

HUMAN RIGHTS AFTER FAITH — AN INTRODUCTION TO THE ‘CULTURES OF HUMAN RIGHTS’ SYMPOSIUM

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I FAITH AND THE CULTURES OF HUMAN RIGHTS

The symposium articles in this edition of the *Melbourne Journal of International Law* are drawn from a workshop on the theme of ‘The Cultures of Human Rights’, held at Melbourne Law School in July 2005. The workshop was concerned with the question of how human rights encounter other modes of thought or ways of being, and with the effects of naming this encounter as one between a universal law and a particular culture, or as a clash of cultures or even (infamously) of civilisations. This contest of cultures is often represented from the perspective of the human rights professional or activist faced with an incomprehensible and ‘Exotic Other’, to quote an early and influential piece by Karen Engle¹ — perhaps today the torturer or, more incomprehensible still, the torturer’s legal adviser, the terrorist or the woman behind the veil. The workshop thus sought to explore the terms of this encounter. How do human rights encounter ‘other’ cultures, such as the United States military, the politics of Eastern Europe, Africa, Asia and Latin America, indigenous peoples, the institutions of globalised economics or militant Islam? Are human rights the product or portend of one culture, or of many? And does it make a difference that human rights arrive or are imagined in many different forms?

My own interest in this question of the arrival of human rights was initially spurred by the sense of dissonance that I felt when reading some of the critiques of human rights generated by critical legal scholars from the US and Europe. It seemed to me that these critiques were as much of the form in which rights arrive as of anything specific to rights themselves. To take one example, in an essay entitled ‘The Critique of Rights in Critical Legal Studies’, Duncan Kennedy takes issue with those who have faith in rights.² His argument against faith in rights follows from the ‘loss of faith in legal reasoning’.³ Kennedy describes his own loss of faith in legal reasoning in terms of an event that occurred to him in

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¹ Karen Engle, ‘Female Subjects of Public International Law: Human Rights and the Exotic Other Female’ (1992) 26 *New England Law Review* 1509.

² Duncan Kennedy, ‘The Critique of Rights in Critical Legal Studies’ in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (2002) 178.

³ *Ibid* 191. Kennedy there equates legal reasoning with ‘judicial reasoning’.

his first year in law school. Kennedy was working on a law review case note, and waxing eloquent to a second-year student editor about the importance of the implications of a particular paragraph in the majority judgment.

The editor looked at me with concern and said, 'I think you may be taking the language a little too seriously.' I blushed. It was (unexpectedly, suddenly) obvious to me that the language I had been interrogating was more casual, more a rhetorical turn, less 'for real' than I had been thinking. No judicial opinion since has looked the way some opinions looked before this experience.⁴

Kennedy suggests that loss of faith can 'spread' like a disease or 'jump' like a forest fire.⁵ And so once he loses faith in legal reason, Kennedy loses faith in rights as the *word* to which we can appeal for a moral code or a normative system outside politics. Thus in this American context, rights seem to take a religious form — the critical gesture is against faith, and for the secular.

The work of Martti Koskenniemi on 'The Effect of Rights on Political Culture' seems equally concerned with rights as they arrive in a particular form — in his case, as bureaucracy in the context of the European Union.⁶ For Koskenniemi, the administration of Europe is marked by a 'political culture of bad faith',⁷ in which all who exercise discretion know that 'rights [always already] defer to policy'.⁸ This is a critique of the philosophy of bureaucracy organised around the bad faith relationship between European bureaucrats and the rights they ignore in their decision-making. We can hear echoes of Hannah Arendt's description of bureaucrats as the 'secret and anonymous agents of the force of expansion ... The only "law" they obeyed was the "law" of expansion, and the only proof of their "lawfulness" was success'.⁹

