

Revisiting the Origins of Human Rights

Edited by Pamela Slotte
and Miia Halme-Tuomisaari



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REVISITING THE ORIGINS OF HUMAN RIGHTS

Did the history of human rights begin decades, centuries or even millennia ago? What constitutes this history? What can we really learn from 'the textbook narrative' – the unilinear, forward-looking tale of progress and inevitable triumph authored primarily by Western philosophers, politicians and activists? Does such a distinguishable entity as 'the history of human rights' even exist, or are efforts to read evidence in past events of the later 'evolution' of human rights mere ideology?

This book explores these questions through a collective effort by scholars of history, law, theology and anthropology. Rather than entities with an absolute, pre-defined 'essence', this book conceptualizes human rights as open-ended and ambiguous. It taps into recent 'revisionist' debates, and asks: what do we really know of the history of human rights?

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FOREWORD: HISTORY OF HUMAN RIGHTS AS POLITICAL INTERVENTION IN THE PRESENT

MARTTI KOSKENNIEMI

How to write a history of human rights? That depends on what we imagine human rights are like. If we believe them to exist as *inherent* aspects of the human condition – a view implied in references to human rights as universal and inalienable in what the editors below call the ‘textbook narrative’ – then there can scarcely be any history of human rights at all. All that can be produced is a narration of how human beings have gradually become conscious of rights and started to implement them in practice. Such histories are inevitably accounts of progress and enlightenment, somewhat like histories of medicine. While our physical constitution has remained unchanged, our awareness of its qualities and our ability to analyse and intervene in it have improved. Just like medicine has learned to deal more efficiently with the maladies attending our physical constitution, politics and law have succeeded in gradually developing better, more sophisticated ways to give expression to rights. The result has been in the one case a healthier, in the other a happier human being. The language of ‘natural’ rights expresses such an analogy quite forcefully, rights appearing in it as equally obvious to our being as the physiological processes that uphold a healthy body. There may have been paths not taken and others that have led to error. Charlatans and quacks have appeared along the way. But by and large, progress there has been, the present providing the finest and truest notion of rights that humans have been able to produce – just like there can be no question that the consciousness of our bodily functions mediated by modern medicine constitutes the so far most accurate form of physiological awareness.

Writing a history of human rights in a naturalist idiom is difficult owing to its normative, or ideological aspects. It involves not only a commitment to believing that the expression ‘natural rights’ indicates an obviousness paralleling that of, say, the circulation of blood but that ‘rights’ themselves are good to us analogously to how a well-functioning cardiovascular system is good to us. The more awareness there is of rights, the better we can deal with social and political problems, diagnosed as defects in a

polity's rights-constitution. Medical professionals have their Hippocratic oath as a statement of the ethics of their profession. Working with natural rights is no less ethically committed to strengthen a polity's rights-constitution by spreading consciousness of its functioning and awareness of its demands. We address this frequently in our efforts to transform merely 'natural' rights into the positive rights-system of a polity's systems of public enforcement. How fully rights are being 'positivized' will then appear as a measure of that society's political enlightenment. Because a history of human rights strengthens rights-awareness it prepares ground for such 'positivization' and thus participates in the very progress for which it provides an account. It cannot be a neutral history, just like a history of Christianity, written from a Christian viewpoint cannot remain indifferent to how Christian ideas or institutions have fared in the past.

Historical approaches were largely absent from the ascent of rights in the political vocabularies of the West in the recent half-century. This, I suppose, results from the difficulty to compress a narration of rights in the foregoing way within the conventions of academic historiography, deeply suspicious of notions such as 'progress' and 'decline' as analytical categories. National histories of the nineteenth and early twentieth century, for example, were rarely conceived as disinterested accounts of the life and times of a people living in a piece of territory. On the contrary, they were animated by a consciousness of the nation as something intrinsically valuable and were often written as part of an effort to propagate the value of nationhood among the readership. What Peter Mandler writes of the late nineteenth century British historian J. R. Seeley was applicable across the profession: '[H]e was careful to bend his didacticism to the service of the political nation. He saw his job as not only educating statesmen but also helping them build national cohesion by cultivating patriotism'.¹ The discipline of modern history, it is well-known, developed everywhere in close collaboration with nationalism. It thereby also contributed to the organization of humankind's collective past, offering a universal perspective from which to compare and evaluate developments across the world. 'Progress' and 'decline' became self-evident categories for the narration of the lives of nations.

