Pessimism about the Jurisgenerative Effects of Human Rights: Ishiguro's Bleak Cosmopolitan Vision in Never Let Me Go
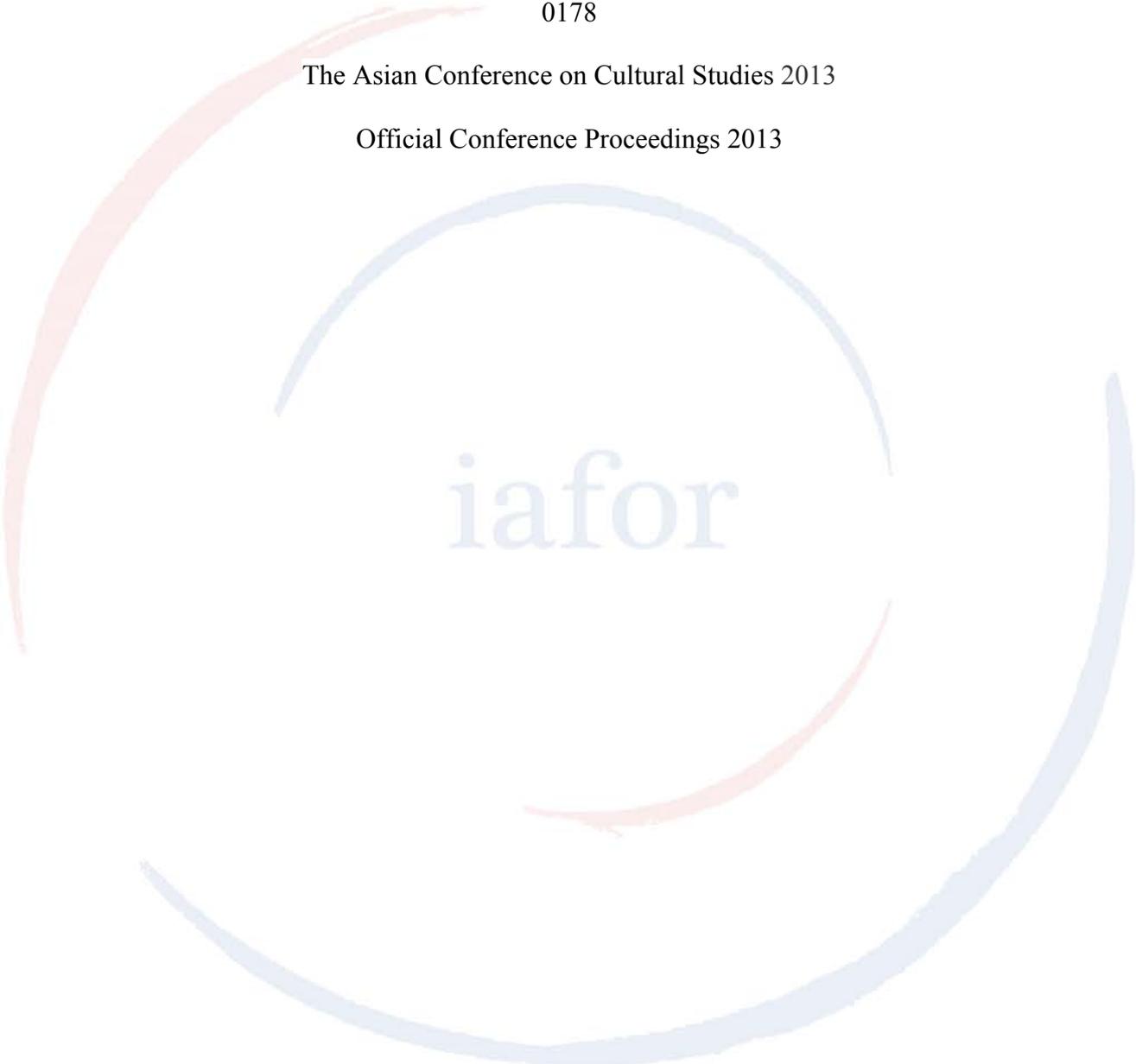
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Introduction:

