



**Law, Social Justice & Global Development**  
(An Electronic Law Journal)

**Is humanity enough? The Secular Theology of Human Rights**

Peter Fitzpatrick,  
Anniversary Professor of Law,  
School of Law,  
Birkbeck, University of London

[\*peter.fitzpatrick@clickvision.co.uk\*](mailto:peter.fitzpatrick@clickvision.co.uk)

This is a **refereed article** published on: 6 December 2007

---

**Citation:** Fitzpatrick, P, 'Is Humanity Enough? The Secular Theology of Human Rights', 2007 (1)  
Law, Social Justice & Global Development Journal (LGD).  
<[http://www.go.warwick.ac.uk/elj/lgd/2007\\_1/fitzpatrick](http://www.go.warwick.ac.uk/elj/lgd/2007_1/fitzpatrick)>

---

**Abstract**

'[W]hoever invokes humanity wants to cheat' decrees Carl Schmitt (Schmitt, C, 1996, p 54). Or, we could add, has to cheat. The uncontainable 'human' of human rights does at times have to be contained. That is a condition of their having any effect, or even affect, whatsoever. But what quality is to be attached to that containment? With its usual usage, the containment assumes an instrumental appropriation of a unitary, a supposedly universal 'human' along with the subordination of others in its name. Taking a generative cue from the work of Upendra Baxi, the 'human' of human rights is found to resist that containment and to extend responsively to a plurality of diverse constituencies. An accommodation of these two seemingly opposed notions of the 'human' is provided by a theological discourse often associated with human rights, a discourse 'secularized' here in terms of Nietzsche's revealing how, with the death of God, 'new idols' are elevated for us now to live by – idols that can effect the neo-deific combination of determinate position with the illimitable possibility of being. The human, including the human of human rights, is taken as an instance. As such, the human of human rights is susceptible of an encapsulated arrogation in a variety of national, imperial and 'global' manifestations. Yet, Nietzsche would also indicate, with the 'tremendous event' of the death of God there is an exalted openness to the uncontainable possibility of the 'human'. This openness, along with its insistent plurality, goes to constitute the 'human' of human rights, and that openness is, in turn, given efficacy by the 'rights' of human rights.

**Keywords:**

Human Rights, Upendra Baxi, Secular Theology, Humanity, Universality, Plurality, Liberation.

**Author's Note**

Thanks to Carrol Clarkson and William Twining for timely references (and for much else), and to Abdul Paliwala for complete understanding.

## 1. Introduction and Celebration

Even a remit as extensive, as ultimately extensive, as human rights would be stretched to celebrate the scholarship of Upendra Baxi – to accommodate its exuberant generosity of engagement, its generative range of reference. The fortunate focus of that scholarship, fortunate for the feasibility of this present essay, has for some time now been human rights, and compounding that happy coincidence, there is the recent and luminous concentration of Baxi's work on human rights in the second edition of his *The Future of Human Rights* (Baxi, U, 2006).<sup>1</sup>

In a tribute to Baxi, this essay will consider his pointed emphasis on the future of human rights, and do so not so much by way of asking what future does human rights have but more by way of showing how futurity is constitutive of human rights – of human rights as they are, here and now. The essay subsumes futurity in this way by combining two qualities of human rights that have played significant parts in Baxi's work. One of these is a religious or quasi-religious quality of human rights, the other is the contested composition of the 'human' of human rights (see Baxi, U, 2006, pp 34-6, xix, xxiii-iv, 21, 89-90, and 137-47; Twining, W, 2006, pp 263 and 265-6). The constituent force these qualities bring to the composition of human rights is derived from a provocative division in the way Baxi typifies human rights. On one side of the divide, human rights cohere as unitary, even as monist and 'universal', at least as 'paradigm', and as such this conception of human rights can assume a 'dominant or hegemonic' position (Baxi, U, 2006, pp xv and 23).<sup>2</sup> In seeming contrast, and on the other side of the typifying divide, Baxi depicts human rights as plurality, as having 'not one but many futures', and he further depicts a scene in which 'human rights enunciations proliferate, becoming as specific as the networks from which they arise and, in turn, sustain' (Baxi, U, 2006, pp 26 and 47). Such multitudinous human rights not only provide 'sites of resistance and struggle', of subaltern assertion, but Baxi would also have it 'that the originary authors of human rights are people in struggle and communities of resistance' (Baxi, U, 2006, p xiv). This original creation does not, however, avoid dominance by something like a monist human rights endowed by some overweening power, even if '[d]ominant or hegemonic rights-talk seeks, but never fully achieves, the suppression of subaltern rights-talk' (Baxi, U, 2006, p 23). Nor do 'communities of resistance' avoid having their authoring of human rights reduced, even if 'at the very least', to a 'role...coequal' with such power (Baxi, U, 2006, p 144). Yet for Baxi futurity would seem to have more affinity with the plurality of rights because 'futures' are 'open and diverse', and so much so that human rights 'may have...radically contingent futures' (Baxi, U, 2006, p 5). Hence, perhaps, the crowning oxymoron of 'fragmented universality' (Baxi, U, 2006, p 50). What all this indicates is that the two typifications of human rights, the unitary 'universal' and the plural, do not escape mutual affect. Not only does the universal appear to be 'fragmented' plurally but human rights as plurality seem to be subject to some dominance by human rights as unitary assertion.

