

TOP PAGE

Peter Fitzpatrick  
Anniversary Professor of Law  
School of Law  
Birkbeck  
Malet Street  
London WC1E 7HX  
Email address: [peter.fitzpatrick@clickvision.co.uk](mailto:peter.fitzpatrick@clickvision.co.uk)

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#### **Notes on contributor**

Peter Fitzpatrick is currently Anniversary Professor of Law at Birkbeck, University of London. He has taught at universities in Europe, North America and Papua New Guinea and published books on legal philosophy, law and social theory, law and racism, and imperialism, the latest one being with Ben Golder, *Foucault's Law* (Routledge, 2009). Outside the academy he has been in an international legal practice and was also in the Prime Minister's Office in Papua New Guinea for several years.

## **Necessary fictions: Indigenous claims and the humanity of rights**

Indigenous right insistently challenges the surpassing arrogations of sovereign right. In so doing, it affirms dimensions of being-together denied or stunted in sovereign modes of political formation. This force of Indigenous right is amplified here through legal and literary instantiations. These, in turn, uncover the continuously created and fictional quality of rights, revealing them to be necessary fictions.

**Keywords:** Indigenous rights; Indigenous literatures; law; Mandela; fictions

How do we stand in that 'turn' in the road, that in one direction leads to what is 'right' (law, duty, obligation, a 'human rights culture') and in another direction takes us to literature, writing, 'representation', 'the culture of mimesis', the illusion of life? Can these paths be joined? (Bhabha 163-4)

### **Introduction**

The first and minor literary pretension of this piece will be to follow a not unusual way of writing a three act play. The audience is settled into the play with the first act which depicts some stable and fairly recognizable scene, but which may also intimate that all is not necessarily well. This intimation is often something intrinsic to the stable scene but perhaps, just perhaps, profoundly disruptive of it. The second act then deeply disrupts that scene. Things fall apart. The third act, frequently set in a different location, puts them together again in a new and conclusory configuration. This may still leave us somewhere close to our starting point, wiser and a little older.

Here, then, the first act outlines what is a critique of rights, human rights in particular, which critique, if in a way quite set, does remain powerfully pertinent. Whilst summary at this stage is especially perilous, it could be said that this is a negative critique, one which

counters the more common Panglossian takes on rights and on human rights. Yet there are minor characters in this act who behave in resistant, even revolutionary ways – in ways strikingly incompatible with the critique, and in ways which would endow rights with considerable virtue. Then the second act looks more closely and separably at human rights, at the human and at rights. This provides the pin that pricks through the castle wall, disrupting both the negative critique and the resistant avowal of human rights. Such disruption, however, is not terminal for it leads us to a conception of rights as constitutively incorporating both these perceptions – the negative critique and the resistant. This orients us to the more resolving ethos of the third act. It draws on Indigenous literatures and legal claims, not only to provide a stark and monumental instance of negative critique and the denial of rights to Indigenous peoples, but also to show that the resistant engagements of Indigenous peoples surpass negative rendition. An epilogue focuses finally on what this entails for a modern conception of rights, on rights as necessary fictions.

If there is to be an epilogue, it may be as well to have a prologue also. True to form, this prologue will intimate what is to come in the rest of the performance, but its connection to what follows will not be laboured.

## **Prologue**

The *mise-en-scène* for the prologue, and a generative location of this paper, is the Ithaca of Cornell University as seen through the eyes of Derrida when he delivered a lecture there in 1983.<sup>1</sup> In his “The Principle of Reason: The University in the Eyes of Its Pupils”, Derrida later explained the lecture and its topology this way: “The talk’s structure has an essential relation with the architecture and site of Cornell: the heights of the hill, the bridge or ‘barriers’ above a certain abyss..., the common site of so many uneasy discourses on the history and rate of suicides” (290). In the lecture proper, he referred to a debate at Cornell

over the erection of barriers, “protective railings” on bridges over certain deep chasms (134) – barriers inhibiting descent into the abyss beyond. The argument against these barriers, an argument invoking death-embracing pronouncements of one of the university’s founders, was that the outlook from the university onto the world beyond should be unrestricted. This for Derrida becomes something of a metaphor for the imperative of unrestricted, unconditional enquiry. Yet for Derrida and for the university there have also to be delimiting barriers, a conditioning topographic embedded in the affairs of the world:

