a label or, worse, a taint. The common, and highly justified, complaint that racial stereotypes do violence to diversity, choice, flexibility and ambiguity, is turned inside out when fixed categories are used for the supposed benefit either of individuals who may well feel uncomfortable with them or else, in contrast, are manipulated to 'stretch a point' or circumvent the rules to take advantage of them – a practice sometimes known by the sanitized term 'strategic essentialism'. Thus, despite their eligibility, there are black Brazilians who will prefer not to apply to university under an affirmative action quota reserved precisely for blacks, because they do not want to seek (or be labelled as seeking) special treatment, while a person whom many would regard as of non-black appearance might choose to claim black status. There are also cases where people would like to apply for socio-economic quotas but for technical reasons find that they are barred, and so, if they are to have a chance at all of admission, are obliged to choose the 'black' quota. However talented, they know that, without having studied at an expensive preparatory course (*cursinho*), the black quota is their only chance.

In many of the world's most ancient and far-flung political cultures this complicated quadrille, or tip-toeing, around the preference or label which dares not say its name would appear absurd. Those cultures are not our subject and to delve into a comparative race relations of Asia and the Middle East, or to account for India's particular history in this regard, is obviously outside the scope of this work, but it is worth remarking that Asian and Middle Eastern political elites seem to regard racial difference and potential discord as a management problem to be taken very seriously, but not as a problem of social justice, which is to be pursued, if at all, in other ways. They lie rather in the management and control of racial friction rather than inequality, and this seems to have been true of China even during the heyday of state socialism (Hasmath 2010). I am not claiming that this approach is better than others, but neither would I say that it is *a priori* worse. Although the practice of racial classification imposed or at least institutionalized from the state is of course associated with autocracies like China and Singapore, and with semi-democracies like Malaysia and Indonesia, it is too widespread and entrenched to be merely dismissed as an authoritarian political device. Its difference too deserves recognition, if only by force of numbers. In Europe and the Americas it has been taken for granted that racial discrimination and beliefs about racial

superiority have been built into our culture and that constant campaigning is needed to extirpate them, but when we compare Asia and the Middle East we must recognize that universalist ideas of humanity and human rights are also, perhaps uniquely, built in to European culture.[5] They may not be a heritage of humanity as a whole. Indeed, as Sartre and Fanon said, both racism and the universalist idea of humanity have perhaps grown up together.

It is hard to round off these reflections without despairing of finding a culturally neutral way for states to operate legitimate and even-handed programmes and laws to overcome large-scale racial discrimination, since the preceding discussion could lead one to think that the classification which is necessary for such an exercise is bound to lack secure foundations. The public debate in Britain revolves around a confrontation between the rhetoric of victimhood and the opposed rhetoric accusing the newly included of sponging or illegitimate advantage (a danger Nancy Fraser pointed to in her essay 'From redistribution to recognition' (Fraser 1995). Latin America has come late to affirmative action, under persistent though not necessarily shrill external pressure from multilateral agencies and from international NGOs like the Ford Foundation, which has probably provided indispensable reinforcement to the region's indigenous and black movements. Although only recently advancing affirmative action, the region may be able to convince the world of the benefits of blurring the issue by applying messy criteria of racial affiliation with a generous showering of material benefits – taking advantage of the windfall from the region's recent high rates of economic growth.

The Politics of Recognition

Charles Taylor's essay on the 'Politics of Recognition' (Taylor 1994) encapsulated the dilemmas that arise from the unhappy marriage of identity and social justice. Taylor tells us that to ignore people's identities or to use power to impose upon them an identity or an interpretation of their identity is to violate their collective or individual integrity. Rousseau's 'sentiment intérieur de l'existence', invoked by Taylor, reigns supreme. But is what I would call 'identity politics for identity's sake' sufficient

[5] This is an extremely complicated question because in practice the denunciation of Western colonial concepts by anthropologists and political theorists tends to be very general in tone and rarely attacks democracy or human rights 'head-on'. On women's rights it is also very hesitant cf. Philips 2007.

justification for state policies? There is no intention here of questioning this justification in other spheres – in art, in music, in political mobilization – but in the sphere of state policy the multiple difficulties raised by state involvement in racial classification, by the interplay of protagonists' claims and issues of authority and representativity, by disputes over authenticity, by free riding and 'strategic essentialism', do raise costs and risks and the probability that policies will be misfiring, or will encourage the emergence of unwanted sub-agendas and even sub-cultures. On the other hand these risks must be confronted and dealt with because a commitment to the removal of disadvantage grounded in factors beyond individuals' control. This includes class structure and ethnically-based or ethnically-driven factors, and an inheritance of racial, linguistic or religious discrimination, which is surely a core feature of most liberal and social democratic thinking in Europe and the Americas. Furthermore, this removal of disadvantage must require some sort of classification, some sort of imposition of categories by an administrative, often state, authority, and those categories must include race and cultural heritage, independently of the claims of racial and religious groups to recognition. Otherwise how are those responsible going to discover the extent to which a person's socio-economic situation is the result of structural advantages or disadvantages beyond his or her control? How are those charged with achieving social justice going to improve the chances of those adversely affected? And how is the public going to be convinced that the measures are truly fair and not the product of clientelism, backroom deals, favouritism or just political pressure?

One way of encapsulating our problem is to ask why, if self-assigned ethnic or racial affiliation is to be used in the allocation of scarce resources, affirmative action opportunities or exemptions, the same approach should not also be used in classic social or redistributive policies, allowing people to assign themselves to the working class, the middle class, the 'top 10 per cent', the bottom 10 per cent or whatever. If the state is to allocate resources to a particular group, after all, it should surely do so on the basis of criteria which are at least not established by the beneficiaries. Somehow, the politics of recognition must be placed at the service not of itself but of social justice. For present purposes I will, somewhat artificially, put class structure to one side (because socio-economic classification, however complex technically, is conceptually uncontroversial), and in exploring ways to compensate for or neutralize factors beyond an individual's control, restrict the discussion, as already stated, to colour, ethnic origin or religion. The crucial phrase 'socio-economic situation' used in the

preceding paragraph, refers to characteristics which can be assessed without reference to the person's emotions or beliefs, for example their income and wealth, their educational achievements, their occupation and its place in a social hierarchy, their state of health, or their gender-specific wellbeing.

