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The revolutionary past: Decolonizing Law and Human Rights

O passado revolucionário: descolonizando o Direito e os Direitos Humanos

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Abstract

Combining a radical revision of the historical formation of occidental law with perspectives derived from decolonial thought, this paper advances a deconstruction of occidental law. That deconstruction is then brought to bear on human rights. Although occidental law and human rights are shown in this way to be imperial in orientation, that same deconstruction reveals resistant elements in law and in human rights. These are elements which the decolonial can draw on in its commitment to intercultural transformation.

Key words: human rights, post-colonialism, decolonization.

Resumo

Combinando uma revisão radical da formação histórica do direito ocidental com perspectivas derivadas do pensamento descolonial, este trabalho propõe uma desconstrução do direito ocidental. Essa desconstrução é exercida sobre os direitos humanos. Embora a lei ocidental e os direitos humanos sejam mostrados em um modo de ser imperial na orientação, essa mesma desconstrução revela elementos resistentes de direito e de direitos humanos. Estes são elementos que a descolonização pode traçar em seu compromisso com a transformação intercultural.

Palavras-chave: direitos humanos, pós-colonialismo, descolonização.

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'Let us return to the past,' wrote Verdi – but unfortunately did not set it to music –, 'that would be progress' (1971, p. 169). That proposition would for many be perverse. The past is where we progress from, not to. Progress is something we are always coming to, even committed to. Its indefinite but tentacular *telos* orients, even directs, the condition of our being-together. Just who this 'we', this 'our', may be is debatable but its range is not confined to 'the West', to the Occident. And I hear there is a country which has as its motto 'Order and Progress'.

The 'decolonial' would incline us otherwise, at least as a first and essential step. The posited past here would be the Hispanic colonization of South and Central America, something taken as an origin of a modern imperialized world – an origin of what and who is to be included in predominance and what and who is excluded. Like any claim to an historically set origin, this one is impossibly exclusive, but it will serve to set this impelling decolonial tying of modernity integrally to 'coloniality'. The fusion of these provides the founding force of modern occidental imperialism. Let me just take for now one depiction of this imperialism and of the incipient resistance to it to be found in the decolonial. José María Arguedas sets the first chapter of his *Deep Rivers* (1978 [1958]) in Cusco, once the capital of the Inca Empire. In a sense, what embeds the whole novel here are the stones, the stones of what were once Inca buildings and walls in Cusco but which have now been built on by the colonists. The stones are both foundational of, yet subordinated to, imperial structures. But the same stones are radiant. They seethe, they move, talk, frolic. Their streets flow like rivers, deep rivers, rivers akin to primordial serpents. This foundational fusion with movement and change is later aligned in the novel with Indigenous rebellions, with a primal or abyssal capacity to sweep away the existent, to sweep it away in a flood, a flood of rivers (chapters 7 and 11).

There is a seeming tendency for decolonial agendas to be more anodyne and to advance the resistant perspectives and action of the excluded in a relation of plurality to the occidental modern – a relation which, according to Mignolo, would recognise that the 'Eurocentered narrative,' of this occidental modernity, 'of course, has its right to exist, since it corresponds with the experience of Euro-American histories, but it does not have the right to be the narrative for the rest of the world, except in its imperial/colonial dimensions' (Mignolo, 2013, p. 19). Yet for there to be a plurality, for

entities to relate plurally, there has also to be some commonality between them. One scenario was seminally sketched by Quijano in finding that:

> First of all, epistemological decolonization, as decoloniality, is needed to clear the way for new intercultural communication, for an interchange of experiences and meanings, as the basis of another rationality which may legitimately pretend to some universality. Nothing is less rational [...] than the pretension that the specific cosmic vision of a particular ethnie should be taken as universal rationality, even if such an ethnie is called Western Europe because this is actually [to] pretend to impose a provincialism as universalism (2007, p. 177).

What this imports is something rather more unsettling of 'the Eurocentred narrative' – something that portends the primal dissolution envisaged by Arguedas with his Indigenous rebellions, a not unfamiliar scenario in Indigenous literatures. To 'provincialize Europe', adapting also Chakrabarty's (2000) stunning title, would entail not only the denial of universality but also a denial of the exclusion on which it is founded, an exclusion embedded, as Mignolo puts it, in the supposed 'superiority of Christians and then of the whites' (2013, p. 13). That would be constituently challenging enough, but there has to be more. Making a proprietary or exemplary claim to the universal as an ontological completeness obviously excludes those that do not conform to the terms of membership, but as universal the claim must also include them in some way.

