The Cambridge Companion to

Human Rights Law

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Florian Hoffmann

For many, the fall of the Berlin Wall and the end of the Cold War marked the triumph of human rights (discourse) and the inauguration of a new era which, in allusion to a term coined by American legal philosopher Ronald Dworkin, could be described as the 'rights' empire'.[1] This 'empire' denoted, of course, not a reality in which all human beings did, in fact, enjoy the state of being represented by human rights, such as a life in dignity, civil and political liberties, the rule of law and democracy, and a (certain) degree of social welfare. Rather, it signified a discursive hegemony that turned human rights discourse into the common currency of a globalising world.[2] In fact, the impressive expansion of the international human rights regime,[3] and the proliferation of new constitutions with ample bills of rights in Central and Eastern Europe, Sub-Saharan Africa and Latin America have turned 'rights-talk' into the predominant instrument for defining and defending personal and collective identities. This does not, of course, allude to the reality behind rights-talk, which remains at best ambivalent, but to the fact that human rights has come to enjoy a near monopoly on emancipatory and utopian discourse in a post-communist and post-industrialist era.

Who owns human rights (discourse)?

Whoever seeks liberation from any type of real or perceived oppression couches his or her claims in the language of human rights. Whoever aspires to live out his or her particular identity also expresses this desire in human rights terms. Individuals and groups across the globe use human rights to articulate their claim for better lives. As such, they have at once become one of the defining discourses of globalised (post)modernity and an expression

[1] See R. Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press 1986).
[2] C. Douzinas, *The End of Human Rights* (Oxford: Hart 2000) 1 ff.
[3] See L. Henkin, *The Age of Rights* (New York: Columbia University Press 1990).

of its hubris.[4] In their dominant interpretation they represent the ongoing process of emancipation and differentiation by individuals from social norms and governmental power that has become the hallmark of liberal democracy and market-based capitalism. Yet, they have also been at the heart of critiques of a 'Western' modernity that is seen to over-emphasise liberty over responsibility, individuals over nations, markets and competition over community and solidarity.[5] Indeed, even within the mature Western democracies, rights-based claims to different aspects of individual identity increasingly run up against security-based claims to protect the integrity of a collectively defined 'way of life' against its detractors such as 'criminals', 'terrorists' or simply 'others'.[6]

Rights, in short, remain an 'essentially contested concept' over which both its proponents and its critics continue to argue.[7] And this argument is, essentially, one over foundations – that is, over the authority of different narratives on where human rights come from and what they (ought) to mean to whom. However, this open and open-ended debate on the moral and cultural foundations of human rights is cross-cut by a phenomenon that acts as an independent variable on the discourse, namely that of law and legalisation. Starting, arguably, with *Magna Carta*, which was, itself, modelled on the feudal contract, via the constitutionalisations of the late eighteenth century, and up to their incorporation into international law in the second half of the twentieth century, there is a history of legalising (human) rights that runs parallel to the reflection on their moral and cultural foundation, and yet is distinct from it. Both are linked tautologically, for each refers to the other in order to fill a gap it cannot close by itself. Hence, (human rights) law requires moral or cultural foundations it cannot generate itself, whereas foundational (human rights) discourse seeks the facticity which only legal positivation and institutional enforcement can

[4] See, inter alia, the critical essays in M. Gibney (ed.), *Globalizing Rights* (Oxford University Press 2003).

[5] See T. Evans, *Human Rights Fifty Years On* (Manchester University Press 1998).

[6] See C. Gearty, *Can Human Rights Survive?* (Cambridge University Press 2006); R. A. Wilson, *Human Rights in the 'War on Terror'* (Cambridge University Press 2005); see also F. Hoffmann, 'The Dignity of 'Terrorists', in F. Hoffman and F. Mégret (eds.), *Dignity: A Framework for Vulnerable Groups*, Report to the Swiss Initiative to Commemorate the 60th Anniversary of the Universal Declaration of Human Rights (2010) 88.93, www.udhr60.ch/report/HumanDignity_Megret0609.pdf.