Beware of the abysses and the gorges, but also of the bridges and the barriers. Beware of what opens the university to the outside and the bottomless, but also of what, closing in on itself, ...would make the university available to any sort of interest, or else render it perfectly useless.  
(153)

More positively, the university has to combine these death-bound dimensions, the unconditional and the conditioned – to bind them in a virtual alternation, yet to do this in a way that gives some ultimate force to each without subjecting one to the other. For Derrida, this process of alternating and combining went to constitute the forms of life, forms of “what lets singular beings...‘live together’” (“Autoimmunity” 130).

### **Act I: scenes of critique**

It is not to be dismissive of it to say, with a hint of paradox, that the negative critique of rights is well established. Indeed, to dismiss such a negative critique here would be contradictory since it will also be adopted. Relying initially on Elizabeth Anker’s vivified rendition of the

classic critique of human rights in her engagement with Coetzee's *Disgrace*, and in bald summary, we find that *Disgrace* engenders openings to social justice, openings which offer "a pointed rebuke to prevailing accounts of human rights", and we find that they do so by exposing "human rights to be indebted to an individualist logic" ("Human Rights" 243). All of which entails a complicit acceptance of "dominant Western legal and philosophical conceptions of individuality" (243). Thence, human rights fail "to account for notions of responsibility and interdependence" (251), for "unconditional" ties (253). Furthermore, human rights, being "a legal construct" (243) and like the law generally, are found to be rigidly determinate – "unyielding, absolute, and authoritarian" (259). In a like vein, they are also found to be saturated with the "legally codified...violence and oppressions of apartheid" (241). And ominously for present purposes, Anker further observes of the postapartheid nation that "the status of human rights in South Africa has often been read to betoken a prognosis for the global future of the human rights paradigm" (234). The encompassing frame here remains, however, one of national sovereign assertion – a force often decreed to be essential for rights and human rights to be effective (e.g. Arendt chapter 9).<sup>2</sup>

Moving on now to this wider terrain, Anker's searing engagement resonates with many critiques set in international and even global terms. Pheng Cheah's is one that is much noted and will be briefly instanced here as a prelude to the more moderated critique to be derived from him in the second act. What is of pointed and present significance is his equating the putatively universal in human rights with their "particular site of emergence", whether that emergence is from the "economically hegemonic North", or from Southern NGOs, or Asian governments (*Inhuman Conditions* 152, 159). Other claims can be more explicitly encompassing, such as those made in the names of global capital and biopower (see Bailey). All of which, in Upendra Baxi's rendition, is a typifying of human rights as unitary, even as

monist, and at least “paradigm”, and as such this conception of human rights can assume a “dominant or hegemonic” position (xv, 23, 206).

Supporting instances these days appear numberless. So, we have the claims of a certain imperium to some prime purchase on human rights, claims which do not sit well with the operative inhibition on the ratification by the United States of international conventions on human rights. As well as being a proprietorial adornment of such documents as the National Security Strategy, human rights are given some direct force by the United States through being made conditions of trade and aid. Overlapping these efforts, and probably more extensive and certainly more tentacular, there is the insistence on human rights by various international organizations in programmes of “structural adjustment” and “poverty reduction strategies”. It is difficult to be at all exact about what would now seem to be the enormous resources devoted to all of this because provision for “promoting” human rights tends to be mixed in budgets of, for example, the World Bank, the IMF and the US Agency for International Development, with accompanying imperatives to do with promoting democracy, and the rule of law, and with pursuing “the war on terror”. These and other like endeavours, such as “The Nine Principles” guiding “The Global Compact” for co-operation between the United Nations and “the private sector”, are focussed on the promotion of market relations and neo-liberal orthodoxy. Going in another, or perhaps the same, direction we have the linking of human rights with war, sometimes by way of “humanitarian intervention” – the Gulf War, one and two, the conflict over Kosovo, and the war in Afghanistan, all often dubbed wars for human rights and all instances of Gore Vidal’s neo-Kantian squib, “perpetual war for perpetual peace” (title page).<sup>3</sup>