Within professional historiography, nationalist histories have not fared well. The same half-century that saw the ascent of human rights came

¹ Peter Mandler, *History and National Life* (London: Profile, 2002), p. 44.

to think of those older histories as naively committed to an idea of self-evident or inherent nationhood. It learned to regard nations no longer as objective realities existing ‘out there’ but instead as ‘imagined communities’, ideological constructions projected on the world by clever nationalists in order to support their institutional projects.² Or then they were offshoots of an industrial and economic modernity in quest for a principle of human organization that would enable the efficient production and distribution of material and spiritual values according to a systemic logic, above all that of capitalism.³ Old histories of the rise and fall of nations were condemned as ideological simplifications of a much more complex world, the interesting questions not being about how nations fared in the world but what it was that made people not only to believe in nations but to live and die for them.

Considerations that made historians give up these kinds of nationalist narrations obstructed the writing of a history of human rights from within the human rights paradigm itself. Or then, if they were included in the ‘textbook narratives’ they were inevitably inclined to become progress histories, imposing on the world a narrative of redemption indefensible within conventions of modern historiography. What was needed before illuminating work on the history of human rights could start was to shed the human rights ideology itself – just like a respectable history of a nation had to shed the nationalist frame. Instead of taking ‘human rights’ as a category both obvious and obviously good, passing through history as self-identical and unchanging, that notion was itself to be read as problematic and in need of explanation. What made people at some moment think of something as ‘rights’? And what did they *mean* when they thought so? Hence, the authors of the present volume turned their attention to the different contexts where something like ‘rights’ have appeared. They examine the worlds of Roman law and early modern scholasticism, the revolutionary era, nineteenth-century nationalism, the women’s movement and the peace movement to find out what role ‘rights’ may have played. They enquire into the ways in which rights appeared in socialism, Christian ecumenical collaboration and modern international institutions. Well-versed in the linguistic turn in the human sciences, the authors insist that the meaning of recourse to ‘rights’ is to be determined

² The classic is, of course, Benedict Anderson, *Imagined Communities*, rev. edn (London: Verso, 1991).

³ See Ernst Gellner, *Nations and Nationalism* (London: Blackwell, 1983).

from within the – political, legal, philosophical – vocabularies within which the expression appears.

What did it mean that people at certain moments began to address the world in rights-terms? An often discussed case is Hugo Grotius' *De jure belli ac pacis* (1625) that separated between three meanings of the expression '*ius*': it referred to the 'justice' that law sought to bring about, the legal act itself ('*lex*') as well as '*a moral Quality annexed to the Person, enabling him to have, or do, something justly*'.⁴ This, it has been suggested, meant a subjective turn in the language of natural law, connoting something we 'have' – in contradistinction to the larger objective of justice that it had been the purpose of law to attain under earlier, religiously inclined vocabularies. It was part of the emergence of a typically 'modern' way of thinking about the relations of individuals and community that privileged the desire of self-preservation and self-perfection over the collective goals of the community.

But Grotian natural law was not the only linguistic environment where rights found a home. Other studies pointed to their emergence in the writings of the Spanish Dominican scholars of the sixteenth century as a series of commentaries to Thomas Aquinas while still others identified canon law as the proper linguistic and systemic context in which the notion had come to operate.⁵ More recent studies on the history of rights have tended to focus on later moments – the French or the American revolution, English nineteenth-century liberal culture and, especially, institutional developments in the twentieth century. All of such contexts are discussed in the chapters below. Among historians of law and political thought there is a debate, moreover, of whether the 'subjective rights', 'natural rights' and 'rights of man' that began to emerge in the texts of jurists and political thinkers in the seventeenth century are the 'same' or 'different' from the human rights referred to, for example, in the 1948 Universal Declaration of Human Rights (UDHR). For surely, the mere appearance of an identical expression in texts temporarily distant from each other did not necessarily signify that they meant the same thing. It is not evident that when the UDHR declares that '[a]ll human beings are born free and equal in dignity and rights', the implications of this are

⁴ Hugo Grotius, *The Rights of War and Peace*, edited and with an introduction by Richard Tuck (Indianapolis, IN: Liberty Fund, 2005), Book I, Chapter I, p. 138.

