

Everything is Dangerous: Some Post-structural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law

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In adopting the Universal Declaration of Human Rights (UDHR) in 1948,¹ the United Nations (UN) General Assembly confirmed that there were 'universal' human rights, which merited global supervision and protection. In giving content to the human rights clauses of the UN Charter, the UDHR represented an unparalleled foray into the domestic jurisdiction of states and was understood as promoting 'a unique and revolutionary purpose'² for international law.³ Even so, human rights discourse was to assume a role in the shaping of global affairs which, it can be safely surmised, was well beyond the expectations of its early protagonists, the European victors of World War II. The discourse was to provide a grass roots language, as well as a formal legal framework, which supported decolonisation, mobilisation around sexual and racial discrimination, the dismantling of apartheid in South Africa, movements against authoritarian regimes, and the rights of a multitude of other exploited and

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1 Universal Declaration of Human Rights (UDHR), GA Res 217A 3 UN GAOR, UN Doc A/Res/217A, Part 1 (1948) 71 was adopted by 48 votes, with eight abstentions and none against.

2 Henkin L 'Introduction' in Henkin L (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* Columbia University Press, New York (1981) 1, 7.

3 Although the UDHR was an aspirational statement in 1948 and not a proclamation of 'law', it is considered by many to have become a statement of customary international law. See Sohn L 'The New International Law: Protection of the Rights of Individuals Rather Than States' (1982) 32 *American University Law Review* 1, 16; Kaladharan Nayar M G 'Introduction: Human Rights: The United Nations and United States Foreign Policy' (1978) 19 *Harvard International Law Journal* 813, 816-7; Montreal Statement of the Assembly for Human Rights, 22-27 March 1968, (1968) *Journal of the International Commission of Jurists* 94.

subordinated groups including indigenous peoples, workers, children, lesbians and gay men, the elderly, ethnic minorities and people with disabilities.

Notwithstanding the productivity of the post-World War II human rights regime, its universal applicability has been a point of contention from a broad spectrum of viewpoints. My aim in this paper is to outline some post-structural⁴ theoretical tools which, in breaking with the European tradition of modernity, open different ways of thinking about the project of 'universal' human rights, thereby further advancing the transformative⁵ or liberating potential of human rights discourse. In so doing, I draw substantially on the ground breaking work of French philosopher Michel Foucault as well as on a range of critical feminist, sexuality, race and post-colonial perspectives.

I begin with an overview of the hierarchy created by the generational development of human rights law since 1948, suggesting that this has served to manage and silence important challenges to universality and thus to contain more radical challenges to the global *status quo*. Second, I discuss the European and masculinist specificity of modern knowledges which shaped the UDHR in 1948, and explore how the claim of modernity to universal application is legitimated by the ordering of non-European and non-masculine differences in binary and hierarchical interdependence. Third, I explain how Foucault theorises power and understands knowledge and power as mutually reproductive rather than autonomous or separable. Finally, I turn to the knowledge system of human rights law, examining its power to function as a mechanism of domination in its production and enforcement of universal knowledge or truth, and its concomitant transformative potential. I conclude that post-structural analyses provide a means of both critiquing and complementing modern human rights strategies, particularly in escaping the disempowering polarisations that have shaped the dominant debates of the past and present, and offer new ways of conceptualising a counter-hierarchical and non-dominating universal human rights discourse.

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- 4 The terms 'post-structural' and 'post-modern' are often used interchangeably and there is considerable overlap between the two projects in their fundamental challenge of the certainties of modern knowledges. Smart *C Law, Crime and Sexuality: Essays in Feminism* Sage Publications, London (1995) pp 7-9, distinguishes post-structuralism as being more concerned with the local, embodied, situated construction of knowledge while post-modernism is a critique of the epistemological foundations of modernity. Like Smart, I use the term post-structuralism to indicate my interest in the local mechanisms of power, how concrete bodies are invested with particular meanings and subjectivities, and how these effects of power can be resisted.
- 5 For discussion of the term 'transformative' see note 26 and accompanying text.

1. Contesting universality: the generational approach

An early sign of challenges to the universality of human rights law was the group of UN member states that abstained from voting for the adoption of the UDHR in 1948.⁶ The presence of Saudi Arabia, among those who abstained underscored the basic legal and philosophical differences between the Islamic tradition and the approach of the UDHR.⁷ The early opposition of the communist states,⁸ who formed the majority of the abstainers, hardened into the Cold War hierarchy which saw civil and political rights classified as the 'first generation' of human rights⁹ and promoted as unquestionably universal, while economic, social and cultural rights were classified as the more doubtfully universal 'second' generation.¹⁰ In the Marxist view, the discourse of civil and political rights serves to legitimate and promote individualistic self-interest, whereas a socialist approach is concerned with social obligations that satisfy the needs

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- 6 There were 48 states that voted to adopt the UDHR. The eight abstaining states were Saudi Arabia, South Africa, and six members of the Eastern European bloc: Belarus, Czechoslovakia, Poland, Ukraine, Union of Soviet Socialist Republics (USSR) and Yugoslavia. It should be noted that the duty of states to observe the provisions of the UDHR was later acknowledged unanimously in General Assembly Resolutions. See GA Res 1904, 18 GAOR Supp 15, UN Doc A/5515, (1963) 35.
 - 7 Saudi Arabia has since taken many opportunities to reconfirm this position. See statement made to the General Assembly that human rights are interpreted differently by different traditions: 32 UN GAOR C3 (43rd mtg), at 11-13, UN Doc A/C3/32/SR43 (1997). Saudi Arabia has also consistently refused to participate in UN Women's conferences for the same reasons: see Amnesty International, Report on the Fourth World Conference on Women, IOR 41/30/95, 3.
 - 8 The USSR also had problems with the UDHR because it didn't cite Nazism and fascism as human rights violations. See Leary V A 'The Effect of Western Perspectives on International Human Rights' in Ahmen An-Naim A and Deng F M(eds) *Human Rights in Africa: Cross Cultural Perspectives* The Brookings Institution, Washington DC (1990) p 24. The communist states of Eastern Europe did eventually formally accept the UDHR in the Final Act, Conference on Security and Co-operation in Europe (Helsinki 1975), (1975) 14 ILM 1293.
 - 9 *International Covenant on Civil and Political Rights (ICCPR)*, adopted GA Res 2200A (XXI), 16 December 1966, entered into force 23 March 1976.
 - 10 *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, adopted GA Res 2200A (XXI), 16 December 1966, entered into force 3 January 1976. See Cranston M 'What are Human Rights?' in Laqueur W and Rubin B (eds) *The Human Rights Reader* New American Library, New York (1979) pp 17-25; Bailey P *Human Rights: Australia in an International Context* Butterworths, Sydney(1990) pp 11-17.

of everyone.¹¹ The communist states, in the context of human rights discourse, argued the primacy of economic and social rights which, although individually framed, at least provide some basic substantive guarantees.

In addition to the Saudi and Marxist critiques, there have been many other challenges to the normativity of human rights law that have contested its claim to universality. The analyses of post-colonial and indigenous theorists have pointed to the complicity of the human rights paradigm in the imposition of hegemonic European agendas,¹² and feminist and sexuality activists have highlighted its exclusionary and disciplinary effects.¹³ To date, these critiques have been largely marginalised, especially if they move beyond seeking inclusion in the present regime to promoting more fundamental change.

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- 11 Marx K 'On the Jewish Question' in Christopher Pierson (ed) *The Marx Reader* Polity Press, Cambridge (1997) pp 42-44; Kolasowski L 'Marxism and Human Rights' (1983) 112(4) *Daedalus* 81; Lafort C 'Politics and Human Rights' in *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* Polity Press, Cambridge (1986) 239-72.
- 12 Williams RA 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples Survival in the World' (1990) *Duke Law Journal* 660; Morgan E M 'The Imagery and Meaning of Self Determination' (1988) 20 *New York University Journal of International Law and Politics* 355; Williams P and Chrisman L (eds) *Colonial Discourse and Postcolonial Theory: A Reader* Columbia University Press, New York (1994) particularly Torres G and Milun K 'Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case' (1990) *Duke Law Journal* 625; Guha R and Chakravorty G Spivak (eds) *Selected Subaltern Studies* Oxford University Press, New York (1988); 'Interpreting Oriental Cases: The Law of Alternity in the Colonial Courtroom' (1994) 107 *Harvard Law Review* 1711; Pannikar R 'Is the Notion of Human Rights a Western Concept?' (1982) 120 *Diogenes* 76.
- 13 Bunch C 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 *Human Rights Quarterly* 486; V Peterson S 'Whose Rights? A Critique of the "Givens" in Human Rights Discourse' (1990) 15 *Alternatives* 303; Charlesworth H 'What are "Women's International Human Rights"?' in Cook R J (ed) *Human Rights of Women* University of Pennsylvania Press, Philadelphia (1994) p 58, Cook R J 'Women's International Human Rights Law: The Way Forward' (1993) 15 *Human Rights Quarterly* 230; Romany C 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Cook R J (ed) *Human Rights of Women* University of Pennsylvania Press, Philadelphia (1994) p 85; Morgan W and Walker K 'Tolerance and Homosex: A Policy of Control and Containment' (1995) 20 *Melbourne University Law Review* 202; Dorf J and Perez C 'Discrimination and the Tolerance of Difference: International Lesbian Human Rights' in Peters J and Wolper A (eds) *Women's Rights Human Rights* Routledge, New York (1995) p 324.