In Australia, human rights do not seem to arrive as bureaucracy, still less as an article of faith. Human rights are not part of the *Australian Constitution*, nor are rights in any robust fashion part of the legal or political culture. Rights are smuggled in, perhaps as pedagogy in law schools, by judges from time to time resisting the actions of the executive, or through human rights commissions or UN bodies whose reports are used in a similar fashion to documentaries or investigative journalism. Human rights arrive in the Australian context not as bureaucracy or judgment, but as advocacy, commissioned truths or pedagogy.¹⁰ The language of human rights is taken up by those seeking to constrain state power, or to contribute to the shaping, fashioning or challenging of official memory, yet the relation of rights to legal or state institutions is tenuous. While it is still relevant to critique the place of rights in Australian culture, the questions that rights raise for critical theorists here have little to do with faith. Australia is

⁴ Ibid 193.

⁵ Ibid 194.

⁶ Martti Koskenniemi, 'The Effect of Rights on Political Culture' in Philip Alston (ed), *The EU and Human Rights* (1999) 99.

⁷ Ibid 115 (emphasis omitted).

⁸ Ibid 116.

⁹ Hannah Arendt, *The Origins of Totalitarianism* (1966) 215.

¹⁰ For attempts to explore the particular forms in which human rights have arrived in Australia over the past decade, see Anne Orford, 'Commissioning the Truth' (forthcoming 2006) *Columbia Journal of Gender and Law*; Anne Orford, 'Biopolitics and the Tragic Subject of Human Rights' in Elizabeth Dauphinee and Cristina Masters (eds), *The Logics of Biopower and the War on Terror: Living, Dying, Surviving* (forthcoming 2006).

an aggressively iconoclastic, secular and utilitarian polity and few people have 'faith' in rights. So we might want to explore the ways in which an appeal to rights in Australian foreign policy produces an Australian public which understands itself as virtuously engaged in relieving the suffering of its neighbours in East Timor or the Solomon Islands. We might want to read proliferating activist texts written in the language of rights to ask about the theory of sovereignty, the vision of power or the notion of the social that they imagine or assume. Rights experienced as bureaucracy or adjudication or memory or violence are productive, and we might name what is produced as a culture. Yet I don't think we can always predict what we will find when we begin to ask about the culture produced by human rights. The need to articulate the universal through the particular means that something new happens each time the universal arrives, and this will not necessarily be an error of translation. What might it mean to focus more on the *arrival* of the universal in the particular? It is to this question that the articles gathered in this collection turn.

II THE ARRIVAL OF RIGHTS

The articles in this symposium attend closely to the questions of how and in what form rights arrive, and to the cultures that rights bring with them. What might the idealism (and for that matter the scepticism) about human rights as a product of bureaucracy, legal formalism and bourgeois politics mean for other politics in this era of global capitalist integration? How, and to what effect, do rights arrive in particular contexts, both within and outside Europe and the US?

For Costas Douzinas, human rights law arrives in modern nation states as a form of collective memory. Douzinas argues that lawyers in rights-promoting (or revolutionary) states have been allocated the task of 'recalling the past' and 'constructing the future'. The work of putting 'memory and its recollection' to work in the service of the nation has been entrusted wholesale to lawyers, as evidenced by the new enthusiasm for war crimes trials and 'official remembrance rituals' such as truth commissions. Douzinas seeks to explore the stakes of this 'transformation from history as the judge to the judge as historian'. He rejects the assumption that the telling of stories about the injustices of the past is a 'healing process', or that establishing the truth of a contested history is the necessary basis for moving forward as a nation and creating the conditions for a viable, shared life. For Douzinas, when truths are commissioned or when those accused of war crimes are tried, history is written. The historian, even when she is a judge, is also a writer. Thus rather than understand history trials or truth commissions as involving the healing of the past through the collecting of memories, Douzinas makes visible the institutional conditions and the productivity of the rituals of official memory. Testimony or speech becomes part of commissioned truth through institutional mediation — through the institutions of language, of the nation state and of liberal internationalism. The way in which transitional justice institutions approach the question of the meaning of the past

is captured well by Ruti Teitel in her description of the appeal to 'bounded change':¹¹