In a stark contrast, both the negative critique and the hegemonic utility of human rights are disturbed by Baxi’s evocation of another human rights, human rights as plurality, a plurality

in which “human rights enunciations proliferate, becoming as specific as the networks from which they arise and, in turn, sustain”, networks embedded in “communities of resistance” (26, 47, 144). Human rights of this kind exist along with the “hegemonic” human rights but can never be “fully” dominated by them (23). To take but two instances: one comes from the degradation of detention camps set up by the Australian government in remote locations to hold refugees, asylum seekers, and illegal immigrants, so-called. Spectacular resistances within the camps allied with legal action reliant on human rights led in July 2009 to a radical reversal of government policy and practise. (Bailey). The other instance comes from the Womens’ Courts in and around Delhi, the Mahila Panchayats. These are courts established by women quite outside of the formal legal system. Typically, proceedings are taken against men for domestic violence or for maintenance. As well as drawing on “local idiom”, there is a general reliance on “equitable notions of jurisprudence and women’s rights” (Magar 44, 55), 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.

In all, this first act ends with some apt unease, with at least a touch of irresolution, with some intimation of a divide that could prove to be intrinsically disruptive.

## **Act II: dissolution**

The dissolution which should now ensue in the second act hardly looks likely if its focal concern is going to be law, which it is. Law, after all, is supposed to provide us with some security of expectation, some stability in an unstable world, some reliable determinacy. Law of this kind is commonly considered to reach its apotheosis in the modern “rule of law”. As

with law, so with that artefact of law, rights. To make a claim of right, what you are claiming has to have some determinate existence.

And yet law, modern law, has (also) to be the opposite of all that. If law ceased to be responsive to the ever-changing conditions of being-together in and as its community, it would progressively cease to rule a situation changing around it. At least, this would be the fate of modern law, for such law can no longer resolve the divide between its determinate existence and its responsiveness by way of a transcendent reference, by way of sovereign divine right for instance. In terms of Derrida's Cornelian topography, there have to be both the containing barriers of determinacy and the abyssal openness of the responsive. An ultimate commitment to either is death – death by way of stasis or death by way of dissipation. These two dimensions fuse yet remain distinct in an aporetic generation of a form of being-together, of law.

As the abyssal may suggest, dissolution goes further yet. A correlate of law's illimitable responsiveness is that it can have no enduring content of its own. It is a vacuity. "Law itself", says Nancy, "does not have a form for what would need to be its own sovereignty" (*Being Singular* 131). Law depends upon a power apart from it for determination, for its enforceable determinacy. Not that all this makes law's responsive dimension ultimately dependent on the determinate. With law's illimitable responsiveness, with its unconditionality, it can never be contained, never be subjected to a conditioned determinacy, and such determinacy would include a site of sovereignty. Law thence remains ever open to appropriation by any site of power, by a plurality – returning to Baxi's perception of human rights (47, 144).

We are left for now with law as a contained and subjected determinacy, yet also as uncontained and illimitable. The crux and the focal illustration of this seeming paradox comes now, with Derrida's help, from Mandela in the struggle against apartheid (Derrida

