Introduction

Costas Douzinas and Conor Gearty

In the preface we noticed one meaning of compendium, suggestive of a shortening or an abridgement. We start our substantive work here by recalling its Latin configuration, where a *compendium* was something 'weighed or kept together . . . a gain or profit through saving'. A compendium of human rights law would be the collected gain, the saved wisdom, the amassed weight of 'human', 'rights' and 'law'. Three contested concepts, long histories and complex practices are at stake. Their combination is weighty, profitable, its capital amassed and saved through the ages. Many tomes have been written and will be written about each of the three words. The term 'human' directs us away from what is other than humanity, the divine and the animal. Sacred and secular theologies as well as science are involved in defining the 'human' and determining its entitlements. The term 'rights' refers to ethics, morality and the law, to legal entitlements as well as to moral responsibilities. And the 'law' as institution and practice permeates every aspect of life and language. Every form of knowledge is affected by the law; every social relationship involves moral expectations and legal obligations. If the terms 'human' and 'rights' that precede it are to be taken seriously, every legal norm should aspire to promote the dignity of humanity.

Embracing the human

How does this *Companion* approach its responsibility to shorten and at the same time to produce 'gain or profit' through our saving of knowledge? In so vast a field our chapters must both cover their own ground and stand for something beyond their immediate remit – only in this way can the particular simultaneously evoke the general. Take first this idea of the human. In his 'anatomy of rights jurisprudence',[1] Costas Douzinas in Chapter 3

[1] See p. 58.

considers the limitations in 'conceptions of personhood'[2] that flow out of the work of those philosophers (principally here Alan Gewirth and James Griffin) who seek to impose a rational approach to human rights, above the messiness of history and the contingent meaning of words. Douzinas argues that the '"correct interpretation" of the capacity for rational action has been and still is a strategy used to exclude people'.[3] Gerard Quinn's Chapter 2 (with Anna Arstein-Kerslake), 'Restoring the "human" in "human rights"' is a case-study in challenging the consequences of such exclusion. Their central concern is with the UN Disability Convention but they see the success of this agreement in its having been able to reach far beyond the conventional, autonomous-based approach to personhood to force the kind of fresh understanding that not only gives new life to what it means to be human but embraces as well the relational, personal aspects of humanity: what matters is what it means for this person here and now and not 'persons' in general. As Quinn and Arstein-Kerslake observe (and this is what they see as the key breakthrough), the Convention 'starts with what it means to be a human being ... [rather than] with a menu of rights to be mechanically tailored to yet another thematic group'.[4] This chapter ends on a startling note of concern about the future, perhaps even the present, with genetic manipulation offering new opportunities to mould humanity, often under cover of the human rights of (potential) parents: 'humans cannot be reduced to an essence, that we are who we are because of our interaction in community (something that does not come pre-packaged) and that while cognitive ability complicates our existence it does not destroy our humanity.'[5]

As a starting observation about our book, therefore, this *Companion* asks its readers to think hard about what humanity entails, and in doing so to be open to fresh accounts of what this might involve: no closed list of human rights is to be found in a schedule to this volume, worked on by teams of research assistants in pursuit of definitiveness. The 'human' in 'human rights law' entails openness, fluidity, an earthy resistance to the certain. Douzinas' Chapter 3 shows how damaged this idea of the human has been by its being reluctantly added in by those liberal writers who have always been far more interested in (and arguably dominated by) the separate notion of rights. All this takes us inevitably to politics, and it is a further goal of our *Companion* that it should engage with rather than affect to rise above the noise, the scheming and the abuses of power that mark out how we interact with each

[2] *Ibid.*, p. 60. [3] *Ibid.*, p. 65. [4] See p. 38. [5] *Ibid.*, p. 54.

other on issues of general importance. To use a Dworkinian term, human rights should give us an 'attitude' within the world of politics – but (we would say) no automatic over-lordship sitting outside it. This is part of what the 'humanity' in 'human rights' necessarily entails. If Quinn and Arstein-Kerslake show us one vision of the human to have flowed from a successful reorientation on a global stage, Patrick Hanafin in Chapter 10 reveals another, on a smaller canvass (Italy) perhaps, but involving a framing of humanity that also has universal import – the legal recognition of the embryo with all that this involves, not only for those who would wish to bring pregnancies to an end ('the right to privacy' or more dramatically 'to control over one's own body') but also – the main thrust of the chapter – with laws on assisted reproduction.