Transitional jurisprudence's appeal is that it offers the closure that passage brings. But it does so at a cost. Every act of transition implies an ambivalent resolution. These liberal rites perform political passage by constructing discontinuities and continuity, destruction and reproduction, disappropriation and reappropriation, disavowal and avowal. These rituals attempt to relegate to the past the worst of this century, while also propounding a workable shared narrative for the future. By these practices, a line is drawn delineating the parameters of that collective memory to be preserved: what is to be remembered and what repressed; what is to be abandoned and what validated; what is to be rendered incontestable and what will remain controverted.¹²

Truth commissions and war crimes trials are attempts to produce just such a sense of continuity and closure, of a unified past and a shared future within the liberal democratic nation state. Bounded change is the *telos* of the rituals of transitional justice. Yet these ritualised performances can never succeed in determining finally what is to be remembered and what repressed. As Judith Butler suggests, to the extent that a moment is ritualised it opens out to the past and the future.¹³ And it is this sense of the time of law to which Douzinas turns in his closing evocation of a different sense of democratic time and of humanity. Douzinas argues that we are all performers in the rituals of democratic politics. When the traumas of the past return to haunt our politics, the task facing us is not to seek to represent the past as it really happened, nor to right the wrongs of history. Instead, Douzinas urges us to search, in such moments of danger, for 'the trace of a different humanity', one which neither originates in the past nor is promised in a future paradise, but is engaged in re-founding a democracy to come in 'every action in the Now'.

For Hassan El Menyawi, human rights arrive as activism. In his article, El Menyawi explores a series of violent attacks carried out against gay men by the Mubarak Government in Egypt since 2001. These attacks have involved raids and detention at the hands of the police and security units, trials before the Emergency State Security Courts and subsequent detention and torture. His article relates to a broader concern about the place of human rights in the context of states of emergency or the exercise of apparently unconstrained executive power. While we might think immediately of the situation facing detainees at Guantanamo Bay or in Australian immigration detention facilities, the exercise of exceptional or emergency powers by the executive is of course not only a contemporary phenomenon. Indeed, what links the situation facing people subject to torture or detention within the territories of the US, Australia and Egypt may be the legacy of British colonial law and practice which these States share. Resort to administrative detention and martial law are long-standing features of British state practice, both in the colonies and domestically.¹⁴ While the use of emergency powers may seem unexpected when it comes to state

¹¹ Ruti Teitel, *Transitional Justice* (2000) 229.

¹² *Ibid* 229–30.

¹³ Judith Butler, *Excitable Speech: A Politics of the Performative* (1997) 3.

¹⁴ See A W B Simpson, 'Round Up the Usual Suspects: The Legacy of British Colonialism and the *European Convention on Human Rights*' (1996) 41 *Loyola Law Review* 629.

persecution of gay men, El Menyawi shows the close relationship between the preservation of state authority and these attacks in the case of Egypt. The State perceives its authority to be threatened by the appeal of militant Islamic groups such as the Muslim Brotherhood. Within this logic, the targeting of gay men through the use of security laws works to achieve the aim of emergency powers, that is, the preservation of state authority. As Nasser Hussain has shown, the declaration of a state of emergency involves the manifestation or performance of power, through which the authority of the nation state is preserved. In order to understand what emergency or martial law is, we need to think about what it does:

What martial law does, and does terribly well, becomes clear only if we nuance the catchall phrase 'law and order', distinguishing issues of force and order from issues of authority. It is the reconstitution of the general authority of the state that martial law performs ...¹⁵