I am aware, of course, that legitimate and impartial assessment of the extent to which individuals are held back by ethnic and other inherited features is inherently subject to dispute: it can never be completely untainted by value judgement. Educational achievement is notoriously subject to conflicting and equally valid incommensurable assessments. A person may graduate top of the virtuoso class at the Julliard School of Music but her playing may be derided as over-technical or soulless; another person may write very expressive English but be marked down for poor grammar (e.g. James Joyce). There is no shortage of research-based polemics contesting, for example, the educational tests routinely used by states to assess pupils and teachers. All this is well-founded, but in order to assess a person's place in the social structure, without relying on her own values, beliefs and predispositions, some such measures are needed. The search for consensus-based measures in a particular society assumes that reservations about the impartiality or fairness of measures and indicators can be resolved by relying on recognized professional experts and technicians. Of course, just as there are disputes about the fairness of educational testing or the cultural bias of measuring wellbeing in financial terms, so also innumerable authorities have explained that professional bias and technical narrow-mindedness exist and may even be endemic in state bureaucracies. Placing these issues in a broader framework, Iris Marion Young (Young 1990) made such critiques a centrepiece of her attack on Rawls' idea of a 'veil of ignorance' (1990) and on the principle of equal treatment, or at least its 'mechanical application' (1990) for her the measurement of 'all against some universal standard' leads to an essentializing of difference which denies non-mainstream groups the legitimacy of their specificity 'in their own terms' (1990:166). But such criticisms are a distraction. They only hold for those who believe that such biases are irremediable and incurable, or that groups have 'distinct cultures' (ibid.) – a formulation which is far too vague and vulnerable to the same charge of essentialization. No anthropologist would accept the claim that cultural and group boundaries are homogeneous and coterminous (even if anthropologists are often in the forefront of claims to affirmative action and multicultural recognition). Young herself also seems to have changed her position over the 1990s In an essay entitled 'Social difference as a

political resource' in her later book *Inclusion and Democracy,* she states that the political claims of discriminated groups are against discrimination and social disadvantage, and not in themselves a mere assertion of identity (Young 2000: 91–107).

Such criticisms are a distraction if they are used to challenge the principle of measuring social phenomena for policy purposes. They only hold for those who believe that racial and other biases in bureaucracy are irremediable and incurable. For the purposes of social justice they are surely useless, and indeed may even make matters worse by promoting esoteric or subjective criteria. All we need to know, for these purposes, is that there are recognized professionals who enjoy a degree of legitimacy, whose methods are subject to public evaluation and are taken by state institutions to be impartial (save in cases of corruption or negligence, which are covered anyway by the concept of legitimacy), and, importantly, that they do change their procedures and instruments in response to public and professional debate. Beyond formal guarantees, the professional activity involved has to have integrity, and also has to be underpinned by a culture of trust without which institutional life can barely exist. These seem to me to be essential conditions for any discussion of social justice, even if the post-modern questioning of professional expertise, which finds allies of convenience in religious intolerance, New Age Spiritualism and fundamentalism, does undermine that culture, as in the case of current campaigns against climate change science, or in support of homeopathic medicine.

However, it is not politically realistic to deal with sensitive issues of race and discrimination in a desiccated, bureaucratic manner. Indeed, a contrast may be drawn between a European social-democratic response drawing on the social engineering habits of the welfare state, which can be called bureaucratic but also places a strong emphasis on fairness and procedure, and the methods adopted in China and India, which emphasize inclusion, starting with excluded ethnic or caste elites or future elites who are co-opted or promoted through politics and the education system but not with the aim of overall social equality.

Social Justice as the Purpose of Multiculturalism

The proposal here then is to frame a discussion of multiculturalism in terms of social justice, and to construe social justice in terms of socio-economic equality rather than of recognition. It bears much resemblance

to Nancy Fraser's status model (Fraser 2000: 119), which advocates a two-pronged approach: institutional and cultural reform and campaigning to reduce prejudice, and a reduction of maldistribution by classic economic and social policies. Her model is admirable because she 'avoids reifying group identities', focusing rather on 'the status of individuals as full partners in social interaction'. In her own feisty words, it 'avoids hypostatizing culture and substituting identity-engineering for social change' and by refusing to privilege remedies for misrecognition that valorize existing group identities, it avoids essentializing current configurations and foreclosing historical change, not to speak of 'the authoritarian monologism of the politics of authenticity … separatism and group enclaves'. Curiously, Fraser does not take issue with Taylor explicitly in this paper, but obviously he is in the background. I hope to take the discussion forward here by noting that although Fraser readily states that 'status subordination cannot be understood in isolation from economic arrangements, nor recognition abstracted from distribution,' she does not spell out the ways in which real-life politics can deal with that relationship without opening the door to the authoritarian or non-authoritarian 'monologism' which she so plainly detests.

At the same time, the purpose is to chart a framework for removing failures of recognition and patterns of misrecognition, which are central and perhaps uniquely painful causes of disadvantage: it is thus hoped to assess them in a manner which does not require contentious and ultimately subjective judgements to be made about the merits of respecting this or that custom or cultural practice, but does take very seriously the discriminations which lead to unjustified inequalities. They can then in principle be related, causally, to quantifiable, impersonally and professionally established indicators of socio-economic status which are the generally accepted basis for an evaluation of social injustice. These are not ethnicity-specific, and they are not dependent on subjective judgements on the part of the populations they measure. (i.e. they are not based on self-assigned racial, ethnic or religious categories). They are not entirely free of bias, but the biases they embody are subject to debate and correction, are not intended to reflect states of being like happiness or deprivation, and less biased than the alternatives implied in Marion Young's critique for example, and they are more comparable across ethnic and similar boundaries than subjective attributes. Although the resulting policies, with the opportunities and costs they bring, are bound to bring about changes in subaltern, subordinate, indigenous and immigrant culture, those outcomes will be unpredictable and are not intended to subvert or

drown those cultures through assimilation or *métissage*. In this sense they differ fundamentally from the Chinese approach which sponsors and folklorizes ethnic minority cultures under party control. In any case there is little reason to think that improved socio-economic status and high educational achievement will necessarily produce assimilation, for we may cite many instances where a relatively successful immigrant group has been assimilated in a socio-economic sense, achieving rising economic wellbeing and even prosperity, while over a similar period experiencing a discernible ethnic or religious renaissance, in addition to instances where upward mobility has been accompanied by active, dynamic revival or renewal of apparently old – but in truth often quite new – habits and rituals. Examples include a Muslim middle class in Singapore (Nasir et al. 2009), the Egyptian urban middle class post 2000 (Bayat 2007) and growing strict observance among France's North African Jewish population, not to speak of Europe's very substantial and successful Sikh minority.

In order to gain a more grounded sense of the way such remedial or compensatory policies might work, we shall now refocus on the issue of universalism versus identity politics by considering two broadly opposed approaches or responses to the problem of ethnicity-based exclusion, of which one can broadly be described as identity-driven and the other as behavioural and exemplary. Both are focused less on social justice in the broad sense and more on discrimination. But whereas the identity-driven response interprets discrimination to include cultural marginalization or devaluation, linguistic decline and much besides, and relies on the executive branch and its largesse, the exemplary response is law-driven, punishes individual, or identifiable corporate, misconduct through the judiciary, and is more universalist.

