Human Rights and Constituent Power

Without Model or Warranty

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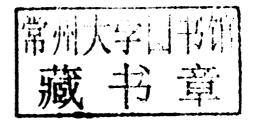# Human Rights and Constituent Power

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With the emergence of modern human rights in the Universal Declaration, what remained of a radical political potential of the discourse withdrew: statism and individualism became its authorised foundations and the possibilities of other human rights traditions were denied. The strife that once lay at the heart of human rights was forgotten in an increasing juridification. This book seeks to recover the radical political pole of human rights. It looks to the debates surrounding constituent power – the 'power of the people' – in order to understand different possibilities for the discourse. Using continental political philosophy and critical legal theory, *Human Rights and Constituent Power* presents a very different conception of human rights, more at home on the riotous streets than in courtrooms and parliaments.

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Contents

Democracy, radical politics and a differential human rights

Human rights is a law that both allows for the resolution of political dispute *and* supports resistance to state power. The traditional subject of human rights demands her internationally guaranteed rights against an overbearing state. She forces the state to respect her rights, resisting its aberrant activity, by pleading before a judicial body. Thus, human rights posits a law of resistance, seeking to restrain and police the state in the worst excesses of its force and power. It does this by becoming the language *of* the state. Resistance is translated into a common language, thereby allowing a judge to decide its legitimacy.[1] I want to begin by marking a difference: human rights transcend and resolve political conflict, but they also properly belong to political conflict.[2] The discourse thus takes its place at the junction of politics and law, both a political demand and the juridical decision. Human rights have a difference at their heart (demand *and* decision). However, the former pole of this difference is denied by the traditional discourse. The everyday presentations of human rights see these two aspects (conflict and resolution, authoritative demand and deliberation or decision) as two sides of one coin, thereby inexorably tying demand to decision. The point of this book is to recover the radical pole of human rights and challenge the closing down of the political implicit in juridification.

The conception of human rights as 'authoritative demands' demonstrates this point. As *authoritative* demands they are structured by a prior authorization, attuning resistance to the language of the state. This facilitates resistance to state power, but also (re)inscribes state power itself. Crucially, the translation places the moments of demand and decision together in a necessary relation. The resistant demand, expressed in the language of rights, is dependent on the juridical for its completion. If these two moments necessarily belong together in human rights, if they form one phenomenon, then essentially they can be united in one moment: decision is rendered as the *essential* moment because it synthesizes the various demands. Thus, we find a human rights indisassociably linked to the juridical. A political conflict placed in the language of human rights is *completed* by the decision of an authority. Human rights discovers an identity in the juridical, a closed sense of itself.[3] What initially appears as a differential structure becomes unified

in the (re)giving of law. The tension between demand and decision is thus 'resolved' by privileging the latter.

This book will argue that both the enunciation of a demand and the decision are equally important, but that the only way to understand this is to recover their *different* senses. The enunciation of a demand must be distinguished from a decision on that conflict. They are not two aspects of the same phenomenon merely distinguished by time, but, rather, they differ in their very nature. By thinking about what is radically democratic in rights it is possible to recover this difference. It is only due to the withdrawal of the radical democratic sentiment that human rights can be reduced to a legal framework – in the very projection of this framework as the totality of human rights the withdrawal is re-produced and re-inscribed. Human rights are no longer understood in terms of political creation, but rather as the pre-existing solution to individual conflicts, filtered through the judicial wing of the state or its international avatars. In fact, modern human rights themselves are constituted by this withdrawal of the creative potential, that is by their pre-constitution in the Universal Declaration of Human Rights (hereinafter, the UDHR) and the Covenants. Prior to that, human rights spoke through a variety of voices – from the radically democratic to the reactionary.[4] However, after the UDHR it becomes difficult to see the differential sense of human rights because an authoritative document exists. This blocks the multiplicity of rights-positions by implicitly claiming to write the totality of the human through her rights. But let me be clear: I am not suggesting that modern human rights could or should be swept aside. Rather, I argue it is both necessary and possible to think about a *differential discourse of human rights*.