Hanafin tells a classic human rights story about a '"manifesto law" which has for its real objective the upholding of a traditionalist idea of family formation'[6] and which in turn provokes a political resistance on the part of important sectors in Italian society which leads in turn 'to a very gradual rewriting of the Act through judicial intervention'.[7] For Hanafin it is in 'such acts of citizen resistance [that] we witness how rights can become something other than dead letters enunciated but never enacted'. Such 'engagements can be seen as enactments of what Étienne Balibar has called a "right to politics"'.[8] Interestingly, efforts to close down politics here have been unsuccessful, with the European Court of Human Rights (ECtHR) having refused a definitive intervention (*S H and others* v. *Austria*, extensively discussed by Hanafin). His concluding remark can be generalised into another of this *Companion*'s main ideas: 'The example of Italy provides both a warning to those who think reproductive autonomy should be taken for granted and also provides examples of how collective citizen action is essential in the establishment and maintenance of reproductive rights.' What the human is matters as much as what 'rights' and 'law' entail – and is similarly in our own hands.

Understanding rights

Can this idea of having a 'right' to something possibly mean anything at all? And – to mimic the exam question – if so, what can it be? A number of our chapters take on this key issue directly. For Douzinas in Chapter 3,

[6] See p. 193. [7] *Ibid.*, pp. 193–194. [8] *Ibid.*, p. 194.

philosophical attempts to create solid foundations fail in two related ways. They either identify human rights with rights *tout court*, inflating and cheapening their currency, or they turn rights into the main building block of an anaemic morality leaving no space for critique or dissent. The privileging of agency or personhood as the master principle of human rights not only detracts from the human (as we have seen) but serves also to promote civil and political rights at the expense of economic and social well-being. The result is a human rights law that is found wanting so far as important struggles for equality, dignity and social justice are concerned. Douzinas wants instead to celebrate the absence of solid foundations, overriding rational justifications and conclusive definitions, the absence in other words of all that many deem essential. It is the gaps that flow from this that make the tensions between lawyers, philosophers and campaigners creative, serving to re-define the meaning and extending the scope of human rights, opening them to new groups, uses and practices.

In his search for 'Foundations beyond Law', Florian Hoffmann in Chapter 4 sees precisely these 'undetermined' others, outsiders, 'strangers, women, heathen, savages, barbarians' as being the lost groups who allow those inside the circle to claim universal equality and the identity of sameness. For Hoffman as much as for Douzinas, the rights that make up human rights are an essentially contested concept. While human rights *law* needs a foundation or justification, the *moral* discourse of rights has no purchase on reality without the enforcement that only the law can give. Despite the religious and moral provenance of the idea of human rights, their positivisation has been necessitated by the need for moral foundations while also making possible the pensioning off of exactly this idea. To Hoffmann, human rights are 'no static concept, no jigsaw puzzle with neatly fitting pieces, but a dynamic and highly adaptive process'. Each discourse has its part to play, contributing 'a certain functionality to the process; law provides facticity, moral discourse normativity and culture habit', and it is out of their 'continuous recombination' that emerges 'the infinite diversity of attitudes towards and uses of human rights' which we see in the world around us.[9]

So politics are unavoidable here too. Anna Grear in Chapter 1 tells us about the Universal Declaration of Human Rights (UDHR), that great manifesto of humanity (an 'iconic matrix'[10]) that aspires to rise above politics

[9] See p. 96. [10] See p. 19.