Human rights arrive in Egypt (and in El Menyawi's text) in a number of forms, and their relationship to those targeted under the emergency laws is complex. El Menyawi recounts the arrival of a globalised gay rights discourse in Egypt via the internet, and its effects on gay rights activism. This globalised rights discourse, emanating particularly from the US, involved two 'primary paradigms' — the adoption of a fixed sexual identity and the promotion of a strategy of gay rights advocacy based on 'open activist approaches to advancing gay rights, including protests, demonstrations and condemnations of governments engaged in gay persecution'. Thus human rights were an intimate part of the construction both of gay identity and of a particular mode of advocacy in Egypt. El Menyawi subjects this aspect of the arrival of human rights to critique, arguing that human rights as identity politics specifies and fixes sexual identities in ways that may make it easier for repressive states to regularise, normalise and discipline individuals. The strategy advocated by American gay rights activists of 'coming out of the closet' as a mode of empowerment proved particularly dangerous in a climate in which emergency powers were being deployed to prosecute and persecute gay men. As El Menyawi notes of his own experience, 'my willingness to take on a "gay identity" was provocative ... one can see this as my playing into the hands of the authorities'. El Menyawi argues instead for a 'return to the closet', envisioned not as a small space inhabited by a single person, but as a protective space which can expand to include an growing number of 'lesbian, bisexual, gay, transgender and questioning' groups and their allies. He explores the 'hidden' activism which this might enable, based on the idea that secrecy and silence are indispensable to the operation of power, including the power of those seeking to resist state oppression.

Human rights arrive in El Menyawi's article in a second form — as the source of factual information about the state of emergency in Egypt and as a public challenge to this practice. His footnotes refer regularly to Human Rights Watch reports on the general human rights climate in Egypt and on the particular context of state violence against gay men. Thus human rights also arrive as a source of information about Egypt. Human rights non-governmental

¹⁵ Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (2003) 119.

organisations are present as producers of knowledge which then circulates globally. In this sense, human rights NGOs are engaged in something akin to older notions of statecraft, in which information and knowledge about other cultures are produced as part of a move towards colonial (or global) governance. Human rights in this mode is accompanied by the idea that human rights activists are public guardians of the rule of law, and that the rule of law and emergency powers are distinct and, in some sense, opposed.

Carolyn Evans explores the arrival of human rights in the form of adjudication, in the context of two decisions made by the European Court of Human Rights concerning the right of Muslim women to wear headscarves in public. The first, *Dahlab v Switzerland*, concerned a school teacher who was fired from her job because she wore a headscarf.¹⁶ The second, *Şahin v Turkey*, concerned a medical student at Istanbul University who was refused access to lectures and permission to sit for an examination because she was wearing a headscarf.¹⁷ In both cases, the Court found that there was no violation of the right to freedom of religion as provided for in art 9 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*,¹⁸ which includes the right to ‘manifest ... religion or belief in worship, teaching, practice or observance’. The Court found that the actions of the authorities in each case fell within the scope of legitimate restrictions which a state may place on the freedom of religion, because such restrictions are within the margin of appreciation granted to the state to determine what is necessary in a democratic society in order to protect the rights and freedoms of others, public order and public safety. In a close reading of the reasoning in the two decisions, Evans reveals the Court’s readiness to equate the wearing of the headscarf with impermissible levels of proselytising, to assume without evidence that the wearing of the headscarf in each case was a symptom of gender inequality, and to treat the wearing of the headscarf as ‘incompatible with tolerance’. As Evans argues, this reasoning juxtaposes the image of ‘intolerant Islam’ with the image of the democratic state as guardian of a ‘tolerant secularity’.

This contrast between religion and secular democracy, where secular democracy maps onto the European state, is of course an old opposition, one at the heart of international law and international relations. The Peace of Westphalia of 1648 is usually taken in these disciplines to figure the moment of secularisation. In this disciplinary narrative, Westphalia marks a clean break between the social formations of Christendom and their successors — the sovereign independent states of modern times. In the human rights jurisprudence of the Court, and in international law and international relations more generally, this ideal form of the secular state is linked with peace or order. This can be seen in the decision of the Court in *Refah Partisi (the Welfare Party) v Turkey*, where it upheld the Turkish Government’s ban on a political party proposing to organise a state and society according to religious or divine rules.¹⁹ The Court

¹⁶ *Dahlab v Switzerland* (2001) V Eur Court HR 449.