Multiculturalism in the Republican States of Latin America

The behavioural or exemplary approach responds to the evidence of socio-economic inequality and exclusion affecting ethnic, religious or linguistic groups, in a universalist mode. It is encapsulated in anti-discrimination measures such as the UK's Race Relations Act (first passed in 1965 and amended in 1968, 1976 and 2000, and complemented by the Equality Act 2006) and similar legislation elsewhere, which punishes individual acts of discrimination. Another interesting example is the notice posted on elevators all over Brazil stating that discrimination in

admission to elevators on grounds of colour, sex, non-communicable disease, etc. is punishable by a law passed in 1996.[6] Despite the prevalence of this sort of legislation, prosecution and conviction are rare. Where discrimination is a pattern embedded in social relations, prosecutions are always going to be limited in scope when compared to the scale of racial equality, and also intentional discrimination is extremely difficult to prove. In Latin America the punishment of discriminatory acts, although perfectly possible under the laws of many countries, like the Brazilian one just quoted, is very unusual. This is perhaps because of the indifference or prejudice of authorities, or also on account of factors such as the powerlessness of the victims, the difficulty of proving the intention to discriminate, and the absence of a state institution such as Britain's Race Relations Commission (subsumed within the Equality and Human Rights Commission created in 2006), which has statutory powers to respond to and act on denunciations without requiring individuals to take legal action on their own account. Many Latin American countries now have Human Rights Commissions, but these do not have powers to do more than report and denounce and pass evidence to the Public Prosecutor.

This approach is universalist because it envisages the sanctioning of acts which are judged to be racially or ethnically discriminatory in themselves irrespective of the past or future of the culture of the victim. The acts in question are discriminatory because they exclude the victim from some entitlement, moral or material, on the basis of that individual's irrelevant or external and ascriptive characteristics, real or even supposed ethnic, racial or religious affiliation, or on the basis of his or her gender. Although this approach does not enjoin us to appreciate each and every, or even any, cultural tradition or trait, it can apply where some act stimulates racism in general. A case of the latter arose in 2008 when a Rio de Janeiro judge prohibited a carnival float depicting Holocaust victims. Her grounds were that the float constituted 'uma ferramenta de culto ao ódio, banalização da barbarie e racismo'.[7] An employer, say, who refuses a person a job on the grounds of that person's foreign accent – or because he or she 'speaks like an *indio*' – may be punished for failure to treat an individual on the same terms as all other individuals, thus affecting his ability to earn a living, which is a basic and universal human right. The offense is

[6] The reason is that people who did not fit the relevant physiognomy were routinely and insultingly told to take the 'service' lift when visiting apartment blocks, especially in middle and upper-middle class neighbourhoods.

[7] 'An instrument promoting the cult of hatred, the portraying of barbarism and racism as mere objects of distaste ('banalization')'. See Topel 2009.

not the failure to appreciate the value of a particular culture. But in the current climate of the politics of recognition – which barely existed forty years ago in Europe – it is hard for anti-discrimination law to remain immune to questions of collective identity or cultural heritage.

The more explicit advocacy in terms of an entitlement to recognition which is grounded in Taylor's essay is not easy to interpret. Taylor's translation of Rousseau's phrase is 'inwardly derived identity' and refers to an individual's distinctiveness – a distinctiveness formed not in a personal bubble but in open dialogue with others. He argues that difference-blind respect, the universalist's concept, which takes all individuals as entitled to the same regard on the basis of their individual attributes and achievements alone, reflects a single hegemonic culture. Difference-blind respect becomes a front for the imposition of a dominant set of social valuation criteria, which sounds like a play on words: are there no shared characteristics? Does a society have to found itself anew every morning to avoid the shared characteristics becoming hegemonic? Or, is social life possible without the exercise of some sort of ideological power or the dominance of a hegemonic value system or social capital (Bourdieu-style)? How could one have a notion of disadvantage without a shared conception of the good?

However, Taylor does not defend the incommensurability of cultural traits, as a radical relativist might. He admits the notion of universal potential and the legitimacy, in looking at how low achievers could achieve more, of looking at what others have in fact made of their potential. He also expresses disdain for the 'neo-Nietzschean' hard-line multiculturalism which he associates with the names of Foucault and Derrida, as well as for the culture of victimhood and the trend towards ghettoization. He also criticizes strongly certain strands of multiculturalism, rejecting the idea of recognition based on the sufferings of predecessors, which he sees as a type of condescension: authentic recognition of a people is recognition of their worth, and the worth of their products (in the broadest sense): to recognize that worth on grounds of ancestral suffering is to patronize.

Taylor takes these sorts of issue up later in his Quebec Report (Taylor and Bouchard 2008). Written in response to a government request, and in the light of growing controversy about multiculturalism vis-à-vis immigrant groups and Muslims in particular, the report provides excellent dissections of issues but few firm answers to questions about the marking of difference and the reconciliation of identity-driven demands with core liberal principles or taken-for-granted norms of the Canadian welfare

state. Instead it calls for reconciliation, local or community-based negotiations and suchlike ad hoc arrangements. These may indeed be the best available way forward but they hardly represent hard-line multiculturalism. His founding text remains ambiguous: on the one hand he has strong words for Rawlsian difference-blind respect, but on the other he hesitates in the face of what might be called cultural fragmentation and ghettoization.

Others, including some who invoke Taylor, are less circumspect. A current of opinion widely disseminated among NGOs and the anthropological profession, and even in multilateral institutions like the World Bank (Hall and Patrinos 2006), supported in political theory by Will Kymlicka's idea of liberal multiculturalism, advocates the strengthening of group differences, the thickening of institutional, linguistic boundaries, and even the creation of institutional or territorial zones of relative autonomy. Kymlicka's distinctive contribution is the invocation of collective rights. These rights belong to collectivities that share a culture, and are a response to undoubted disadvantages and a legacy of physical, cultural and socioeconomic violence perpetrated against livelihoods, institutions and traditions. The model makes quite good sense as a model, but encounters serious problems in the real world of today, which Kymlicka readily recognizes. These problems emerge when Kymlicka discusses concrete problems, and especially when he encounters conflicts between indigenous cultures and liberal-democratic assumptions. Kymlicka seems to constrain group self-rule so much that it is restricted to a pyramidal, Republican arrangement Latin or French-style, or to some sort of federalism, for he is not prepared to allow groups to repress individual freedom of conscience and vigorously opposes the 'communitarian idea that people's ends are fixed and beyond rational revision'. 'There is', he writes, 'a genuine conflict here' and leaves it at that (Kymlicka 1995: 163). Recalling that exemptions were granted to certain immigrant groups to the US in the late 19th and early 20th centuries, he says that maybe this was a mistake, and that they have a greater claim to maintaining 'internal restrictions' – i.e. restrictions which go against the grain of a liberal rights regime – than more recent migrants (Kymlicka 1995: 170). So Hasidic Jews who impose illiberal restrictions on their wives and children would be allowed to continue while more recent Muslim immigrants would not? Kymlicka has difficulty applying his ideas outside the Canadian situation. Thus in his later *Multicultural Odysseys*, quoting Rachel Sieder (1999), he criticizes vigorously 'legal practices that are said to be timeless and authentic [but] are often…recent, based on a pastiche of cultural

influences' and the manipulation on the part of local elites of ideas about 'sacred obligations' so as to silence disagreement within the group (Kymlicka 2007: 150). He abandons the discussion, lamenting that since Guatemala is such an illiberal society, one can hardly expect its indigenous people to be liberal-minded – though in fact it would be hard to claim that those in authority in Latin American indigenous societies are systematically more repressive, or more frequently violate their members' rights, than ultra-Orthodox Jews worldwide who prevent their children from studying more than an absolute minimum of non-religious subjects in school (Lehmann and Siebzehner 2006, 2008).