The array of challenges to the universality of human rights, like the dominant human rights discourse itself, have their foundations in particular configurations of global contestations of power which, over time, give rise to new discourses of support or opposition, and reframe earlier endorsement and dissent. Following the first Cold War segmentation of UDHR rights into first and second generations, powerful global movements have achieved further generational additions to the human rights heartland of civil and political rights. The classification of new and emerging human rights into generations establishes a hierarchy that serves to further qualify the universal status of the additional categories of rights.

The rights known as the 'third generation' were advanced primarily by third world¹⁴ states in their assertion of the collective rights of previously colonised peoples to economic independence and development.¹⁵ Third generation or 'solidarity rights' have come, over time, to include other collective rights such as peace and environmental sustainability.¹⁶ The legitimacy of these ideals as human rights is contested strongly by many western commentators and states, particularly the US. In the view of the US, the rights associated with development are little more than rhetorical devices 'to permit the Third World to "distort" the issue of human rights by affirming the equal importance of economic, social and cultural rights'.¹⁷ Finally, a 'fourth' generational status has been ascribed to the extra-statal rights claims of indigenous peoples.¹⁸

14 I use the term 'third world' because it highlights the hierarchical ordering of the UN member states during the Cold War that was also reflected in the generational development of human rights law. The term reflects the self-assumed superiority of the first (western/capitalist) and second (eastern/communist) worlds of Europe. It also became a focus for the expression of the unity and solidarity of decolonised states in their struggle to resist European domination.

15 Declaration on the Right to Development, GA Res A/Res/41/128 (4 December 1986) was adopted by 146 votes to one against, with eight abstentions. The US cast the only vote against adoption. Those who abstained were Denmark, Finland, Germany, Iceland, Israel, Japan, Sweden, United Kingdom.

16 *World Commission on the Environment and Development, Our Common Future* Oxford University Press, New York (1987); Report of the UN Conference on Environment and Development, Rio de Janeiro, June 1992, UN Doc A/CONF.151/26; Marks S 'Emerging Human Rights: A New Generation for the 1980s?' (1981) 33 *Rutgers Law Review* 435; Alston P 'Peace as a Human Right' (1980) 11 *Bulletin of Peace Proposals* 319.

17 Alston P 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1 *Harvard Human Rights Yearbook* 3, 22.

18 The generational terminology was first used in an affirmative sense by Manuel G and Polsins M *The Fourth World: An Indian Reality* Collier-Macmillan, Ontario, Canada (1974). A draft Declaration on the Rights of Indigenous Peoples is currently under consideration by a Working Group of the UN Human Rights Commission.

In attributing progressively less status to successive generations of human rights, an increasingly questionable universality is imputed to the later generations. Used in this way, as a marker of 'relative universality', the generational trope has become an important means of delineating between different subgroups of human rights with the result that the dominance of civil and political rights is reinforced and normalised. More broadly, the technique of hierarchising different human rights entitlements serves to naturalise the inequitable arrangements of global power supported by these gradations, and shield them from challenge. Paradoxically, at the same time, the egalitarian language of human rights opens the potential for transformative challenge of the same systems of domination that it shields. It is this potential to challenge the status quo of the global distribution of power that post-structural tools of analysis can help to explore.

Today, in the post-Cold War environment, the contesting of the universality of human rights standards has been focused on the tension between the promotion of universal standards and the recognition of religious and cultural differences. This is, in some ways, a reframing of the concern that was expressed by Saudi Arabia at the time of the adoption of the UDHR. A ferocious battle is being waged on the world stage over whether 'cultural relativity'¹⁹ should be a factor that qualifies the universal application of human rights norms. While not a new debate,²⁰ the present contest squarely raises issues of European hegemony, state sovereignty and local and transnational solidarities, which go to the heart of questions about the universality of the human rights paradigm based on the UDHR and its progeny. One reason for the intensity of the debate, as philosopher Pheng Cheah argues, is that its outcome has important ramifications for the struggle over economic dominance between the liberal capitalism of the West and the powerful economic systems emerging from the non-liberal context of some Asian states.²¹

19 'Cultural relativity' is a term that has its origins in anthropology and moral philosophy. Ferdinand Teson 'International Human Rights and Cultural Relativity' (1985) 25 *Virginia Journal of International Law* 869, 886-8, identifies several types of cultural relativism. The point I want to highlight is that relativism is based on a comparison that, in human rights law, has Europe as its standard.

20 See, for example, Pollis A and Schwab P 'Human Rights: A Western Construct with Limited Applicability' in Pollis and Schwab (eds) *Human Rights: Cultural and Ideological Perspectives* Praeger New York (1979) 1; Pannikar, above note 12; contra Donnelly J 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights', (1982) 76 *American Political Science Review* 303.

21 Cheah P 'Posit(ion)ing Human Rights in the Current Global Conjuncture', (1997) 9 *Public Culture* 233, 237. The financial crisis of many of the developing Asian economies that became apparent in late 1997 will obviously impact on the cultural relativity debates — perhaps opening new possibilities for transformative change.

The cultural relativity controversy is not neatly contained within any single category of the existing hierarchy of human rights, and it is unlikely to be resolved by a further expansion of the human rights generations. The battle has created a paralysing polarisation between the binary camps of universality and cultural relativity that roughly correspond to the north-south cartography of the post-Cold War era. On the one hand, the debate has provided a means of reasserting northern or European universality by linking universal human rights with 'democracy' and 'free market forces' and contrasting the 'superiority' of Europe with the 'authoritarianism' of the pariah states of non-Europe.²² On the other hand, the debate has fostered claims about the pre-eminence of certain non-European traditions.²³ Ultimately this is a contest between alternative assertions of universal truth and not a questioning or rejection of the utility of universals. Those in the cultural relativity camp are not promoting diversity but rather, claiming universal legitimacy within their own spheres of influence.

One consequence of the polarisation of the debate is that transformative critiques of human rights standards are silenced in the rush to express absolute, uncompromising positions on both sides. Critical perspectives are often forced into compromise positions and (mis)characterised as apologists for one side of the main debate. For example, many feminist groups at the 1995 Fourth World Conference on Women were forced to either assert an unqualified commitment to universality or an absolute commitment to cultural relativity.²⁴ The polarisation effectively marginalises challenges to the human rights corpus from non-elite scholars, lawyers and activists such as feminists, post-colonial and subaltern groups, lesbians and gay men, working class movements, critical race theorists and indigenous peoples. The marginalisation of these voices ensures that the current debate side-steps many crucial issues, including the intensification of global patterns of domination by the globalisation of capital in the post-Cold War environment. Realising the transformative potential of these critiques requires loosening the grip of the intractable dualisms of the current debate, and giving voice to alternatives that look to universality in the context of the indivisibility of human rights and the multiplicity of humanity.

22 Bayefsky A F 'Cultural Sovereignty, Relativism, and International Human Rights: New Excuses for Old Strategies' (1996) 9 *Ratio Juris* 42, 51; Teson 'International Human Rights and Cultural Relativity' (1985) 25 *Virginia Journal of Intellectual Law* 869, 895.

23 The Bangkok Declaration, Declaration of the Ministers and Representatives of Asian States, Regional meeting for Asian-Pacific States in preparation for the 1993 World Conference on Human Rights, Bangkok, Thailand, 29 March-3 April 1993, reprinted in C Davies M C (ed) *Human Rights and Chinese Values* Oxford University Press, Hong Kong (1995) 205-9.

24 Otto D 'Holding Up Half The Sky, But For Whose Benefit? A Critical Analysis of the Fourth World Conference on Women' (1996) 6 *Australian Feminist Law Journal* 7, 19.

It is among the critiques on the frontiers²⁵ of human rights orthodoxy, which I refer to as 'transformative' perspectives, that I position the following discussion and myself. By transformative I intend the double meaning attributed to it by post-structural feminist Drucilla Cornell:

change radical enough to so dramatically restructure any system — political, legal or social — that the 'identity' of the system is itself altered. The second meaning, defined as broadly as possible, turns us to the question of what kind of individuals we would have to become in order to open ourselves to new worlds.²⁶

That is, transformative change involves the interconnected processes of changing the way we, as individuals, locally understand the world as well as altering the global economies and practices of power.

