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978-1-107-02785-5 - The Meanings of Rights: The Philosophy and Social Theory of Human Rights

Edited by Costas Douzinas and Conor Gearty

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Introduction

Conor Gearty and Costas Douzinas

Human rights are an inescapable fact in the world. They bring together the North and the South, the left and right, church and state. Street activists look to them while armed forces adopt codes of conduct ostensibly on their basis. They are the ideology after ‘the end of ideologies’, the only set of values left now that we have arrived at ‘the end of history’. Of course, such pervasiveness comes at a price of intellectual promiscuity. Human rights are used as a symbol or synonym for liberalism, capitalism or individualism by some and for development, social justice and/or peace by others. In the South, rights are seen as primarily collective rather than individual, social and economic rather than civil, associated with equality rather than with liberty. In the North, they can reflect commitments to solidarity and social justice as well as to political freedom – but they have also been used to underpin invasion and military brutality.

This volume captures and reflects the variegated nature of the meaning of human rights in contemporary scholarship and in public discussion. It brings together an eclectic group of leading philosophers, lawyers and social theorists to examine the foundations, meaning and impact of human rights on the world, and the dynamic inherent in the phrase’s use today. The term itself is a combined one: the ‘human’ refers to morality and ethics and to the treatment that individuals are entitled to expect from public and private powers ‘Rights’ refers to their legal provenance. The hybridity of human rights introduces a number of paradoxes at the heart of society, which this volume explores in a way that is inquisitive, critical and above all inter-disciplinary. Let us introduce the volume by looking at four in particular.

Finding foundations

A first paradox underpinning this volume is the need to identify a set of truths for human rights against a background of a confident awareness on the part of most contributors of the improbability of the discovery of truth anywhere. It is clear that controversies around cultural relativism,

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humanitarian wars, the conflict between liberty and security and the most appropriate means for the protection of rights indicate that the proclamation of rights is not enough. As Catholic philosopher Jacques Maritain observed in *Man and the State*, we agree on the rights, providing we are not asked why. With the 'why', the dispute begins. But the fear of dispute should not put intellectual enquiry beyond the realm of discussion. Our volume reflects the tension not only in various versions of rights but even in the fact of having this discussion about origins.

In Chapter 1, Jean-Luc Nancy's two 'simple' remarks capture in their 'simplicity' a most profound philosophical reflection on human rights. The 'human' of rights carries in it the ambiguities and problems of humanism. Humanism is deeply implicated with power, capitalist domination, a restricted conception of freedom and the hierarchies of philanthropy. 'Rights', on the other hand, are the products and carriers of legal history. At the same time, right expresses a certain flexibility that inhabits the solidity of positive law. Right goes to the boundary of the legal domain and expresses law's mission to render justice. But justice cannot be founded or justified. Justice must be rendered to the singularity of existents and is therefore infinite. Human rights inscribe in law and remind law of its necessary and impossible commitment to an unconditional justice.

To Conor Gearty in Chapter 2, the power of the idea of human rights is driven by a very particular paradox: it craves a basis in truth but at the same time it needs to fail to have one in order to maintain its hegemonic power as the progressive ideal of the post-political age. Nature is the latest in a long line (which includes religion, reason and law) to tantalise us with a certainty that must forever remain impossible. The way to cope with this craving is to embrace it as a thirst for justice which is itself a kind of truth. Building on the work of American pragmatists as deployed by the philosopher Philip Kitcher in his effort to identify and describe mankind's ethical project, Gearty presents a vision of human rights which is half-truth, half desperate longing for a better life.

John Millbank in Chapter 3 offers a fascinating account of the genealogy and philosophy of human rights from medieval theological debates to our contemporary humanitarian wars. Human rights encourage a 'slide of neo-liberalism towards a fully-fledged totalitarian capitalism'. This drift is enabled by the ontology of human rights based on the isolated individual and by the abandonment of the Judaic and Christian conception of the 'person'. Millbank argues that a type of revisionist history and theology has tried to justify this distortion of Western identity by linking subjective rights with Christianity and justice. Reviewing in detail the long and complicated history of the emergence of rights, Millbank sides

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with Michel Villey and against Brian Tierney, arguing that the foundation of human rights must be sought in the nominalism of William of Ockham and Duns Scotus and their turn towards theological voluntarism and atomising metaphysics. This ontology persists in contemporary human rights, which combine extreme individualism with a sovereign omnipotence which regularly trumps rights. Millbank believes that we must abandon 'absolute' foundations for a relational conception of rights. An alternative modernity that abandons liberal capitalism for the egalitarian Christian legacy can achieve that. The foundation of self is not dignity and liberty but the sacredness of the person; the only effective rights are those of communal belonging and solidarity. In this sense, only a God can save us.