So Kymlicka is less radical than some might think, and his advocacy of differentiated group rights is tempered by a fierce commitment to liberal human rights and oversight by the national state's judiciary. The pyramidal republican state is built to deal with precisely those differences and possesses mechanisms to allow changes in consensual values. But is it possible to allow a concept of collective rights, while at the same time preserving the right of the individual to make choices on fundamental issues? One may divide collective rights into rights of self-government and collective or corporate representation and other rights which govern individual behaviour. The former might cede control over resources and territory within a framework of decentralization, but the latter might relate to sensitive issues like religion, marriage, sexuality and gender. The republican arrangement will usually allow individuals to opt in and out of the latter but will resist formal political representation – which is why Colombia's Constitution is so exceptional, though it may also be a path-breaker. While citizens in standard liberal states cannot opt out by dissenting from the laws, within a liberal rights regime collective rights coexist side by side with mainstream arrangements, so the issue is whether an individual who is ascribed to a particular recognized distinct group can opt in to the mainstream. Yet if such individual latitude is allowed, what is the point of collective rights, since the institutions charged with enforcing the consequent rules will not have the power of coercion which legal institutions usually have?

One example of the outcome of such tangled knots is the case in which a Colombian Supreme Court judge entered into an anthropological analysis of indigenous law and concluded that it should be respected as a living, dynamic institution. The case started in the Cauca region where over several decades a variegated system of indigenous government and politics has developed, sometimes against and sometimes with the support of the

state. In the town of Jambaló a local leader was sentenced to be whipped for his remote role in the assassination of a rival. There was no question of his direct implication. Rather, the issue was whether he had contributed to creating the climate in which this murder could be committed – a crime known as *atardecer* in the indigenous context. He was tried by a *cabildo* – a council – and sentenced by the recognized indigenous judicial instance to sixty lashes plus exile and exclusion from political office. The state's own municipal penal court ruled that the process had been deficient and that whipping constituted torture, but appeals succeeded one another right up to the Constitutional Court, whose President ruled that 'concepts such as human rights and torture could only be defined in culturally specific ways' (Van Cott 2000; Rappaport 2005: 249). Although his stance was clearly a relativist one, it was not couched in terms of a fossilized concept of a tradition. Instead, he said that the case could only be resolved 'from an intercultural dialogue capable of establishing minimal standards of tolerance that encompass different value systems' (Rappaport 2005: 250). And he stated that *usos y costumbres* (that is, indigenous customary law) as the legal and electoral expressions of tradition 'are a dynamic process', so the issue was not one of demonstrating that 'the ancestors' did it thus or thus. 'What is required is compliance with those actions that the accused can anticipate and that approach the traditional practices that assure social cohesion' (Rappaport 2005: 250). Colombia's 1992 Constitution includes the following provisions:

> Indigenous office-holders may exercise judicial functions within their territorial areas in accordance with their own rules and procedures, so long as they are not contrary to the Constitution and laws of the Republic. The law shall establish the forms whereby coordination of this special jurisdiction will conform to the national judicial system (Article 246), *and*
>
> In accordance with the Constitution and laws of the country, indigenous territories shall be governed by councils whose membership and procedures will be established in accordance with the customs and traditions of the communities (Article 330)

But if this means that judges can use a concept of social cohesion – rather than a concept of identifiable individual or corporate responsibility – in their judgments, then we are introducing anthropological analysis, with all its recognized relativism, uncertainties and margins of error, into a field where normally judicial rulings are expected to make matters as cut and dried as possible. Indeed, the judge's ruling itself, by recognizing that the traditions whose legitimacy is enshrined in the Constitution were

themselves subject to change as society changes, surely created a highly uncertain situation for individuals who might ask themselves who decides what the tradition is.

This however is not what worries the more engaged branch of Legal Anthropology. In a paper on *interculturalidad* – the term now almost universally adopted in Spanish America in the place of multiculturalism with its perceived excessive encouragement of ghettoisation and postmodern relativism, and also to convey the interaction and interpenetration of cultural traditions – the Mexican legal anthropologist María Teresa Sierra comments on a case that arose in the state of Oaxaca involving the exclusion of a woman from standing for office in a municipality where *usos y costumbres* had been officially established as the recognized electoral procedure. In fact it is unfortunate that the case hit the headlines because the Oaxaca experience of incorporating indigenous practices into the electoral system has overall improved the democratic environment in the state's 570 municipalities – of which 390 have chosen to govern themselves, in a process overseen by the State Electoral Commission (Recondo 2007). After decades of murky manipulation during which local authorities were chosen by the ruling PRI in private negotiations with local notables and faction leaders, the adoption in 1996 of indigenous procedures, largely initiated by two governors with nothing like the pressure from below experienced in neighbouring Chiapas, actually brought more openness and a more clearly rule-bound procedures, because they were now supervised by an impartial State Electoral Commission. It is therefore understandable that Teresa Sierra should complain that this incident (in the pueblo of Santa Maria Quiegolani in late 2007) should be used to discredit indigenous law and to attack indigenous culture. But at the same time she wants to keep a distance from the state-sponsored version of diversity and also from conventional notions of modernity. She rejects any sort of essentialism, yet still demands the recognition of difference and protection of women's rights, while defending indigenous culture against 'exclusionary, evolutionist and universalist visions of modernity' (Sierra 2009:, 76).[8] Somehow she is trying to find a path to diversity

[8] It is worth quoting the passage in full: 'A diferencia del discurso oficial del multiculturalismo, que promueve la inclusión de la diferencia en la lógica estatal, el discurso impulsado por el movimiento indígena ...es un discurso transformador que implica un cuestionamiento radical a las visiones evolucionistas, excluyentes y universalistas de la modernidad occidental con su reivindicación de la dimensión ética y política de la diversidad. Desde la perspectiva de la interculturalidad, la diversidad es un valor que debe acompañar al reconocimiento de lo propio, al mismo tiempo que hace relevante la diferencia

which avoids the essentialization of culture, leading to the exhortation to 'approach diversity from diversity'.

This text surely illustrates the confusion brought about by tip-toeing through a minefield of undesirables: on the one hand those associated with official *interculturalidad*, namely essentialism, modernity, universalism and neoliberalism, and on the other those embedded in everyday life – in this case limitations on women's rights. This confusion shows that there are arguments for the restitution of indigenous law, but also that it would be better to evaluate them in terms of the outcomes they seek to achieve rather than their ideological justifications, insofar as the two can be separated.