and law, 'framing the project' as her chapter title puts it. But of course this is impossible. Capturing well the intended spirit of this volume as a critical friend to its subject, Grear is distinctly non-hagiographic in her engagement with this and other 'human rights breakthroughs': to her 'international human rights law, in both theory and practice, is riven with contradictions, disputations, rival framings and oppositional accounts'.[11] But she defends her approach as essential to the right kind of progress, not the Whiggish predictability of the rise of the good but something altogether more compelling: 'Human rights emerge from [these] critical accounts as "ideas" (albeit powerful, world-shaping ideas) which are revealed as being semantically elusive "placeholder[s] in a global conversation that allows a constant deferral of the central defining moment in which rights themselves will be infused with substance"'.[12] Such an outcome is by no means necessarily bleak: 'Hope lies, perhaps, in the idea that international human rights law has not yet exhausted the critical energy of human rights as an endlessly recursive interaction concerning inclusions and exclusions in which every inclusion necessarily creates new, unforeseen exclusions, and in which every lived exclusion births new claims for inclusion.'[13] The 'perhaps' here is a warning against the kind of absolutism into which human rights warriors are too easily drawn, but it remains a positive note nonetheless.

The necessity of law

Law, morality, politics and culture contribute in their different ways to the understanding and practise of human rights, but they do not form a perfect pyramid with a moral *Grundnorm* at the bottom. Law at least has a kind of tangibility as a beacon of ethical truth in an otherwise choppy sea of moral and political uncertainty. This is what gives the third of our triad of foundations, human rights *law*, so much force in our field. The temptation is always to lure law into more truth than its structure can bear, an enticement that this *Companion* resists while always recognising the potency of the idea with which it is dealing. Grear introduces the subject with her

[11] *Ibid.*, p. 24.
[12] *Ibid.*, p. 25. citing A. Ely-Yamin, 'Empowering Visions: Towards a Dialectical Pedagogy of Human Rights' (1993) 15 (4) *Human Rights Quarterly* 640–85 at 663.
[13] *Ibid.*, p. 34.

mapping out of the 'carnivalistic'[14] excitement of the post-Second World War growth of international human rights law. Chaloka Beyani in Chapter 9 takes up this story, covering the global tale but also identifying the various ways in which this big idea has managed also to take regional shape, as localised versions of a shared perspective on the world. Beyani's concern is to describe these 'regional drivers of the universal'[15] and also at the same time to argue for their importance as more effective deliverers of content than are all those international instruments which are more concerned with aspiration than the kind of dull engagement with delivery that law generally (and rightly) thinks of as its especial strength.

Gerd Oberleitner's study of the enforceability of international human rights law in Chapter 13 takes this last point on directly, or to put it in his succinct way, 'Does enforcement matter?' To Oberleitner, understanding the complex challenge of effectively enforcing human rights necessitates borrowing from other ideas within the law family, principally those of enforcement, compliance control and dispute settlement. Understanding what is to be gained from 'enforcement' requires us first to know what our goal in calling for this is: what do we seek to achieve when we 'enforce' human rights? Is it the protection of individual victims from violence? Financial damages for victims of past violations? Or is it grander, long-term changes in domestic laws and practice perhaps; the eradication of extreme poverty; the creation of a just social order? To Oberleitner, 'the improvement of the human rights situation is not an isolated process but is closely linked to larger economic and democratic developments in a given state' and it is exactly for this reason that it is 'imperative that an expansion of enforcement mechanisms does not conceal human rights as the larger political and societal project that they are'.[16] In a way that echoes a further goal of ours in bringing these essayists together, we learn (once again, albeit in this fresh context) that things – even things seemingly so clear as human rights law – are not as simple as they appear, and – if it is true understanding (rather than the lure of false certainty) that we are after – nor should they be.