“Laws of Reflection”; Mandela). The contrasts could hardly be more stark. Mandela’s intense commitment to various affirmations of human rights existed along with the apartheid regime’s subscribing to many such affirmations, whilst denying their application to the bulk of the population (Derrida “Laws of Reflection” 16-17, 36; Mandela 199-206). As for the law, Mandela was among its most trenchant critics. This was a law he saw as constitutively compromised in its subordination to a dominant power in general and to the exclusionary regime of apartheid in particular (e.g. Mandela 309). That much would occasion no surprise. Yet there is a seemingly other Nelson Mandela, one who, in the very midst of his acute perception of the legal oppressions of the apartheid regime, sees another law, a rule of law in accordance with which the courts even within that regime can provide fairness (308). Mandela advances a conception of professional duty which operatively respects and admires both the law and its judicial institution, even as the pervasive legal oppressions of apartheid are being brought to bear on him. The law which calls forth this magnanimous regard is the law which can always extend beyond its determinate existence, the law that integrally and responsively orients that existence in the law’s ordinary course towards the possibility of its being otherwise, and towards a corresponding possibility of its inclusive and equal extension to all groups in South Africa – towards a more inclusively whole South African people (Derrida “Laws of Reflection” 19-21).

That conjunction is key. Along with Derrida’s emphasis, Mandela characteristically invokes the inclusive “we” of the people “when he asks the question of the subject responsible *before the law*” (Derrida “Laws of Reflection” 26). Mandela would equate “all the people” with “the subjects of the law” (21). True, the founding of a national people entails a “coup de force”, entails the violent affirmation of some sovereign determinacy (17-18). Yet for its law to be “established”, the “fiction” of “the unity” of the nation must be

“presupposed” in “this violent act” (17-18). But with apartheid and South Africa, the supposed founding of a nation “remained a coup de force, thus, as a bad coup” (18 – his emphasis).<sup>4</sup> Along with this remaining there was the persistent “failure” of a putative law that, in its primal exclusions, “never managed to establish itself” (18). What apartheid failed to effect was what Derrida has described elsewhere as “a law of originary sociability” (*Friendship* 231), a law that generates the “laws”, that produces the “visibility” of the laws (“Laws of Reflection” 34, 38). Such law in its very responsiveness is of the laws, intrinsic to law as it is. Law, to be law, cannot ultimately be subordinated in some determinate presence.

So also with 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. That standard formulation will reappear in the next act.

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” be. Such humanity, to adapt Nancy, is “not subject to any authority; it does not have a sovereign” (*Being Singular*, 185). And to echo Derrida, humanity is always and ever “to come” (e.g. “Force of Law” 256).

A return to Pheng Cheah’s much noted concern with human rights can provide an engaged focussing of these points (*Inhuman Conditions*). His perspective on human rights would accord with both their negative critique and with the confirmation of that critique offered earlier when identifying the vacuous susceptibility of rights to appropriation. So, and for

example, he finds human rights bound “to the instrumentalization of human relations” and thence “rooted in the very nature of economic development within the structure of capitalist accumulation” (259). There is much else cogently in that vein. Yet Pheng Cheah also finds that human rights can extend beyond this delimited existence and “enable...the actualization of humanity” (265). He is also inclined, along with Derrida, to affirm the “unconditional normativity” of human rights (174). Yet there is point to Anker’s view that “[f]or Cheah, there is no outside to the force field of global capital” (“Contaminations” 2). And even if this “force field” for Cheah may not be a totality, it would seem nonetheless to have a totalizing ability (176). In other words, in going beyond their existent determinacy, human rights would still be committed to return to the encompassing “force field” of this hegemonic determination. Yet Cheah also provides the salutary corrective. Where he engages with democracy, the purposive object of course of numerous human rights, in his “The Untimely Secret of Democracy”, Pheng Cheah fulsomely accommodates the unconditional in and as democracy (78), accommodates its “constitutive exposure to the wholly other” (79), accommodates its “incalculable” quality (85).

In sum, the parting position at the end of this second act is that rights constitutively and inseparably entail both their conditioned appropriation within containing barriers, as the negative critique so poignantly reveals, *and* the ability to go unconditionally, illimitably beyond any such appropriation into the realm of the abyssal. Moving now without intermission to the third act, the effort there will be to show existentially how this containment and this unconditionality combine into and as rights, to the effect that rights, still granted Anker’s critique, may yet “account for [those] notions of responsibility and interdependence”, for those “unconditional ties”, they are said to counter so affirmatively (“Human Rights” 253). Or, in Mandela’s terms, the effort will be to show existentially how

rights as an artefact of law are integral to the being-together of a people. The opening scene is not propitious.