Before resolving the seeming paradox of that mutuality, I must account for the qualities of human rights that enable this to be done: account for their religious or quasi-religious quality and for their quality of being human. To do this it will be necessary to go beyond the standard correspondence drawn between religion and human rights, and to do that I will first join the numerous pilgrims to the market-place

where Nietzsche's madman announces the death of God, an announcement that is a prelude to Nietzsche's embedding a secular theology in modernity.<sup>3</sup> What Nietzsche helps us identify is that which in modernity can effect the neo-deific combination of determinate position with the illimitable possibility of being. The 'human' is then taken as an instantiation of the combination. Thence the 'rights' of human rights are found to operate in that same combinatory dimension, making the universalized 'human' operative. And this configuring of human rights is found to depend on that mutuality of affect between human rights as monist and as plural derived from Baxi's *The Future of Human Rights*.<sup>4</sup>

## 2. The Dimensions of Secular Theology

In the oft-invoked report of God's death given us by Nietzsche's supremely sane madman in *The Gay Science* we find the madman, 'having in the bright morning lit a lantern', proclaiming to a group of mocking moderns gathered in the marketplace that he is looking for God, only then to fix them in his stare and announce that God is dead and that, furthermore, '*We have killed him – you and I! We are all his murderers*' (Nietzsche, F, 2001, pp 119-20, his emphasis). The madman then puts a series of piercing questions to his audience. In muted summary: How could we possibly encompass this deed? How could we survive in the ultimate uncertainty that results from it? What substitutes will we have to invent to replace the murdered God? His audience is silent and disconcerted. He realizes he has 'come too early', realises that news of this deicide, of this 'tremendous event', is still on its way, yet to reach 'the ears of men': 'this deed', he concludes, 'is still more remote to them than the remotest stars – *and yet they have done it themselves!*' (Nietzsche, F, 2001, pp 120, his emphasis).

What of Nietzsche's own response to the deed? That response could be rendered in three related dimensions, moving at times now beyond *The Gay Science*. And all three are compacted in one of the madman's questions: 'What festivals of atonement, what sacred games will we have to invent for ourselves?' (Nietzsche, F, 2001, pp 120).<sup>5</sup> Nietzsche saw that deific substitutes were, for now, imperative. We 'have to invent' them.<sup>6</sup> And indeed Nietzsche did mark and decry the emergence of such 'new idols' as the 'man' of humanism – 'the religion of humanity' to borrow the phrase – and the state, the state that would still act like 'the ordering finger of God' (Nietzsche, F, 1954, pp 160-1 and 1994, p 14).<sup>7</sup> There is, in short, a jostling pantheon of new idols involved in this first response of Nietzsche to the deicide.

There is, however, a monism imported by Nietzsche's second response. The festivals that have to be invented are ones of atonement, at-one-ment, the recovering of a unity.<sup>8</sup> 'I fear we are not getting rid of God because we still believe in grammar...' (Nietzsche, F, 1968a, p 38). Grammar, in this broad dispensation, enables us to act as if there were still a God-like 'measure of reality' within which an entity, including a new idol such as the 'human', could be constituted as a 'thing in itself', a thing that can carry a force of effective domination (Nietzsche, F, 1968a, p 50 and 1968b, pp 14, 300-7).<sup>9</sup> I will try to show how the appropriation in such terms of the 'human' of human rights is ultimately impossible, but to show also that this impossibility is productive of possibility. Which leads, seamlessly enough, to Nietzsche's third deicidal response, to the coming of this 'tremendous event...still on its way', and thence to overcoming the death of God. It is here that we come to a Nietzschean edge.