Nonetheless, these two examples show that it is possible to have some sort of legal or institutional pluralism within a Republican and liberal order, regulated by the state's own legal authorities. It will, however, be quite a restricted pluralism, because Latin American states are deeply Republican and will definitely only allow the recognition of indigenous judicial procedures within the overarching pyramidal framework – even in that beacon of indigenism, Bolivia. Bolivia's recent Constitution announces wide-ranging openings to indigenous law, but it will take a long time, and an elaborate institutional design, for those provisions to be translated into law, and meanwhile there is no formal recognition. It should be recalled, also, that while Oaxaca – the state with by far the largest number of municipios and thus a dense machinery of local government – forged ahead with *usos y costumbres*, other states which did adopt them, like Michoacán, have not implemented them systematically (Assies et al. 2006).

Parallel legal arrangements, of which classic example is the Sicilian mafia (Gambetta 1993 and innumerable other sources), are not unknown in Latin America, but in the past they have not been rooted in indigenous culture. Deborah Poole (2004) describes a regime of informal law prevalent until the Agrarian Reform in the highlands of Peru, which is not

---

colonial, es decir, el hecho mismo de la subordinación y el poder en los que se han construido históricamente esas diferencias. La interculturalidad apuesta también a construir diálogos, pero desde nuevos contextos que reconozcan las injusticias históricas que han marcado la vida de los pueblos indígenas y otros grupos minorizados. El concepto de interculturalidad implica entonces un *aspecto relacional*, es decir, la relación entre grupos sociales y culturas; las *relaciones de poder* entre grupos históricamente subordinados y hegemónicos; el *reconocimiento de la diferencia colonial*, o sea, la necesidad de valorar la diversidad como aporte a modelos civilizatorios; y también una apuesta dialógica transformadora, que impacte al modelo de Estado unitario y a la democracia.'

just rough and ready arbitrary punishment meted out by local landlords-cum-political bosses, but is indeed state-sanctioned. Like Brazilian *coronelismo*, they are 'neither an alternative form of sovereignty that exists 'beyond' the margins of the state … nor a sovereign power that either mimics or 'contaminates' the state – for both of these terms imply a point of departure that is somehow exterior to the state' (Poole 2004: 66). Poole also describes the *rondas campesinas* which, originating in local defences against cattle-stealing, evolved in some regions into dispute-resolution mechanisms and also into defence squads against the Sendero Luminoso insurgents of the 1990s (Poole 2004: 60) – an interpretation contested by Orin Starn (Starn 1999). Neither of these examples could be regarded as indigenous justice systems. Poole alludes only in passing to 'strict community hierarchies and systems of rotating positions' as one aspect of the phenomenon she is describing. Indeed, her account of a judicial body 'both of and not of the state' is reminiscent of the phrase coined by Jan Ruus for the relationship between Mexican indigenous communities and the state prior to the electoral reforms described above in Oaxaca: *'la comunidad revolucionaria institucional'*[9] (Rus 1995). This arrangement enabled the ruling party to embrace community leaders and, curiously, by rarely allowing more than one candidate to stand in local elections, produced a system with all the appearances of a 'consensus' government attributed by some to indigenous political culture. Later, when *usos y costumbres* were introduced in Oaxaca, the PRI lost power in many municipalities, and sometimes people were disconcerted to have to choose between candidates when for generations there had never been more than one! So perhaps by introducing *usos y costumbres* the state was undermining traditional ways of building political authority to which the epithet indigenous might as well be applied as any other. A similar evolution is described by Sandra Brunnegger in her study of the institutionalization of indigenous law in Tolima, Colombia, where we find indigenous judges sending offenders to state jails and receiving training in judicial procedure from international aid agencies. Far from a parallel system, this is one which defends its legitimacy 'in a legal idiom' rather than an idiom grounded in versions of tradition (Brunnegger 2011).

It is indeed a paradox that recognition in the legal sphere must mean regulation. There is a great deal of extra-legal criminal justice and dispute settlement in Latin America, but pleas for recognition presumably do not

[9] This is an allusion to the PRI – Partido Revolucionario Institucional – which ruled Mexico for 80 years till 2000 as in effect a one-party regime.

call for that de facto situation to continue, even though that might be the purest multicultural response. No one in these Latin American debates has mentioned the Gypsy or Romani model which is a true system of justice existing side-by-side with, in subterranean interaction with, but also hidden from, and sometimes subverting, the official system (Weyrauch 2001).

Recognition is a double-edged sword: it recognizes difference but by the same token it brings marginalized – or purportedly marginalized – practices within the purview of state regulation. The recognition of indigenous systems of justice would be a rural phenomenon and would probably contribute more to institution-building and modernization in rural areas and small towns than to a revival of identity, as illustrated by the Colombian Nasa people of Jambaló and the electoral process in Oaxaca. It may or may not contribute to social justice, but it surely enhances citizenship by incorporating social groups into the institutional system and providing them with access to due process.

Recognition and Redistribution: Brazilian Rural Black Populations

In this section, I will argue that the opposition between the politics of recognition and the universalist approach is, at least to some extent, a false one, and that elements of universalism are embedded in the application of the politics of recognition.

We came to legal pluralism because we were engaged in a questioning of 'recognition for recognition's sake', not in the field of culture and creation, but in the field of distributive justice. The examples we have provided show that there is a non-correspondence between the way in which a state uses words like 'ethnic' or 'indigenous' and the way those identities are shaped in real social life and through historic processes of change. The state looks for cut and dried categories, and has to shape instruments which translate principles and concepts into actions affecting individual or corporate actors. In response to indigenist pressures for recognition, or for restitution, it has to gradually systematize criteria of recognition in a sphere of social life where the criteria are fluctuating, contextual and ambiguous, and yet where there clearly is an issue of social justice which must not be overlooked: it is not sufficient to stand on the side lines and unpick these policies and claims because of their inconsistency, for they do constitute attempts to deal with real injustices, with disadvantages

inherited and perpetuated through generations. Furthermore, universalist policies such as land reform and distributive welfare have left much to be desired, and so it is not surprising that movements for social justice, and the activist intellectuals who inspire them, are turning to these other themes to attract resources and attention.