⁵ See Annabel Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge University Press, 1997) and Charles J. Reid Jr, 'The Canonistic Contribution to the Western Rights Tradition: an Historical Inquiry', *Boston College Law Review*, 33 (1991–92), 37–92.

the same as when John Locke, in his *Second Treatise* wrote in 1690 that human beings ['Men'] were 'by nature all free, equal and independent'.⁶ Locke's writing was deeply embedded in a Christian frame and he had no difficulty to accept the inclusion of a provision on slavery in the Fundamental Constitutions of Carolina.⁷ On the other hand, it seems clear that the many ways in which governments that have subscribed to the UDHR intervene in the lives and properties of their citizenry, would have been condemned by Locke as 'tyrannical'.

For such reasons, historians of rights have insisted on focusing away from the linguistic context to the historical moment of their production and, more specifically, to the intentions of their creators: what is it that Locke and the drafters of the UDHR wanted to achieve, in view of the linguistic conventions available to them in their intellectual milieu and the socioeconomic conditions prevailing at the time when they were read?⁸ Grotius wrote his *De jure belli ac pacis* as a protestant activist, a refugee from his native Holland at the time of the Thirty Years' War; Locke published his *Two Treatises* on return from exile in the aftermath of a 'Glorious Revolution' that purported to rid England of the 'tyranny' of a monarch; the UDHR was written as part of the establishment of a new system of global peacemaking in the aftermath of the horrors of the Second World War. The language of rights was oriented towards a different objective in each of these situations. Understood in view of that objective, their content, ways of realization and limits were also differently conceived. Their *meaning*, in other words, was different.

The linguistic and the contextual 'turns' have highlighted the way in which rights operate as aspects of political cultures, capable of being understood and analysed only by reference to what we already know about those cultures, including their social and hierarchical organization. Perhaps understandably, this has prompted a variegated group of critics of Western modernity – the privileged place where rights have operated – to extend their criticisms to human (subjective) rights as well. Traditionalists

⁶ John Locke, *Two Treatises of Government and a Letter Concerning Toleration*, edited by Ian Shapiro (New Haven, CT: Yale University Press, 2003) Second Treatise § 95, p. 141.

⁷ For the scriptural basis of Locke's arguments, see Ian Shapiro, *The Evolution of Rights in Liberal Theory* (Cambridge University Press, 1986), pp. 84–9; for Locke and slavery, see James Farr, 'Locke, Natural Law and New World Slavery', *Political Theory*, 36 (2008), 495–522.

⁸ For just such an examination of Locke, see e.g. James Tully, *A Discourse on Property: John Locke and his Adversaries* (Cambridge University Press, 1980).

such as Michel Villey, Leo Strauss or Alasdair MacIntyre have described the emergence of liberal rights discourse in seventeenth-century Europe, the turn from natural 'law' to natural 'rights', as a lamentable undermining of older (Christian, Aristotelian) notions of virtue that construct political obligation from the perspective of (the objectives of) the community.⁹ With Thomas Hobbes, it has often been claimed, the 'subjective turn' culminated in positivism and the theory of 'sovereignty' that has borne a fundamentally negative legacy in Western political thought.¹⁰ For thinkers from the political Right as well as Left, the vocabulary of 'rights' has been inextricable from the development of a 'possessive individualism', operating as the ideological groundwork for the rise of capitalism and mass democracy. Every student of Karl Marx is able to point to human rights as 'nothing but the rights of a *member of civil society*, i.e. of egoistic man, of the man who is separated from other men and from the community'.¹¹

In a sense, this ('negative') narrative is the obverse of the human rights ideology. Equally normative as the latter, though its preferences lie elsewhere, it is also tied up with an *a priori* normative perspective that informs the production of its rights-narrative. No doubt, both are capable of making valuable points about the way rights have operated in modern Western society and intellectual life. They are at their strongest as philosophical perspectives on politics, enabling the evaluation and critique of past periods or actions and making historically coloured insights to bear on present normative choices. Some of the most impressive works of history of political thought have precisely the ambition of developing meticulous contextualizations of the functioning of political vocabularies of the past into reassessments of aspects of present political consciousness – for example that instead of Locke, it is rather Machiavelli that opens the way to how 'the foundation of independent America was seen'.¹² Rights, we also learn from these works, have operated to set up structures of ideological, cultural, economic and political hegemony as well as provided

⁹ See Michel Villey, *Le droit et les droits de l'homme* (Paris: PUF, 1983); Leo Strauss, *Natural Right and History* (University of Chicago Press, 1965); Alasdair MacIntyre, *After Virtue: a Study of Moral Theory*, 2nd edn (London: Duckworth, 1985).