Conor Gearty and Chris Himsworth in Chapters 11 and 12 carry the human rights law theme into the national and sub-national spheres. Gearty's particular concern is with working out how the idea of a set of

[14] *Ibid.*, p. 21, citing U. Baxi, *The Future of Human Rights* (Oxford University Press 2006) 46.
[15] See p. 189. [16] See p. 267.

human rights truths can function within a democratic system of government that by its very definition (happy dependence on electoral whim) is wedded to the contingent. To Gearty, the answer lies not in positioning courts as guarantors of rights in opposition to elected governments but rather in seeing these judicial guardians as democratically mandated invigilators on behalf of human rights, able to warn but not to override. He sees the UK Human Rights Act (HRA) as having marked a point at which serious work has finally begun in properly re-integrating human rights within the political sphere, the disastrous nature of earlier experiments with supposed apolitical judicial supremacism (e.g. the USA) having proved impossible even for advocates of 'law's empire' to have continued to ignore. Himsworth's chapter complements Gearty's in taking the human rights idea further into the lower reaches of the law, well past the universal and further even than the regional, and in Himsworth's case past the national, into local or devolved administration. The findings, drawn from a close study of the Scottish scene, are remarkable: 'Far from providing a stable environment in which human rights protection might take its place alongside other opportunities for diversity in subsidiarity, the conditions of constitutional autonomy defined by the combination of devolution under the Scotland Act with the much longer-standing separateness of the Scottish legal system have produced a fluidity and antagonism which have come to be most prominently characterised by the iconic lightning conductor of human rights adjudication.'[17] To the question, 'Is there no end to the politics of human rights, even in human rights law?', the answer appears to be 'Of course not; how could there be?' In their different ways all our contributors stand for the better grasping of this simple point, or (to put it another way) the truth behind the necessary uncertainty of all the other (human rights) truths.

Some paradoxes of human rights law

So much, then, for the triad of ideas upon which the *Companion* depends for its coherence. In putting things in the way that we have done thus far, we are led to a core paradox, that of a subject (human rights and flowing out of it human rights law) whose contingent political power depends on the

[17] See p. 247.

denial of this contingency in favour of a foundationalism that it knows neither can – nor should – exist. Paradox is never far away in any critically engaged discussion of human rights. A paradox, from *para-* 'contrary to' and *doxa* 'dominant view' is what is 'contrary to expectation or orthodoxy'. In logic, a paradoxical proposition is true and false at the same time or an impasse in an inquiry, often arising as a result of equally plausible yet inconsistent premises. *Paradoxology* on the other hand means 'marvellous speaking' or the 'narrating of marvels'. At its best human rights law is a marvellous discourse and practice that does not follow orthodoxy.

We have already embraced the widest manifestation of the paradox in our discussion of Beyani, Gearty and Himsworth: while the concept of right is in some sense universal, the content of human rights law differs from place to place. This should be no surprise. The 'human', like the 'natural' and the 'God-given', claims to transcend parochial and historical limitations but the law is inevitably temporally and spatially located. Law offers stability and predictability, legal problems have right answers and clear outcomes. Humanity on the other hand as aspiration or inspiration is open-ended and mobile, it looks back to history and tradition and forward to a time of justice and peace. In this sense, human rights law or a law that incorporates human rights has installed in its midst the demands of a justice which is as Grear has suggested always still to come. In this way human rights law incorporates the principle of its own self-transcendence. This sense of a dynamic, fast-moving and paradoxical constellation permeates our *Companion*.

For Upendra Baxi in Chapter 8 the paradox takes the form of discovery as opposed to invention and of universal normativity against the tradeoffs, negotiations and compromises that legal observance by governments necessarily involves. Did (the principles of) human rights exist before their declaration, in which case were they simply unconcealed or discovered? Or are they a creation or invention of modernity? The American and French revolutions 'declared' or re-stated natural rights because they had been 'concealed' or distorted during the ages. In this narrative, the law of human rights is an immanent part of history, despite being abused and concealed. If human rights or their principles existed prior to their legislation, as many liberal philosophers claim, then they are eternal, synchronic, universal. Accusations of partiality or Eurocentrism must therefore be wrong: the founding philosophical and legislative fathers were simply the mouthpieces of the world spirit. If, on the other hand, human rights were created *ab novo* and introduced into law and politics by their 'founding fathers', the historical context

of their emergence conditions their nature and action. Discovery or invention, immanent or imposed, ahistorical or historically determined – this is the foundational dilemma at the heart of rights. If invented, rights are products of secular theology, commands of an all-powerful legislator. Their provenance colours their reception and opens them to accusations of partiality. If immanent or discovered, rights are the modern markers of reason or nature and their propagation and spread becomes part of humanity's mission. There is a pragmatic dimension to this that we need to add to Baxi's treatment of his large subject, for to critics of human rights juridicalisation he has this question: how else in the moment of 'concrete universality' may 'the morality of duty be translated into practices of arresting the abuse of public power?'[18]