Cosmopolitan theorists of human rights such as Seyla Benhabib argue persuasively that human rights provide the conditions for empowering the disempowered, enabling marginalized people to challenge the existing normative arrangements restricting them to the periphery and constraining their ability to act in the world. Yet for all the inclusive universalistic rhetoric in which they are couched, human rights themselves describe a normative framework; they offer a vision of how the world "ought" to be that tends to be exclusive of competing visions. This paradox at the heart of human rights talk takes narrative shape in Ishiguro's *Never Let Me Go* (2005), in which the emergence of a liberal conception of the clone protagonists' rights is constantly stymied by its own parochial understanding of what constitutes the human. Human rights in this novel appear to be an integral part of the normative architecture that underpins and perpetuates the oppression of the clones. In this paper, I use Ishiguro's novel to interrogate Benhabib's cosmopolitan theory, according to which the constrictive normativity of human rights is balanced by (indeed constitutive of) their liberating "jurisgenerativity," and to consider whether her optimism on this question is justified.

Human rights: whose morality?

If the question at the heart of cosmopolitanism is "what are our obligations to others conceived as fellow members of a world community?"[1] then human rights may appear to offer the answer. Human rights, however, are nothing if not controversial. We can perhaps bypass the legal positivist objection that denies the existence of any "rights" that are not written into specific legislatures, condemning the notion of innate rights, in Bentham's famous dictum, as "nonsense on stilts".[2] It has been convincingly argued that this objection misses the point of human rights entirely. Proponents of human rights are not describing an existing state of the world; they are making robust and defensible statements about how that world ought to be organized. In the words of Norberto Bobbio: "The freedom and equality of human beings is not a reality, but an ideal which has to be pursued, not an existence but a value, and not a being but a must".[3] On this widely-held understanding, human rights are not "legal" but "moral" rights; they provide a prescriptive vision of how we should organize our legal and political institutions so as to preserve human dignity.[4] Described by Herbert Hart as "parents of law"[5], they are part of a normative discourse that is generative but not determinative of law.

Yet this brings us to a more substantial objection to human rights thinking. As soon as we start filling in the details of this moral vision, enumerating the list of rights that underlies our idea of human dignity, we have abandoned culturally neutral ground. Moreover, as societies and technologies evolve, so do their ideas about what aspects of their "humanity" require protection. While an absolute principle could, in theory,

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[1] See, for example, the introductions of Van Hooft (2009) or Brown and Held (2010), for descriptions of cosmopolitanism along these lines.
[2] Quoted in Sen (2009), 357, 361-2; also Lukes (1993), 28.
[3] Bobbio (1996), 15; cf. Sen (2009), 357-8.
[4] Bobbio, *op. cit.*, chap. 2, 12-31. See also Donnelly (2003), chap. 1.
[5] Qtd. in Sen, *op. cit.*, 363

provide a timeless and universally valid anchor for human rights, in a world of plural and evolving values such foundationalism is met with justifiable skepticism. Consensus on a particular list of human rights, such as those laid out in the 1948 Universal Declaration of Human Rights and subsequent treaties, is therefore necessarily contingent. Furthermore, given the internal conflicts between competing principles that characterize such lists, implementation will inevitably involve prioritization and possibly trade-offs, thus necessitating political decision-making at the local level. Human rights, in short, can never be more than moments of agreement in an ongoing, open-ended debate on the constitution of human dignity; they must also be available for contestation and negotiation by the particular peoples who will implement and enforce them.[6] Rather than an answer to the question posed by cosmopolitanism, it seems that human rights may do little more than defer it.