Taking up where Millbank leaves off, Rowan Williams' starting point in Chapter 4 is a reflection on what it means to be human and on the valuable contribution a religious perspective offers us as a source for 'resources for grounding the discourse' of human rights. An early breakthrough offered by Christianity is its rejection of the inequality of the master-slave relationship or, rather, its assertion that both are equal under God. The idea of the humanness of the body means that it is not reducible to an object among others and nor is it something which depends on the successful negotiation of pre-conditions for entry: Williams argues strongly against making dignity dependent on an actor's 'self-conscious' capacity as an 'organiser of experience into patterns of continuity through time, past and future'. Rather 'the irreducible core of human rights is the liberty to make sense as a bodily subject; which means that 'the inviolability of the body itself is where we should start in thinking about rights'.

Law, rights and revolution

Our second underlying paradox lies in the fact that the ideological power of human rights lies largely in their ambiguity, the oscillation between real and ideal, is and ought, community and humanity. When human rights are part of the law, as with the UK Human Rights Act 1998, such legislation invariably includes a principle of self-transcendence, which pushes against the law's settled state. A legal system that includes human rights is therefore not truly equal to itself, since human rights call the whole of law to account. In this sense, human rights become the latest expression of a human urge to resist domination and oppression and to dissent from the intolerance of public opinion. This was the case in the great revolutions of the eighteenth century, in the post-Second World War 'never again' declarations, in popular uprisings against fascist and

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communist rule. Viewed in this way, human rights are idealist, parts of a philosophy and practice of emancipation, the last great utopia of our age.

In Chapter 5, Costas Douzinas examines ‘philosophy’s hesitant exploration of the link between revolution and right’. The question is whether philosophy can explain the ‘eternal return’ of resistance despite law’s persistent attempts to ban it’. A thorough reading of Kant, Hegel and legal philosophy explores the connection between revolution as the motor of modernity and rights as a key part of its ethical make-up. For modern philosophy, there can be no right to revolution as such – this would be an ‘affront to the positivism and formalism of law’. Rather it is success, ‘a question of fact’, that determines the legal position: ‘Whether one is a great criminal or a hero is decided by the outcome of the rebellion. The *is* reverses the *ought*.’ The legal foreclosure of revolution and its philosophical justification has been regularly set aside by the *event* of revolution, which inexorably leads to a radical change of constitution and law and the retrospective legitimisation of revolution and its right. Douzinas concludes that these opposed rights, the right to the existent and the right to what does not exist according to current legality, indicate perhaps that two types of will mobilise the language and practice of rights. A right to revolution exists despite the reservations of philosophers and lawyers. In this sense, the obligation to obey the law ‘is absolute only when accompanied by the judgement that the law is morally just and democratically legitimate’.

Following a similar line of thought, Illan Rua Wall in Chapter 6 addresses the radical potential of human rights. Wall sketches the contours of the idea of *right-ing*, an imaginative re-conceptualisation of rights that mobilises a resistant core that lurks in human rights. Right-ing describes the practices of groups, which exceed the rights given to them by law in order to re-construct the ‘institution of society’. The philosophical basis of right-ing is found in the theory of constituent power and the critiques of humanism, propriety and authenticity. However, insisting on the excess of human rights, in a philosophical sense, is not enough. It is necessary to begin to think about how right-ing engages with law in order to generate such moments of rupture. The chapter examines conceptions of critical legal strategy and constituent power in order to develop a vocabulary of right-ing. It argues that right-ing may entail the use of existent rights through the activation of an immanent torsion and confrontation or the generation of new rights. The question is ultimately *not* about the preservation of a fetishised body of rights, but about the unlocking of the radical potential which lies within rights discourse.