### **Act III: resolution**

This opening scene tells an old story but a story not often enough told. The oppression and dispossession of Indigenous peoples in both the assertion and denial of rights matches a genealogy of human rights that can be traced back through natural rights and thence to natural law (Fitzpatrick “Latin Roots”). This particular grand narrative is joined here at a fairly late stage in 1823 with the case of *Johnson v M’Intosh* decided by the Supreme Court of the United States. For a great many national legal systems, this decision remains what the lawyers would call “a leading case” by virtue of its being a formative legal authority on Indigenous rights (e.g. Bartlett 182-3). This is an elevation freighted with obvious irony since the case deprived Indigenous people of their rights.

Continuing in an ironic vein, some nuance has to be brought to that abrupt conclusion. The judgment in that case invariably invoked when referring to it as authority is that of Chief Justice Marshall. In that judgement we find that, with some regard perhaps to a recent revolution based on universal or natural rights or on the rights of all “men”, Marshall *did* recognize that Indian peoples had “natural rights” in their land, including the right to transfer ownership (563). To deny them that right, which the case did, was for Marshall indefensible, but “may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them” (588). It may not be incidental to add that to have done otherwise could well have proved disastrous for the fledgling union of the United States (Williams 231, 306-8). But returning to Marshall and to the lamentable

character and habits of Indian peoples, what these amounted to was “the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct entity” (590). This indefinite mixture of separation and subordination has of course endured ever since. To drive the point home, Marshall next resorted to Realpolitik:

However this restriction [on a right of property] may be opposed to natural right, and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly cannot be rejected by courts of justice. (591-2)

Even more pointedly the court had to go along with the sovereign “government” since it was this government that “has given us...the rule for our decision” (572).

Yet even this elevation of a surpassing power of government over law could not quite end matters because in one vital respect “the rule for our decision” was dubious. Marshall found that the colonial appropriation of the land was legitimate on what was then a standard legal ground used to found imperial settlement, that of “discovery”. Yet in the later case of *Worcester v Georgia* decided in 1832 Marshall found it

...difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors. (542-3)

Marshall had no further regard to that particular “difficulty” but it, and variations of it, have given pause to courts in other settler states. For example, with *Mabo v The State of Queensland (No.2)* decided by the High Court of Australia in 1992, the realization that settlement was based on a legally invalid ground impelled the court to declare that this was simply a matter that should not be enquired into (31).

This could hardly provide a less promising prospect for the cases brought of late by Indigenous peoples to affirm their rights, and their human rights – cases where they have relied on law’s responsiveness, no matter how attenuated that responsiveness may become when filtered through sovereign arrogations. As the *Mabo* case has just intimated, these actions have fittingly and radically unsettled a self-sufficing sovereignty. The assertion of rights founded in Indigenous being-together presents, to borrow the phrase, a clear and present danger to sovereign settlement. Repeating somewhat, rights are normative claims on the illimitable futurity of a being-together in community. Hence a constituent imperative of rights, of being-in-right, is the autonomy of that being – a stark counter to an all-surpassing sovereignty that would seek to limit them. The reaction of the courts to this challenge has been revealing, the Canadian cases especially so.

In *R v Van der Peet* decided in 1996, Chief Justice Lamer in the Canadian Supreme Court cautioned, with emphasis, that the rights being claimed by the Indigenous group in that case “are *aboriginal*”, and this “aboriginality” meant that the “rights cannot...be defined on the basis of philosophical precepts of the liberal enlightenment”, on the basis of their being “general and universal” (paras 17-18). This generality and universality are decidedly not of the kind associated earlier with the illimitable responsiveness of rights. Indeed, and in *Delgamuukw v British Columbia*, the Canadian Supreme Court held in 1997 that aboriginal title to land existed and entered into existence, and into contention,<sup>S</sup> only because it had

“crystallized at the time [colonial] sovereignty was asserted” (para. 145). That sovereign claim is of the standard, quasi-transcendent variety, a claim for sovereign power being able to subsist finitely yet encompass the general and the universal within its determinate existence.