A discourse-ethical view of human rights: Benhabib's "cosmopolitanism without illusions"

One theorist who meets head-on the challenges posed by this picture of human rights is Seyla Benhabib. With globalization generating not only increased interdependence but also an ever more visible gap between its beneficiaries and those it leaves behind, she notes the pressing need to reaffirm our commitment to moral universalism and to "expand the legacy of natural rights" to include marginalized others.[7] Yet at the same time she seeks to move beyond the disembedded, disembodied, self-legislating subject of Enlightenment rationality and to reformulate universalism to make it interactive, context-sensitive, and less certain of its privileged grasp of a unique truth.[8] In the past she has referred to "pluralistically enlightened ethical universalism on a global scale"[9], but has more recently rechristened her approach "cosmopolitanism without illusions"[10]. Recognizing individuals as both "generalized" and "concrete" others, i.e. extending the scope of ethical concern not only to what they have in common but also to what makes them different, Benhabib's discourse-ethical approach seeks to mediate between the poles of universalism and particularism. For her, cosmopolitanism is "a field of unresolved contrasts: between particularistic attachments and universalistic aspirations; between the multiplicity of human laws and the ideal of a rational order that would be common to all human cities; and between belief in the unity of humankind and the healthy agonisms and antagonisms generated by human diversity".[11] Human rights occupy a unique position in Benhabib's cosmopolitanism. They are at once its output and the conditions of its possibility. They are the variously interpretable moral principles that emerge from these agonistic deliberations, to be suitably situated in positive schedules of locally justiciable legal rights. Yet they simultaneously constitute the substantive normative commitments that ensure that deliberations are fair, accessible to all affected, and not hijacked by powerful vested interests. These commitments are prior to the debate, but also recursively validated by that debate; and if there is some "circularity" here, for Benhabib this circularity is an

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6 Sen (2009), Donnelly (2003), and Bobbio (1996) provide more detailed discussion of the ideas touched on here.

7 Benhabib (2011), *Dignity in Adversity*, 191-192

8 Benhabib (1992), *Situating the Self*, 4-5

9 Benhabib (2002), *The Claims of Culture*, 36

10 *Dignity, op.cit.*, 14-19

11 *Ibid.*, 2

inescapable feature of all intersubjective processes of practical reasoning.[12]

For all the appeals to particularism, clearly the normativity of human rights does a lot of work here. It is worth taking a moment, therefore, to explore how Benhabib envisages human rights generally and to specify her substantive normative commitments, before considering how she addresses the issue of moral imperialism and its implications for legitimacy.

Benhabib's vision of human rights takes as its starting point Arendt's "right to have rights," which she sees as the "one fundamental moral right" held in common by all human beings[13]; however, rather than understanding this right simply in terms of political membership, she interprets it in terms of a discourse-ethical conception of the moral respect due to all. As she puts it, this is the right "to be recognized as a moral being worthy of equal concern and equally entitled to be protected as a legal personality by his or her own polity, as well as the world community".[14] Within the discourse-ethical framework, "moral beings" are those capable of "communicative reason," i.e. able to offer reasons for their goals or actions that are justifiable to others within a human community, where "justifiable" is understood in a broadly Kantian sense of generalizability and reciprocity.[15] Equal concern is shown to such "moral beings" by ensuring that their "communicative freedom" is protected. For discourse-ethicists, what this basically means is ensuring that they are equally able to challenge the rules and institutions that constrain their lives through participation in moral argumentation within the public sphere.[16] Benhabib's crucial further stipulation is that such argumentation should not abstract, in an exclusively rationalistic manner, from the particular personal, social and cultural contexts within which individuals understand their own goals and actions. This is the point of extending concern to the "concrete" as well as the "generalized" other, and thus ensuring that the public sphere allows space for plural perspectives and for forms of argumentation with a potentially more affective texture. In Benhabib's view, the "moral discourses" from which understandings of human rights principles emerge cannot be too restrictive with regard to what she terms the "semantics" of reason-giving nor can there be any *a priori* limits placed up what is open for discussion. Furthermore, understanding of even as "fundamental" a principle as communicative freedom will vary with the context of the interpreting community.[17]

This double gesture, in which Benhabib insists on a fundamental principle while simultaneously accepting its potential fallibility and the scope for differential interpretation, is what gives her approach to human rights its distinctive shape. On the one hand, human rights articulate universal moral principles that underpin communicative freedom and hence give substance to the "right to have rights." Wherever in the world one might be, if these principles are not honored, then the

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[12] *Ibid.*, 70-72 on this circularity

[13] *Ibid.*, 59

[14] *Ibid.*, 62

[15] Ibid., 62 (footnote 19, 227), 67-70, 147-8

[16] See *Situating*, chap. 1, *op. cit.*, for detail on the Habermasian principles of universal moral respect and egalitarian reciprocity that both constrain and enable such moral argumentation.