Frantz Fanon is a driver of two chapters. Drucilla Cornell in Chapter 7 is determined to emphasise his work as a route back to traditions of

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African and Afro-Caribbean revolutionary thought that have served greatly to enrich our contemporary understanding of human rights. Her account shows how necessary the denial of the human was to the colonial project: '[I]f the colonized are recognized as human, then they of course have their own culture, their own intellectual traditions, their own values, because human beings never live outside not only language but the "symbolic forms" in which they are constituted. But if one is thrown off the register of the human, then such creatures, by definition, do not have a culture worth taking into account.' It is, therefore, 'the violent struggle' that 'must self-consciously grasp itself as part of the creation of a new national culture', something 'which is inseparable from the becoming of a people out of their own self-mobilization'. As Cornell shows, the way this is worked through in the mind of Fanon puts him at odds with some of the more orthodox of successful national liberation leaders of the 1960s, but who is to say that he was not right to be on the wrong side of that particular history?

Like Cornell, Paul Gilroy in Chapter 8 draws inspiration from the work of Frantz Fanon for his reflection on 'Race and the value of the human'. It is this writer's consistently expressed commitment to imagining a new kind of humanism that appeals to Gilroy, a version in other words of what it is to be alive which is not contaminated with the baggage of past meanings driven by the powerful. To Gilroy this involves a search for a 'reparative' humanism that, properly understood, can 'help to clarify a number of problems that characterise the *postcolonial* world'. This humanism is, however, 'stubborn' because so much of the structuralist and post-structuralist movements of recent times have 'converged around the idea that humanism was, at best, an anachronism'. Gilroy's chapter is a good example of the unceasing power of the language of human rights and of humanism to rejuvenate old discourses, filling terms grown stale with new possibilities, a project driven by frank acknowledgement of the 'costs of antihumanism'. Getting behind the human despite the debilitating effects of colonial and racial impositions is what is at the core of Gilroy's chapter, a bold effort to think through the 'elusive, reparative element in Fanon's thinking'.

Rights, justice, politics

In advanced western societies, we can see our third paradox in the way that human rights have mutated, expanded and turned into a vernacular touching every aspect of social life while resisting any kind of pinning down that can explain or support such pervasiveness. Secure in their ambiguity, human rights are seen as key concept in morals, politics,

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individual and collective identities. Claiming rights has become the main form of morality. Responsibility, virtue and duty, on the other hand, have been confined to religious or communitarian backwardness, with dire consequences. Similarly, rights recognition is the main tool and target of politics. Group claims and ideological positions, sectional interests and global campaigns are routinely expressed in the language of rights for individuals. But when rights become a ‘trump card’ that defeat state policies and collective priorities, allegedly to support the liberty of the individual, society starts breaking up into a collection of atoms indifferent to the common good. This way politics is depoliticised. Both liberty and security suffer in this process.

Walter D. Mignolo’s Chapter 9 is concerned with justice, and in particular with the potential of human rights to rectify the injustices and wrongdoings of past eras. As with Gilroy and many other contributions in this volume, the ‘splendour of human rights’ lies in its capacity to force fresh thinking onto a stage that has been desiccated by the twin facts of state and corporate abuse. We must embrace the new language of ‘thinking otherwise’, and – echoing the famous challenge to this effect posed by Albert Einstein and Bertrand Russell in 1955 – Mignolo presents his subject as one in which there are three major shifts: from human rights to the right to life; from the saviours of the victims to the victims themselves; and from the politics of rights to an ethic of survival. As with Gilroy and Cornell, the spectre of colonialist and imperialist exploitation hangs over Mignolo’s themes – decolonial thinking and thinking otherwise can manage, as in the Bandung Conference, to articulate a future that is expressed neither as ‘capitalism nor communism, that is, life regulated by the economy or by the state’.

Chantal Mouffe in Chapter 10 starts with a brief presentation of political and agonistic democracy, her well-known theory of politics. Social order is the hegemonic articulation of contingent practices that temporarily pacify antagonism. From that position, Mouffe finds problems both in the standard liberal version of cosmopolitanism, which universalises European ideas of democracy, dignity and rights, and in the various subaltern cosmopolitanisms of Homi Bhabha, Walter Mignolo and Paul Gilroy. Such writers might prioritise diasporas, immigrants and refugees, but their ‘pluralist universalism’ fails to recognise the conflictual character of democracy. Mouffe proposes the creation of a multipolar world organised around regional units with their different cultures and values. The same perspective applies to human rights. Rights are usually presented as both universally valid and uniquely European in origin. In a multipolar world, however, non-European conceptions of selfhood, dignity, the good and democracy would be

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as acceptable as European individualism. Equivalent but different notions of dignity and selfhood would create an ‘agonistic’ version of human rights.