To recover the radical in human rights it is necessary to understand them through the collective and alegal nature. I am sure this will strike many as strange because human rights are usually thought of as both legal and individual. But my purpose is not to reiterate human rights as they have been represented for the last 60 years, but rather to recover and recreate a space for the radical within the discourse. It is useful to understand this in the context of radical democratic theory. Mouffe suggests that there are actually two traditions in what is now called 'democracy' or modern democracy:

> The novelty of modern democracy, what makes it properly 'modern', is that, with the advent of the 'democratic revolution', the old democratic principle that 'power should be exercised by the people' emerges again, but this time within the symbolic framework informed by the liberal discourse, with its strong emphasis on the value of individual liberty and human rights. Those values are central to the liberal tradition and they are constitutive of the modern view of the world. Nevertheless, one should not make them part and parcel of the democratic tradition whose core values, equality and popular sovereignty, are different.[5]

Mouffe's central argument is that the conjunction of 'liberal democracy results from the articulation of two logics which are incompatible' and, in the final

instance, paradoxical: democracy with its 'power to the people' and liberalism with its limitation by the rule of law.[6] She insists that this difference of democracy and liberalism should not be thought of as two separate, distinct and pure traditions, but as two poles, each constantly infecting the other with its logic. Nevertheless, she maintains that there remain two logics or poles of thought.[7]

For Mouffe, human rights remain a separate tradition to democracy, thoroughly liberal in their pedigree. I want to challenge the *necessity* of this categorization. I will ultimately argue that it is possible to conceive of human rights in a non-metaphysical sense, that is, from within the radical democratic tradition. But, for now, I will say that to simply cede human rights to the liberal tradition is to fail to understand the significance of the democratic tradition in human rights. What is more, the overemphasis of the human rights–liberal nexus misunderstands the everyday practice of human rights. Evans ably critiques this in the context of international law: '[F]ocusing so singularly on international law elevates the *legal* approach beyond its potential, offers a distorted view of progress in providing protection for human rights, obfuscates the structural roots of human rights violations and overlooks the inconvenient fact that international law is politically motivated.'[8] In fact, human rights is often used as a means of generating democratic movements more focused on the power of the people (the constituent power) than on the limitation of that power. The problem is that because human rights are only understood through the UDHR and its like, the political creation of constituent power is elided from such a usage. To recover the radical pole or logic of human rights (and thereby re-establish its differential structure) requires an alternative approach.

A 'differential structure' means, on the most basic level, that the essence of human rights cannot be simply rendered as some sense of limitation of the people or 'authoritative demand' of an individual. In fact, it would mean that there could be *no essence of human rights* or, at least, no essence separable from their performance in each instance. To understand the radical democratic pole of human rights, it is necessary to start from constituent power. If I were to do this by half-measures, I would say that some rights are radical and some are not. Thus, maybe the rights to association, speech or strike all put the 'common man' against the 'power of the state'. At the pinnacle of this might be something like self-determination or even the right to revolution, which cannot be secured legally. I will not follow this course, however. Such a crude portrayal of the difference of human rights would focus too much on the normative content of rights and not enough on the manner in which they are performed. This rendering of the difference of human rights (as between different rights) is perpetually repeated in concerned tones in classrooms, courts and academic conferences with the question: 'But what happens when one human right conflicts with another?' The answer is, of course, the conflict is resolved with one or other norm. Such a structuring runs exactly counter to my project. The difference of human rights is not normative and cannot be resolved. It is precisely the tension *between* the poles that makes human rights a politically productive discourse. To rejuvenate this tension, the forgotten constituent power of human rights must be recovered.

Although modern human rights are constituted by the withdrawal of the radical, a trace of radical politics remains within them. This trace of the radical means that there is an effervescent democratic *potential* (in the sense of constituent power) within the discourse that conventional renderings mystify. It is not that I want to revive the right to revolution and deny traditional rights talk. The point is that even in traditional rights talk a radical trace remains.[9] Similar to the democratic and liberal poles that Mouffe highlighted earlier, a differential human rights would not have two separate camps that remain pure and uncontaminated. It is the difference and the constant tension between the poles of human rights that make them such a crucial part of modern politics and law. There is a constant contamination between them. Thus, there can be no proper, given and static essence of human rights.[10] Rather, there is constant *oscillation or vibration* between the poles of limitation and creation, a certain *trembling* between decision and demand. It is neither pole that defines human rights but the oscillation, trembling or vibration itself.[11]

