



# Examining Critical Perspectives on Human Rights

EDITED BY

Rob Dickinson, Elena Katselli,  
Colin Murray and Ole W. Pedersen

CAMBRIDGE

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## EXAMINING CRITICAL PERSPECTIVES ON HUMAN RIGHTS

*Examining Critical Perspectives on Human Rights* sets out a practical and theoretical overview of the future of human rights within the United Kingdom and beyond at this key juncture in the human rights project. A number of internationally renowned scholars respond to David Kennedy's contribution 'The International Human Rights Movement: Still Part of the Problem?' from a range of different perspectives. With its combination of the theory and practice of international and domestic human rights, this collection is of relevance to all scholars and practitioners with an interest in human rights.

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## ACKNOWLEDGEMENTS

This collection of papers is the outcome of a seminar series titled 'Human Rights in Retreat' which took place in November and December 2009 at Newcastle Law School and a symposium in January 2010 also hosted at Newcastle Law School titled 'Human Rights – Drop of Liberation or Fig Leaf of Legitimation?', both taking place during Colin Murray's tenure as Director of the Newcastle Human Rights Research Group. The symposium was generously supported by a grant from the *Modern Law Review* Seminar Fund, without which it is unlikely that the event would have been such a success. The willing engagement of the attendees and speakers at all of these events helped to make them very fruitful fora for the exchange of ideas. Each section of this collection has been edited by one of the team of editors, with Ole Pedersen assuming responsibility for the introduction, Colin Murray overseeing the 'Domestic Perspectives' section and Elena Katselli and Rob Dickinson handling the 'International Law Perspectives' and 'Theoretical Perspectives' sections respectively.

In addition, the editors wish to acknowledge the helpful assistance received from academic colleagues at Newcastle Law School in running the seminar series and the symposium. In particular the hard work and advice of Richard Mullender is gratefully acknowledged, as well as the assistance of Professors Ian Ward and Rhona Smith (Northumbria University) in taking the time to chair symposium panels. A special 'thank you' is reserved for Samantha Ryan, who in her time at Newcastle Law School played an important role in the Human Rights Research Group and provided much of the initial impetus behind this project. None of the above events would have run smoothly without the dedicated assistance of the administrative staff of Newcastle Law School, particularly Suzanne Johnson and Gemma Hayton who oversaw the project budget and arranged all room bookings.

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*The Editors*

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## PART I

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### Introduction



## Examining critical perspectives on human rights: an introduction

OLE W. PEDERSEN & C. R. G. MURRAY

### From political considerations to grand principles

As Costas Douzinas writes, it is possible to regard the Universal Declaration of Human Rights (UDHR) in 1948 as a turning point at which natural rights attained the dignity of law,<sup>1</sup> 'albeit of a somewhat soft kind'.<sup>2</sup> Over sixty years later, in the words of Francesca Klug, '[i]t is easy to forget that until the UDHR was adopted, virtually *any* criticism – let alone interference – by one government with the treatment of the citizens of another, was considered a breach of the principle of national sovereignty'.<sup>3</sup> But much as hindsight suggests that the general acceptance that '[s]tates now have duties to each other and to their subjects to observe human rights' amounted to an event by which traditional understandings of the relationship between the individual and the state had been 'turned upside down',<sup>4</sup> Douzinas's 'soft law' caveat remains essential.

Firstly, even as the idea of human rights was enshrined by Francis Fukuyama as part of the 'end of history' in the heady days for Western liberal democracies that followed the end of the Cold War,<sup>5</sup> there was a tension between the expansive vision of human rights advanced by the concept's proponents and the reality of the concept at work within the legal systems of liberal democracies. Conor Gearty allows that the concept needed to exude confidence to gain traction amongst policy makers:

Our thanks to Elena Katselli (Newcastle University) and Robert Dickinson (Newcastle University) for their advice and comments upon earlier drafts of this introduction. Any errors remain our own.

<sup>1</sup> GA Res. 217 A (III), UN Doc. A/810 (10 December 1948).

<sup>2</sup> C. Douzinas, *The End of Human Rights* (Oxford: Hart, 2000) p.9.

<sup>3</sup> F. Klug, 'The Universal Declaration of Human Rights: 60 years on' [2009] PL 205, 207.

<sup>4</sup> C. Palley, *The United Kingdom and Human Rights* (London: Sweet & Maxwell, 1991) p.37.

<sup>5</sup> F. Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).

The phrase 'human rights' is a strong one, epistemologically confident, ethically assured, carrying with it a promise to the hearer to cut through the noise of assertion and counter-assertion, of cultural practices and relativist perspectives, and thereby to deliver truth. To work its moral magic, human rights needs to exude this kind of certainty, this old-fashioned clarity.<sup>6</sup>

But, as David Kennedy came to recognise, in ascending to a role amongst the gamut of concerns feeding into governments' policy making, international human rights standards shed much of their transformative potential. From the outset, these standards were approached pragmatically by governments, which seek to gain the legitimacy of being 'rights respecting' whilst maintaining the maximum scope for their freedom of action. The employment of human rights as a 'status quo project of legitimation'<sup>7</sup> by the Government of the United States of America (USA) can be seen as early as the famous case of *Brown v. Board of Education*,<sup>8</sup> in which the US Supreme Court unanimously ruled that the segregation of public schools was unconstitutional. The US Government submitted an *amicus curiae* brief which argued that '[i]t is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed'.<sup>9</sup> In other words, the existence of racial segregation within the southern states could be exploited by America's Cold War rivals in the battle for influence in the developing world. Human rights arguments were explicitly coupled to Cold War foreign policy objectives, creating a heady brew which 'could not fail to impress Cold War patriots sitting on the Court'.<sup>10</sup> Today *Brown* is regarded as one of the stepping stones by which the USA sought to extricate itself from its historical failures to secure the benefits of liberal democracy for citizens regardless of race. But, in light of the failure of the US Government to take action to enforce it for another decade, the decision's primary impact on the Eisenhower Administration was that it provided an opportunity to market the credentials of the US system of government to the world.