¹⁷ *Case of Leyla Şahin v Turkey*, Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005).

¹⁸ Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

¹⁹ *Refah Partisi (the Welfare Party) v Turkey* (2003) II Eur Court HR 269; 37 EHRR 1.

agreed with the Government that such a party poses a threat to liberal democracy.²⁰ It referred to its established case law confirming that one 'function of the State'²¹ may be to place restrictions on religious freedom 'in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected':²²

[The Court] has held that in a democratic society the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety.²³

According to the Court, 'secular universities' may also need to regulate manifestations of religion 'with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others'.²⁴ In these trains of thought, it is religious radicalism that leads to disharmony, disorder and the potential 'destruction of democracy'.²⁵ The state must be a neutral and detached observer or, in the words of the Court, 'the neutral and impartial organiser of the exercise' of faith.²⁶

But, as Evans asks in her article, *can* the State be a neutral and detached observer when it comes to questions of faith and religion? This has become a pressing question in recent times for many in the US, Europe and Australia in the context of the war on terror. For some, radical Islam seems to challenge 'the notion of secularism as a guarantee for peace'.²⁷ For others, the equally radical Christianity of the Bush administration in the US offers the same challenge. Yet as Mona Kanwal Sheikh and Ole Wæver have recently argued:

the grievances of radical Islamists against 'the West' are less directed against the West's religion and more against its lack thereof ... Thus understood, if secularism is the very cause as to why radical Islamists take action defending faith, it seems odd to maintain that the way to counter radical Islamism is that of secularism.²⁸

For instance, to suggest that secularism is the necessary condition for peace and stability, that the state is neutral, and that 'others' need only to accept that religion is a private matter, may only confirm that 'secularism is a mortal threat to faith'.²⁹ Perhaps, then, the anxiety expressed in response to religious radicalism, in Turkey and elsewhere, involves the haunting sense that religious radicals or religious parties represent the limits of secularism. They make secularists confront the possibility that perhaps the secular states of Europe and

²⁰ Ibid 316; 48.

²¹ Ibid 302; 33.

²² Ibid 301; 33.

²³ Ibid 302; 33 (citations omitted).

²⁴ Ibid 303; 35.

²⁵ Ibid 303–4; 35.

²⁶ Ibid 301; 33.

²⁷ Mona Kanwal Sheikh and Ole Wæver, 'Lines in Water and Sand: Comparative Secularism across Europe and the Middle East' (Paper delivered at the 46th Annual International Studies Association Convention, Hawaii, US, 1 March 2005) 1.

²⁸ Ibid.

²⁹ Ibid.

elsewhere are not fully secularised or, alternatively, that secularism is not always tolerant and neutral.

For Amir Kordvani, rights arrive as a philosophy of justice. The increasing tendency to control movement across borders as a means of ensuring state security or of protecting against terrorist attacks has meant that borders are ‘no longer places of passage; they are places of interdiction’.³⁰ While many commentators have explored the implications of this for those seeking asylum or permanent residence, Kordvani is interested in exploring the barriers to movement imposed on those who are otherwise exemplary agents of market integration, that is, service suppliers whose freedom of movement is the subject of liberalising disciplines under the auspices of the World Trade Organization. In particular, WTO member states are parties to the *General Agreement on Trade in Services*³¹ and to the *Annex on Movement of Natural Persons Supplying Services under the Agreement*.³² Kordvani explores the persistent barriers to movement of service suppliers — particularly those who are nationals of Arab countries or countries with large Muslim populations — posed by domestic law and administrative practice. He invokes the Kantian notion of a cosmopolitan right to hospitality in the spirit of critique, to identify ‘the points of arrival where the right to hospitality is violated, distorted, or rendered impossible to realise’.