¹⁰ Strauss, *Natural Right and History*, pp. 190–1.

¹¹ Karl Marx, 'On the Jewish Question', in Joseph O'Malley (ed.), *Early Political Writings*, (Cambridge University Press, 1994), p. 44. See further C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford University Press, 1962).

¹² John Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, 1975), p. 545. See e.g. Annabel Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton University Press, 2011).

instruments to attack such hegemony. Instead of studying the ‘natural evolution’ of rights, they lead us to think about how rights have been used to make ‘claims and counterclaims’ in defence of some positions or interests, and against others, at different moments.¹³ By connecting rights-vocabularies with past efforts to gain, exercise or challenge power, it might be possible to attain a more realistic image of the role rights have as aspects of political speech. This, I have understood, is the ambition of this book.

An upshot of the experience of writing histories of human rights is that such writing is always vested with a normative perspective, that it is always in this sense ‘political’. However much historiography might aim to situate past events or utterances in their ‘context’ so as to avoid the accusation of anachronism, or narrate the events from the viewpoint of the actor or the period concerned, the question of what that right context is, and how we know we have attained the actor’s perspective will always lead into making delicate choices between alternative methods and standpoints.¹⁴ Positivism is unsustainable. The past is a construction, informed by present concerns. The problem with older histories of human rights as progress or decline – the ‘liberal’, Marxian or ‘conservative’ narratives – is not at all that they emerge from a standpoint and embody a message but that the message is frequently too simple, that it fails to communicate the *complexity* of rights, their many uses and implications as part of the political languages of the past. Their one-dimensional narratives demand from us too firm a conviction of the political right or the political wrong. They pretend to know too much.

In reading histories of rights, such as contained in the present volume, one question that always needs to be asked is ‘what is the perspective from which these histories have been composed?’ After the contextualization of rights in the past follow questions about the context of their narration in the present. These include the question about the *discipline* – the conventions of academic specialization – from which the narrative

¹³ Stefan-Ludwig Hoffmann, ‘Introduction: Genealogies of Human Rights’, in Stefan-Ludwig Hoffmann (ed.), *Human Rights in the Twentieth Century* (Cambridge University Press, 2011), p. 4.

¹⁴ See further Anne Orford, ‘On International Legal Method’, *London Review of International Law*, 1 (2013), 166–97; Anne Orford, ‘The Past as Law or History? The Relevance of Imperialism for Modern International Law’, in Emmanuelle Jouannet and Hélène Ruiz-Fabri (eds.), *Tiers-monde: Bilan et perspectives* (Paris: Société de Législation Comparée, 2014). See also Martti Koskenniemi, ‘Vitoria and Us: Thoughts on Critical Histories of International Law’, *Rechtsgeschichte*, 22 (2014), 119–38.

has been produced. There is no doubt that a history of rights written within professional history of ideas will look different from one produced from within legal history or the history of international relations. A number of the following chapters have been written by historians of political thought whose disciplinary interest has long been focused on moments such as the Franciscan poverty debate, the role of Protestantism in European early modernity and the intellectual context of the English, American and French revolutions. In each, there emerged a robust vocabulary of rights that left some legacy to successive generations of political actors. To some extent, these overlap with narratives told by theologians – although the interest of the latter in highlighting the intervention of such religiously coloured concepts as *Menschenwürde* (human dignity) is not necessarily shared with the former.¹⁵ Legal historians feel comfortable in addressing questions such as the role of rights in Roman law and often dwell intensely on the ways of implementing rights in domestic or international judicial proceedings.¹⁶ Experts in international relations, again, perhaps like those of international law, focus on the UDHR as the pivotal instrument and look both backwards into its antecedents and forwards into the ‘universality’ of its principles and their implementation.¹⁷ Economic historians, it is true, do not often see themselves as producing rights-histories. But if it is pointed out to them that, historically speaking, the most significant claim to right has been a claim of protection of right to property, they might concede that this, indeed, is precisely what they are doing.