Samuel Moyn has already written an important book debunking the mythological foundationalism of the 1948 Universal Declaration so far as the contemporary human rights movement is concerned. Here, in Chapter 11, he turns his attention via the German scholar Bruno Snell to the supposed classical origins of the idea of humanity. Moyn argues that it is ‘certainly wrong to conscript the Greeks into an invention of tradition’, that while they knew what ‘humanity’ might entail, the real issue was ‘living up to its implications’. On his reading, humanity ‘is a simple discovery rather than an epoch-making breakthrough’, something which being ‘common in the annals of human affairs’ inevitably takes many shapes (multiple universalisms), one of which has recently been that of ‘human rights’. With the ground cleared, Moyn’s chapter then produces an absorbing account of the interrelationship between sovereignty and human rights: ‘The alliance with state and nation was not some accident that tragically befell the rights of man; it was their very essence, for the vast bulk of their history.’ For Moyn, we should be careful not to mislead ourselves by the current meanings of human rights into believing that the universalisms they signify today were ever thus: ‘It is now the order of the day to supplement [the] state forum for rights, but until recently the state was their sole and essential crucible.’

Rights and power

The very success of human rights produces our fourth and final paradox: the term’s value as a guide to complex arenas of meaning depends in part on an overly simple approach to its subject, one that militates against a true understanding of that which the phrase purports to explain. In short, rights talk has become an easy and simple way of describing complex historical, social and political situations, a type of ‘cognitive mapping’ and the main tool of identity politics. In post-modern societies ‘I want X’ or ‘X should be given to me’ easily mutates to ‘I have a right to X’. This linguistic inflation weakens the association of rights with significant human goods. Our volume explores the dangers inherent in too reckless a deployment of the term in pursuit of goals that are beyond the realm of the language being deployed to achieve them.

Pheng Cheah in Chapter 12 takes an iconoclastic approach to comfortable assumptions about the necessity of the protection of economic and social rights and how this is mediated through traditional international human rights law. The chapter provides an alternative reading

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rooted in a biopolitical analysis of the sort pioneered by Michel Foucault, Gilles Deleuze and Giorgio Agamben. Utilising a formidable philosophical erudition combined with detailed empirical socio-legal analysis, Cheah points to the Janus-like character of socio-economic rights. Far from being an enthusiast for the multiplication and proliferation of rights, Cheah sees the inevitable juridification that it entails as necessarily inimical to ‘the biological or natural dimension of human life’ that such rights should rightly encompass. Like Moyn, Cheah can get to this point because of his clear location of human rights in the power of the state: ‘both the bourgeois liberal conception of human rights and the Marxist reformulation of human rights presuppose sovereignty’. The ‘dynamic of simultaneous freedom and constriction’ of human capacities that this approach foregrounds illuminates our condition much better than the tired and repeated orthodoxies of mainstream social theory.

The Left has developed, since Marx, a number of critiques of the abstract and formal character of rights. At the same time, rights claims are a main weapon mobilised by social and protest movements. Paul Patton in Chapter 13 starts from this paradox and focuses on the work of Michel Foucault and Giles Deleuze with Felix Guattari, philosophers who have been extensively utilised by the critics of rights. But, as Patton argues, the position is more complicated than it might seem. Both Foucault and Deleuze/Guattari agree that rights are not a-historical, a-cultural or absolute. They are embedded in relations of power and in structures of popular belief and action. Deleuze and Guattari reject the idea that rights are grounded on universal human characteristics such as freedom or rationality. On the contrary, rights operate within immanent modes of existence. In this sense, it is not law or judges but ‘jurisprudence’ that creates rights. Deleuze defines jurisprudence as the process of ‘becoming-right’, the variety of macro- and micro-political means by which new ways of acting become established. Foucault, on the other hand, reminds us that rights must be justified by discursive frameworks widely accepted. Citizen resistance against governmental actions, for example, draws on principles that inform governing. For Patton, Foucault argues that the necessary justification of rights depends on the available forms of public political reason, including conceptions of the nature and functions of government. The necessary justification of rights is not moral and universal but historical and political. In this sense, some of the standard critiques of rights are refuted and their positive political function affirmed.