[17] *Dignity*, *op. cit.,* chap. 4. *Situating*, *op. cit.,* chaps. 1,5&6. On "semantics" see *Claims, op. cit.,* 140ff and also footnote 37, *Dignity,* 230

normative and institutional constraints under which people labor cannot be considered uncoerced and due respect will not have been paid to them as "moral beings". On the other hand, in so far as respect for the communicative freedom of differently situated subjects demands respect for the different ways that they might understand that concept, the protection of communicative freedom also requires that particular peoples be left space to interrogate and appropriate these principles for themselves. Human rights, therefore, can take a range of "normatively defensible"[18] juridical forms when they are adopted within particular legislatures. Benhabib thus draws a distinction between the "unity" of human rights as moral principles that govern all; and the "diversity" of the various "schedules of rights" affirmed by individual peoples and justiciable in their respective courts.[19] It is these vital processes of "public argument, deliberation, and exchange through which universalist rights claims are contested and contextualized" by both institutional and civil actors that Benhabib terms "democratic iterations;" she emphasizes that these iterations are creative and transformative practices, and that the "authority" of the "original" principle is contingent upon its continuing ability to hold meaning for those who appropriate it.[20]

Benhabib acknowledges that there are substantive normative commitments here. However, unlike discourse ethicists such as Habermas, she sees her position not as "foundational", i.e. argued from first premises, but rather as "presuppositional". Her normative commitments are those that are presupposed by a certain moral horizon. This is the postconventional horizon that does not seek to limit moral concern to a particular in-group but rather to extend it all human beings, however situated; it is the horizon of moral universalism endorsed in the Preamble of the UDHR. For Benhabib, such a horizon already assumes a commitment to people's reciprocal rights to ask for justification of arrangements that affect them, i.e. to communicative freedom. Furthermore, since the justification envisaged here takes the form of actual intersubjective dialogue (rather than hypothetical reasoning exercise), a condition of its possibility is what Benhabib terms "justificatory universalism": the idea that human reason has some framework-neutral content. Theories of strong incommensurability, therefore, are forcefully rejected as both empirically and philosophically flawed.[21] Finally, since the operative notion of legitimacy running through the above is a deliberative democratic one, there is also a firm normative commitment to democracy. Democratic iterations only produce legitimate appropriations of human rights principles if individual members of the demos have secure means of participating; only then can they be justly said to be both authors and subjects of the laws under which they stand. To the question "Is there a human right to democracy?" Benhabib's answer is therefore an unconditional "Yes!"[22]

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18 Dignity, *op. cit.,* 80

19 Ibid., 72-75, 79-80

20 Ibid., 129, where Benhabib is referencing Derrida's "Signature, Event, Context". Cf. Benhabib (2004), *Another Cosmopolitanism*, 47-51.

21 "the consequences of bad cultural narratives following upon the heels of wrong philosophical assumptions" (*Claims*, 42)

22 The normative commitments discussed here have been a consistent thread running through Benhabib's writing. In addition to chapters 4 and 5 in *Dignity* on universalism and democracy, see also *Situating*, chap. 1, and *Claims*, chaps. 2 and 5, on the assumptions of communicative ethics and the issue of commensurability.

So is such cosmopolitanism "the Trojan horse of a global Empire"?[23] Benhabib argues that while both economic globalization and the spread of human rights standards act to weaken state sovereignty, they follow different "normative logics"[24]. These logics are often "antagonistic," with cosmopolitan norms providing a key channel for resisting the forces of global capitalism, which Benhabib sees as too easily captured by private interests and unresponsive to democratic pressures.[25] Cosmopolitan norms augment popular sovereignty (notably distinct from "state" sovereignty) by strengthening the ability of the people to hold the state accountable. Democratic iterations that involve interested actors from beyond a state's borders, appealing to a transnational logic of interconnection and shared responsibility, are for Benhabib the most effective avenue for dealing with the problems of today's globalized world.[26] It is in such interactions that she sees hope of "jurisgenerativity" – roughly speaking, the capacity of law to be open to new appropriations of its meaning as societies change, and thus to expand its own scope and content.[27] Benhabib believes that Marxist critics ignore the "jurisgenerative effects" of cosmopolitan norms such as human rights principles, and that the accusation of moral imperialism underplays the vital role these play in empowering new actors and facilitating new channels of resistance.[28] Hers is an optimistic vision of human rights as enabling the access of hitherto marginalized people to an open public sphere, providing the necessary resources for them "to develop new vocabularies of public claim-making, and to anticipate new forms of justice to come".[29]