With the death of God there forebodes a ‘deep darkness’, perhaps totalitarian comprehensions, conveyed by Nietzsche’s prophecy for ‘the next century’ of ‘the shadows that must soon envelop Europe’ (Nietzsche, F, 2001, p 199).<sup>10</sup> And in the same written breath, this dread is diminished by exaltation, by the incipience of overcoming, by a new openness, ‘a new dawn’, in which ‘our heart overflows with gratitude, amazement, forebodings, expectation...’ (Nietzsche, F, 2001, 199).<sup>11</sup> It is this exalted openness to possibility that suscitates the ‘human’ of human rights. That openness, in turn, is carried by the ‘rights’ of human rights – rights which, complicit as they may be in existent oppressions, can never be contained by these oppressions.

### 3. Rights and the Righteous

The historical rupture usually taken as generating modern secularism with its rights of ‘man’ looks itself, when closely observed, rather more like continuity. Burleigh’s irresistible account of religion and politics in the French Revolution reveals an intense reliance on substituted religious practices. To take the most pointed example, Mirabeau wrote in 1792 that ‘the Declaration of the Rights of Man has become a political Gospel and the French Constitution a religion for which people are prepared to die’ (Burleigh, M, 2005, p 81). In one crucial respect the demands of this religion on adherence and belief were even more extravagant than those of the religion it would replace. Before the revolution the sacral combining of the god’s terrestrial dimension, ‘his’ chosenness for a people and such, was combined with the god’s illimitable efficacy by way of a transcendent reference. With the new monotheism, however, illimitable efficacy is now fixed to an earthly domain. Yet that domain itself is rendered transcendent. The rights of man are declared into worldly efficacy on 26<sup>th</sup> August 1789 but they are so declared as something that has always been and will always be (cf. Derrida, J, 1986; 1987, pp 17-18).

Of course it could readily be said that this was an evanescent religion, the fleeting emergence of which in such a transitional period is thoroughly explicable. Countless thousands of people no longer gather to worship Robespierre’s ‘Supreme Being’ on the Champ de Mars, and so on. Certain contemporary attitudes to law could, as well, be seen as fitting this scenario of transience. So, to take one significant clarion, in place of ‘kings and priests’, the regenerate people not only bring with them ‘a God, virtue, law’ but they also present themselves as ‘a people ready to sacrifice itself wholly for law...’ (Burleigh, M, 2005, pp 94-5). With such a founding of ‘the single universal religion...our law-makers are the preachers, the magistrates, the pontiffs...’ (Burleigh, M, 2005, p 81). All of which may explain the confidence of the revolutionary regime in law’s almost self-sufficient effectiveness when that regime, in 1790, enacted the restrictive *référé législatif* forbidding the interpretation of the law by judges; where interpretation was unavoidable it had to be referred to the legislature (Stone, J, 1964, 213). Understandably, the enactment did not last long. That these elevations of law were not just a matter of a passing and misplaced confidence but, rather, the filling of an epochal hiatus by law is intimated by the monumentally enduring legacy of the Napoleonic period and its lapidary codes under which the ‘empire of liberty’ was to be fixed forever in what Kelley describes as ‘an almost totalitarian effort of social control’ (Kelley, D, 1984, pp 42-3).

Mirabeau’s vaunting the Declaration of the Rights of Man and of the Citizen as ‘a political Gospel’ resonates aptly enough with its deific dimensions – the dimensions

of a monotheistic god. Indeed the Declaration itself did explicitly 'recognise and proclaim' the rights of man and of the citizen 'in the presence and under the auspices of the Supreme Being'. Notoriously, it enshrined that most idolatrous of new idols, the sovereign nation. And it did so in a neo-deific combining of nation's determinate existence with its infinite, 'universal' capacity to extend appropriatively beyond what that existence may be at any one time. The great universal nation is announced in terms of Article 3 of the Declaration: 'The principle of all sovereignty resides essentially in the nation. No body or authority may exercise any authority that does not proceed directly from the nation.' France thence provided the template not only for a monodynamic transformation within the national territory, but also for the aggressive extraversion of that same transformation. Even if the increasingly attenuated plausibility of a nation's universal and messianic thrust has been taken on more by modern imperialisms, this was, and remains, an imperialism of national sovereignty. The neo-deific abilities of the modern sovereign nation manifestly accommodate empire – the ability to subsist finitely yet extend infinitely, the ability to be both an emplaced entity and a universal extraversion. That wondrous combination of abilities has enabled nation not just to extend as a force of imperial domination but also to cohere as imperial concentrations of 'leading' nations, such as 'the great powers' or the 'legalised hegemony' of certain predominant nations, all exemplary of the universal 'human' (Simpson, G, 2004, p 68). And presaging a pending engagement, human rights provide a mantric ideology commensurate with this 'universal' scale. '[T]he humanist and the imperialist', opines Tony Davies, 'share a common patrimony' (Davies, T, 1997, p 47).