The vision of human rights as limitation or empowerment-before-the-law is ideologically hegemonic. The point of this book, therefore, is to recover the second pole of radical political creation. The premising of decision and the importance of authoritative demands leads human rights to be understood merely as limitation on the *cracy* (force) of the *demos*. The effect of such a framework is that human rights increasingly pacifies politics. With this trembling of the difference within human rights I have introduced the most important theme that runs through this work. The withdrawal of the radical in human rights is the manner in which human rights loses touch with the fundamental difference at its heart. The differential core of human rights is destroyed by reducing it to international legal questions of standard setting, reporting and enforcement. To understand this differential character in its essence it is necessary to retrace the radical in human rights. In this, I will mirror Nancy and Lacoue-Labarthe's idea of re-treating or retracing the political. In their analysis, the political has withdrawn from politics, it has 'retreated'. This means that 'the question of the political, that is the question as to its exact nature or essence, retires or withdraws into a kind of evidence or self-givenness, in which that which is political in politics is taken for granted or accorded a kind of obviousness which is universally accepted.'[12] Our time is no longer concerned with the nature of the political, rather it is 'given' or 'obvious'. Politics is presupposed as that which happens after and in the wake of the economy, and is ultimately determined by the economy. In this, politics itself is erased under the sign of the market.[13] It is not difficult to see there that the 'nature' of politics remains entirely 'given' or unquestioned except insofar as the economy demands. The political has retreated from politics.

This reduction of the political into the givenness of everyday politics leads Nancy and Lacoue-Labarthe to give 're-treat' a second sense – the re-treating of the political – a sense that 'implies a necessary and urgent retreating, retracing or rethinking of the political'.[14] In the context of this urgency to re-treat the retreat, philosophy should withdraw from politics in order to allow it to rethink the

political. This is crucial, as the traditional move is to advance philosophy in order to provide the ground of politics. The political, however, is not a ground that would lend metaphysical weight to specific political determinations. Rather, what occurs is the withdrawal *from* politics, re-treating the retreat of politics with its philosophical pre-givens.[15] This necessitates a withdrawal from everyday politics, in order to trace the possibility of the political. This can then be reinserted into politics, but the questions of politics themselves have changed. Nancy and Lacoue-Labarthe's analysis of the political will be loosely mirrored in this work. There is, of course, a variety of differences between the analyses. The political is very different from human rights, however, the method of seeking to recover the possibilities of that site, tool, or discourse, remains.

By way of a guide to this work; the first substantive step after this introduction is to challenge the hegemonic idea of human rights. Thus, in Chapter 2, I trace three strategies of pacification in the human rights historiography. Rarely, if ever, is a radical sense of human rights understood. Rather, the current practice is rendered natural by showing an inexorable progress towards international human rights law. To do this, it carefully selects historical subjects. Through a progression of patricians, nobles and bourgeois subjects, human rights is shown to accord to the 'best' moments of bourgeois western politico-legal history. A very clear teleological causality is constructed here, with progress rendered as the secular version of the divine hand of providence. Other heterogeneous movements are reduced so that they mirror the present (or at least an idealized version of current practice). They are pacified by being rendered *just* as human rights movements. Having sketched the pacification of human rights history, I go on to ask what we can learn from the manner in which the Haitian Revolution and the abolition of the slave trade are written for human rights law. The point of this is to ask why one moment is privileged (abolition) and the other (Haiti) is silenced. In this, I demonstrate a certain structuring of the human rights imaginary around the quasi-colonial triplet of victim, rescuer and oppressor.

In Chapter 3, in order to explain the withdrawal of the radical, I look to Locke's right to revolution. On first reading, it would seem that this would be the apogee of the radical in human rights. However, on closer inspection we find in Locke precisely the withdrawal that I want to demonstrate. Property is the axis through which his right to revolution operates. It binds the social together and allows a revolution to overthrow the political constitution, while maintaining the social constitution of inequality. Property is written into human nature, thereby allowing only limited political reform. At this moment, where the radical appears most evident, we actually find one of the clearest efforts to withdraw that which is most political in rights. This early instance is placed alongside an analysis of human rights as they are enacted today. There we find only the slightest trace of the radical. This is because modern human rights are only truly constituted when the radical withdraws, leaving only ghostly traces of their prior potentiality. The second half of the chapter suggests that it is the deep structures of individualism and statism that maintain and keep out radical voices. I seek to deepen the traditional critiques

of Burke, Bentham and Marx, through the addition of Heidegger's critique of humanism. With this, individualism and statism become symptoms of a more fundamental problem in human rights: their metaphysical core. Through an all too brief introduction to Heidegger, I challenge the renderings of the subject, temporality and being in humanism. This marks the closing of the first section of the book (Chapters 1 to 3). The focus on humanism and human rights is concluded and I hope that my critique of the current state of human rights is clear.