Like the dominant players, perspectives from the margins are also concerned with issues of difference in the international community. However, unlike both the universalist and the cultural relativist camps, transformative perspectives stress the importance of finding ways to comprehend multiplicity as an alternative to repeating the dyadic paradigms of the current debates. This is where post-structural theories have much to offer by suggesting ways of thinking that escape the restrictive dualisms of the past and present, and resist the subjugating hierarchies of the human rights orthodoxy itself. From a post-structural perspective, human rights law is understood as a form of power and its universality is questioned by examining connections between the regimes of power it serves and the construction and ranking of human diversities that it enforces. In this re-understanding, the philosophical search for a transcendent universal knowledge or truth on which to base human rights norms is discarded and spaces are opened for the emergence of new conceptions of universality and difference.

2. Modernity's knowledge and universal claims

Modernity is the dominant philosophical production of present day 'Europe', by which I do not simply mean the geographical entity but, more broadly, those interests or regimes of power which benefit from the production of the truths of Europe. This includes the post-colonial elites that have embraced European

25 Boaventura de Sousa Santos 'Three Metaphors for a New Conception of Law: The Frontier, the Baroque and the South' (1995) 29(4) *Law and Society Review* 569, 574-6.

26 Cornell D *Transformations: Recollective Imagination and Sexual Difference* Routledge, New York (1993) p 1.

knowledges and institutions as their own, albeit with indigenous variations, as well as the elites of the West. Modernity has its origins in 18th century Enlightenment thinking²⁷ and is aptly described by feminist jurist Margaret Davies as 'the attempt to find absolute grounds for knowledge, to discover abstract, transcendent principles that would be the foundation for all philosophical questioning'.²⁸

In its early manifestations, modernity revealed its potential for dominating as well as liberating effects: its imperialist and masculinist dimensions were exposed in the support that its emergent knowledges lent to colonial and patriarchal forms of domination, while its transformative dimensions were apparent in its early fostering of the democratic struggles. In contrast to the earlier Truths of a feudal society structured by religion and social status, modern epistemology enunciated a new foundation of *egalitarian* Truth.

In this section I will discuss three features of modern philosophy which are important to a post-structural critique of human rights law:

- the assertion of the veracity of scientific knowledge as universal;
- the humanist construction of the unified, rational, pre-constituted subject of universal knowledge; and
- the way in which modernity's binary and hierarchical construction of difference has dominating effects.

Scientific rationality as universal

A prominent feature of modern philosophy, apparent in both liberalism and Marxism, is its claim to the transcendent status of irreducible universal knowledge. The basis for this claim lies in the idea that value-free, archetypal knowledge is possible and accessible by way of rational or dialectical scientific methods and standards of proof.²⁹ One aspect of the superiority claimed by scientific knowledge is its purported insulation from the vagaries of human diversity and contingency by the exercise of reason. It is precisely because of this ostensible autonomy that modern knowledges lay claim to universal Truth. The

27 Seidman S *Liberalism and the Origins of European Social Theory* University of California Press, Berkeley (1983).

28 Davies M *Asking the Law Question* Law Book Company, Sydney (1994) p 221.

29 *Ibid* pp 96-97.

timeless, disembodied, abstract order of reason is understood as universal in contradistinction to the chaos of the 'unreason' of knowledges considered context-dependent, like those associated with nature, tradition or emotion.

Post-structuralists, building on critical philosophies of science,³⁰ reject the possibility of absolute truths and universally ordered systems of knowledge.³¹ Instead, knowledge is understood as produced by an 'economy of discourses of truth'³² and meaning emerges from the interaction of competing discourses. Some knowledges justify and support dominating meanings and practices while other knowledges, usually marginal, challenge hegemonic discourses. It follows that the scientific knowledge of modernity is understood as internal to its particular tradition: that rationality is a specific way of knowing with certain political allegiances which can be uncovered by analysing the specifics of its social and historical production. This perspective doesn't make scientific knowledge 'untrue'. Rather, it demands that we understand Truth in a different way, as the contingent product of particular, situated ways of comprehending the world and not as something that is absolute and immutable which pre-exists social relations and awaits discovery.

Consequently, a post-structural approach to the question of the universality of the modern knowledge of human rights is not concerned with arguing the truth of the objectivity of science, or with searching for a truer knowledge. Instead, as Foucault describes it, it is interested in the altogether different project of 'resitua[ing] the production of true and false at the heart of historical analysis and political

30 See for example, Kuhn T *The Structure of Scientific Revolutions* University of Chicago Press, Chicago (2nd ed 1990); O'Hear A *Introduction to the Philosophy of Science* Clarendon Press, Oxford (1989); Harding S *The Science Question in Feminism* Cornell University Press, Ithaca (1986).

31 Foucault M 'Truth and Power' in Gordon C (ed), *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) 109, 131-2 outlines five characteristics of the political economy of truth in modernity.

32 Foucault M 'Two Lectures' in Gordon C (ed) *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) 78, 93. Scott J W 'Deconstructing Equality-versus-Difference: or, the Uses of Poststructuralist Theory for Feminism' (1988) 14 *Feminist Studies* 33, 35 explains Foucault's understanding of discourse as follows: 'A discourse is not a language or a text but a historically, socially and institutionally specific structure of statements, terms, categories and beliefs ... [d]iscourse is thus contained or expressed in organizations and institutions as well as in words'. Foucault's use of the term 'economy' indicates that the exercise of power through discourse is organised in specific and efficient ways. It also makes the link between power and the economic interests which power supports.

critique³³ by uncovering the historical specificity and local practices of particular discursive relations. In this shift, the central issues become those of understanding the conditions in which certain discourses or world-views are privileged and how the distinctions they produce between true and false can be contested. As feminist legal theorist Carol Smart observes,³⁴ this (re)vision of truth also disrupts the idea that 'correct' transformative strategies can be determined by scientific reasoning.

The Humanist subject as universal

The second feature of modernity which is important to a post-structural critique of human rights law is the humanist conception of the sovereign, unified, rational, disembodied, self-knowing individual as the starting point for universal knowledge. As Enlightenment philosopher Rene Descartes expressed it, 'I think, therefore I am'.³⁵ Concomitant with the idea that universal knowledge has an autonomous existence is the belief that the bearer of such knowledge, the human subject, must also possess an essence that precedes social relations. This view was central to the thinking of German philosopher Immanuel Kant, whose work at the end of the 18th century made crucial contributions to the development of modern philosophy. He has also been characterised as an early proponent of the concept of universal human rights.³⁶ As Davies explains:

Kant argued that we see through the universal laws of the mind, which provide the conceptual structure of experience ... [He] saw the basic structures of the mind as universal: in other words, they are the same for all people ... [Therefore] knowledge can be objective because everyone has the same fundamental structure in their minds.³⁷

The assertion that modern rationality springs from a subjectivity that has *a priori* universal existence lends modernity a particularly robust claim to absolute truth.

It is hardly surprising that the early modern view of the pre-constituted individual is thoroughly rejected by poststructuralists.³⁸ Instead subjectivity, like knowledge, is

33 Foucault M 'Questions of Method' in Burchell G, Gordon C and Miller P (eds), *The Foucault Effect* University of Chicago Press, Chicago (1991) pp 73, 79.

34 Smart C *Law, Crime and Sexuality: Essays in Feminism* Sage Publications, London (1995) p 10.

35 Descartes R *Mediations on First Philosophy* Hackett Publishing Company, Indianapolis (1993).

36 Teson F 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53, 54.

37 Davies M *Asking the Law Question* Law Book Company, Sydney (1994) pp 6-7.

38 The rejection of human subjectivity as coherent and unified is not a uniquely post-structural insight. It draws on the work of many modern theorists including Freud S, Althusser L and Ferdinand de Saussure.

understood as discursively produced in the everyday conflict of competing knowledge systems through language, experience and social practices.³⁹ Even the 'biological' characteristics of sex and race, which modernity has so convincingly produced as natural and universal, are discursively constructed.⁴⁰ The outcome is an individual who is fluid, fragmented and contingent, but nevertheless still 'there'. Post-structuralism does not necessarily abandon the subject or the possibility of law, as some have claimed,⁴¹ but does it reject the *unified* subject, replacing *him*⁴² with an identity that is continually reconstituted rather than intrinsic, and multiplicitous rather than singular. It is in the processes of constant contestation, reconstitution and recodification of subjectivity that the potential for transformative outcomes lies, not in the search for universal human essences.