Thus the last example I provide is that of the Brazilian *quilombos* – fugitive slave settlements and their 'remanescentes', a word which conveys a framing of the inhabitants of the targeted places as either descendants or successors – direct descent being too restrictive and unverifiable a criterion. The quilombo was brought out of the mythology of a rebellious past and into current political vocabulary during the wide-ranging debates which surrounded the drafting of Brazil's Constitution in the period 1986–88. The result was a definition of quilombos, which were previously understood as communities of offenders – runaway slaves – as a positive self-attributed identity. The issue remained in a legal limbo, though, because of the lack of criteria and procedures for the recognition or certification of quilombo communities and above all for the restoration of their land. In 2001 the power to recognize a quilombo and its members, the quilombolas, was conferred on a government-supported semi-official Cultural Foundation devoted to black causes – the Fundação Cultural Palmares – named, precisely, after the most famous quilombo in Brazilian history (Reis 1995–96).[10] But this type of organization did not have the expertise or powers to implement the restitution of land, so in 2003, under a new President, that power was moved to the Land Reform agency, INCRA (Instituto Nacional de Colonização e Reforma Agraria). The relevant Decree, elaborated after extensive consultation with federal agencies and with the quilombo movement (CONAQ – see below) stated that the successor communities ('remanescentes das comunidades dos quilombos') are 'self-attributed ethnic-racial groups with a history of their own, enjoying specific territorial relationships among their members with a presumption of black ancestry related to resistance to a history of oppression'.[11] The shift from a specific legal-genealogical criterion to a more

[10] Palmares was a name given to a vast archipelago of semi-kingdoms populated by escaped and revolting slave which survived through most of the 17th century.

[11] 'Consideram-se remanescentes das comunidades dos quilombos os grupos étnicoraciais, segundo critérios de auto-atribuição, com trajetória histórica própria, dotados de relações territoriais específicas, com presunção de ancestralidade negra relacionada com a resistência à opressão histórica sofrida.' (Decree 4.887/03.) I have translated a little freely: thus *etnico-racial,* a distinctive and new Brazilian term widely used in policy statements

subjective ethnic one is clear, and the scope of this definition could include perhaps the majority of Brazil's rural population.

The background of course is the joining of a claim for restitution of some sort to benefit the black population as descendants of slaves with the pressure for Land Reform, which has proceeded in Brazil since the 1990s but hardly enough to keep up with the demand or the need for land among the landless or those without title. In the intervening years the quilombolas have become a recognized ethnic group, eligible to benefit from affirmative action programmes and recognized on a par with indigenous groups for example in the Education Ministry devises teacher training programmes for teachers. INCRA has established a department specialized in quilombo claims headed in 2009 by an activist from the quilombo movement, and the quilombolas have spokespeople in a range of federal government agencies, like the Secretariat for Racial Equality and the above-mentioned Fundação Palmares. The sense of smuggled agendas is heightened when one realizes that the notion of recognition – as in 'recognized ethnic group' – is not a tight legal concept nor, obviously, does it rest on a clear delimitation of the group. Recognition can be said to have radiated out in Brazil from the legal recognition of the Indian population, which has a long history, to other populations. At first the Indians themselves emerged in the public sphere as more and more diverse, and then the vast black population, and now quilombolas – rural blacks – could be seen as equally deserving, to be followed by *caboclos* (Amazonian populations of multiple racial descent) and eventually no doubt others. But the process of recognition is at the same time empirical and contextual: there is no single authority to decide who is what, but rather multiple programmes in agencies of the vast federal state apparatus that confer recognition for different purposes. Although this may seem intolerably chaotic to some, for others it will be a necessary effect of the constant struggle involved in gaining an improvement in the material conditions of these populations and also in their recognition as citizens (not just as ethnic or racial groups). But recognition brings bureaucracy and the mere fact that a quilombola activist occupies the position of head of INCRA's quilombo department does not guarantee sympathetic hearings, for both the literature and my interviews are replete with complaints about the

---

and discussions, is rendered as 'ethnic-racial'; I have inserted 'among themselves' to clarify the relationships being referred to within the territory; and I have translated *remanescentes* as 'successor', since a word like 'remainder' or remaining' does not convey the meaning of the original. 'Survivor' would also be suitable. Jan Hoffman French mentions alternatives such as 'survivors', 'remnants' and 'descendants'.

tectonic slowness of INCRA's responses. As land claims multiply so this problem will get worse.

Pressure for the quilombola cause comes, inter alia, from the CONAQ - Coordenação Nacional de Articulação de Comunidades Rurais Negras Quilombolas – originally created in 1996 as the Coordenação Nacional de Quilombos. In the state of Paraiba, according to an interview with two social scientists in March 2010 at the Federal University of Paraiba who have been contracted by the authorities to advise on these matters, NGOs related to the Movimento Negro approach INCRA to initiate a process of recognition and restitution, but they also have to first persuade the prospective beneficiaries that they are descendants of slaves and are entitled to make a claim. That in itself is not always straightforward: in a detailed ethnography undertaken deep in the interior of the state of Bahia, in the region known as the Chapada Diamantina, Ubiraneila Capinan describes different myths or narratives of origin recounted by a leader and a member of the local quilombo association, which has been recognized and has also achieved a restitution of lands. In one, the notion of a fugitive community is robustly denied, while in the other it is woven in a complex image of slaves who were not allowed to sleep at their place of work (Capinan 2009: 143–162). Both accounts included an account beginning with black settlement – but only in one were the blacks subsequently enslaved by colonizers (*bandeirantes*).

In Paraiba the anthropologists of the Federal University found in their search for actual and potential quilombolas that potential beneficiaries had migrated, while others had entered into relationships with landlords and also that prospective quilombo land had been allocated to a Land Reform settlement under the management of the Movimento dos Sem Terra (MST – Landless People's Movement), the leading grassroots mobilizing force for land redistribution. Reesink (2008) reminds us that it was quite common for slaveholders to give land to their slaves or ex-slaves, so that the notion that the descendants are heirs to a struggle or to a fugitive community is quite fanciful in such cases. Reesink's main complaint is that some anthropologists, on studying a group which has racial features in common (namely, black skin) conflate this with struggle, religion (Afro-Brazilian ritual), collective consciousness of a difference vis-à-vis others (whites), endogamy, exclusion by discrimination and an awareness of African origins. Jean-François Véran presents an even sharper criticism based on his observation of expert anthropologists in their field trips to prospective quilombos and also of his ethnography of the Rio das Rãs quilombo in Bahia. Véran's difference of opinion opposes him to Jose Jorge

Carvalho, later to gain prominence as a leading advocate of black quotas in Brazilian universities, as the author of an early anthropological report on Rio das Rãs undertaken for the Palmares Foundation and published as a book in 1996 (Carvalho 1996). Like Reesink, commenting on other works, Véran sees little reason for Carvalho's joining together of race, community, territorial identity and social separation; in his conceptualization there is a whole array of social networks within and outside the population of this place, and he finds the assumption that these categories are superimposed in the life of the population unwarranted (Véran 2003: 108–9).