In the second section of the book (Chapters 4, 5 and 6) I propose to withdraw from the liberal rendering of rights and instead to question the sense of democracy – of the *cracy* (force) of the *demos*. At its most basic, democracy suggests that power belongs to the people to make and remake the polity – this is the constituent power of the book title. The purpose of these chapters is primarily to explore the sense of constituent power as distinct from the explanations provided by the constituted order that it founds. In other words, I want to explore constituent power as such, rather than as and for the constituted order. In Chapter 4, I examine the work of the Abbé Sieyès and Immanuel Kant. These works demonstrate a number of variations, but, ultimately, show a view of the constituent that is deeply tied to the constituted order. In a totalizing and crude dialectic, the constituent is understood not in its essence, but rather in relation to what it will institute. In other words, the constituent is defined by the constituted order that it creates. Authority is the linchpin here. As Loughlin says, constituent power gives authority to modern democracy. However, to think a different non-metaphysical and radical human rights, it will be necessary to challenge the necessity of authority in the configuration of right. Kant provides an interesting counterpoint. Unlike Sieyès, he understands the unauthorizability of constituent power – the *salto mortale*. There is a tension within his oeuvre between the rejection of the morality of revolt and the complex argument that the sympathy for (or even will to) revolution is evidence of moral progress. Nevertheless, constituent power essentially remains unthinkable in his project.

To break this prefiguring of the constituent, I move to consider a number of very different conceptions of constituent power. Georges Sorel, Walter Benjamin and Georges Bataille provide three themes that I follow throughout what remains of the book. From Sorel, the sense of a radical being together emerges; from Benjamin, I show an alegal (although mysticized) moment of change; and finally, from Bataille, there appears a radical challenge to the economic form of utility, calculation and commensurability. Each in his own way demonstrates a thinking of constituent power that is not tied to a determinate end (constituted order). Rather, they suggest a means without end(s). However, each attempt fails and this is crucial. I do not propose any of their schemas, but rather suggest that they open the possibility of a different constituent power. In Chapter 6, I ask who the subject of this different constituent power is. In particular, I am interested in recovering 'the people' from substantialism (see Schmitt for instance) and from the tendency to fold it into the constituted order (like Kelsen). Through Derrida and Rancière, I offer two different deconstructions of the people. The first looks to

Derrida's attack on the notion of pure presence. In this, the challenge is to under-stand the people temporally, as deferred but not pacified in an infinite suspension of constituent power. The second, through Rancière, differs the people from itself. It challenges the sense of the people as a unitary actor. This marks the end of the second section of the book. At this stage, I hope that a different sense of constit-uent power (that is, without model or warranty) is beginning to emerge. However, it is still, in many senses, oceans away from a radical sense of human rights.

In section three I begin to bring constituent power and human rights together in a radically different manner, by looking to Jean-Luc Nancy and his ontology of being singular plural. This turns the previous questioning of the people inside out. I begin by setting out Heidegger's sense of being-together, focusing on the prob-lematic idea of the *Volk* (the people) in *Being and Time*. Challenging this, I argue that the totalization involved in an *ontological* idea of gathering renders Heidegger deeply problematic. This introduces Nancy's critique of those who set the idea of a community to work in creating and defending community. I briefly sketch his notion of an *inoperative* community. From this, the beginning of a different sense of human rights emerges, one that does not unavoidably start with the individual and then move to the state. Rather, the ontological status of the inoperative community allows us to think differently about questions of law and the political. Being-together is now the starting point for a radical ontology.

Chapter 8 seeks to take seriously the assertion in human rights that the nexus between human *being* and the political gives rise to a different and new political impetus. The problem with this nexus is, of course, biopolitics. Foucault demon-strated that the development of human rights is concurrent with and intimately connected to disciplinary structures of biopower and capitalism. This questioning allows me to pose the problem of the subject of human rights from a critical perspective. With Agamben, the political is cleared of actors, but, with Rancière, it becomes merely a matter of resubjectivization. Meshing these ideas, I look to Nancy's sense of singularity to think an anti-juridical (alegal) non-subject. This opens onto Nancy's critique of biopower. He argues that what is so problematic in our recent political configuration is not so much the matter of 'power through life' but rather a question of 'technology of emplacement' – *ecotechnics*. This reframing of the problem allows me to close the chapter with the question of world creation as distinct from the manner in which global capitalism is world destroying.