Yet even as the Declaration introduced this overweening scheme, it put in place something of its antithesis. The Declaration further proclaims in Article 6: 'Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation'. The rights declared were both constituent of and to be secured by law. To fill the gap in the Declaration between a surpassing sovereignty and this elevation of a demotic law, we can resort to the spiritual parent of the Declaration, to Rousseau and to his pronouncing sovereignty to be 'nothing other than the general will' (Rousseau, J-J, 1968, p 69). Of course an excessively well-worn criticism of Rousseau is that he reduced the relation between a free people and the sovereign to a totalitarian pervasion of the latter (e.g. Berlin, I, 1969, ch III). Yet there is much in Rousseau to indicate the contrary. True, for Rousseau 'the sovereign power' is 'wholly absolute, wholly sacred, wholly inviolable': 'The sovereign by the mere fact that it is, is always all that it ought to be' (Rousseau, J-J, 1968, pp 63, 77). Yet there is also an alternative Rousseau who would implicate the opposite.

For this other Rousseau, 'sovereign power' is limited by the 'covenants constituting the social bond', covenants to do with an equality of citizens and a generality of rules secured by laws: 'Laws are really nothing other than the conditions on which civil society exists' (Rousseau, J-J, 1968, pp 77, 81-3). Clearly, if they are the necessary conditions for the existence of the infinitely protean civil society or social bond, such laws cannot be constitutively subordinate to an existent, a determinate sovereign. Rather, for Rousseau, 'Gods would be needed to give men laws' (Rousseau, J-J, 1968, p 84). For laws to be effective and lasting they had to come from a quasi-divine lawgiver possessed of an entirely disinterested 'great soul', always selflessly attuned to possibility, and able 'to make the Gods speak' (Rousseau, J-J, 1968, p 87). Yet

further, even though the lawgiver's 'task...is beyond human powers', it is a task the achievement of which Rousseau sees as necessary in the world (Rousseau, J-J, 1968, p 86). So, it is a task which Rousseau configures to the qualities of the lawgiver. In bestowing the laws of the constitution, the lawgiver has to create a social bond that integrates individuals into it, a bond believed in by those individuals, and one that is 'lasting' (Rousseau, J-J, 1968, pp 84-5, 87, 99). To perform these tasks, the god-like lawgiver has to be quite apart from the 'nation' being so endowed, lacking in and as itself in any authority, right, force or interest to create the laws. Not only is the law so given incapable of being encompassed by the determinate national sovereign, but for good measure, the only way in which the sovereign can act is 'to make laws' (Rousseau, J-J, 1968, p 101). And Rousseau would go so far as to equate departure from the 'voice' of law 'alone' with a return to the divisive and 'pure state of nature' (Rousseau, J-J, 1986, p 136).

This imperative vacuity in the giving of the law is matched by a putative solidity in the receiving of it. Rousseau provides a list of attributes needed for a people to be 'fit to receive laws', attributes which amount to absolute autarchy (Rousseau; 1968, p 95). Nothing less than absolute autarchy would 'fit' the ultimacy and the illimitable quality of law, for to be less than autarchic would involve a dependence of the people beyond the effect of its laws. So he finds that 'there is still one country in Europe fit to receive laws, and that is the island of Corsica' (Rousseau, J-J, 1968, p 95). Departing from the persistent prescription in *The Social Contract* that states should be small, Rousseau next resorts to the largeness of Poland as a propitious candidate for this autarchic fitness to receive laws (Rousseau, J-J, 1972, p 14). In the evanescence of 'elsewhere' I have shown that Rousseau undermines his own attributions of autarchy in his recognition that a nation must responsively relate to what is beyond it, and that indeed the nation depends on that relation for its very self-identity (Fitzpatrick, P, 2001, pp 148-9). So whilst it may readily be conceded that the ineffable giving of the law needs some determinate emplacement, that place cannot subsist and be without a responsive relation beyond it. I will return to these apposite imperatives once a similar divide has been extracted from the idea of the human.