The point about alternatives (or their absence) is a broad one, and it is in this context that paradox can emerge as signalling a route to progress. Joanne Scott writes in her classic study of women in the French revolution that the 'rights of man' had 'only paradoxes to offer' to women. Scott takes the phrase from a letter by Olympe de Gouges, the French feminist who published the *Declaration of the Rights of Woman and Citizen* in 1791, at the beginning of the 'human rights movement'. De Gouges argued that 'if women are entitled to go to the scaffold, they are entitled to go to the assembly'.[19] For Scott, the paradox of de Gouges' declaration went beyond the 'conflict between universal principle and exclusionary practice ... to the need both to accept and refuse "sexual difference"'.[20] The French and American revolutionary declarations present the subject and beneficiary of rights as an abstract human being. The rights-holder is the 'man' of the rights of man, 'everyone' or 'anyone'. And yet, once we turn from the abstractions of law to real people with flesh and blood a different picture emerges. The 'everyone' of the universal human subject is shadowed by the various categories of exclusion and marginalisation. More optimistically, and in a way that, as we have seen Hoffmann in Chapter 4 echoes, the French philosopher Jacques Rancière has given a succinct description of the paradoxical way rights move from the inner circle of privileged beneficiaries to the excluded beyond.[21] Double standards get ironed out, old paradoxes get replaced by new contradictions,

[18] See p. 168.
[19] Jacques Rancière, 'Who is the Subject of the Rights of Man?', in I. Balfour and E. Cadava (eds.), 'And Justice for All: The Claims of Human Rights' (2004) 103 (2/3) *The South Atlantic Quarterly* 303.
[20] J. W. Scott, *Only Paradoxes to Offer* (Cambridge, MA: Harvard University Press, 1996) 3–4.
[21] Rancière, 'Who is the Subject' 19.

and the dynamic restlessness of human rights forces it into new battles with abuses of power, and so the process goes on.

We should not forget that this is a human rights *law Companion*, and that third of our triad of organising words takes us to a further paradox inherent in our study: the necessary interdisciplinarity of this most law-oriented of subjects. Human rights needs law in order to function while at the same time needing as well to transcend law in order to make itself interesting and fresh, to have in other words something of value to say. Many chapters in this volume explicitly draw on the strengths offered by other fields while remaining true to their disciplinary focus. Abdullahi An-Na'im directly confronts the question in Chapter 5, which commences our section devoted to the inter-connectedness of human rights. To An-Na'im, whose concern here is with the study of human rights, the paradox of localism (already mentioned) is compounded by the residual colonialism of so much of this local content and by the inevitable dependence on state power to make rights real. The exposure of 'inherent ambiguities and tensions in the concept [of human rights] that need clarification and mediation' is something that we should not so much fear as embrace as evidence that we are on the right path to progress. In asking 'how can interdisciplinarity escape the limitations of disciplinarity by maintaining its flexibility and indeterminacy, while being focused and effective in fulfilling its mandate' and, further, in questioning how 'interdisciplinarity [is] different from multidisciplinarity, and how [can we] achieve its value-added in practice',[22] An-Na'im is demonstrating that enquiry is a core part of discovery, that arrival must be preceded by travel and destinations need to be sought before they can be found. If there is a manifesto for this *Companion*, then, it might be the idea with which An-Na'im starts his exploration of the power of interdisciplinarity (albeit in a more specific context) that of 'imagining the unimaginable and retrieving the irretrievable'.

Nightmares and dreams

We have already heeded Baxi's warning to the sceptics to be on guard against the question 'so what would you do?' Nowhere is the need for our subject clearer and the scepticism of the well-meaning quieter than in

[22] See p. 111.