In the final article in this symposium, human rights arrive as diplomacy. Gregor Noll explores the growing resort by states to the practice of authorising the removal of non-nationals to third states with questionable human rights records, both as a tool of migration control and as an element of the war on terror. Noll focuses on the trend to accompany such ‘extraordinary renditions’ with diplomatic assurances. Typically, these assurances provide that the non-nationals will be given a fair trial and will not be subjected to cruel, inhuman and degrading treatment, torture or the death penalty, and that their treatment will be monitored by diplomats of the sending state. How should the relationship between these diplomatic assurances and the broader international human rights obligations of states be understood? Noll argues that it is necessary for international lawyers to ‘take the legal formalism of assurances seriously’ in order to understand their meaning for the contemporary practice of international human rights. Diplomatic assurances ‘must be seen as an integral part of the productivity of human rights law in a system of nation states.’ In particular, Noll argues, what these assurances produce is silence. As Noll shows, these bilateral guarantees enable the secret services of nation states to continue to build networks across borders while sidelining the role of courts in reviewing the treatment of ‘captives’. Further, they produce a structure within which the suffering of the captive cannot be articulated as a human rights violation, either by the captive or by the diplomats of the sending state. Finally, they ‘create legal

³⁰ Jacques Derrida, ‘Derelictions of the Right to Justice (But What Are the “*Sans Papiers*” Lacking?)’ (Elizabeth Rottenberg trans, 2002 ed) [trans of: ‘Manquements du droit à la justice (mais que manque-t-il donc aux “sans-papiers”?)’] in Elizabeth Rottenberg (ed), *Negotiations: Interventions and Interviews 1971–2001* (2002) 133, 134.

³¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1B (*General Agreement on Trade in Services*) 1869 UNTS 183.

³² *Ibid* art XXIX (*Annex on Movement of Natural Persons Supplying Services under the Agreement*).

ambiguity by contract', thus limiting the capacity of the norm prohibiting torture to 'speak for itself'. Yet rather than treat these effects as somehow foreign to the practice of international human rights law, Noll argues that they must be understood as exemplifying the general effects of international human rights law in a world of sovereign states.³³ In other words, international law as a regime that recognises certain kinds of actors as sovereign produces a world of legitimate violence which is territorially bounded. International law, through the institutionalisation of human rights, also produces the techniques by which the law attempts to mediate that violence.³⁴ Diplomatic assurances must be studied as part of both aspects of the regime — the production of modern political organisations with control over people and territory, and the process of mediating the resulting violence exercised over people within the territory of the state. In a similar vein, Anthony Carty argues that 'it is irresponsible of international lawyers not to engage with actual practice of states at a level that may be convincing for international historians and political scientists'.³⁵ This engagement is a necessary condition not only for making 'judgments about the quality of state conduct' and about 'whether and how far a state is complying with international law',³⁶ but also for knowing what a state's obligations currently are under international law.³⁷ Following Carty, we might understand Noll's insistence that the workings of diplomatic assurances are an internal element of the practice of human rights law as an attempt to take responsibility for the varied effects of international law in our time.

III WHAT COMES AFTER FAITH?

The close attention that these articles pay to the arrival of rights in the particular suggests an answer to the question: what comes after faith in rights?³⁸ The critiques by both Kennedy and Koskenniemi discussed in Part I are concerned with the question of faith — 'loss of faith' in the context of Kennedy, 'bad faith' in the context of Koskenniemi.³⁹ Faith here invokes a particular sense of the relationship between speech and action, or word and flesh, one that we might understand as part of a Christian philosophy or tradition of reading. This is a tradition in which the truth of the Scriptures is proved by the arrival of Christ. The tradition of reading to which this idea of truth gives rise is thus animated by 'the idea of the Book that comes to life, of the letter that delivers its spirit by the

³³ See also John T Parry, 'The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees' (2005) 6 *Melbourne Journal of International Law* 516, 533.