<sup>6</sup> C. Gearty, *Can Human Rights Survive?* (Cambridge University Press, 2006) p.19.

<sup>7</sup> See Chapter 2, p.33 below.

<sup>8</sup> *Brown v. Board of Education of Topeka* 347 US 483 (1954).

<sup>9</sup> P. Kurland & G. Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States* (Arlington, VA: University Publications, 1975) vol. 49, p.121.

<sup>10</sup> L. Powe, *The Warren Court and American Politics* (Cambridge, MA: Belknap Press, 2000) p.35.

Nor was the US State Department alone in co-opting human rights to the ideological battle of the Cold War. In May 1948, as tensions built towards the Berlin Blockade, Winston Churchill declared that:

[t]he Movement for European Unity must be a positive force, deriving its strength from our sense of common spiritual values. It is a dynamic expression of democratic faith based upon moral conceptions and inspired by a sense of mission. In the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law.<sup>11</sup>

Despite Churchill's soaring rhetoric it was only in the 1970s that human rights began to gain traction within the policy-making circles of even Western governments. Churchill's 'Charter of Human Rights' for Europe had come into being in the form of the European Convention on Human Rights and Fundamental Freedoms (ECHR),<sup>12</sup> but the novel enforcement mechanism of the European Court of Human Rights had achieved little by the time the United Kingdom (UK) accepted the ability of individuals to petition the Court in January 1966, meaning that 'the Convention was a sleeping beauty (or slumbering beast, depending upon one's viewpoint)'.<sup>13</sup> Wiktor Osiatynski provides convincing reasons why the concept of human rights had largely lain fallow since 1948. Only in the 1970s had Western governments 'finally removed the human rights liabilities [by a process of decolonisation for many European countries and desegregation in the USA] that had made governments somewhat skeptical to the idea of human rights immediately after World War II'.<sup>14</sup> In his contribution to this collection David Kennedy remembers how the concept of human rights seized progressive thought:

Jimmy Carter had made human rights a respectable vernacular for transposing what we remembered of sixties idealism to international affairs. I know my academic colleagues felt we were redeeming the better promise of Carter's diplomacy, turning the Cold War struggle from proxy wars to direct affirmation of democracy and citizens' rights.<sup>15</sup>

Taken in isolation, Kennedy's focus on 'citizens' rights' might be thought to betray some of his discomfort with the direction in which the human

<sup>11</sup> W. Churchill, *Europe Unite: Speeches 1947 and 1948* (London: Cassell, 1950) 310, p.312.

<sup>12</sup> 213 UNTS 222 (3 September 1953).

<sup>13</sup> A. Lester & K. Beattie, 'Human rights and the British constitution', in J. Jowell & D. Oliver (eds), *The Changing Constitution*, 6th edn (Oxford University Press, 2007) 59, pp.63–4.

<sup>14</sup> W. Osiatynski, 'Are human rights universal in an age of terrorism', in R. Wilson (ed.), *Human Rights in the 'War on Terror'* (Cambridge University Press, 2005) 295, pp.297–8.

<sup>15</sup> See Chapter 2, p.21 below.



rights movement was travelling, for the concept of human rights should in theory extend beyond an individual's allegiance to any particular state. However, in the context of his steadfast criticism of the failure of the human rights movement to close the 'protection gap' between international refugee law and national asylum law,<sup>16</sup> Kennedy's use of this phrase highlights his scepticism at the international human rights movement's capacity to secure its goals. This criticism notwithstanding, by the close of the twentieth century human rights appeared to be embedded as 'grand principles' underpinning liberal democracy. Gearty extolled their role as a bulwark against the excesses of capitalism at a time when socialism had failed to maintain its ideological challenge.<sup>17</sup> Human rights became, in Samuel Moyn's arresting description, 'the last utopia'.<sup>18</sup>

### A lost Utopia: the crisis of human rights

A proliferation of academic commentary asserts that the international human rights system is in a state of crisis in the first decade of the twenty-first century. Even at the height of optimism surrounding the potential of human rights,<sup>19</sup> Costas Douzinas argued that they were 'veering away from their initial revolutionary and dissident purposes'<sup>20</sup> and feared 'that the extravagant boasts about the dawn of a new humanitarian age would be accompanied by untold suffering'.<sup>21</sup> In *Human Rights as Politics and Idolatry*, Michael Ignatieff identified both a spiritual and a cultural crisis facing human rights, as proponents struggle with both the 'intercultural validity of human rights norms' and 'the ultimate metaphysical grounding for these norms'.<sup>22</sup>

While a human rights revolution unfolded in the second half of the twentieth century, we now have grounds for thinking that success in advancing this agenda may be giving way to atrophy. In the first decade of the twenty-first century 'the hallmarks of the current era of human rights' became 'the controversial policies of torture, rendition, and of holding

<sup>16</sup> D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, (Princeton University Press, 2004) pp.208–9.

<sup>17</sup> Gearty, *Can Human Rights Survive?*, p.27.

<sup>18</sup> S. Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press, 2010).

<sup>19</sup> See M. Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000).

<sup>20</sup> Douzinas, *The End of Human Rights*, p.380.

<sup>21</sup> C. Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Oxford: Routledge-Cavendish, 2007), p.6.

<sup>22</sup> M. Ignatieff, 'Human Rights as Idolatry', in A. Gutmann (ed.), *Human Rights as Politics and Idolatry* (Princeton University Press, 2003) 53, p.77.