Ishiguro's clones

This brings us to Ishiguro's clones, who represent an extreme example of one such marginalized group, eking out their foreshortened and often painful existence on the edges of the society, economy, politics, even the definition of the human, in an imagined dystopian past (England, 1990s). Bred to become "donors", their organs successively harvested to lengthen the lifespan of the "normals," the clones are brought up in specially designated institutions, in conditions varying from the horrific to the relatively humane. As young adults, they typically spend a period as a "carer" – someone whose job is to look after the donors' physical and mental wellbeing, helping to avoid "agitation" and so contributing to the productivity and efficiency of the donations system. This is a job at which the novel's narrator, Kathy H., is proud to have excelled for an impressive eleven years. However, after the death ("completion") of her two closest childhood friends, Ruth and Tommy, Kathy has become tired and is now readying herself to begin her own donations. Her narrative meanders from childhood reminiscences of Hailsham, the most "progressive" of the establishments for rearing clones and for Kathy an idyllic place of privilege that provides the roots for her self-identity, up until more recent memories of fleeting pleasures and poignant disappointments shared with Ruth and Tommy as she cared for them during their final days.

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[23] *Dignity*,188

[24] Ibid., 97

[25] Ibid., 102-106, 113-114

[26] Ibid., 94-118

[27] *Another*, 48-9

[28] *Dignity*, 118-126

[29] Ibid., 15

There is a notable disjunct between the comfortable, everyday ordinariness of Kathy's narrative voice, full of colloquialisms, euphemisms, commonplace turns of phrase and asides to the reader, and the dark, sometimes horrific details of the clones' lives that emerge piecemeal as the story progresses. Ishiguro's own comments on the novel suggest that this is a deliberate ploy to bring into relief his humanistic, universalist thematic concerns:

> "This is just one metaphor for one aspect of how people are. The strategy here is that we're looking at a very strange world, at a very strange group of people, and gradually, I wanted people to feel they're not looking at such a strange world, that this is everybody's story."[30]

Just as in *The Remains of the Day* (1989) Ishiguro was interested in the figure of the butler as an illustration of the extent to which human autonomy is more generally compromised[31], so here he paints the clones in the colours of "everyman" and does not allow us to doubt for a moment that they are as human as we are. It is not just Kathy's narrative voice that is instantly familiar. Equally recognizable is the whole affective texture of the clones' lives as she describes them: their childhood loyalties, rivalries and petty jealousies; the pleasure they take in creative play and learning; their capacity to love and be loved; the need they express for adult role models and parent figures; their psychological suffering when these needs are not met; and perhaps above all, their desire to belong and consonant readiness to acculturate. In terms of Martha Nussbaum's "capabilities" paradigm (with its emphasis on human sociability, reason, emotion, cognition, imagination and play), there are no substantive differences between what clones and humans are capable of, so that a "decent political order" should seek to secure for them the same minimum levels of resources and freedoms to nurture those capabilities it deems central to a "dignified life".[32] Certainly, from a discourse ethical perspective, which requires recognition of "the rights of all beings capable of speech and action to be participants in the moral conversation"[33], there could be no grounds for their exclusion from the debate about what such dignity entails.