The final step then is to fold these political and ontological insights back into human rights. However, with this folding, the questions change. No longer is it a matter of the radical in human rights, as though there were some sort of substance that could be rediscovered. There is not simply a different set of rights whose object would be properly and exclusively radical. Rather, it is a matter of the constituent potential *in* rights. To demonstrate this, I look at two attempts to put forward different rights. Raoul Vaneigem's version is a failure as it attempts completely to inscribe human being – *graphephilia* is the danger of biopolitics *par excellence*. By the same token, Henri Lefebvre's idea of the right to the city

gets to the heart of the matter. It posits a right of world creation where the right itself does not go untouched by the object it seeks to facilitate. It is a matter of seeing the possible manners in which 'human rights' can be thought that reveal their essential political function of unveiling the possibility of the political. This is found, I suggest, in the awkward neologism 'right-ing'. The subtitle of this book ('without model or warranty'), which is taken from Jean-Luc Nancy, suggests that to rework human rights in a non-metaphysical fashion, it is necessary to begin to question the reliance on 'legitimacy', which suggests a transcendent authority that might give warranty for certain action. Right-ing has no authority, no sovereign power over others. Instead, it starts from the in-between of relation, from the possibility of world creation.

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As I finish this introduction, the snow is falling on a dark and wintry London. The student protests have begun to quieten down after a cacophonous month on the streets and in occupation. Ireland lies in an abject despair after the rapacious incompetence of its political elite and the IMF intervention. Once again, Greece is in flames, with a general strike manifesting the power of labour and the police, with truncheons and gas, manifesting the power of law. It seems to me that now is the moment to rethink the political givens of our time. Perhaps for the first time since the fall of communism in western Europe, we have entered a crisis of worlds. The pacifying and neutering thinking of human rights must give way to a more militant and collective sense. Human rights mean nothing if they do not provide the tools to resist the everyday network power of what Nancy called 'soft totalitarianism'. This book is written in an attempt to clear some ground, to write a space in which human rights may be reimagined. However, it also hazards a number of positions. To be merely analytic about human rights is to miss the great antagonistic spirit that they so often name. This book is an attempt not to found or ground some new orthodoxy, but rather to write of the task of thinking politically about the possibilities of human rights – possibilities that have everywhere withdrawn. I think today, more than ever, the challenge is to think a human rights more at home on riotous streets than between the hallowed walls of supreme courts or in the leather-bound chairs of power.

Challenging human rights histories

> The role of the one who speaks is therefore not the role of the legislator or the philosopher, between camps, the figure of peace and of armistice, in that position of which already Solon had dreamt and also Kant. To establish oneself between adversaries, at the centre and above them, to impose a general law on each and to found an order that reconciles: this is not at all what is at issue. At issue, rather, is the positing of a right marked by dissymmetry, the founding of a truth linked to a relation of force, a weapon-truth and a singular right. The subject that speaks is a warring – I won't even say a polemical – subject.
>
> Foucault, *Society Must Be Defended*

In 1932 the surrealist group penned a declaration entitled 'Murderous Humanitarianism'. In it, they argued with perspicacity that humanitarianism and the embryonic human rights discourse is bound to a western colonial capitalist military machine.[1] When this strain of thought is placed alongside the human rights of the UDHR we find the basic division of the politics of humanism: anti-humanism attacks the mystification of humanism and its *mission civisatrice* and humanism roundly denies the anti-colonial anti-humanism of the radicals with cries of nihilism. These battle lines have long been drawn. What the surrealists demonstrated, along with subsequent postcolonial critiques, is the manner in which human rights becomes a morality of (imperial) power while simultaneously mystifying this function. I want to retrace this division through a critique of the 'church history'[2] usually told about human rights: a narrative that sacrifices any perceived negative aspects of the lineage and tells a purified story. This forms the basis of the surrealist critique of their contemporary humanitarian discourses that shrouded colonial violence in a cloak of morality. I argue that, to begin to see the possibilities of human rights, it is necessary to understand the manner in which these possibilities are withdrawn. Thus, in this chapter and the next, I will look at the manner in which human rights is constructed so as to exclude radical politics. This purification is crucial; however, unlike the surrealists, I want to suggest other possibilities for human rights: neither mystifying moral warranties nor the drowning out of imperial violence, but, rather, the possibility of radical political demands.