[7] W. B. Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167–98.

give it. Indeed, foundational and legal human rights discourse might be interdependent in an even deeper way, as legalisation might well constrain the ways in which foundations can be conceived.[8] Likewise, hard cases in (human rights) law are often only resolved by returning, sometimes under the guise of 'principles' or with reference to the underlying idea of 'human dignity', to moral or cultural narratives.[9] Yet, the operational logics of law and of foundational discourse remain separate and, arguably, ultimately incommensurable. The law cannot 'understand' moral or cultural discourse from within its own logic and vice versa.[10] The difference lies in the foundations of foundation: the foundation of (human rights) law is legality or legal validity, as determined by clearly defined (secondary) rules.[11] The foundation of these, in turn, lies outside of the law and, from its internal perspective, is simply a given.

The foundation of foundational discourse, in turn, is moral legitimacy and cultural significance, the foundations of which lie in the particular narrative through which human rights are reconstructed and which are always contested and contestable by alternative narratives. At the heart of all foundational discourse lies an argument about the potential validity of human rights in different *fora*, whereas legal discourse is premised on a validity that must always already be given. As a result, the question of foundations has always also been a question of ownership. It is a question of who may speak for human rights under what authority. And it has brought forth a long-standing contest between human rights lawyers, foundational thinkers of human rights – moral philosophers, anthropologists, historians, etc. – and simple 'users' of the language, on who is the principal owner of the discourse. By and large, the lawyers can so far be said to have been resoundingly victorious.

On the surface, the reason for this seems almost trivial: positive law enforced by courts simply pits normative power against (possible) truth and insight therein. Once a fundamental right is enshrined in a domestic constitution, once a state becomes party to an international human rights

[8] See S. Meckled-García and B. Çali, 'Lost in Translation: The Human Rights Ideal and International Human Rights Law', in S. Meckled-García and B. Çali, *The Legalization of Human Rights* (New York: Routledge 2006) 11–31.

[9] See F. Hoffman and F. Mégret (eds.), 'Introduction', in F. Hoffmann and F. Mégret (eds.), *Dignity: A Framework for Vulnerable Groups* 1–6.

[10] See N. Luhmann, *Law as a Social System* (Oxford University Press 2004).

[11] See H. L. A. Hart *The Concept of Law*, 2nd edn (Oxford University Press 1994).

treaty, the question of foundations, that is, of moral legitimacy or cultural significance, becomes immaterial. All that counts from a legal perspective is whether a particular norm is (legally) valid and then whether it has been complied with or not. Compliance does not depend on (foundational) consent, but only on the obligation to comply that stems from the deontological structure of law.[12] It, incidentally, also does not depend on 'real' compliance, as non-compliance does not render law any less legal but simply constitutes a violation of the law. Nor do human rights lawyers need to concern themselves with the foundations of adherence, that is, the moral, political or other reasons for why a government or a state has adopted a human rights instrument in the first place. The sole referent for human rights lawyers is the valid norm, whether governments and states like it in any particular case or not. This removes all contestability and all ambivalence from human rights discourse, it radically reduces its complexity, and it renders it institutionally decidable and, thus, enforceable.[13] From this, it derives its particular force that consists of isolating human rights both from time – i.e. history – and space – i.e. cross-cultural significance – that is, from their foundations, in general. Indeed, legalisation suspends the essential contestability of human rights and, by reducing them to specific legal claims enforceable in specific institutions, renders them certain and stable. Like all law, human rights law operates through the binary code of legal/illegal or rather violation/non-violation and it secures its integrity by remaining normatively closed, that is, by not self-reflexively thematising its own validity.[14] All of this has given the legal dialect the upper hand over all other human rights dialects making it into a 'Queen's English' of sorts within the human rights community. In fact, it has become a substitute for (non-legal) foundational discourse and is often evoked as a last-resort, trumping argument in broader foundational debates. Indeed, in advocacy situations, most human rights professionals will take human rights law as their starting point, with the latter's facticity being seen as a sort of magical fiat, a pre-ordained ground which is beyond questioning.[15] To be sure, most

[12] R. Alexy, *A Theory of Constitutional Rights* (J. Rivers, trans.) (Oxford University Press 2009).