Bruce Robbins in Chapter 14 agrees that traditional histories of human rights exhibit the problems that Patton has identified. Many historians (Micheline Ishay, Lynn Hunt, Aryeh Neier) take an idealist

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approach. They present human rights as either the end product of a progressive sequence that started in antiquity or as timeless. Critics, such as Samuel Moyn, can be problematic in reverse. They argue that rights are determined by the historical and political conditions of their emergence. But as all major political projects are conditioned by ideologies and structures of power, critics tend to undervalue their significance and contribution. The ‘discourse of the beneficiary’, which Robbins traces in texts by George Orwell, Jean-Paul Sartre and Wallace Shaun, has similar problems. This type of discourse denounces the system of power and exploitation to which the critic belongs and cannot escape while at the same time enjoying its benefits and privileges. Jacques Rancière’s work is an example of this idealistic and at the same time somewhat cynical position. Pictures of suffering in remote lands create fear and pity but cannot lead to the ‘impossible identification’ with the ‘cause of the other’ that is the mark of politics. Rancière has based his political philosophy on a strong claim to equality. However, his belief that inequality is eternal and that support for the cause of the other emerges only in domestic politics means that his powerful appeal for change cannot recognise change when it occurs. All humanitarian action can lead to intervention and occupation and human rights do depoliticise politics. But if we abandon an impossible and exaggerated idealism, we have to recognise the tangible improvements that human rights, solidarity and development have achieved.

Joseph Slaughter, too, takes issue with the teleological histories of human rights. In Chapter 15 he focuses instead on the history of the person, the artificial subject of human rights, and its complex relationship with humans and corporations. This relationship is examined in legal history and jurisprudence and through a reading of Daniel Defoe’s *Robinson Crusoe*, that is compared with the emergence of the corporation as a domestic and international legal person with legal and human rights. Standard histories see corporation rights as extensions of individual rights based on the personification of the company. Slaughter reverses this narrative. The genealogy of the human rights person and human rights law are intertwined with the legal life of the corporation and imperial and colonial capitalism. The business corporation preceded the human being in human rights. Basic provisions of human rights law were first given to the colonial charter company and articulated in so-called free-trade agreements. Capitalism and imperialism had a pivotal role in the formation and perpetuation of human rights and international law.

Slaughter’s detailed reading shows that *Crusoe* bears a surplus of personality and has the characteristics of the colonial charter company.

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Crusoe becomes a sovereign through the forced recognition of Man Friday; he is a castaway subject to sovereignty and, finally, he personifies the corporate enterprise. Crusoe's oaths, diaries and formalities follow the actions of the colonial charter company. When he grants human rights to his subjects, he imitates the rights corporations claimed for themselves and then spread to the world as part of the colonising and civilising mission. Crusoe prefigures the development of corporations. When the corporation finally became a full legal person in the nineteenth century, it acquired also international personality and international human rights well before the human became a subject of human rights and an international person in its own right. This re-writing of the history of legal personality changes contemporary political priorities in international human rights and economic law.

Slavoj Žižek starts his Chapter 16 with a number of examples illustrating his theory of ideology. Žižek's trademark approach bridges a number of fields: from opera to film and literature, from the French Revolution to North Korea and China and from *The Sound of Music* to cigarette advertisements to Berthold Brecht and documentaries about atrocities in Indonesia. The philosophical trajectory is similarly dizzying, moving from Hegel to Marx, Lacan and Rancière. Žižek argues that explicit ideology is sustained by a series of implicit obscene injunctions and prohibitions, teaching the subject how not to take certain explicit norms seriously and how to implement a set of publicly unacknowledged prohibitions. This analysis is then generalised: the law can only sustain its authority if people hear in it the echo of an unconditional and absolute assertion of power.

Applying a similar analysis to human rights and humanitarianism, Žižek argues that depoliticised humanitarianism acts as the ideology of military intervention serving specific economic-political interests. This supposed defence of the innocent and the powerless against power, questions the opposition between universal, a-political human rights and the political rights of citizens. Adopting a standard ideology critique, Žižek argues that no a-historical human rights above politics exist. However rights should not be dismissed either as the reified fetish of concrete historical processes. The Marxist critique of the gap between the ideological function of the universal legal form and the particular interests that effectively sustain it is not enough; it neglects the emergence and operation of the form of universality itself. When abstract universality emerged as a form, like all forms, it started affecting social life. Following Rancière's analysis, Žižek argues that the bourgeois 'formal' freedom allowed the emergence of 'material' political demands and practices, from trade unions to feminism.