This in itself is not sufficient definitively to counter the challenge of right since a right itself is illimitable. The right must then be limited. The “crystallized” right has to retain its originating hardness; or, in the widely used colonial idiom, the rights are “frozen” (*Van der Peet* paras 165, 170, 172). Rights of this kind are so specifically tied to temporal and spatial determinants that they can be proved as a matter of “fact”, and so integrally tied that if the determinants changed the rights disappear. Such rights, that is, cannot be creatively oriented beyond an unchanging determinate existence. Since this generative orientation beyond is necessary for being-in-right, the rights so “recognized” (the standard term) are not rights at all. More starkly, this is a domain of non-being – either a stasis that denies being, denies the motility of being, or a dissipation, an unfreezing, that denies existence to being. In the Cornelian topography this amounts to either an unchanging containment within barriers or a fall into the abyss.

To illustrate this farrago more concretely, one of its more egregious contributions could be taken, the case of *Mashpee Tribe v Town of Mashpee*. This was a decision by a Federal District Court of the United States in 1978, and it was obliquely affirmed by the Supreme Court. It involved an action brought by the Indian community at Mashpee on Cape Cod to recover land. To succeed the Mashpee had to establish that they were a “tribe” in terms of the relevant legislation. Despite an abundance of evidence showing that the Mashpee as a community had persisted for upwards of three hundred years, they failed to establish that they were a “tribe”. This is because in crucial respects the Mashpee failed to meet the criteria of “tribal” identity fixed in the legislation. Their most lamentable failure lay in being a generous

and a gregarious people who welcomed into their midst and inter-married with a diversity of others, with settlers, deserters from the mercenary ranks of the British Army in the revolutionary war, and runaway slaves. Because these people coming in were not sufficiently subordinated to an enduringly set identity, because the responsive regard to their presence at times altered some supposed original identity of the community, the Mashpee failed to show that they had sustained an invariant identity, and so their claim to the land failed.

If we are dealing with a relation here, if we are dealing even with the recognition so-called of Indigenous peoples and their rights, then this is a relation and a process of recognition lopsided to the point of absurdity. In short, is it a relation in which one side can not only influence but also determine what the other is, something that this “other” cannot do, reciprocally or otherwise. Indigenous peoples thence remain “encapsulated societies”, to borrow the term from Geertz (3).

Moving now towards an inversion of this monist “recognition” by way of Indigenous literature, the Indian protagonist, Abel, in Scott Momaday’s *House Made of Dawn* observes of his trial for murder: “Word by word by word these men were disposing of him in language, *their* language, and they were making a bad job of it. They were strangely uneasy, full of hesitation, reluctance” (95 – original emphasis). The hesitation, the reluctance, the “bad job”, the bad coup, emanate from the precipitate reduction of Abel’s case, from the blocking of an informed responsiveness to him, and to his case. No such hesitation or reluctance characterizes the trial in Sherman Alexie’s *The Lone Ranger and Tonto Fistfight in Heaven*. Here the accused, Thomas Builds-the-Fire, asserts his own narrative, and asserts it aptly in court, and in so doing rouses the support of his people (cf. Mandela 384-5). The court in its peremptory positioning can accommodate neither the narrative nor the people and is driven to violence and obscenity to assert its own encapsulated reality (93-103).

So much, in terms of the Cornelian typography, for the barriers. What of the abyss? The attempt here will be to follow the kind of process mapped out by José Rabasa, the process in which “the philosophical and political tradition of the West would be considered in indigenous terms” (197). This will not, cannot, be done by resorting to “indigenous terms” perceived in some assuredly “authentic” way (cf. Kuper).<sup>5</sup> The terms here will be clearly consonant with the shreds of the philosophical and the political drawn on so far. And what generates these terms here is the *literary* quality of Indigenous literature, an abyssal literary quality of illimitable receptivity: the poet, says Rilke, is “he or she who is ready for everything” (see Fenton 248). Or, evoking the other generative placing of this paper in Portsmouth,<sup>6</sup> there is the boundless possibility of being sensed by Nietzsche when facing the openness of the sea (e.g. *Gay Science* 199 [343]; *Zarathustra* 65 “On the Blessed Isles”).