Before that, the affirmation of a distinction, perhaps needed: it concerns the divide in modernity between (if the pleonasm can be tolerated) religious religion and political religion. To draw the distinction is not to say that this divide and the opposition in modernity between these two religions is not (only) because they are different, but it is (also) because they are the same. It is that similarity between the two, and the inclusive tendencies of each, which calls forth the explicit and intense effort that has for so long been put into enforcing their heterogeneity. The telling instance here, besides that of France, is probably the United States where it is, historically and currently, the intimacy of relation between the two religions that provokes their strident separation. The distinction does have its pointed significance for human rights, however. Although there is a latter-day tendency to recruit religious religion in the cause of human rights (see e.g. Hollenbach, D, 2003 and Nurser, J, 2005), or vice versa (see e.g. Žižek, S, 1999), the genealogy of human rights is characteristically tied to a secular humanism, their defense having 'become a kind of worldwide secular religion' (Wiesel, E, 1999, p 3), whether adhered to with the intensity normally characterizing religious commitment may be doubted.

#### **4. All Too Human**

As influential assessments have told us, with the rights of man the universality of 'man' is subordinated to the determinacy of nation (Arendt, H, 1958, ch 9; Agamben, G, 1998, pp 126-34). Whilst not entirely accurate, these assessments do reflect a predominant tendency. The same straitened national basis is also taken as extending to human right (e.g. Agamben, G, 1996). And of course it is a truism that human rights embedded in international law remain dependent in various ways on the nation as creating international law. Yet the shift from the rights of 'man' to the 'human' of human rights is not only more of the same. Although not without attenuation, the international and its law subsist and have a force beyond nation: as a configuration of the ability of nations to extend beyond their determinacy, the international and its law transcend national origins (Fitzpatrick, P, 2003). And typically, if not invariably, the 'human' subjects of human rights are not confined in national terms. Consonant with being so unconfined, and increasingly, such subjects are able to assert and enforce rights by acting in their own capacity. It is necessary then, to account for the human as such.

'It is...impossible', Fukuyama tells us, 'to talk about human rights...without having some concept 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' (Fukuyama, F, 2002, pp 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, F, 2002, p 101). In a more resolutely tautological vein, Donnelly tells us that 'human rights are literally the rights one has simply because one is a human being' – *sancta simplicitas!* – before going on also to concede uncertainty (Donnelly, J, 1985, pp 9, 21). 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. More on that shortly. In the meantime, it might help that we now have a history of the concept of 'humankind' in Fernández-Armesto's engaging *So You Think You're Human?* (Fernández-Armesto, F, 2004, p 7). Not that this would help ground the 'human' of Fukuyama's scientific positivism.

Aptly enough, for present purposes, Fernández-Armesto's historical 'human' would match Nietzschean ideas of history, ideas set against 'a suprahistorical perspective, [against] a history whose function is to compose the finely reduced diversity of time into a totality fully closed upon itself'; rather, such a 'human' would evoke a history that 'is an unstable assemblage of faults, fissures, and heterogeneous layers that threaten the fragile inheritor from within or from underneath' (Foucault, M, 1995, pp 146, 152). So, Fernández-Armesto's 'human' is interminable, a labile creature 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 dominion, among others. The upshot of so much disabuse is to leave us with, at least, a 'precious self-dissatisfaction', so much so, Fernández-Armesto concludes, that 'if we were uncompromising mythbusters, we



would tear up our human rights and start again' (Fernández-Armesto, F, 2004, p 170.)

We do not have a comparable history of human rights but from its fragments we can see that many of the confident criteria that would go to differentiate the 'human' as genus figure largely in constituting the 'human' of human rights (e.g. Gearty, C, 2006, p 41). Not only that, the 'human' of human rights has contributed its own refined positivities and extended the range of what must be taken, or not taken, to be definitively human. So, in addition to rights being denied or attenuated because their would-be recipients are deemed not 'human' in terms of the genus, or not 'human' enough, the human of human rights must not be too backward, too traditional, and should be conspicuously affiliated with certain economic and political modes of existence (Howard, R, 1993, pp 315-38; Bush, G W, 2002, preface and 2006, pp 4-6;<sup>12</sup> cf. Evans, T, 2005, pp 1057-59, 1062-64, 1066). Not only that, the human of human rights also makes a pointed contribution to the logic of exclusion intrinsic to the genus. This logic has it that the claim to the human is ontologically ultimate and, as such, universal. What is 'other' to the human conceived as universal can only be utterly, irredeemably other. Such sharp discrimination shores up the perduring distinctness and inviolability of the 'human'. Not only that, being constituted in negation, this 'human' compensates for the dissipation of the universal which would ensue were it positively, particularly emplaced. Human rights contribute to this logic in both negative and positive dimensions. By inferentially equating the human and certain rightful conduct, the prescriptions of human rights hone negation by heightening the insuperable, the inhuman alterity of the other. Positively, with human rights equating right conduct with people who behave in specific ways, people can claim, positively, to exemplify the universal. Hence, Simpson's witty designation of 'the export theory of human rights' wherein certain peoples need only regard human rights as something to be dispatched elsewhere; as Simpson says of a momentous negotiation over a human rights treaty, 'whatever mixture of motives influenced the major powers as the primary actors in the negotiations, self-improvement certainly did not feature amongst them' (Simpson A W B, 2001, pp 347-8; cf. Rancière, J, 2004, p 307). More loosely, yet still potently, there is the correspondent sense in which this 'being in the right' carried by ideological appropriations of human rights links to the righteousness of *imperium* in its current manifestations (Stephanson, A, 1995; Marty, M, 1977, ch 1; Wallis, J, 2005, ch 9).