It is significant that certain individual characteristics survived the abstraction of the humanist prototype, thereby becoming concomitant with neutrality, as many feminists and critical race theorists have revealed. The authentic universal subject who determines what qualifies as knowledge, the exerciser of reason, was always already masculine, European, heterosexual and middle class (or, to put it another way, was always NOT female, non-European, queer or poor). As Davies⁴³ makes the point, "[n]eutrality" is only the position which is culturally enabled to deny its positionality — it is the position which is empowered to know'.⁴⁴ Thus modernity's egalitarian

39 Weedon C *Feminist Practice and Poststructuralist Theory* B Blackwell, Oxford UK (1987) p 21.

40 With regards to the discursive production of sex see Butler J, *Gender Trouble: Feminism and the Subversion of Identity* Routledge, New York (1990); with regards to race see Haney Lopez I F 'The Social Construction of Race' in Delgado R (ed) *Critical Race Theory: The Cutting Edge* Temple University Press, Philadelphia (1995) p 191.

41 See Bordo S 'Feminism, Postmodernism, and Gender Scepticism' and Hartsock N 'Foucault on Power: A Theory for Women?' in Nicholson L J (ed) *Feminism/Postmodernism* Routledge, New York (1990) 133 and 157; Fiss O M 'The Death of the Law', (1986) 72 *Cornell Law Review* 1.

42 Humanistic discourse is characterised by 'phallogentrism' which, as explained by Grosz E 'Philosophy' in Gunew S (ed) *Feminist Knowledge: Critique and Construction* Routledge, New York (1990) p 150 'is a specifically discursive series of procedures, a strategy of collapsing representation of the two sexes into a single model called "human" or "man", but which is in fact congruent only with the masculine. It is the universalization of particular features of masculinity, as if these were genuinely representative of both sexes'. See also Irigaray L *This Sex Which Is Not One* Cornell University Press, Ithaca (1985).

43 Davies M *Asking the Law Question* Law Book Company, Sydney (1994) p 177.

44 The constitutive character of language is a general proposition, not confined to modernity.

language of rationality, impartiality, equality, universality and human rights, which opened many transformative possibilities, also provided an effective subterfuge for the new elites privileged by modernity's democratic and scientific revolutions.

Binary differences and hegemonic universals

A third important aspect of post-structural critiques of modernity relates to the constitutive power of language and the binary and hierarchical structure of modern knowledge. Consistent with the modern idea that rationality and subjectivity pre-exist the social, relational processes of communication, language had also been thought of as descriptive of pre-existing thought processes, like those that Kant describes: as a way of giving a nomenclature to already constituted meaning, not as itself creating meaning.

The structuralist theory of Swiss linguist Ferdinand de Saussure fundamentally challenged this view of the way that language functions.⁴⁵ His work revealed how language constitutes or creates meaning through patterns of binary relationships between 'signs',⁴⁶ so a particular meaning results from being contrasted with other signs that it is not. In other words, the dualistic interplay of difference is fundamental to the way that knowledge is constructed.⁴⁷ This is evident from the examples I have already used: what counts as scientific rationality is understood in relation to the converse construction of 'unreasonable' knowledges; and the unified universal subject of modernity is shaped with reference to those 'different' human characteristics which he does not possess. Therefore, the system of signs of a language creates a particular discursive reality or truth that bears no necessary relationship to the reality produced by other languages. It follows, as Davies observes, 'that there can be no absolute "reality" common to all people'.⁴⁸ This conclusion obviously has important implications for human rights law.

The work of French post-structuralist Jacques Derrida takes this analysis a step further, by revealing that the binaries which create meaning/knowledge are invested with a power relationship of domination and subordination.⁴⁹ Each duality

45 de Saussure F *Course In General Linguistics* McGraw-Hill, New York (1959).

46 Saussure's concept of the 'sign' consists of both the 'concept' which he calls the 'signified' and the 'sound-image' which he calls the 'signifier'. The relationship between the particular sign and signifier is not determined by a consistent or prior system but is the result of convention. See Davies, above n 28, pp 231-2.

47 Davies M *Asking the Law Question* Law Book Company, Sydney (1994) p 221, 229-240.

48 *Ibid* p 234.

49 Derrida J *Positions* University of Chicago Press, Chicago (1981) p 41.

creates a hierarchy between its contrasting sign(s); between what lies 'inside' a particular sign (the standard) and what lies 'outside' it (its other). Thus constructs like scientific rationality and the unified subject are not only dependent on the binary concepts of 'unreason' and 'difference' for their meaning, but the first term in the binary represents a positive value and the second term is a subordinated counterpart to the first. The subordinate term is neither fully erased nor completely self-defining, but is contained or disciplined by the subjugating power of the dominant term which is the only one of the two terms which has any autonomy.⁵⁰ Derrida emphasises the violence involved in the exclusionary force used to marginalise, debase or disqualify the subordinated term.⁵¹ His analysis enables us to understand how the universalising knowledge of modernity, in the name of science and rationality, constructs not only its difference from other knowledge but also its superiority.

The subjugating experience of Europe's reifying⁵² standards has been described from many marginalised perspectives. For example, Indian Subaltern Studies⁵³ scholars explain that knowledges which are not commensurable with or performative of Europe's 'other', are reduced to a 'clamour' or a 'randomness' that is not interpretable within the terms of Europe.⁵⁴ Further, cultural critic Edward Said describes Europe's production of the 'exoticism' of the Middle East as 'Orientalism': 'a certain *will* or *intention* to understand, in some cases to control, manipulate, even to incorporate, what is a manifestly different (or alternative and novel) world'.⁵⁵

In addition, feminist perspectives point to Europe's androcentric production of the

50 Grosz E *Space, Time and Perversion: The Politics of Bodies* (1995) p 53.

51 Derrida J *Positions* University of Chicago Press, Chicago (1981) p 41.

52 Boyle J 'Ideals and Things: International Legal Scholarship and the Prison-House of Language' (1985) 26 *Harvard International Law Journal* 327, 334 defines reification as 'the way we turn other people, or social systems, or institutional hierarchies into objects which we then confront as disempowered observers.'

53 Edward Said 'Forward' in Guha R and Chakravorty Spivak G (eds) *Selected Subaltern Studies* Oxford University Press, New York (1988) v-x, traces origins of the term 'subaltern' to Gramsci A. In Gramsci's usage, subalternity is opposite to a 'dominant', 'elite' or 'hegemonic' position of power. Subaltern Studies scholars use the term broadly, as inclusive of all those subordinated in South Asian society, whether because of class, gender, caste, religion, age, office or any other system of hierarchising difference into relations of domination and subordination.

54 Guha R 'The Prose of Counter-Insurgency' in Guha R and Chakravorty Spivak H (eds) *Selected Subaltern Studies* Oxford University Press, New York (1988) p 45.

55 Edward Said *Orientalism* Penguin, London (1978/1995) p 12.

'disorder' of women⁵⁶ and the 'deviance' of sexualities other than procreative heterosexuality,⁵⁷ and indigenous peoples highlight the subjugating effects of the classifications of 'uncivilised' and 'traditional'.⁵⁸

In combination, modernity's grading of binary differences constructs the dominating meta-narrative of masculinist Europe as the embodiment of the highest stage of human development and the pinnacle of global progress, according to Europe's own universal indices. As feminist post-structuralist Jane Flax aptly expresses the problem:

[T]he escape from tutelage through reason and knowledge that Kant believed was also the path to freedom may, it seems now, lead instead into an ever more terrifying enslavement to the products of that knowledge.⁵⁹

Thus modernity carries 'certain political baggage' which includes lending scientific legitimacy to notions of western supremacy.⁶⁰

While modernity's subjugating binaries also produce transformative knowledges of the other, for example in movements for the recognition of indigenous sovereignties, women's and queer liberation and racial equality, the production of resistance is contained by and dependent on reproducing the binary paradigm and thus its transformative potential is circumscribed. As feminist post-structuralist Judith Butler points out using the example of gender, modern egalitarian ideals like equality and self-determination can operate as 'regulatory fictions' that assist norms like heterosexuality and masculinity.⁶¹ This idea is illustrated by the struggle for women's equality in the North. Equality discourse, important as it has been for women, is confined by a dualistic understanding of gender as either male or female. With the

56 Pateman C *The Disorder of Women: Democracy, Feminism and Political Theory* Polity Press, Cambridge (1989); Charlesworth H, Chinkin C and Wright S 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613.

57 Alexander M J 'Not Just (Any) Body Can be a Citizen: The Politics of Law, Sexuality and Postcoloniality in Trinidad and Tobago and the Bahamas' (1994) 48 *Feminist Review* 5; Robson R *Lesbian (Out)Law: Survival Under the Rule of Law* Firebrand, Ithaca New York (1992).

58 Morgan, 'The Imagery and Meaning of Self Determination' (1990) 20 *New York University Journal of International Law and Politics* 355.

59 Flax J *Thinking Fragments: Psychoanalysis, Feminism, and Postmodernism in the Contemporary West* University of California Press, Berkeley (1990) p 8.