³⁴ For a more detailed consideration of the place of human rights in the broader modern tradition of international law, see Anne Orford, 'A Jurisprudence of the Limit' in Anne Orford (ed), *International Law and Its Others* (forthcoming 2006).

³⁵ Anthony Carty, 'International Legal Personality and the End of the Subject: Natural Law and Phenomenological Responses to New Approaches to International Law' (2005) 6 *Melbourne Journal of International Law* 534, 549.

³⁶ *Ibid.*

³⁷ Anthony Carty, 'The Iraq Invasion as a Recent United Kingdom "Contribution to International Law"' (2005) 16 *European Journal of International Law* 143.

³⁸ For another answer to this question, see Florian Hoffmann, 'Human Rights, the Self and the Other: Reflections on a Pragmatic Theory of Human Rights' in Anne Orford (ed), *International Law and Its Others* (forthcoming 2006).

³⁹ For a call to abandon faith in human rights on different grounds, see Sundhya Pahuja, "'This is the World: Have Faith'" (2004) 15 *European Journal of International Law* 381.

action of a body'.⁴⁰ The world is imagined in terms of 'a sort of human theater where speech [*parole*] becomes action, takes possession of souls, leads bodies and gives rhythm to their walk'.⁴¹ Both Kennedy and Koskenniemi describe a loss of faith in this relation between speech and action. In the words of Kennedy, '[l]oss of faith is a loss, an absence ... Loss of faith in legal reasoning bears a close analogy to one of the many kinds of experience of loss of faith in God'.⁴² As Koskenniemi puts this, we need to abandon the 'altogether excessive faith in the social determinacy of political or legal doctrines; that is, in the tendency of particular doctrines to bring out particular outcomes, whatever the circumstances'.⁴³

So what happens when the transmission of a tradition of faith is interrupted or suspended? What comes after faith? The answer to this question developed in much human rights critique goes something like this. We must abandon the old inflated expectations of legal determinacy. Where once we used to have faith that language, law or reason determined action or guaranteed an outcome, now we know that this is not so — language does not determine action, legal reasoning cannot determine outcomes. Then what? Well, if we have lost our faith in the word (and perhaps even if we never had that faith), we should stop reading. There's not much point in reading because it will not give us the truth but only contingency — the truth is out there, in politics. Truth is already established elsewhere, and law can at best aspire to announcing that truth.⁴⁴ This is felt even more strongly when it comes to rights, with their promise of a foundational, inalienable, apolitical and universal claim to 'rightness'.⁴⁵ If we can't trust the word to guarantee a determined outcome, then we should abandon fidelity to the text and do something else, perhaps sociological description, or calculation, or cartography which attempts to map the totality of a national legal consciousness or a historical epoch.

But should we understand the relationship between word and action only in terms of 'the letter that delivers its spirit by the action of a body'? Should we measure the effectiveness of human rights law through its ability to constrain the powerful or move them to action? Is there any other way to think about 'the theater of relationships between the text and what's outside, between writing and the politics it establishes'?⁴⁶ A different response to loss of faith in the word as truth might be, somewhat perversely, to *keep* reading, because although reading might not give us truth, or a way to judge individual authors, it might give us something else. Language is still at work, even if the work it does cannot be explained in terms of cause and effect. Indeed, the sense that reading might after all remain productive (and thus dangerous) emerges in Kennedy's critique of rights. In a pragmatic turn, Kennedy explores the possibility that faith offers a 'comparative advantage'. For Kennedy, the reason that leftists who are engaged

⁴⁰ Jacques Rancière, *The Flesh of Words: The Politics of Writing* (Charlotte Mandell trans, 2004 ed) 72 [trans of: *La chair des mots: Politiques de l'écriture*].

⁴¹ *Ibid* 4.

⁴² Kennedy, above n 2, 191–2.

⁴³ Martti Koskenniemi, "'By Their Acts You Shall Know Them ...'" (And Not by Their Legal Theories) (2004) 15 *European Journal of International Law* 839, 841.

⁴⁴ Koskenniemi, above n 6, 114.