In any case, among largely illiterate people who until recently hardly had any education at all, and in regions where the registration of land title has been dubious for centuries, as exemplified by the practice of unregistered donations of land by slaveholders, verification of a fugitive slave community of origin (by definition non-legal and unregistered) is almost impossible. Furthermore, although intellectuals and activists may take pride in slave ancestry, or may regard it as a source of pride for others, and while some may see merit in the victim status, the literature also repeatedly mentions that in Brazilian daily life, to admit, let alone proclaim, a person's slave ancestry is more a source of shame than of pride. For all these reasons, if the quilombo restitution is to happen, and especially if it is to be translated into a legal-bureaucratic reality, it probably cannot be based only on criteria embedded in the rhetoric of past oppression. It is not therefore surprising that the November 2003 Decree 4,887/03 defined the quilombos in a way which did not require proven descent in the sense which the original popular concept of quilombos as fugitive slave settlements would have implied. These highly qualitative and subjective criteria opened the way for the involvement not just of anthropologists buyt also of their professional body, the Brazilian Anthropological Association (Associação Brasileira de Antropologia – ABA). ABA had previously reached an agreement with the Palmares Foundation to provide anthropologists as expert rapporteurs in establishing the quilombola identity of individual communities, and later the Association reached an agreement with the Procuradoria Geral da República (also known as Ministerio Público) that they would nominate anthropologists as professionals qualified to produce a *laudo* (expert opinion).[12] These opinions carry weight.

[12] The Ministerio Público is a peculiarly Brazilian, but powerful, legal figure emerging from the country's recent Constituent Assembly's and probably in response to the country's recent history of large-scale abuse of power during the military regime. Its staff, known as Procuradores, are totally independent and are free to take up issues of public

The participation of anthropologists, notably of the leading expert and activist Wagner de Almeida, had helped to persuade a judge to reduce the size of a satellite launch base in Alcantara, for example.[13]

But the process is agonizingly slow when it comes to translating the recognition of the quilombo identity into the allocation, and indeed redistribution, of land. Between 2004 and 2008 the Palmares Foundation had published 1,075 certificates recognizing quilombo communities nationwide, mostly in the Northeast (Capinan 2009: 104). In the same period 812 petitions were formally presented to INCRA for the recognition of quilombo lands, but of these only 48 actually received land titles, adding to the still pitiful 54 received in the period before INCRA acquired its exclusive responsibility for this process. The process of demarcation involves, among many other things, drafting a technical report covering identification and demarcation (Relatório Técnicos de Identificação e Delimitação – RTID) written by a team comprising an anthropologist an agronomist, a surveyor and an 'analyst in administrative procedure' (Capinan 2009: 10). In a similar exercise in Paraiba, reported in my 2010 interview with the Paraiba anthropologists, 18 months were required for the preparation of a report. After demarcation by the state there may still be unfinished business since the land involved may be owned or occupied by third parties – that is, small or large private landowners.

Capinan goes on to explain the socio-cultural shock experienced by communities which on the one hand are receiving the benefit of recognition and restitution, but on the other hand are the subjects of a transition from a customary to a positive legal regime and from an individual usufructuary title to a formalized collective title to land which now is inalienable and can therefore not be used as a loan guarantee which would be very useful in financing annual crops. That is, the state has imposed a new form of title. This has to be put into a context in which the process rests upon a petition being presented by an Association, not by individuals, which itself requires prior organization and mobilization. On the other hand, the formal process has largely been emptied of the issue of slave or fugitive slave ancestry, replacing these with criteria of community life and belonging. Although these criteria seem vague, the inclusion of anthropologists in a positive legal process enables them to be concretized in the

interest. It has offices in all the state capitals. (To clarify: the Advocacia Geral da União is the Public Prosecutor, the government's legal service, known in some Spanish-speaking countries as Procuradoría.)

[13] Interview with Ruben Oliven. President of ABA in 2000–2002, May 2010.

way just explained. One is forced, in the end, to ask whether it would not be simpler to infuse more dynamism in the Land Reform itself, for these other devices – which include also claims by or on behalf of indigenous groups. Are these not devices to achieve the aims of a Land Reform regarded by activists as inadequate? The existence within the bureaucracy of pockets of sympathy – for example among the lawyers of the Ministerio Publico and in the anthropology profession, but crucially not in INCRA itself – also helps.

The involvement of anthropologists may indeed be surprising and takes us back to the Colombian discussion about legal pluralism and to the quotas in the University of Brasilia. For it is once again hard to reconcile the discipline's relativist ethos with its participation in such procedures – a dilemma also pointed out in our account of Teresa Sierra's critique of official *interculturalidad*. ABA has however taken these issues on board and, after signing a Technical Cooperation Agreement with the Procuradoria, organized a workshop in 2000 (funded by the Ford Foundation, known for its longstanding commitment to indigenous and anti-racist causes in Latin America) for the purpose of producing a document which treads the tightrope with the utmost care. The document is described as list of 'questions', or issues, designed not as guidelines but rather to stimulate debate. Nevertheless, it must have more than the status of a mere text, if only because, by bearing 19 signatures of which five are from the Ministerio Publico and the remainder are academic anthropologists, plus one from an NGO, it is clearly a document which has been negotiated and agreed.[14] It recognizes clearly the difference between the needs of the law and the bureaucracy, who need to produce 'judgments' and 'truths' (quotes in the original), and the anthropologists' search for intelligibility and interpretation. It stipulates that the reports (the *laudos*) keep to the subject, explain their methods, and above all answer the specific questions which are addressed to them in the commissioning of a study, and that they explain 'notions used in a different way from that which might be found in a dictionary' ('noçoes utilizadas que fujam au seu sentido dicionarizado').

The remainder of the 6-page document reflects the concerns of the anthropologists, and of activist anthropologists who are devoted to the cause of indigenous peoples and quilombolas in particular. For example, respect for their different forms of knowledge is required so as to avoid

[14] It can be found at http://www.nuer.ufsc.br/documentos/carta_cana.htm

any chance of adaptation (by which they state that they mean 'subordination') of one to the other. The reason given is that the possibility of transforming the 'prevailing national juridical and administrative system … by interaction with different, subordinate juridical, social and political systems' ought to be preserved so as to 'open the way to a broader diversity of rights'. They also recommend that prior to agreeing to undertake a commission, anthropologists should recognize the juridical or administrative issue which gave rise to the commissioning, just as the counterparts should be prepared to enter into a dialogue when anthropologists present alternative formulations of the problem. In practice, one presumes that there is a sub-text according to which the commissioning authorities know that anthropologists are likely to be sympathetic to the claims of Indians and quilombolas, while anthropologists recognize that their reports are not rulings. As the document says, anthropologists are not detectives or judges. In fact, INCRA and the Ministerio do employ anthropologists on their staff, and there is some debate about whether their use of external anthropologists as-consultants is well advised. This is not surprising given the role of ABA in naming consultants with known public positions on these subjects.

We could describe much of this as a carefully negotiated network of compromises. Although Brazilian governments have in recent decades undertaken major initiatives in reducing the incidence of poverty, in reducing inequality and in redistributing land, through the Bolsa Familia, Land Reform and investing in scholarships for low-income students in higher education, there has been strong pressure from sectors of the intelligentsia and from a congeries of black pressure groups and related NGOs to add a colour dimension to these efforts in the form of quotas for university entrance and restitution of land to quilombos. These measures are full of inconsistencies and are implemented in disparate ways across the federal bureaucracy (more than the state bureaucracy) but they add a dimension of symbolic and real inclusion to universalist programs. They thus enable politicians to acquit the state of a historic debt to the victims of racial exclusion without spending very large amounts of resources or threatening broad-based interests: hence the difficulty of concretizing quilombo status by awarding definitive land titles, and hence also the dilution of racial quotas with socio-economic criteria.