60 Nicholson LJ 'Introduction' in Nicholson LJ (ed) *Feminism/Postmodernism* Routledge, New York (1990) p 4.

61 Butler J 'Gender Trouble, Feminist Theory, and Psychoanalytic Discourse' in J Nicholson LJ (ed) *Feminism/Postmodernism* Routledge, New York (1990) p 336.

male/female dualism intact, equality for women is limited to measurements of women's position against masculinist standards. In this process, gender stereotypes are reinvented, rather than deconstructed and deinstitutionalised.⁶²

In contrast to modern movements for liberation, post-structural theorists are, like many feminists, interested in disrupting dualistic knowledges by exploring the possibility of thinking in non-binary concepts, in terms of multiplicities rather than dualisms.⁶³ The positing of transformative perspectives on the margins of Europe's dualisms, by legal theorists like Cornell, is one such attempt. Thus post-structuralists argue that it is necessary to learn to conceive of the world in a different (dis)order to that produced by Europe's universal truths, an order that is instead premised on pluralities, incommensurabilities and everyday local experience.

Links between knowledge and power

In suggesting the paradigm shifts of abandoning the search for foundational truths, relinquishing the quest for freedom based on the articulation of a universal human essence, and moving to plural subjectivities and multiple significations, post-structuralism theorises knowledge itself as a site of struggle.⁶⁴ Knowledge or truth is understood as both an effect and a mechanism of relations of power. This complex of power relations relies on the economy of discourses to produce truth through power and to exercise power by the production of truth.⁶⁵ It follows that modern knowledges are the product of power and not of objective, universal reason operating independently of power.⁶⁶ In fact, scientific reason camouflages the allegiance of modern knowledge to certain 'regimes of truth'⁶⁷ or power. As Smart observes, this is a very significant reappraisal of knowledge.⁶⁸

62 Williams J 'Deconstructing Gender', (1989) 87 *Michigan Law Review* 797.

63 Scott J W 'Deconstructing Equality-versus-Difference: or, the Uses of Poststructuralist Theory for Feminism' (1988) 14 *Feminist Studies* pp 33, 35.

64 In introducing a new set of binaries, I concede the usefulness of binary thinking as well as its dangers.

65 Foucault M 'Two Lectures' in Gordon C (ed) *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) p 93.

66 Grosz E *Space, Time and Perversion: The Politics of Bodies* (1995) p 43.

67 Foucault M 'Truth and Power' in Gordon C (ed), *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) 109, 131-2 outlines five characteristics of the political economy of truth in modernity: uses the term 'regime of truth' to refer to the systems that link truth and hegemonic power in a mutually sustaining relationship to each other.

68 Smart C *Law, Crime and Sexuality: Essays in Feminism* Sage Publications, London (1995) p 216.

In this section I outline Foucault's radical departure from modern models of power and the connections he makes between power and knowledge. I discuss three contentions that are fundamental to modern theories of power which are refuted by Foucault:

- that power is *centralised* in the form of the nation-state and its institutions;
- that power is *possessed* by already constituted individuals and groups; and
- that power operates as a primarily *repressive* force.

In a Foucauldian framework, the central issue is not how to transcend power (as it is in modernity), but how to loosen the grip of dominating forms of power on the production of truth and strengthen the power of marginal, transformative knowledges. With respect to human rights law, this means giving voice to those produced as other by the binary truths of modernity, and thereby contesting the Eurocentric and masculinist standards which have been legitimated as universal.

Power in ascending analysis

Foucault's first point is that modern philosophy, in both the liberal and Marxist traditions, conceives of power as centralised and macropolitical and, consequently, that 'freedom' is understood as the result of overthrowing monolithic power.⁶⁹ In the liberal framework, which he calls 'juridico-discursive',⁷⁰ power is understood in terms of the sovereign state, legitimated by the fiction of the consent of the governed, and checked constitutionally by its division between various arms of government and the rule of law.⁷¹ In a Marxist view, power is understood as primarily economic and globally organised in the form of class domination. This class-based power would eventually be replaced by a new egalitarian order of the international proletariat in which there would be no need for law to regulate power. However, until then there was a role for law in checking the power of the state administrative apparatus.⁷² Foucault points out that the modern critiques of both liberalism and Marxism, as class domination and as

69 Foucault M 'Truth and Power' in Gordon C (ed), *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) pp 115-6.

70 Foucault M *The History of Sexuality*, Volume I Penguin, London (1976) p 82. At 85 Foucault describes 'juridical' power as 'centred on nothing more than the statement of law and the operation of taboos'.

71 Foucault M 'Two Lectures' in Gordon C (ed) *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) p 88.

72 Evgeny Pashukanis *Law and Marxism: A General Theory* Ink links, London (1978).

totalitarianism respectively, continued to understand power as centralised and remained largely uncritical of the law as a means of preventing abuse of power.⁷³

As Foucauldian Colin Gordon observes,⁷⁴ Foucault's work takes our understanding of power beyond the modern duality of 'good' and 'evil', to a conception of power as dispersed and circulating unevenly in discursive networks or chains through the entire social fabric.⁷⁵ In its circulation, power is constantly contested and transformed, creating points of intensity as well as generating possibilities for change.⁷⁶ In this view state sovereignty, the law and other systems of centralised power are only the terminal forms that power takes, not its sources.⁷⁷ It is the multiplicity of power relations at the micro, local level which are 'invested, colonised, utilised, involuted, transformed, displaced, extended' and come eventually to support global regimes of power.⁷⁸

Foucault's *ascending* analysis of power⁷⁹ inverts the modern view that seeks to explain local phenomena by reference to objective universal indices and centralised forms of juridical power. His analysis starts with diverse local knowledges, not with the assumption of an overarching unity. Foucault employs the method of 'genealogy' to trace the lineage or 'analytics' of knowledge production from its local, capillary character to the appearance of unity in certain global effects of domination.⁸⁰ He stresses that genealogies are not empirical investigations but 'anti-sciences' which:

73 Foucault, above n 70, p 88; Foucault, above n 31, pp 115-6. This view does not do justice to Marxist analysis, but Foucault's characterisation of Marxism generally tends to be unidimensional and reductionist. I agree with Hunt's suggestion that there are 'strategic reasons' for Foucault's rather unsatisfactory engagement with the legacy of Marx: that he uses Marxism as a means of highlighting the distinctiveness of his own analysis of power rather than as a theory with which he directly engages. See Hunt A 'Foucault's Expulsion of Law: Towards a Retrieval' (1992) 17 *Law and Social Inquiry* 1, 10.

74 Gordon C 'Afterword' in Gordon (ed) *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) 229, 234.

75 Foucault M 'Two Lectures' in Gordon C (ed) *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) p 98.

76 Foucault M *The History of Sexuality*, Volume I Penguin, London (1976) pp 92-93.

77 *Ibid* p 92.

78 *Ibid* p 99.

79 Foucault M 'Two Lectures' in Gordon C (ed) *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) p 99.

80 Grosz E 'Philosophy' in Snejka Gunew (ed) *Feminist Knowledge: Critique and Construction* Routledge, New York (1990) pp 85-86.

... entertain the claims to attention of local, discontinuous, disqualified, illegitimate knowledges against the claims of a unitary body of theory which would filter, hierarchise and order them in the name of some true knowledge and some arbitrary idea of what constitutes a science and its objects.⁸¹

This analysis suggests new frameworks for theorising the emergence of grass roots human rights movements and for understanding their potential to challenge global regimes of power.

It is from the strategic alignment or 'insurrection'⁸² of disqualified and subjugated knowledges that viewpoints on the margins of modernity have emerged. Foucault uses the examples of gay rights and prison activism to illustrate this point.⁸³ The subject positions of the homosexual and the prisoner are produced by the dualisms of the modern knowledge systems of medicine, law and psychology as abnormal or deviant and therefore outside those privileged by modernity. This disqualification, at the same time as subjugating its objects, is also productive: it has empowering effects. Counter-knowledges are produced which reclaim these identities as affirmative and assert rights associated with them. Subaltern studies scholar Dipesh Chakrabarty identifies the same dynamic in the context of colonialism when he observes that 'imperialism enables as much as it victimises'.⁸⁴ And in a similar vein, critical race feminist Patricia Williams emphasises that the African-American civil rights movement 'breathed new life' into rights discourse, making it their own.⁸⁵

Foucault's project was not to explicate an account of how local forms of power actually come to be aggregated in centralised forms like the state and the law. In fact, he would have resisted such a project. However, this is my point of departure as I, like critical legal sociologist Alan Hunt, am concerned that our understanding of resistances not remain localised and dispersed 'without ever being able to mount a wider transformative politics'.⁸⁶ While I believe that understanding the processes

⁸¹ Foucault M 'Two Lectures' in Colin Gordon (ed) *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) p 83.

⁸² *Ibid* p 81.

⁸³ Foucault M *The History of Sexuality*, Volume I Penguin, London (1976); Foucault M *Discipline and Punish: The Birth of the Prison* Penguin, London (1975/1979) p 90.