⁴⁵ Kennedy, above n 2, 218–21.

⁴⁶ Rancière, above n 40, 129.

in critique of rights often feel that what they are doing is dangerous may be that 'if "we" lose our faith in rights rhetoric but "they" don't, then they will gain an advantage over us'.⁴⁷ Yet the reference to 'comparative advantage' also makes me wonder about how such a text functions in a world in which critical legal theory, particularly that emanating from the US, is globalised. Kennedy's proselytising about the need to abandon faith in the word seems directed to the enlightenment of those naïve believers whose relationship to the word offers them a comparative advantage. Yet by responding to a loss of faith by turning aside from the close reading of legal texts, Kennedy's critical practice seems in a strange way to preserve the sacred authority of such texts. If they can't be read as a guarantee of truth or authority, they shouldn't be read at all. In this sense, the combination of form and content in Kennedy's essay reminds me of the passage in a 1536 document addressed by Empress Isabella to Antonio de Mendoza, viceroy of New Spain, concerning the relationship between reading, authority and the government of the colonies.

Some days ago the Emperor ruled that no Romance Books of profane matter and fables be sent to those lands, lest the Indians who know how to read give themselves over to them, abandoning books of good and healthy doctrine, and reading them learn bad habits and vices and also lest, once they know that those books of vain stories were composed without things really having occurred thus, they no longer place authority and credit in our Sacred Scriptures and other books by learned saints, believing, as a people not well established in the faith, that all our books are of one authority and kind. And because we fear that the proper care has not been taken in the execution of this decree we very much entreat and order you to see that from now on no books of this sort be sold or brought anew, that these unsuitable effects might cease, and to see that the Spaniards do not keep them in their houses nor permit any Indians to read them.⁴⁸

Here, truths are put into question because the Indians are astute readers who however 'cannot — or will not — discriminate among texts according to their authority'.⁴⁹ So perhaps truth cannot be transmitted and a tradition of faith is no longer available. Yet rather than protect a relationship to truth by abandoning the sacred texts or any serious relationship to language, we might try to transmit a new or altered relation to such texts. Perhaps those who are interested in the word (of God or the law) are not, after all, naïve readers who are 'merely ... taken in by the "lies" of romance',⁵⁰ or the seductions of faith. Rather, they (or we) may be the astute and 'dangerously formalist' readers that the Spanish authorities recognised in the Indians.⁵¹ Perhaps the danger is that the readers of human rights texts might approach them in this way, not as sacred artefacts but as one amongst many writings that might be subjected to the task of a dangerously formalist reading or made vulnerable to the 'contagion of fictionality'.⁵² As Peter Goodrich comments, the critical scholar preserves the

⁴⁷ Kennedy, above n 2, 217.

⁴⁸ As cited in Barbara Fuchs, *Mimesis and Empire: The New World, Islam, and European Identities* (2001) 15.

⁴⁹ Fuchs, above n 48, 15.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.* 13.

object of love — the law — if he or she refuses to engage closely with its texts, its doctrines, its dogmas or its textures.⁵³ Rather than try to preserve the authority of sacred texts, the articles gathered here engage in just such a project of dangerously formalist reading. As readers who retain a relationship to the word, the authors of these articles pass on the texts of law, not as markers of truth, not in order to ‘renew the old world’ which has been lost to us forever,⁵⁴ but perhaps as an inheritance nonetheless.

⁵³ See Peter Goodrich, ‘The Critic’s Love of the Law: Intimate Observations on an Insular Jurisdiction’ (1999) 10 *Law and Critique* 343, 345–50.

⁵⁴ On ‘the collector’s deepest desire’ being to ‘renew the old world’ which has been lost to us forever, see Walter Benjamin, ‘Unpacking My Library: A Talk about Book Collecting’ in Hannah Arendt (ed), *Illuminations* (Harry Zorn trans, 1999 ed) 61, 63 [trans of: *Schriften*].