Yet this is to move ahead of ourselves. Before prematurely drawing out such cosmopolitan moral implications, we must first pay attention to what, in the worldview of the novel's characters, marks the clones out as different, as other. This is, of course, their genetic status – as copies, derived, infinitely replicable, lacking that original "something" that would make them unique and hence irreplaceable. As Rebecca Walkowitz has rightly observed, "unoriginality" is not only a feature of Kathy's narrative style, it is a recurrent motif throughout the novel and one that is closely tied to the clones' sociality.[34] The moment when Kathy makes friends with Ruth, joining in the riding of her imaginary horses, contains in microcosm a dynamic that becomes very familiar as the novel progresses. "I accepted the invisible rein she

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[30] Interview with Cynthia Wong (2006), in Shaffer and Wong (2008), 216

[31] ". . . at an ethical and political level, most of us are butlers. We don't stand outside of our milieu and evaluate it . . . We take our orders, we do our jobs, we accept our place in the hierarchy . . ." (qtd. in Matthews and Groes (2009), p.115)

[32] Nussbaum (2011), chap. 2; see also Sen (1999)

[33] Benhabib, *Situating*, 29

[34] Walkowitz (2007)

was holding out"[35] relates Kathy, indicating her willingness to be led, to conform to the rules of the group, to contribute to the myths that bind its members together. For by reinforcing the myths that sustain the mystique of Hailsham, the clones (and Kathy is the arch-clone in this respect) also buttress their own sense of security in belonging there. This is why Kathy responds with anger to Moira's attempt to puncture one of the more obvious illusions[36], as indeed she does to Tommy's suggestion that the student clones' carefully fostered creativity might not be as all-important as they had been led to believe[37]. It is why the Hailsham students gladly join in their self-policing, with "severe punishment" for those of their number who are "careless" in testing the boundaries set by the guardians[38]; and it explains their widespread cognitive dissonance when presented by Miss Lucy with brutal facts about their predetermined futures that do not conform with what they have been told and want to believe:

> "Some students thought she'd lost her marbles for a moment; others that she'd been asked to say what she had by Miss Emily and the other guardians; there were even some who'd actually been there and who thought Miss Lucy had been telling us off for being too rowdy on the veranda."[39]

Value systems in the novel are seen to be self-perpetuating, even if, as in the Sales, what is valued is little more than a pile of cast-off bric-a-brac, or as in the Exchanges, the "hysterically daft" poems of an eleven-year-old child.[40] And though there is obvious satire in this vision of the students "pricing up" their childish artworks and hording their chests full of precious odds-and-ends, it is nevertheless the existence of these value systems that sustains the clones, structures their interactions and confers meaning on their lives.

It hardly needs laboring that, even in his depiction of the clones' apparent idiosyncrasies, Ishiguro has not left the territory of "everyman." Indeed, what he is stressing is simply the reversal of the "clones are humans" equation – namely, that "humans are clones," that unoriginality of the kind discussed above is a vital part of being human. Here, importantly, unoriginality is being glossed not only in a negative sense of uncritical copycat behavior, a tendency toward unquestioning acceptance of value systems underpinned by the views of others, but also more positively, as an implicit recognition that it is only from within these value systems sustained in cooperation and sociality with others that new meanings can ever emerge. An idea that comes in for very strong criticism in the novel is the Romantic notion that the individual (or nation) possesses a particular genius, stamped in its blood with a genetic seal of authenticity, and that this is what makes it special, worthy of value. As Walkowitz notes, this Romantic aesthetic is associated most closely with Miss Emily, the liberal activist Head Guardian at Hailsham, who has her students' art-work publicly displayed in order to prove to the world that clones too have "souls". But by the end of the novel, Miss Emily's hypocrisy and the limits of her activism have been exposed, and her views on art are similarly discredited. The dignity and singularity of

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[35] Ishiguro, *Never Let Me Go,* 43

[36] Ibid., 50-51

[37] Ibid., 22ff

[38] Ibid., 46, 62-3, 76

[39] Ibid., 74

[40] Ibid., 38, 17

each of the clones is not contingent upon some Romantic notion of the unique soul, but rather on their capacity to interact with others, to participate in and contribute to the networks of social meaning-making within which they are individually and uniquely situated. What is being valorized is a uniqueness founded on the singularity of context, which makes every iteration different, and on the personal choices made by individuals under constraint – a uniqueness that is shared by human and clone alike.[41]

The moral logic of the novel may thus be seen as profoundly cosmopolitan in the terms indicated by Benhabib. It demands the inclusion of the clones within the category of the human, as much because of as in spite of their perceived "unoriginality." It appeals towards an open and reflexive human rights, a "jurisgenerative" human rights, that would accord the clones recognition and a place within the public sphere; that would prove able to generate the radical break with the existing discourse needed to secure their legal protection and empowerment.