⁸⁴ Chakrabarty D 'Marx After Marxism: History, Subalternity and Difference' (1993) 52 *Meanjin* 421, 422.

⁸⁵ Williams P *The Alchemy of Race and Rights* Harvard University Press, Cambridge Massachusetts (1991).

⁸⁶ Hunt A 'Foucault's Expulsion of Law: Towards a Retrieval' (1992) 17 *Law and Social Inquiry* 1, 8.

whereby local power becomes sufficiently organised to challenge dominating power at its terminal sites is necessary for a (re)vision of human rights law, I also acknowledge the danger that yet another universalising theory may result.

Power and agency

Foucault's second departure from modernity's conception of power is his contention that power is *exercised* rather than, as in the modern view, *possessed* by the *a priori* individual or by a particular class or group of people. For example, he explains that liberty is a *practice* rather than an institutional or legal guarantee, and must be exercised in order to be attained: 'The guarantee of freedom is freedom'.⁸⁷ This view that power is not a possession or an item of exchange, but rather 'a complex strategical situation'⁸⁸ challenges both liberal and Marxist perspectives.

Foucault dispenses with the need for the transcendental humanist subject, who possesses power, as the foundation of knowledge. Instead, he develops a genealogical account of the mechanisms that constitute the subject within a specific historical framework.⁸⁹ In this framework the individual is understood as 'the product of a relation of power exercised over bodies, multiplicities, movements, desires, forces'⁹⁰ rather than a pre-given entity already possessed of power. This shifts the focus for change from the consciousness of individuals to an understanding of the production of Truth in the relations of power.

However, it is important again to emphasise that this approach does not erase the subject nor deny its agency. As Foucault himself says, '[a]t the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom'.⁹¹ Foucault therefore presupposes the agency of

87 Foucault M 'Space, Knowledge and Power' in Rabinow P (ed) *The Foucault Reader* Penguin, Harmondsworth, Middlesex (1986) p 245, cited in Gordon C, 'Government Rationality: An Introduction' in Burchell G, Gordon C and Miller P (eds) *The Foucault Effect: Studies in Governmentality* Harvester, Wheatsheaf London (1991) p 47.

88 Foucault M *The History of Sexuality*, Volume I Penguin, London (1976) p 93.

89 Foucault M 'Truth and Power' in Gordon C (ed), *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) p 117.

90 Foucault M 'Questions on Geography' in Gordon C (ed) *Power/Knowledge* The Harvester, Press, Brighton Sussex (1980) pp 73-74.

91 Foucault M 'The Subject and Power' in Dreyfus H L and Rabinow P (eds) *Michel Foucault, Beyond Structuralism and Hermeneutics* University of Chicago Press, Chicago (1982) pp 221-2.

the individual rather than annulling it.⁹² But Foucault's analysis challenges us to look below the surface of universal categories of apparent sameness and difference, of sex or race for example, to understand this exterior effect as the outcome of multiple mobile networks of power rather than an expression of a subject's biologically or psychoanalytically determined essence.⁹³ Thus, Foucault theorises transformative knowledges as everywhere in the networks of power relations and says that 'it is doubtless the strategic codification of these points of resistance that makes a revolution possible'.⁹⁴ Again, this brings us to the question of how such codifications might be encouraged and strengthened in order to successfully denaturalise the claims of dominating regimes of Truth to universality.

Power and resistance

The third of Foucault's contentions is that power operates primarily as a positive and productive force rather than repressively:

[i]f power was anything but repressive, if it never did anything but say no, do you really believe that we should manage to obey it? What gives power its hold, what makes it accepted, is quite simply the fact that it does not weigh like a force which says no, but that it runs through, it produces things, it induces pleasure, it forms knowledge, it produces discourse ...⁹⁵

Therefore power is primarily an enabling force, rather than constraining and inhibiting as in Foucault's reading of modern theories of power. From the creativity of power comes the possibility of emancipation or resistance as well as domination, and the two are interdependent.⁹⁶ In Foucault's paradigm, resistances are inscribed in relations of power as the binary and irreducible opposites of dominant knowledges and 'play the role of adversary, target, support, or handle in power relations'.⁹⁷ While power and resistance are oppositional, they also rely on each other for meaning, as in the Saussurean analysis of the dualistic construction of language and knowledge.

92 Gordon C, 'Government Rationality: An Introduction' p 5.

93 Probyn E 'Travels in the Postmodern: Making Sense of the Local' in Nicholson L J (ed) *Feminism/Postmodernism* Routledge, New York (1990) 176, 181-2.

94 *Ibid* p 96.

95 Foucault M 'Interview With Lucette Finas' L in Morris and Patten (eds) *Michel Foucault: Power, Truth, Strategy* Feral Publications, Sydney (1978) p 63.

96 This point is also made by Said, above n 53, p viii.

97 Foucault M *The History of Sexuality*, Volume I Penguin, London (1976) p 95.

Foucault identified a new modern form of power, which he called 'discipline', which emerged during the 17th and 18th centuries and came to represent the interests of the bourgeoisie.⁹⁸ This power was developed and exercised by the knowledges of the social sciences that were expressions of modernity *par excellence* in their mapping of human behaviour in universal humanist categories and classifications, although Foucault emphasises their multiple origins and localised operation. In fact he contrasts the universality of law with the specificity of the disciplines.⁹⁹

Foucault's work traces the operation of disciplinary power in schools, prisons, poor houses, factories, hospitals and psychiatric institutions. Many of his descriptions of discipline seem to characterise it as a repressive force exercised through local surveillance, institutional monitoring and material bodily coercions.¹⁰⁰ For example, he describes discipline as enforcing docility and 'normalisation'¹⁰¹ by becoming embedded in daily life and resulting in an extensive 'carceral network'¹⁰² which operates to exclude and subjugate knowledges associated with subversive or resistant anatomies. However, it must be emphasised that Foucault saw discipline as having parallel productive outcomes in ensuring that the body's capabilities were optimised and integrated efficiently into the economy of the marketplace,¹⁰³ and in the form of individual agency.

Understanding this apparent paradox — that 'knowledges, methods and procedures which support dominating forms of power can also act as sites of resistance, struggle and change'—¹⁰⁴ is critical to a transformative agenda, and central to the question of how the potential of human rights to have counter-dominating effects might be more fully realised. This is not a question of transcending relations of power but, rather, of how to give voice to, and strengthen, non-dominating and anti-disciplinary forms of power/knowledge. Such knowledges are not new truths, although they might make this claim, but

98 Foucault M *Discipline and Punish: The Birth of the Prison* Penguin, London (1975/1979) p 90.

99 *Ibid* p 223.

100 Foucault M *Discipline and Punish: The Birth of the Prison* Penguin, London (1975/1979), p 104.

101 *Ibid* p 107.

102 Foucault M *Discipline and Punish: The Birth of the Prison* Penguin, London (1975/1979) p 303.

103 Foucault M *The History of Sexuality*, Volume I Penguin, London (1976) p 139.

104 Grosz E 'Philosophy' in Gunew S (ed) *Feminist Knowledge: Critique and Construction* Routledge, New York (1990) p 89.

'useful fictions'¹⁰⁵ or strategies that challenge the status of truth. Relations of power take many forms, which means that resistance, too, is multiple and dispersed. Clearly, the familiarity and reassurance of unity that modernity teaches is a desire associated with domination that must be unlearned (if that is conceivable) before we will understand fully the productive possibilities of resistance at the local and global levels.

3. Power of law

Applying Foucault's ascending analysis of power to human rights law is to understand law as the contingent effect of discursive networks that originate locally. It follows that the regimes of power supported by human rights law need to be made transparent before the transformative productivity of human rights discourse can be fully understood and developed. The discourse of law clearly participates in the production of True and False, particularly in its authorisation of centralised power and the delimitation of its legitimate exercise. But in Foucault's view, law is a pre-modern form of power that has been colonised by the new, modern forms of disciplinary and governmental power. This view, that law is increasingly merging with discipline, is supported by the increasing legalisation of social life, at least in the north, in which rights discourse is playing a significant role.¹⁰⁶

In this section I explore the connections between legal knowledge and power, with specific reference to human rights law. I make my argument in three steps:

- that the post-structural analysis of the power effects of modern knowledges, including the utilisation of binary differences to legitimate hierarchies of true and false, can be extended to human rights law;
- that the mainstream scholarly preoccupation with defending the authority of international law by arguments about the legitimacy of its sources (foundations) is a diversion from the question of the relationship between law and power; and
- I consider Foucault's view that legal power is becoming increasingly disciplinary and the challenges this presents for human rights activists.

¹⁰⁵ *Ibid* p 86.

¹⁰⁶ Brown W *States of Injury: Power and Freedom in Late Modernity* Princeton University Press, Princeton New Jersey (1991) 27; Smart C *Feminism and the Power of Law* Routledge, London (1989) 163; Hunt, above n 73, p 3.