The colonized and the enslaved were essential to various imperial designs. One which became widely accepted came from Francisco de Vitoria especially in his lectures *De Indis* (1991, p. 233 ff.).[2] Vitoria drew on the inclusive, universal reach of scholastic natural law which he aligned with the *ius gentium* of Roman Law: 'the law of nations (*ius gentium*) [...] either is or derives from natural law, as defined by the jurist: "What natural reason has established among all nations is called the 'law of nations'"' (Vitoria, 1991, p. 278). The fact that 'the jurist' is unnamed and that no source is given for the text, which is from the Institutes of Gaius, indicates just how intimate, just how 'natural', this linking was for Vitoria's audience in Salamanca – this linking of the *ius gentium* and a Christianized natural law. And for Vitoria this *ius gentium* included another category of Roman Law, the *ius inter gentes*, the law governing relations between different peoples, different nations (Stein, 1999, p. 94-95).

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[2] A more extensive account can be found in Fitzpatrick (2009).

Unlike the more predatory and murderous of his compatriots, for Vitoria the colonized 'Indians' of 'the New World' had affective abilities and subsisted within the range of the *ius gentium*, as befits the all-inclusiveness of the universal. By virtue of being human and thence possessed of reason, the Indians had *dominium*; or in other words they had a mastery of property and a mastery of rule evidenced by their modes of living in some similarity to those of the Spanish (Vitoria, 1991, p. 239-250). These same Indians however were also different to the Spanish, being afflicted with certain gross behaviours which they were to overcome. These defects serve to ensure the efficacy of imperial rule when combined with ways of acquiring 'just title' provided also by the same obliging *ius gentium* – ways formulated by Vitoria so as to identify 'the legitimate titles by which the barbarians could have been subjected to Christian rule' (Vitoria, 1991, p. 252). He emphasised two of these. The first emanated from a right to trade, to travel and to dwell in the countries of the barbarians – a universal right of course and a right extending beyond trade narrowly conceived to include intercourse and communication generally (Vitoria, 1991, p. 278-284). The second was a right to proselytize: 'Christians have the right to preach and announce the Gospel in the lands of the barbarians' and that even against their will, conversion being 'necessary for their own salvation' with the barbarians being 'obliged to accept the faith' if it were adequately presented to them (1991, p. 271, 284-285). This right provides the limit-case where the assumed universality of a Christianized *ius gentium* breaks down. The whole of *De Indis* is a 'reflection' on the injunction in Matthew (28-19): 'Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost' (see Vitoria, 1991, p. 233). And as Schmitt tersely put it: 'It never occurred to the Spanish monk that non-believers should have the same rights of propaganda and intervention for their idolatry and religious fallacies as Spanish Christians had for their Christian missions' (2003, p. 113).

The *barbari* being often found resistant to these 'particular' rights, 'it becomes lawful' for the Spaniards 'to do everything necessary to the aim of war' to ensure compliance; territorial acquisition by conquest ensued even to the point of the elimination in this 'just war' of those who resisted, and Spain's imperial domination could continue with at best marginal adjustments (Vitoria, 1991, p. 280-283, 185-186, 291-292). So, the barbarians were not only included but were also in a condition of primal exclusion. That condition was confirmed in terms that even then were far from original and which were to become more pervasive with the emergence of imperial racisms. So, Vitoria found the barbarians to be undeserving of full inclusion because they were like madmen or children, cannibalistic, sexually perverted and culinarily outrageous, and well neigh impervious to a reforming natural reason (1991, p. 207-30, 290-291; and see also Pagden, 2003, p. 86-91, 100-103).

In all, we have in place what could be seen as incipient human rights. From the mixture of natural and Roman law there is a notion of rights that are enforceable as such and derive content from a 'universal' natural law that is, borrowing Quijano's terms, 'the specific cosmic vision of a particular ethnie' (2007, p. 177).