What in this light is most telling about the *Deep Rivers* of José Mariá Arguedas can be found concentrated in the first chapter set 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. Yet 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).

Given world enough and time, these same motifs of rivers and serpents, these same forces it would seem, can be found abundant in Alexis Wright’s *Carpenteria*, set in northern Australia. Here such forces are concentrated in the Law, in an Aboriginal conception of the Law (e.g. 2). This, reverting to Rabasa’s appropriation of philosophy “considered in

Indigenous terms” (197), and returning also to Derrida specifically, would be a “law of originary sociability” (*Politics of Friendship* 231). And it is these forces which, in the novel’s culmination, regeneratively sweep away in a cyclonic flood the artefacts of imperial exploitation along with its operatives, the “Law-breakers” (404).

### **Epilogue: the paths converge**

In Roman law the legal fiction served to accommodate change in the law whilst that law remained evidently the same. So, to make some claims in law you had to be a Roman citizen, but eventually for this purpose foreigners were simply deemed to be citizens whilst “the letter of the law” remained unchanged (Maine 21-2). Somewhat more expansively, Derrida would see the law, the determinate law, as “fictional”, as “artifice” (“Force of Law” 240). For Derrida, “narrativity and fiction” inhabit “the very core of legal thought” (“Before the Law” 190). With Nancy’s “juris-fiction” the law is that which is “modelled or sculpted (*factum*) in terms of right”, with right having constitutively to combine the abyssal “unforeseen” with a posited determinacy (*Finite Thinking* 156-7). The persistence of Indigenous claims through law and right may yet lend further transforming force to the realization of law as fiction, the realization of its constantly created quality. Fiction here, as Thomas Docherty would have it, “is strategic lying – but, importantly, the strategic goal is not deception but rather the establishment of the faith, trusts, and friendships that we call ‘community’, a commonality of sense” (113-14). The law embodying that commonality of sense, and drawing one last time on Derrida’s “reflecting” Nelson Mandela, would be “a law that has not yet presented itself in the West, at the Western border, except briefly, before immediately disappearing” (“Laws of Reflection” 38).

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## Acknowledgements

This paper combines presentations at two conferences, one on “Post/Colonial Cultures: Legality and Legitimacy” held at the University of Portsmouth on 19 June 2008, and the other on “Human Rights: Theory, Narrative, Postcoloniality” held at Cornell University on 16-17 October 2009. Looked at another way, the paper would not exist without the generosity and guidance of, respectively, Alex Tickell and Elizabeth Anker in involving me with these conferences. Another essential ingredient was the intellectual companionship of Kathleen Birrell, Chris Lloyd, and Maria Carolina Olarte Olarte.

## Notes

1. See Acknowledgements for the detail.
2. The present paper will remain focussed in this frame and challenge it from within, as it were. This is not to ignore the now extensive international enforceability of human rights (see Steiner, Alston and Goodman, chapters 8-10). That this enforceability is of fairly recent vintage excuses Arendt (cf. Agamben 126-7).
3. These and other like uses of human rights are considered in Fitzpatrick “Terminal Legality”.
4. The terms continue to be taken from Derrida here. Fully fledged apartheid was not introduced until 1948. That could be seen as a re-founding but, in any case, the founding is not simply an isolated coup “back then” but a continuing “*performative act*” (cf. Derrida “Laws of Reflection” 18 – his emphasis).
5. This disavowal may also help avoid the controversy over whether the author about to be invoked, José Mariá Arguedas, is authentically indigenous (Murra ix-xiii).
6. See Acknowledgements for the detail.

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