Law as modern knowledge

There can be little doubt that modern legal discourse occupies a particularly powerful position in the hierarchy of knowledges. Although the law's assertion of its special access to Truth predates modernity's privileging of scientific knowledges as Truth,¹⁰⁷ there are, as Smart argues, sufficient similarities between the claims of law and science to extend Foucault's analysis of Truth, as a discursive product of modern power relations, to law.¹⁰⁸ For example, legal adjudication relies on a specialised type of rationality (legal reasoning) which, like scientific knowledge, claims to result in neutral, objective and value-free determinations. Further, law is theorised as an autonomous realm of knowledge that transcends context, morality and politics and is superior to non-rational forms of knowledge in its determinacy and veracity. In fact many have argued, in the past as well as the present, that law is a mode of scientific adjudication.¹⁰⁹

The idea of the transcendent capabilities of legal reasoning gives law a claim to Truth that can appear impervious to transformative challenge as many feminist legal theorists opine.¹¹⁰ Smart argues that:

[i]f we accept that law, like science, makes a claim to truth and that this is indivisible from the exercise of power, we can see that law exercises power not simply in its material effects (judgments) but also in its ability to disqualify other knowledges and experiences.¹¹¹

This effect is readily apparent in human rights law.¹¹² What qualifies as a universal human right is determined with reference to the humanist standard of the autonomous, European, masculine individual. The disqualification of others is legitimated by reference to a multiplicity of non-standard differences including

107 Davies M *Asking the Law Question* Law Book Company, Sydney (1994) p 32.

108 Smart C 'Law's Power, the Sexed Body, and Feminist Discourse' (1990) 17 *Journal of Law and Society* 194, 197.

109 There are many ways in which connections have been made between law and science. See Davies M *Asking the Law Question* Law Book Co, Sydney (1994) p 104-110. The modern school of law and economics, which applies the 'science' of economics to law, is currently very influential. See Posner R *Economic Analysis of Law* Little, Brown, Boston (1986); Easterbrook F, 'The Inevitability of Law and Economics' (1989) 1 *Legal Education Review* 3.

110 Mossman M J 'Feminism and Legal Method: The Difference it Makes' (1986) 3 *Australian Journal of Law and Society* 9.

111 Smart C *Feminism and the Power of Law* Routledge, London (1989) p 11.

112 See, for example, references cited in notes 12 and 13.

those of race, gender, class, ethnicity and sexuality. The resulting outcome, in the form of universal human rights, is the strategic effect of power networks, not the neutral product of the application of value-free universal legal rules and reasoning.

Human rights law has developed within the framework of international law which categorises, compares, ranks and assesses the different claims to Truth by states. In drawing its comparisons to determine True and False, international law utilises binary legal standards that rely on hierarchies of difference which confirm Europe as the universal standard, like other modern knowledge systems. The genealogies of modern international law reveal its commitment to promoting peaceful relations between European sovereigns,¹¹³ and providing legal justification for the acquisition of colonial territories from non-sovereign (non-European) peoples.¹¹⁴ As international legal scholar Tony Anghie says, once the problem of cultural difference was historically resolved by asserting the superiority of Europe:

the discipline [of international law] could then create for itself, and present as inevitable and natural, the grand redeeming project of bringing the marginalised into the realm of sovereignty, civilizing the uncivilized and developing the juridical techniques and institutions necessary for this great mission.¹¹⁵

These origins are reflected in the UN Charter and have continued to shape the ongoing development of international law, despite dramatic changes in the UN's membership base since 1945, which has trebled with the recognition of post-colonial states whose sovereignty has depended on their modelling of Europe.¹¹⁶

The utilisation of difference to assert the normativity of European standards is illustrated by the generational development of human rights categories during the Cold War that I have outlined above. The technique of hierarchising different categories of human rights entitlements has the effect of naturalising the inequitable arrangements of power supported by the generational graduations and shielding them from challenge. In this way the universal categories and comparative Truths of human rights law can serve the interests of dominating global regimes of power.

113 Kennedy D 'Primitive Legal Scholarship' (1986) 27 *Harvard International Law Journal* 1.

114 Anghie A 'Francis de Vitoria and the Colonial Origins of International Law' (1996) 5 *Social and Legal Studies* 321.

115 *Ibid* 333.

116 Otto D 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 *Social and Legal Studies* 337, 341-2.

Rethinking legitimacy arguments

In contrast to transformative critiques of human rights law, the major preoccupation of mainstream legal theorists has been to articulate the grounds or sources of international law's authority and legitimacy.¹¹⁷ The search for true foundations has largely taken the form of a debate between positivist and natural law theorists, although their approaches are not necessarily mutually exclusive.¹¹⁸ The positivist argument relies on social contract theory and the model of power that Foucault refers to as juridico-discursive, in which the consent of autonomous, rational, self-interested sovereign states legitimates the power of 'hard' consent-based law.¹¹⁹ A narrow positivist position is assumed by many cultural relativists in the post-Cold War human rights debates who argue that universal human rights are limited to what has been specifically and universally agreed.¹²⁰ The natural law justification argues that law's authority rests on its foundation in 'soft' extra-consensual universal principles of justice which are discoverable by the exercise of scientific or practical (Kantian) reason.¹²¹ This approach is adopted by many universalists in the current debates.

117 Henkin L 'Introduction' in Henkin L (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* Columbia University Press, New York (1981); Oscar Schachter 'Human Dignity as a Normative Concept' (1983) 77 *American Journal of International Law* 848.

118 For example Finnis J, a contemporary natural law theorist, argues that natural law provides criteria for identifying legitimate positive law; see Finnis J *Natural Law and Natural Rights* Clarendon Press, Oxford (1980) 290. In another vein, Kennedy D suggests that in combination and counter-argument, positivist and natural law arguments preserve the normative authority of international law by ensuring that it is not firmly committed to either the individualism of sovereign autonomy or the potential tyranny of substantive legal regulation. See Kennedy D 'Sources of International Law' (1987) 2 *American University Journal of International Law and Policy* 1.

119 Weil P 'Towards Relative Normativity in International Law' (1983) 77 *American Journal of International Law* 413.

120 The Bangkok Declaration, Declaration of the Ministers and Representatives of Asian States, Regional meeting for Asian-Pacific States in preparation for the 1993 World Conference on Human Rights, Bangkok, Thailand, 29 March-3 April 1993, reprinted in Davies M C (ed) *Human Rights and Chinese Values* Oxford University Press, Hong Kong (1995).

121 Tasioulas J 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 *Oxford Journal of Legal Studies* 85; A Verdoss and H F Koeck 'Natural Law: The Tradition of Universal Reason and Authority' in R St Macdonald J and M Johnston D M (eds) *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* Nijhoff M, Boston (1983) p 17.

Despite their jurisprudential differences, it is notable that neither framework acknowledges the problem of its European and masculinist assumptions in its quest to identify an essential true justification of universal applicability. Both theories locate this essence in the exercise of (European) reason in the form of free agreement or rationality, thereby claiming universal grounds for the legitimacy of the boundaries and binaries that each approach produces and manages. This 'fetishism of essences',¹²² as critical international lawyer James Boyle aptly calls it, 'distracts us from the reality that [law] is being created by our categories and definitions'.¹²³ Boyle's perspective is consistent with the post-structural view that the question of the legitimacy of law is a diversion from the question of the relationship between law and power. While Foucault does not conclude that legitimation theory is completely empty, his point is that it does not describe how power is actually exercised.¹²⁴

The possibility of universal justice through law has, in the modern view, been argued as a defence against unaccountable power, tyranny and abuses of wealth.¹²⁵ This contrast serves to camouflage the reliance of legal knowledge on multiplicitous networks of power, which are continuously contested and transformed. In a post-structural analysis, legal knowledge is not coherent or pure but rather, as Smart describes it, uneven and contingent.¹²⁶ To understand the contingency of law is not, however, to argue that law be abandoned as a site of progressive struggle. Rather, it encourages striving towards transformative change and highlights the necessity of understanding law in a way that does not rely on the assumption that knowledge must have absolute foundations. It must be acknowledged that law gains the status of transcendence only because of its political dominance, which in turn gives it the power to marginalise and discredit other truths.¹²⁷ As Derrida argues, what we need is a critique of law that results in 'a desedimentation of the superstructures of law that both hide and reflect the economic and political interests of the dominant forces of society'.¹²⁸

122 Boyle J 'Ideals and Things: International Legal Scholarship and the Prison-House of Language' (1985) 26 *Harvard International Law Journal* 358.

123 *Ibid* 332.

124 Gordon C, 'Government Rationality: An Introduction' in Burchell G, Gordon C and Miller P (eds) *The Foucault Effect: Studies in Governmentality* Harvester, Wheatsheaf London (1991) p 7.