Vitoria's colonial template accommodated also the shift from a Christianized to a secular, or supposedly secular, *imperium*. Whilst still being a dedicated Catholic theologian and churchman, Vitoria still managed somehow to reject various papal dictates to do with the colonization of the Americas and the division of the world. In rejecting the authority of the head of the 'universal' church, and even though the rejection was founded on the *ius gentium*, Vitoria aligned the imperial mission with the proto-nationalist Spanish empire by way of the Kingdom of Castile and Aragon, the claims to a national sovereignty being underlined by Vitoria's invoking here Aristotle's conception of 'the perfect community', such perfection involving being 'complete in itself' (1991, p. 301).

This shift or emerging shift from 'the superiority of Christians and then [to that] of the whites', again borrowing Mignolo's abbreviated version (2013, p. 13), may seem like more of the same. Vitoria's 'human' with its universal *ius* could match the idea of the unity of the species in racist discourse. That sets an inescapable problem. How can unity be also a fundamental, a total division. But it is the very preservation of the universalized 'purity' of the species that requires division, that requires dividing the pure from the impure, the exemplar from the deviant, the normal from the abnormal. Indeed, as Foucault would add, division is somehow primary: '[t]hat is the first function of racism: to fragment, to create caesuras within the biological continuum [...]' (2003, p. 255). Overwhelmingly, Foucault identified racism with a 'State racism' (2003, p. 239 ff.). This was and is a racism the 'activation' of which stems from the persistence of 'the old sovereign power' in its 'national universality' (2003, p. 239). 'State racism' became 'the basic mechanism of power, as it is exercised in modern States' (2003, p. 254). Such a state, national and imperial, in the assumption of universality takes on a position of transcendence. Its appropriated sovereignty, in its 'unlimited and unconditional power', Derrida found to be a 'theologic', something that 'remains a theological inheritance

that has not really been secularized' (2005, p. 105, 107, 118). To take a provincial instance almost in passing, there is James Pelikan's aperçu: 'The business of America [meaning the United States] may be business as Calvin Coolidge once said, but it is at least as accurate and as important to assert that the religion of America is America' (Pelikan, 1971, p. 35).

A considerable problem ensues. The continuity from a monotheistic Christianity to a modernity, to this one particular modernity, is incompatible with that modernity – or at least incompatible with its constituent claim to be able to account for itself entirely and in terms of an immanent secularity, and to be able to act in those same terms. All of which is starkly incompatible with a resort to transcendent determination – or at least incompatible with determination by way of a positive transcendence.

There was, however, a fateful alternative. Instead of a positive reference, a negative universal reference was and is resorted to and the intimations of it were already at the core of a Christianized imperialism. A Christianized humanity corresponds to the unity of the species characterizing racism. But both were a prelude to and force of division. And with the negative universal reference, division is the more stark. The entity elevated in negation becomes what certain alterities, certain 'others', are not. Or it becomes not what certain alterities are. Being 'purely' negative and being universal, the division and exclusion are complete. What is beyond the universal can only be utterly beyond. Hence there is racism and the irreducible alterity of the relegated race. Yet that very appropriation of a universality has, as universal, 'also' to be all-inclusive. So the negative universal reference generates an antithesis but then includes that antithesis with-in itself. The now-included take on an operative part with-in the universal scheme whilst still being excluded from it. There is a consistency to this. Whilst the exclusion in its completeness is an utter denial of independent being, so also is the completeness of the inclusion. To resolve, in a way, what is still for them an impossible positioning, the excluded are required in an entirely conformist way to progress, or reform, or in some other way achieve full inclusion. Like the Christian 'salvation', this achievement is necessarily indefinite.

Here we should return to Foucault, if too briefly.[3] His idea of racism was an expansive one. The idea and its operation are integral to the pervasive conjunction of biopower and disciplinary normalization as Foucault conceived of them. And to his instances of these we should, along with Escobar, add the verities of 'development' and the 'abnormalities' they proscribe as well as the 'normalization' they prescribe (1984, p. 387, 388-389), to say nothing of the innumerable disciplinary imperatives issued as 'structural adjustment', 'conditionalities', 'poverty reduction strategies', requirements attached to trade, aid and debt relief, and programmes installing the rule of law in conjunction with measures of security and counter-terrorism – the list could go on. As with the negative universal reference of racism 'proper', biopower and discipline created the 'abnormal', the 'anomaly', the deviant, and these provide the formative force of the normal and the conforming (e.g. Foucault, 1979, p. 229). The abnormal and such are both 'interior and foreign', subjected to 'an inclusion through exclusion' (Foucault, 1970, p. xxiv, 2001, p. 78).