Yet, as reviewers and critics of the novel have been swift to point out, Ishiguro provides no such moment of rupture.[42] We might even say, in contrast with the "moral logic" alluded to above, that the "narrative logic" of the novel shuts down the possibility of such a rupture. The very unoriginality of Ishiguro's clone/humans ties them all too closely into the dominant discourse to allow sufficient room for manoeuvre. The fundamental principle behind the donation system, that clones exist as a source of healthy organs, remains unchallenged by any character in the novel, including its protagonists. As Kathy's pride in her work testifies, it is a system maintained with the apparently willing complicity of the clones. When Tommy, the closest the novel offers to an "odd man out," seems to gesture in the direction of incipient rebellion, in the possibility of other values, he is quickly brought back into line by Kathy and his peers, by the urge to be loved and to belong. His final bellow of inarticulate fury and pain, after his fading hopes of a "deferral" to explore a romantic future with Kathy have been dashed, is conspicuous for being uttered not in the public sphere, but on an isolated back-road late at night, witnessed by Kathy alone:

> "I caught a glimpse of his face in the moonlight, caked in mud and distorted with fury, then I reached for his flailing arms and held on tight. He tried to shake me off, but I kept holding on, until he stopped shouting and I felt the fight go out of him."[43]

Quickly defused by his own self-deprecating humour and by Kathy's comforting arms, within a few pages that scream has degenerated into the placid resignation of the commonplace "It's a shame" with which a reduced Tommy armors himself in the last weeks of his too-brief life.

In short, far from showing us a beneficent jurisgenerativity facilitating the entry of

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[41] My reading of the clones' unoriginality and its significance owes a substantial debt to Rebecca Walkowitz's excellent article on Ishiguro's novel, *op. cit.*, as well as being influenced by Derrida's SEC

[42] The articles on the novel collected in Matthews and Groes (2009) and in Groes and Lewis (2011) are illustrative. Sim (2010) includes a useful review of existing criticism on Ishiguro.

[43] NLMG, 251

new subjectivities into the public sphere, it seems that Ishiguro's novel depicts its opposite: the way that even the victims of a discourse can be co-opted into sustaining it, or in Spivak's terms, how the subaltern subject is left with no position from which to speak.[44] We might, therefore, be tempted to conclude with an aporia: that the novel articulates the necessity of open and reflexive human rights talk, while simultaneously staging the conditions of its impossibility. Yet, *pace* Spivak, I think that the pessimism of the word "impossibility" here is too strong and that it misses the satirical intent of the novel. While it is certainly true that Ishiguro's three clone protagonists operate with severe constraints on their agency and that the vocabularies available to them are impoverished, they still retain a capacity to act and to negotiate that becomes evident in the different uses to which they put it. To apply Bruce Robbins' terms, we might say that there is a distance *within* the clones' location – one that challenges a deterministic reading of their situation.[45] The narrator Kathy's nostalgic refusal to move beyond the values and loyalties of her beloved Hailsham is, in this sense, atypical among her contemporaries. Both Tommy, with his distinctive art (never quite abandoned), and Ruth, with her determined efforts to reach out to other groups and to adopt and internalize new mannerisms, demonstrate a facility for crossing borders and negotiating boundaries that Kathy notably lacks. Indeed, it is this failure to reach out to others, to perceive the artificiality of borders and their availability for deconstruction, which is the special target of Ishiguro's satire. It is not just the story that is told but the act of telling that is significant here. Ishiguro's tragic satire constitutes a cautionary tale of the human frailties that frustrate the realization of a cosmopolitan future. Yet to tell such a tale is not to deny the value of that optimistic cosmopolitan vision; rather it is to underline the challenges that face us if we are to move beyond our own flawed moment to a world where greater reflexivity and more widespread agency are not merely desirable but also realizable.

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[44] Spivak (1988)
[45] Robbins (1998), 250

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