Just as the agenda of the black movement is remolded as something like a specialized branch of broader programs of social inclusion, in the case of *usos y costumbres* – be they in the legal field as in Colombia, or in the election of municipal governments, as in Oaxaca – we see a

universalist agenda of modernization and deepening of civil rights emerging from an identity-driven indigenist inspiration. Major institutional innovations designed to meet the real or supposed demands of indigenous groups and their leaders establish themselves without much resistance, even though they seem to fly in the face of received notions of liberal democracy and modernity. But it turns out that they do in fact promote modernity and civil rights because they bring the practice of impersonal administration of the law and open electoral competition to parts of society where they had been previously little known.

Corporatism: A Reluctant Defence

The burden of much of what has been described here is a questioning of the polarization of relativist and universalist responses to inequality, both in principle and in practice. The question which then arises is why it is that ethnic and quasi-ethnic claims have made such progress in recent years at the expense of those grounded in the more all-encompassing or universalistic categories of inequality and class. One standard but superficial response is that the end of state socialism has dispatched the concept of class to the Siberia of intellectual discourse. Another response has been that politicians find it more to their advantage to adopt a corporatist or clientelist response to social demands – an argument first developed for Latin America by Hooker (2005) when comparing state responses to indigenous, as distinct from Afro-Latin or black grievances and demands. To summarize, the argument is that black people's grievances usually require a universalist response because they cannot be bracketed out with legal pluralism, with grants of land or with intercultural schools or universities. Rather they require thoroughgoing judicial action against discrimination plus a policy of redistribution. The sometimes bitter controversy surrounding the quotas policies applied thus far mostly to university entrance – which has to be the subject of a separate discussion – shows how the state has found some sort of compromise between the two. The slightly less high-profile case of the quilombos is another example of such compromise.

Activists in the indigenist cause and spokespersons of Brazil's Movimento Negro often decry *mestizaje*. They deplore it because it has been used by the state to whiten the population, or to undermine indigenous cultures, or to divert the population's attention from the underlying racial polarization and oppression. Other cases studied in this project but not

reported here show Latin American states and universities responding to these criticisms with concrete measures.[15] We have at the same time also seen that despite attempts to categorize for purposes of social engineering, clear-cut categorizations become blurred in practice. Black quotas in Brazilian universities are mixed with socio-economic criteria. Mexican intercultural universities admit anyone who is qualified without applying any kind of ethnic or racial criterion. And we also know that, in contrast with North America or Europe or Asia, the cultural practices associated with the racially excluded and ethnically subordinate – blacks and indigenous – are accepted and often even glorified by elites and states as national heritage. So however hard activists try they are liable to be sucked in to the state's corporatist embrace. To some extent this is a direct response to the pressure of the movements: the state takes activists into the bureaucracy, creates agencies and niches where they can pursue their agendas within certain limits, and the mobilization politics then become bureaucratic politics.

This fits in with the interests of the political class. Large scale redistribution of land is politically too risky; large-scale reform of the education system is difficult and takes too long to show results for politicians in search of votes in the next election. Affirmative action in university admissions, in contrast, is reputed to be cheap: it was initially funded by the private universities themselves in a deal which condoned massive debts they had with the Social Security system; and seems to have been institutionalized as a tax exemption. According to a brief article published by the Minister of Education Francisco Haddad with two collaborators in the journal *Higher Education* (vol.12 no.2), in 2005 it cost at that time less than US$430 per student, amounting to a total of only US$48m.;[16] since then the sums have increased but the principle remains the same and a total of 900,000 had benefited by 2010. The cost also depends on the parallel increase in university places, and in the number of higher education institutions, which is taking place in Brazil, and on universities' own expenditure on financial support for students to help them stay in full-time higher education plus all sorts of small schemes which were mentioned to me during interviews; and institutional innovations like *usos y costumbres* cost next to nothing. Having said that, there is no evidence that these issues — a big if —, which so exercise the intelligentsia, have been matters

[15] See unpublished papers at http://www.davidlehmann.org/htmls/unpub-pap.html

[16] Accessed via http://prouniportal.mec.gov.br/images/arquivos/pdf/artigo_program_prouni.pdf

of public debate in elections in Brazil or Mexico, and political research has not yet asked whether they have garnered voter support.

These policies have a discernible corporatist character: they target a specific ethnic category and create a new leadership or proto-elite among the black population. In the case of the quilombolas the numbers are very small so far, but if the land allocation continues and is speeded up then the Brazilian countryside will be dotted with small, low-income communities who owe their ownership of land and in many cases no doubt their ethnic identity to a state programme which, though described as restitution, is more like redistribution. Some politicians may well be pleased because these lands will not be under the control of the Movimento dos Sem Terra which is – at least rhetorically – deeply hostile to the state's capitalistic orientation but controls many settlements established under the main Land Reform.

The policies described here are, from the point of view of a classic welfare state, inconsistent and incoherent. Often, solutions beget new problems. The new state policies often reify identities and carry ambiguous and in some cases unforeseen consequences for the potential beneficiaries of these policies. Yet, even if they involve much play with ethnic categories, at least they signal a beginning, and also they are becoming institutionalized, in the form of legal pluralism, affirmative actions, intercultural universities, or quilombo land allocations. All this activity produces jobs for the groups affected or benefited in their management and administration and thus little by little the proto-elite emerges. These elites may take the struggle further and opportunities may open up for others of their group. In the end, the advocates of the politics of recognition will have played a small role as midwives to a society of somewhat greater opportunity.

This chapter began by exploring the difficulties posed by ethnic or racial classification, the non-linear relationship between multiculturalism and social justice, and the impossibility of a purely technocratic impersonal approach in counteracting the effects of generations of race-based exclusion. We also saw how in Asia and the Middle East racial and ethnic differences are quite hard and institutionalized while Europe has trouble with ambiguity and mixture in classification. In Latin America we see that policy responses have combined an apparently divisive rhetoric and nomenclature (separate quotas, separate legal and electoral arrangements, intercultural universities) with a practice which is consistent with the much-derided mestizaje: a broad-brush corporatist approach which pays more attention to inclusion than to equality. It is an approach whose

ultimate consequences will most probably be to extend further the chromaticization and mestizaje of social relations, within a context of declining inequality, at least in Brazil (Ravallion 2009; Neri 2010). This is likely to be most noticeable in Brazil because these programmes and other trends are benefiting from the country's fast economic growth. In Mexico, affirmative action is not on anything like such a large scale but the politics of recognition, whether in the form of intercultural higher education or the institutionalization of *usos y costumbres* promises to be inclusionary in the sense that it combines a politics of recognition with inclusion of the indigenous within the purview of the state and of universalist ideas of citizenship. Yet it all seems to fit in well with the region's deeply-rooted history of corporatist inclusion.