Finally, we come to the culminating stage in the advance of the negative universal reference. In its negativity, such a reference erects no enduringly positive bounds. Not only does this make possible the illimitability of biopower and a disciplinary power, its exclusions are likewise uncontainable. So, the abnormal is not confined to the abnormal. Barbarism is not confined to the barbarian, and so on. 'We' are all prone to regress and sin, and we have to be incessantly on guard against it and ever enhancing of virtue.

It is time to say, belatedly, something of what I am trying to do. It is often easier, and convenient, to say what you were trying to do once you have done it. The story so far, combined with the occasion on which it is being told, would suggest that I am positioning the narrative in a way that will prove critical, negatively critical, of human rights as the successor to the *ius gentium* and natural law (merging later into natural rights). That may turn out to be so, if not entirely so, but a more oblique positioning has also been going on, one to do with another focal concern of this symposium, 'decolonial thinking'. This positioning does not involve any objection to the concerns of such thinking. I would like to think of these as my own concerns if they can be so shared. But my immediate problem is with the contrary tendencies in decolonial thinking. By way of exploring these tendencies, we may come to envisage a decolonizing of the West and in the process begin to envisage a different law and different human rights.

Back to the beginning. We saw that the decolonial espoused what Mignolo refers to as a 'delinking' (2007, p. 453), a setting apart from the universalizing pretension of an Occident that would encompass and

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[3] A more detailed engagement can be found in Fitzpatrick (2013).

represent the other, not only to determine the conditions of relation to the other but also to determine the other's very being and in the process to contain it within certain delimiting categories. The separation sought is not complete, and it could hardly be so. What is involved is said to be, rather, a relation of plurality. Consistent with this plural relation, and as we saw, for Mignolo the 'Eurocentred narrative' of an occidental modernity 'of course, has its right to exist since it corresponds with the experience of Euro-American histories, but it does not have the right to be the narrative for the rest of the world, except in its imperial/colonial dimensions' (2013, p. 19). But what if those dimensions were indistinguishable from the narrative as a whole? And would not the decolonial concern to link coloniality and modernity at least suggest such an indistinction? And would not the indistinction be confirmed in the generative range of the negative universal reference? And if an occidental modernity so constituted had now and instead to exist in a responsive relation of plurality, what would be left of its 'Eurocentred narrative'? Aptly enough: nothing. In the result, the pluralism of decolonial thinking would lead us to the revolutionary scenario of Arguedas's *Deep Rivers* and a sweeping away of imperial dominations.

Perhaps being in a plural relation with a refractory occidental modernity has led to decolonial thinking becoming somewhat infected by it. Whilst the colonization of South and Central America was significantly formative of what became an occidental modernity, it is saying too much to assert with Quijano and Wallerstein, along with many others to the same effect, that

> The modern world-system was born in the long sixteenth century. The Americas as a geosocial construct were born in the long sixteenth century. The creation of this geosocial entity, the Americas, was the constitutive act of the modern world-system (1992, p. 549).

From where could we pronounce so confidently and completely on the situated origin of 'the modern world-system' if not from a position beyond the world – from a position adopting the universal comprehension, a quasi-transcendence of the same kind as that arrogated by an occidental modernity? By way of a sharp contrast, the decolonial is often situated on its side of the plurality as intensely 'local' with some pointed emphasis on 'Indigenous' groupings (e.g. Mignolo, 2013, p. 21). And would it be too mischievous to suggest that the decolonial shares the occidental orientation towards constituting itself negatively – specifically, in an opposition to postcolonialism? This 'darker side' of the decolonial would chastise postcolonialism for being confined to

the academy, too reliant on Western intellectuals, and concerned largely with the West (e.g. Mignolo, 2007, p. 452, 463). By way of a happy acceptance of these criticisms of postcolonialism, I will now short circuit much of them by bringing a postcolonial perspective to bear on the Occident itself and in a way that I hope would be seen as empathetic with the decolonial, the exercise being one oriented towards a decolonizing of the West.

This is where we come, at last, to Verdi's return to the past, a return which can prove as revolutionary as the insurgent deep rivers of Arguedas. In a resolutely postcolonial vein, I shall set this return in an occidental academic engagement but one that seeks to integrate prime decolonial concerns (see e.g. Mignolo, 1995, p. 327-329). The modern Occident's negative universal reference in its very universality negates its own past and generates itself in a constituent rejection of that past – a rejection, an exclusion, which is also and inevitably an inclusion, this included past being one beyond which the modern has progressed, and continues to progress *ad infinitum*. Let me now set that abrupt synopsis in the academic engagement promised.