125 Foucault M, 'Truth and Power' in Gordon C (ed) *Power/Knowledge* The Harvester Press, Sussex (1990) p 108

126 Smart C 'Feminism and Law: Some Problems of Analysis and Strategy' (1986) 14 *International Journal of the Sociology of Law* 116.

127 Davies M *Asking the Law Question* Law Book Co, Sydney (1994) p 120.

128 Derrida J 'Force of Law: The "Mystical Foundations of Authority"' (1990) 11 *Cardozo Law Review* 921, 941.

The Complementarity of law and discipline

On a global scale, Foucault's theory that modern disciplinary codes are colonising the juridico-discursive form of law portends a global society of normalisation or, as he also describes it, the global management of population by 'governmentality' rather than by law.¹²⁹ Foucault identifies the function of law in a disciplinary society as a means to conceal the coercive mechanisms of normalisation by guaranteeing the proper exercise of sovereign power.¹³⁰ In reality, he believes that law is powerless with respect to discipline: disciplinary power 'is not ensured by right but by technique, not by law but by normalisation, not by punishment but by control'.¹³¹

Smart's research in the UK shows how social science and medical knowledges have increasingly been used in the construction of legal argument. She cites as examples the reliance on medical and psychological evidence to establish, in law, what constitutes 'the best interests of the child' and at what point a legal abortion becomes the offence of child destruction.¹³² Smart concludes that law and discipline operate co-operatively rather than in competition. The result is that law utilises disciplinary knowledges to extend the reach of its dominating discourse further into the 'private' or 'personal' spheres of life.¹³³

Smart also makes an important link between the increasing regulatory or normalising power of the disciplines and the concomitant snowballing of individual rights claimed from the state. She suggests that the success of rights claimants is determined by their conformity to the social science categories that have been conceded rights: '[m]ore rights come at the cost of the potential for greater surveillance and greater conformity and the claim for new rights brings about the possibility of new forms of regulation'.¹³⁴ Thus Smart's work also reveals the paradox that while the assertion of rights can result in the empowerment of previously subjugated groups, at the same time rights discourse

129 Foucault M 'Governmentality' in Burchell G, Gordon C and Miller P (eds) *The Foucault Effect: Studies in Governmentality* (1991) p 87.

130 Foucault M 'Two Lectures' in Gordon C (ed) *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) p 95.

131 Foucault M *The History of Sexuality*, Volume I Penguin, London (1976) p 89.

132 Smart C *Law, Crime and Sexuality: Essays in Feminism* Sage Publications, London (1995) pp 15-18.

133 *Ibid* p 17.

134 *Ibid* p 162.

can legitimate the very systems of domination it seeks to erode.¹³⁵

Foucault suggests that the post-structural question of how legal right induces and legitimates the manifold techniques of disciplinary domination needs to replace the modern question of the legitimacy of sovereign power and its right to demand obedience.¹³⁶ He cautions that the response of turning to law as a means of seeking protection from disciplinary power is a 'blind alley' as the two discourses are both implicated in the same general mechanism of power and that disciplinary power is more powerful.¹³⁷ Instead we need to look 'towards the possibility of a new form of right, one which must indeed be anti-disciplinarian, but at the same time liberated from the principle of sovereignty'.¹³⁸

Questions relating to the potential of law, and its discourse of rights, to produce and assist resistance are also necessary. Foucault is unclear as to whether, in proposing the possibility of an anti-disciplinary right, he is suggesting that law can be disengaged from dominating forms of power or, alternatively, whether he envisages an extra-legal system of right that operates through local networks of community justice. He does say, in response to a question about the formation of a people's court to judge the police, that:

one should start with popular justice, with acts of justice by the people, and go on to ask what place a court could have within this ... my hypothesis is not so much that the court is the natural expression of popular justice, but rather that its historical function is to ensnare it, to control it and to strangle it.¹³⁹

While this view suggests that an anti-disciplinary society could emerge from grass roots movements and local knowledges, it really only hints at a possible connection between transformative justice and law. However, it is this possibility that is critical for human rights activists to explore.

135 Butler J 'Gender Trouble, Feminist Theory, and Psychoanalytic Discourse' in Nicholson L J (ed) *Feminism/Postmodernism* Routledge, New York (1990) p 336; Williams J 'Deconstructing Gender', (1989) 87 *Michigan Law Review* 797.

136 Foucault M 'Two Lectures' in Gordon C (ed) *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) p 96.

137 *Ibid* p 108.

138 *Ibid*.

139 Foucault M 'On Popular Justice: A Discussion with Maoists' in Gordon C (ed) *Power/Knowledge* Harvester Press, Brighton Sussex (1972/1980) p 1.

In sum, it is important to understand human rights law as a discourse produced by multiplicitous relations of power, rather than as an autonomous body of transcendent Truth. As a terminal form of power, human rights law relies on local networks of power which, in their aggregated colonisations, reorderings and displacements, produce the global effects of European, masculinist domination. The functioning of the legal paradigm of rights as a tool of domination needs to be recognised and understood, as well as its potential to produce grass roots transformative movements for change. Of particular importance is the recognition that there is a co-operative relationship between legal and disciplinary power which produces and controls categories of rights claimants and, in this way, both restricts and enhances the potential of human rights law to be turned to anti-disciplinary, transformative ends.

Conclusions

Central to philosophical traditions that have dominating effects are the twin assumptions that transcendent universal knowledge or truth is possible and that the particular tradition has unique access to this knowledge. These assumptions rely on the erasure of the specificity and contingency of a tradition's constitutive knowledges which are the outcome of particular histories, places, times, bodies and epistemologies. It follows that the regimes of truth which sustain and extend subordinating outcomes propound the superiority, exclusivity and universal validity of a particular knowledge in contradistinction to other competing knowledges.

Those philosophies that lay claim to universal legitimacy portend a vast potential to produce global hegemonic effects. But, as Foucault has said, while nothing is in itself evil, everything is dangerous.¹⁴⁰ Which historical and political circumstances lead to the realisation of the dominating potential of a tradition, and how these same conditions contain the possibilities of resistance and transformation, are questions that are central to post-structural inquiry and offer new paradigms for thinking about human rights law.

The corollary of a universal claim to Truth is the exclusion or marginalisation of knowledges that challenge its Truth or are incommensurable with it. This operates externally in the production of antipathy, even antagonism, to other traditions¹⁴¹ and

140 Gordon C, 'Government Rationality: An Introduction' in Burchell G, Gordon C and Miller P (eds) *The Foucault Effect: Studies in Governmentality* Harvester, Wheatsheaf London(1991) p 46.

141 The most glaring example is the way that imperialist traditions have subjugated or assimilated indigenous knowledges. A further example is the reliance by both Marxist and liberal traditions on the notion that they are mutually exclusive.

internally where alternative or dissenting knowledges are silenced and pilloried or, in Foucault's terms, subjugated.¹⁴² The binary of difference is a central and powerful technique in these processes of antipathy and subjugation. However, the hierarchies of difference that are produced also make critical and resistant vantage points at the perimeters of dominating knowledge systems possible.

In the global arena, the competing presence of exclusive antipathetic traditions does not augur well for the realisation of universal human rights that are free from dominating effects. In the adversarial context of antagonistic traditions, the project of human rights quickly becomes a contest about cultural superiority: a struggle between alternate universalising philosophies over the power to define the universal. Only two options emerge: either different traditions are hierarchically ordered, and perhaps reinterpreted, according to the standards of a single dominant tradition as in the current *status quo*, or the coexistence of a number of irreconcilable universalising traditions is accepted, as proposed by cultural relativists in the contemporary North-South debates.

However, post-structural analyses of power and knowledge offer alternative theoretical tools that suggest that difference and incommensurability can be embraced without domination or assimilation. They open the possibility of disrupting those established ways of thinking that have harnessed difference to the service of elites. Poststructural theories advance the possibility of rethinking universality as a transformative project by destabilising hierarchies of difference and, as feminist political theorist Anna Yeatmen describes it, 'admitting the extraordinary wealth of diversity which all those formerly subsumed as other represent'.¹⁴³

Perhaps above all, post-structuralism provides an analytical framework to investigate how the idea of universality can be employed as a technology of domination and indicates ways in which its current deployment might be rethought. Rethinking universality will open the potential that lies at the margins of human rights law for the eruption of transformative, anti-disciplinary knowledges. It is in the processes of continual contestation and strategic realignment of knowledges that transformative outcomes lie, not in the modern search for universal truths and human essences. ●

142 Foucault M 'Two Lectures' in Colin Gordon (ed) *Power/Knowledge* The Harvester Press, Brighton Sussex (1980) p 81.

143 Yeatman A 'A Feminist Theory of Social Differentiation' in Nicholson L J (ed) *Feminism/Postmodernism* Routledge, New York (1990) p 290.