## 5. Conclusion: The (Im)possibility of Human Rights

Of course, the absolutized 'human' of such human rights would not survive a Nietzschean history. The impossibilities here are well rehearsed and, to repeat somewhat, can be concentrated in our inability to extend beyond and thence know a universal within which we have defined and encompassed ourselves, and that includes the universal human. With modernity, the universal cannot assume content in a determinately transcendent reference beyond. Nor can content form or coalesce within the modern universal, for to come to the universal from within is never to encompass or be able to hypostatize it.<sup>13</sup> The bringing of the universal into a determinate, and determinant, particularity can never be something irenically set. The particularity of its instantiation is, in its very being, continually subject to challenge and dissipation in and by a plurality. Which is not to say that our existence is one of constant challenge

and dissipation only. Rather, we are also attuned universally or ‘totally’ to the gathering in of effect and endowment in the ‘making sense’ of existence.

The rights in human rights provide a resolving commensurate with human existence. They provide a determinate enclosing or designation of the human and of the qualities distinctive of human ‘being’ yet hold both the human and the qualities open to alterity. When rendered in and as law, rights provide a normative hold on futurity. They have to be ever responsive to the changing composition of futurity, along with its inexorable plurality, whilst having some determinate content to which we can relate and found a claim *in* right. Yet as relatively determinate, rights retain the responsive ability to go beyond their existent contents and thence to necessitate a decision on what their contents will be thereafter. Rights then, in having the incessant capacity to be something other than what they determinately are, become in a sense ultimately vacuous – or deracinated and ‘abstract,’ to borrow perversely a criticism classically levelled at the Declaration of the Rights of Man and the Citizen (Marx, K, 1992, pp 228-31; cf. Douzinas, C, 2000, pp 95-100). Being in this way vacuous, it should occasion little surprise that rights, and human rights, are susceptible to occupation by effective powers – by nation and nations, by empire and ‘the market,’ and so on. Yet it is also the position that this very vacuity shields human rights from definitive subjection to any power, from enduring containment by any power. Such rights remain ever capable of extending beyond, of surprising and countering, the determinacy of any power. And they remain ever capable of orienting universally in their incipient responsiveness:

...‘universal human rights’ designate the precise space of politicization proper; what they amount to is the right to universality as such – the right of a political agent to assert its radical non-coincidence with itself (in its particular identity), to posit itself as the ‘supernumerary’, the one with no proper place in the social edifice; and thus as an agent of universality of the social itself. (Žižek, S, 2005, p 131)

With their intrinsic promise, a promise not confinable to any particularity, ‘universal’ human rights provide a present instantiation of Nietzsche’s third response to the death of God. In their expectant openness and formative receptivity to being otherwise and to being anything, human rights are always awaiting, always generating, but never succumbing to, realisation.

## Endnotes

<sup>1</sup> For a brief and insightful conspectus of a wider range of Baxi’s work on human rights see Twining (Twining, W, 2006, pp 260-74).

<sup>2</sup> For ‘the emergent paradigm’ that Baxi sees as incipiently dominant, ‘trade-related, market-friendly human rights’ see Baxi (Baxi, U, 2006, p 234 and Chapter 8 generally).

<sup>3</sup> For a more extensive account see Fitzpatrick (Fitzpatrick, P, 2007).

<sup>4</sup> That agenda is not intended at all to counter other enterprises in which, to borrow Sen’s formulation, a ‘theory of human rights can...allow considerable internal variations, without losing the commonality of agreed principle’; this is ‘a variability’ we must expect to be ‘standardly present in all general theories of substantive ethics’ (Sen, A, 2004, p 323). Cf. in terms of this present essay, the empathic charge provided by Speed (Speed, S, 2005). I am grateful to Gerardo Munarriz for this reference.