This particular engagement involves the intense concern of late with historical periodization, a concern which has been most conspicuous in scholarly resistance to the relegating of a medieval age which thence provides the constituent contrast to a modern age (e.g. Cole and Vance Smith, 2010). What is entailed in that relegation is the invention, an 'imposition', of an encapsulated age against which a modern age is putatively set – not just a supposedly status-ridden, oppressive medieval or feudal age but also the like attributions to various 'non-Christian', barbaric or savage peoples excluded from a universalized civility (Fasolt, 2004, p. 18-19, 219). In the process these periodized oppositions, or strands of them, can become blended. The medieval and the religious will usually be packaged together for example. And periodized oppositions can also be part of or fused with other venerable expedients. So, progressivist and teleological histories will typically operate as sequenced or streamed periodizations.

In all and to borrow from Kathleen Davis's searing analysis, periodization 'results from a double movement: the first, a contestatory process of identification *with* an epoch, the categories of which it simultaneously constitutes [...]; and the second a rejection of that epoch identified in this reduced, condensed form [...]' (2008, p. 30-31, her emphasis). In this way modernity is 'defined...*toward* the Middle Ages', a period it 'will never let go' (Cole and Vance Smith, 2010, p. 24, their emphasis). In sum, the definition entails the invention of an

encapsulated age as modernity's constituent alterity. And that invention, Kathleen Davis again, does not involve 'simply the drawing of an arbitrary line through time, but a complex process of conceptualizing categories which are posited as homogenous and retroactively validated by the designation of a period divide' (2008, p. 3). The division is not simply found. It is made. And it is not (only) a complete division. It is 'also' an inclusion – a remaking, a reinvention and thence an inclusion.

To effect such homogeneity periodization assumes an all-encompassing ontological comprehension, one which relegates other conditions to a contained historical specificity. So, for Davis, the 'secularization' conceived in opposition to the 'religious' Middle Ages 'turns political difference into temporal distance' thereby setting apart the religious as 'spiritual' and relegating anything political about it to a terminal past (2008, p. 133). This manoeuvre enables 'the sublimation of theology in the "world"' (Davis, 2008, p. 84), a theology which embeds various deific substitutes in and as modernity. For example and as we saw, it embeds a sovereignty which Derrida often found, in its 'unlimited and unconditional powers', to be a 'theo-logic', something that 'remains a theological inheritance that has not really been secularized' (2005, p. 105, 107, 118). The intrinsic claim of a modern sovereignty to this 'secular' transcendence results in its unsettled relation to law, to a rule of law.

Law of a supposedly pre-modern, of a medieval, variety joined the medieval itself in being fictively recast and contained and thence relegated as the polar opposite of a surpassing modern age and its enlightened law. 'Feudal' is the label applied in this standard periodized relegation of law. Feudal law, in this rendition, is a law essentially compromised in its being an entirely compliant instrument for exercising power over the comprehensively subjected, and as such it retrospectively comes to provide the characteristics of a whole society or era (see Berman, 1983, p. 295). All of which is to ignore the diversity and the wide generative range of the 'feudal' both generally and when it comes to law (Ryan, 2010, p. 509). And it is to sidestep the quality of the relation of law to ruling powers, a relation that went far beyond being merely subordinate to them, and a relation that would undermine the standard modern notion of law as a product of sovereign assertion were not law subsumed in an irredeemable medieval 'age'. Typically, the power of the prince was more attenuated than that invested in modern sovereignties. And law was typically incapable of being contained within the power of the

prince. Medieval law was seen as utterly pervading the social: law 'became the most crucial and vital element of the whole social fabric' (Ullman, 1975, p. 28). And that 'fabric' included 'governmental principles and ideology' (Ullman, 1975, p. 28). And this has been seen as a rule of law of 'a far wider scope and framework than [...] its modern successor' (Ullman, 1975, p. 28). Yet, a seeming contradiction: the law was also seen as dependent on other elements of a medieval sociality. Law could not, to take a conspicuous example, 'contradict divine law' and its derived contents were oriented in terms of Christian beliefs. Yet further: this same law was also ascribed 'secular' qualities that set it apart from any such endowment and preserved its unifying coherence as law. Contradiction now compounded: this same unifying entity is characteristically described in 'modern' jurisprudential scholarship as a 'jumble of different sorts of law' and as hardly deserving the name 'legal' at all (Tamanaha, 2008, p. 377; Donlan, 2011, p. 15).