Alongside disciplinary context, the production of rights-histories is also powerfully informed by what the historian thinks ‘rights’ are. MacIntyre once wrote that ontologically they exist about at the same level as witches and unicorns.¹⁸ This may be, but even as imaginary constructions of the mind their influence in the political and cultural world is well worth careful study. What about the distinctions between ‘rights’, ‘human rights’, ‘rights of man’, ‘civil rights’ and ‘labour rights’ for example? Each certainly points to a different political moment, institutional context and

¹⁵ See e.g. Wolfgang Vögele, *Menchenwürde zwischen Recht und Theologie: Begründungen von Menschenrechten in der Perspektive öffentlicher Theologie* (Güterslohe: Kaiser, 2000).

¹⁶ For the former, see Jacob Giltaij, *Menschenrechte in het Romeinse recht?* (Rotterdam: Erasmus Universiteit, 2011).

¹⁷ See Jack Donnelly, *Universal Human Rights in Theory and Practice*, 3rd edn (New York: Cornell University Press, 2013).

¹⁸ MacIntyre, *After Virtue*, p. 69.

a set of different objectives and pursuits. Jurists have developed sophisticated ways to analyse the differences between different aspects of rights-speech. In Wesley Hohfeld's famous dissection they were present as claims, immunities, powers and privileges, each aspect pointing to different relation between the right-holder and some other human being or group of human beings.¹⁹ It is now by and large accepted that 'rights' are not only claims against public power – but do they extend to every liberty humans may desire or are they limited to the reverse side of the legal or moral duties people have towards each other? And what indeed is the relationship between systems of rights written into positive law and those existing as parts of other structures of the human imagination? Should the movement for the abolition of the slave trade in the late eighteenth and early nineteenth centuries be regarded as an important moment in a story of rights? But then, how might it relate to the casual defence of consensual slavery in early modern Western political thought, or the struggle of the 'interlopers' against the monopoly of the Royal Africa Company, and in favour of the right of free trade in slaves in the early eighteenth century?²⁰

No doubt, decision about what kinds of goods qualify as 'rights' whose history need telling is deeply ideological in its effects. It is no accident that most of rights-histories produced at European and US universities tend to concentrate on civil and political rights. After all, the standard way to tell the political history of the West focuses on the development of the relations between public power and individual freedoms. With this, rights-histories celebrate the slow emancipation of the 'individual' from the 'state' in Europe as the model for institutional developments everywhere. At the same time, an increasing number of studies take issue with such proselytizing: the use of rights as an aspect of Western domination over non-European territories has become a key postcolonial theme.²¹ During the Cold War it occasioned the strategic effort to redescribe collective goods in the economic, social and cultural spheres in terms of the rights of the beneficiaries of the respective policies. These were followed by the so-called 'third generation' rights to peace, national self-determination

¹⁹ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, (New Haven, CT: Yale University Press, 1946).

²⁰ See Jenny S. Martinez, *The Slave Trade and the Origins of the International Human Rights Movement* (Oxford University Press, 2012) and William A. Pettigrew, *Freedom's debt: the Royal African Company and the Politics of the Atlantic Slave Trade, 1672–1752* (Chapel Hill, NC: University of North Carolina Press, 2013).

²¹ See José-Manuel Barreto, *Human Rights from a Third World Perspective: Critique, History and International Law* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2013).

or clean environment that further expanded the scope of rights to encompass objectives overshadowed by the West's obsessive concentration on the individual. Although the resulting rights-proliferation has prompted Western commentators to worry that it will undermine the most serious or 'original' political rights, the development has been altogether understandable as a way to oppose the tendency of the West to present its cultural forms and experiences as somehow larger than itself. Recourse to the language of 'indivisibility' of *all* human rights seeks precisely to combat the tendency to label as 'rights' only values the West feels comfortable with. Without a litmus test for distinguishing between 'authentic' from merely supposed rights, however, there is no limit to the kinds of policy that may be translated into the language of rights. What gets included or excluded in this way reflects the dependency of the process of narration on a choice of a relevant conceptual and ideological frame, a choice informed by no ('ultimate') structure beyond the narrator's inherited aesthetic-political bias. This is why narrations of human rights often illuminate the present at least as much as they inform us about the past. The great risk in this process of endless narration is that the domination of the Western academy will see to it that the stories everyone hears will perpetuate precisely the kinds of hierarchy that rights-languages on its best days was expected to dismantle.

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