<sup>5</sup> I have presumed to substitute 'sacred' for the 'holy' in Nauckhoff's translation. The German is 'heilig' but 'holy' would seem to be altogether inadequate in describing a deific substitute, and my obliging German dictionary indicates that 'sacred' is equally acceptable.

<sup>6</sup> More generally, and contrary to reputation, Nietzsche did see 'the religious significance of life' as having a positively sustaining place in contemporary existence, and saw this often in the same respects as he had just excoriated others for holding them (Nietzsche, F, 1997, p 43; and most conspicuously Nietzsche, F, 1996, Third Essay).

<sup>7</sup> As for the borrowing, see Paine (Paine, T, 1778). For the aforesaid 'finger of God' see also Exodus (31:18).

<sup>8</sup> For at-one-ment see Skeat (Skeat, W, 1963, p 30).

<sup>9</sup> These points in the text are put together from different contexts in Nietzsche's work. At least one specific qualification: Nietzsche's 'grammar' is probably not so much a sustaining of God in his absence as an evolutionary endowment (e.g. Nietzsche, F, 1994, pp 18-19).

<sup>10</sup> Cf. Nietzsche (Nietzsche, F, 1996, pp 134-5), for a broadly similar foreboding following on the coming of atheism and the end of morality, although the prophecy here is perhaps rather less pointed, the vista being one 'for Europe over the next two thousand years' (Nietzsche, F, 1996, p 135).

<sup>11</sup> These dissonant 'overcomings' are notoriously associated with *Zarathustra* (Nietzsche, F, 1954). Obviously I think that this work espouses the latter overcoming.

<sup>12</sup> See also, and e.g., Conference for Security and Co-operation in Europe (1990) and United Nations (n.d.).

<sup>13</sup> For situating and telling authority see Darwin (Darwin, C, 1998, pp 149-51, 367-9).

## References

Agamben, G (1996) 'Beyond Human Rights' in Virno, P and Hardt, M (eds) *Radical Thought in Italy: A Potential Politics* (Minneapolis, University of Minnesota Press).

Agamben, G (1998) *Homo Sacer: Sovereign Power and Bare Life* trans. D Heller-Roazen (Stanford, Stanford University Press).

Arendt, H (1958) *The Origins of Totalitarianism* (San Diego, Harcourt Brace).

Baxi, U (2006) *The Future of Human Rights* Second Edition (New Delhi, Oxford University Press).

Berlin, I (1969) 'Two Concepts of Liberty' in *Four Essays on Liberty* (Oxford, Oxford University Press).

Burleigh, M (2005) *Earthly Powers: Religion & Politics in Europe from the French Revolution to the Great War* (London, HarperCollins).

Bush, G W (2002) *The National Security Strategy of the United States of America* (Washington DC, The White House).

Bush, G W (2006) *The National Security Strategy of the United States of America* (Washington DC, The White House).

Conference for Security and Co-operation in Europe (1990) *Charter of Paris for A New Europe* <http://www.hri.org/docs/Paris90.html> 23 November 2007.

Darwin, C (1998) *The Origin of Species* (Ware, Hertfordshire, Wordsworth Editions).

Davies, T (1997) *Humanism* (London, Routledge).

Derrida, J (1986) 'Declarations of Independence', *New Political Science* 15 pp 7-15.

Derrida, J (1987) 'The Laws of Reflection: Nelson Mandela, In Admiration' in Derrida, J and Tlili, M (eds.) *For Nelson Mandela* (New York, Henry Holt).

Donnelly, J (1985) *The Concept of Human Rights* (London, Croom Helm).

Douzinas, C (2000) *The End of Human Rights* (Oxford, Hart Publishing).

Evans, T (2005) 'International Human Rights Law as Power/Knowledge', *Human Rights Quarterly* 27 pp 1046-68.

Fernández-Armesto, F (2004) *So You Think You're Human?* (Oxford, Oxford University Press).

Fitzpatrick, P (2001) *Modernism and the Grounds of Law* (Cambridge, Cambridge University Press).

Fitzpatrick, P (2003) "'Gods would be needed...': American Empire and the Rule of (International) Law', *Leiden Journal of International Law* 16 pp 429-66.

Fitzpatrick, P (2007) "'What Are the gods to Us Now?": Secular Theology and the Modernity of Law', *Theoretical Inquiries in Law* 8 pp161-90.