Far from there being a jumble, Grossi, among others, would see law as taking on 'a unified shape throughout the Middle Ages', see it becoming an 'integrated plurality', and see also the legal pluralism of 'the late Middle Ages' as 'both unified and, at the same time, plural' (Grossi, 2010, p. 21, 35, 37). Law was the integrating element of the commonality, of the plurality of communities embedding the plurality of laws. Law was a working of the community of communities.[4] Such law had to create 'concepts which are entirely abstract, that is, non-existent for human senses' (Conte, 2012, p. 482-483). Yet this same law 'had a peculiarity [...]: the intellectual process itself of describing in technical vocabulary very different experience of real life [...]' (p. 483). Hence, this same unifying law was characterised by 'openness', by a 'capacity of absorption', and in particular it had to be adaptable in its capacity to absorb a huge diversity of sources of law well beyond the range of the Christian and the religious generally (Ullman, 1975, p. 490).

There is a remarkable resemblance between this picture of medieval law and postcolonial, as well as poststructural, ideas of law generally. Postcolonial law is an aporetic combination of law as capable of determinate self-realization and law as 'abstract' or vacuous and thence infinitely responsive, the aporia itself being generative of law in its singularity (Fitzpatrick and Darian-Smith, 1999). This law, again like the medieval, is identified with and matches the constituent conditions of society or community itself (Derrida, 1997, p. 231). With unforgivable brevity, these conditions of law and of sociality

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[4] This would suggest parallels with the Bolivian constitution of 2009.

could be mapped onto the idea of the decolonial – the decolonial combining as it does the 'delinking' of being and thought in its finitude from the quasi-universality of an occidental *imperium* with a responsive relation of plurality – a 'pluriverse' rather than a universe (cf. Mignolo, 2011, p. 72). In all, and bluntly, law is decolonial. Or, in a more restrained vein, in its ability to extend beyond its appropriation by an occidental modernity, law is intrinsically capable of being decolonial.

Can the same be said of that legal artefact known as human rights? Human rights, in a way, pose an ultimate challenge to law and to the decolonial. They claim explicitly and foundationally an operative universality whilst being, and inevitably being, a particularity. Negative critiques of human rights on this score are of course legion. In its classic mode, this critique would find that human rights are based on an at least complicit acceptance of Western conceptions of individuality, of responsibility and of social relations. More situated critiques would see human rights as giving effect to economic hegemonies usually seen as neo-imperial and countless instances have been adduced of the 'promotion' of human rights as part of 'programmes' of aid and development so called. Also, human rights have been shown to be constituted and sustained in a sharp and enduring division of the peoples of the world. I will provide some indications shortly but taking an instance in the interim, currently Kenya and the African Union are proposing in different ways to withdraw support for the International Criminal Court because of a perceived racial bias in its prosecutions – international criminal law being concerned considerably with the enforcement of human rights. Human rights are also seen as having a weighted history, one that continues to endow them with content. So, and for instance, Pagden would trace a genealogy of human rights to Roman law, and pointedly so with the resort to Roman law and the *ius gentium* in the colonization of the Americas, that legacy being sustained in the subsequent European adoption of 'natural rights' (Pagden, 2003).

This genealogy could be extended, but no matter how or whether it is brought to bear, human rights involve a resort to the natural and to the humanity similar to that evoked by the *ius gentium* in conjunction with natural law. 'It is [...] impossible', Fukuyama tells us, 'to talk about human rights [...] without having some conception of what human beings actually are like as a species' – without some constitution of 'human nature: the species-typical characteristics shared by all human beings qua human beings' (2002, p. 101, 128). Then he would add that 'there is an intimate connection between human nature and human notions of rights, justice,

and morality' before cautioning that 'the connection between human rights and human nature is not clear-cut, however' (Fukuyama, 2002, p. 101). In a more resolutely tautological offering, Donnelly tells us that 'human rights are literally the rights one has simply because one is a human being', before going on also to concede uncertainty (1985, p. 9, 21). The notes of uncertainty are certainly understandable. There have, of course, been numberless efforts to construct the human in terms of essential and distinguishing qualities, not least in relation to human rights. None has secured general acceptance, perhaps because if 'we' take the human to be our encompassing essence, there is a problem in being able to stand apart from it and thence encompass and know it. Hence, going back to the negative universal reference, human rights have been more confidently designated in terms not so much of what must be taken but rather not taken to be definitively human. The human of human rights must not be too backward, too traditional, behave inhumanly, and so on. But given our inability to encompass the human, the search for it can only be interminable. The 'human' creature that has emerged from this search has been a labile one whose confident criteria of self-identity have come and eventually gone, or assumed an irresolute half-life, whether these criteria are espoused as a positive marker of the human or, more typically, as its negation, – criteria to do with abnormality, race and gender, various corporeal and genetic endowments, monstrosity and the sub-human, culture and language, rationality and *dominium*, among others (Bourke, 2011).

All of which hardly bodes well for a 'positive' conclusion to a talk a focal concern of which has to be human rights. Given the account so far, such rights come to provide the ultimate instance of the instrumental or pragmatic appropriation of law within an occidental modernity. So situated, and adapting Robert Williams' description of law in 'the colonizing discourse of Renaissance Spain', human rights become and are 'the perfect instrument of empire', of a globalized *imperium* (1990, p. 59). Yet we could now go on to say that human rights as the perfect instrument of something are also its ultimate undoing, or even its transformation.

Intimations of that transformation could be found in a multitude of instances where human rights have been drawn on effectively in the cause of the oppressed. Notably, Upendra Baxi has accommodated such instances in a conception of human rights as plurality – a plurality made up of 'resistances and struggles' against the 'dominant and hegemonic' position assumed by or through a monist, quasi-religious and 'universal' human rights (2006, p. xv, 23, 26, 47). To take just one exam-

ple from another source, the Women's Courts in and around Delhi, the Mahila Panchayats, were established by women, and this was done quite outside of the formal legal system. Typically, proceedings are taken against men for domestic violence or to claim maintenance. As well as drawing on 'local idiom', there is a general reliance on 'equitable notions of jurisprudence and women's rights', and that reliance extends to the Convention on the Elimination of All Forms of Discrimination Against Women, a convention characteristically described as a bill of rights for women (Magar, 2001, p. 44, 55).

The obvious response to human rights as plurality is that human rights would have no content beyond the distinct and scattered instances of their resistant application. But can there not be a 'beyond' of a plurality? And that would seem to be an impelling question for the decolonial also. As we saw when engaging with the plurality of the decolonial, any plurality has to have its commonality. Without it the entities would not be relating plurally. There would be a mere dissipation of them. Could that commonality, then, import a 'universality' of the human of human rights – import a turning to one (in terms of the etymology of 'universality'). Perhaps we can come to this by making the concern with the negative a rather more 'positive' one. Faced with the utter exclusiveness of various occidental regimes – regimes of thought and rule such as racist regimes – we could assert that humanity is that which cannot be ultimately excluded (cf. Boyne, 1990, p. 152-159).

Now to transpose that assertion to rights, human rights. Rights are normative claims on the futurity of a being-together in community. As such, a right has always to be able to transcend any delimitation, always able to become other than what it may presently be. A right, that is, generatively trajects beyond any contained condition whether temporally or spatially contained. That uncontainment is the impelling element of a right's being 'general and universal', of its surpassing any specificity. The human, the humanity of rights, thoroughly embeds this responsiveness of rights. Coming from within the secular human, the posited community of the human, we are not able to occupy some comprehension beyond it, to encompass and contain it – to decree what its 'nature', including its human nature, may 'universally', ever-assuredly be. In the spirit of the decolonial, this perspective would open on to a human rights ever beyond ultimate affirmation, an ever-resistant human rights.

A fittingly inconclusive conclusion, then. Minimally, we could say, along with Fernández-Armesto and his deconstruction of the 'human' of human rights, that

we are left at least with a 'precious self-dissatisfaction' (2004, p. 170). And whilst nursing that dissatisfaction we may, along with Derrida in the company of Nelson Mandela, find 'a law that has not yet presented itself in the West, at the Western border, except briefly, before immediately disappearing' (Derrida, 1987, p. 38).

Acknowledgements

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