Foucault, M (1995) 'Nietzsche, Genealogy, History' in *Language, Counter-Memory, Practice: Selected Essays and Interview* trans. D Bouchard and S Simon (Ithaca, Cornell University Press).

Fukuyama, F (2002) *Our Posthuman Future: Consequences of the Biotechnology Revolution* (London, Profile Books).

Gearty, C (2006) *Can Human Rights Survive?* (Cambridge, Cambridge University Press).

Hollenbach, D (2003) *The Global Face of Public Faith* (Washington DC, Georgetown University Press).

Howard, R (1993) 'Cultural Absolutism and the Nostalgia for Community', *Human Rights Quarterly* 15 pp 315-38.

Kelley, D (1984) *History, Law and the Human Sciences: Medieval and Renaissance Perspectives* (Princeton, Princeton University Press).

Marty, M (1977) *Righteous Empire: The Protestant Experience in America* (New York, Harper & Row).

Marx, K (1992) 'On the Jewish Question' in *Early Writings* trans. Livingstone, R and Benton, G (London, Penguin Books).

Nietzsche, F (1954) *Thus Spoke Zarathustra* trans. Kaufmann, W in Kaufmann, W (ed) *The Portable Nietzsche* (New York: The Viking Press).

Nietzsche, F (1968a) *Twilight of the Idols* trans. Hollingdale, R J in *Twilight of the Idols/The Anti-Christ*, (Harmondsworth, Penguin Books).

Nietzsche, F (1968b) *The Will to Power* trans. Kaufmann, W and Hollingdale, R J (New York, Vintage Books).

Nietzsche, F (1994) *Human, All Too Human* trans. Faber, M and Leyhmann, S (London, Penguin Books, 1994).

Nietzsche, F (1996) *On the Genealogy of Morals* trans. D Smith (Oxford, Oxford University Press).

Nietzsche, F(1997) *Beyond Good And Evil* trans. H Zimmern (Mineola, New York, Dover Publications).

Nietzsche, F (2001) *The Gay Science* trans. J Nauckhoff (Cambridge, Cambridge University Press).

Nurser, J (2005) *For All Peoples and All Nations* (Washington DC, Georgetown University Press).

Paine, T (1778) *The Crisis* < <http://www.ushistory.org/Paine/crisis/singlehtml.htm>> (under the heading November 21, 1778).

Rancière, J (2004) 'Who Is the Subject of the Rights of Man?', *The South Atlantic Quarterly* 103 pp 297-310.

Rousseau, J-J (1968) *The Social Contract* trans. Cranston, M (London, Penguin).

Rousseau, J-J (1972) *The Government of Poland* trans. Kendall, W (New York, Bobbs-Merrill).

Rousseau, J-J (1986) *A Discourse on Political Economy in The Social Contract and Discourses* trans. Cole, G D H (London, Everyman's Library).

Schmitt, C (1996) *The Concept of the Political* trans. G Schwab (Chicago, University of Chicago Press).

Sen, A (2004) 'Elements of a Theory of Human Rights', *Philosophy and Public Affairs* 32 pp 315-56.

- Simpson, A W B (2001) *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, Oxford University Press).
- Simpson, G (2004) *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge, Cambridge University Press).
- Skeat, W (1963) *A Concise Etymological Dictionary of the English Language* (New York, Capricorn).
- Speed, S (2005) 'Dangerous Discourses: Human Rights and Multiculturalism in Neoliberal Mexico', *PoLAR Political & Legal Anthropology Review* 28 pp 29-47.
- Stephanson, A (1995) *Manifest Destiny: American Expansion and the Empire of Right* (New York, Hill and Wang).
- Stone, J (1964) *Legal System and Lawyers' Reasonings* (London, Stevens).
- Twining, W (2006) 'Human Rights: Southern Voices Francis Deng, Abdullahi An-Na'im, Yash Ghai, and Upendra Baxi', *Review of Constitutional Studies* 11 pp 203-79.
- United Nations (no date), *The Global Compact*  
<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> 23 November 2007.
- Wallis, J (2005) *God's Politics: Why the Right Gets it Wrong and The Left Doesn't Get It* (Oxford, Lion Hudson).
- Wiesel, E (1999) 'A Tribute to Human Rights', in Danieli, Y, Stamatopoulou, E and Dias, C (eds) *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Amityville, NY, Baywood).
- Žižek, S (1999) 'Human Rights and Its Discontents' <http://www.lacan.com/zizek-human.htm> 23 November 2007.
- Žižek, S (2005) 'Against Human Rights', *New Left Review* 34 pp 115-131.