[13] A. Fagan, *Human Rights: Confronting Myths and Misunderstandings* (Cheltenham: Edward Elgar 2009).

[14] G. Teubner, *Law as an Autopoietic System* (Oxford: Wiley–Blackwell 1993).

[15] See F. Hoffmann, 'Facing the Abyss: International Law Before the Political', in M. Goldoni and C. McCorkindale (eds.), *Hannah Arendt and the Law* (Oxford: Hart 2012).

human rights professionals are not naïve and purposely elect to 'speak' human rights legally precisely in order to avoid the contestability and institutional weakness of foundational discourse. Yet, in doing so, they claim superior ownership of the law over human rights, promulgating thereby a human rights law beyond foundations.

Foundations in time and space

Before returning to the relation between (human rights) law and (its) foundations, a brief excursion into human rights in their temporal and spatial dimension is called for. If one lifted the heavy lid the law has placed over the historical and cultural contingency of human rights, what would one see? In terms of history, the two extreme poles of the 'origins debate' are formed by, on one hand, those who consider Stoic ideas on human personality and the Aristotelian concept of *dikaion*, justice, as well as the Judaeo-Christian theological heritage as direct precursors of 'human rights[16] and, on the other hand, those who hold that the concept is 'as modern as the internal combustion engine'.[17] In between, there is a host of candidates for the position of 'founder': by far the most popular are Thomas Hobbes and John Locke, followed at some distance by Hugo Grotius and the Spanish neo-scholastics (Suarez, Vitoria *et al.*), who are, in turn, trailed by William of Ockham, and, to a lesser extent, Jean Gerson, as well as the canon law jurists of the so-called eleventh-century 'Renaissance' of Roman Law. Though subsequent 'points' on the human rights timeline, such as the revolutionary period, idealist thought, and the early human rights 'movement' are usually considered important further stepping stones, the great majority of authors situates the origin of the concept of 'rights' in the seventeenth century or earlier.[18]

Generally, three analytically distinct lines of historical development can be distinguished. Firstly, there is the history of the idea of what is now often termed 'moral rights', i.e. the attribution of innate subjective faculties to

[16] See Douzinas, *The End of Human Rights* 23 ff. and, generally, B. Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (Atlanta, GA: Scholars Press 1997).

[17] K. Minogue, 'The History of the Idea of Human Rights', in W. Laqueur and B. Rubin, *The Human Rights Reader* (New York: Temple University Press 1979) 3–17.

[18] See C. Gearty, *Are Human Rights Universal?* (London: Cameron May 2008)1 ff.

human beings *qua* their shared humanity; this history comprises the *ius naturalis* of the Middle Ages, the 'natural rights' of the Renaissance and Reformation period, the 'rights of man' and '*droits de l'homme*' of the English, American and French revolutions, the rights language used in the anti-slavery and women suffrage movements, and up to the Universal Declaration of Human Rights (UDHR) and the Nuremberg principles.[19] Secondly, there is the history of the concept of 'legal rights', i.e. claims vis-à-vis others, the community, or the sovereign which are, at least theoretically, held to be enforceable by appropriate institutions; this spans, arguably, the first precursors in classical Roman law, the medieval feudal 'contract' and other fields such as property and legislation, the notorious early rights documents, namely *Magna Carta* of 1215, the Petition of Rights, the (English) Bill of Rights of 1689, the Virginia Declaration and the American Declaration of Independence, both of 1776, and the US Constitution's Bills of Rights of 1791, and the further 'domestication' of rights in subsequent constitution-making; it is primarily a history about the development of what has come to be termed constitutional, fundamental, or basic rights within nation states, though, to some extent it also includes the history of general international law, which has, of course, attempted to transpose the domestic constitutional structure onto an imaginary international society of states.[20] And thirdly, there is the history of what could be called the 'human rights movement', i.e. the self-conscious reference to human rights within the context of different political struggles, and the gradual (moral) 'legitimation' and 'legalisation' of the claims made in these contexts. This history includes the well-known 'constitutive moments' of human rights that ultimately lead to the UDHR, beginning, *inter alia*, with the anti-slavery movement, the struggle for women's rights and universal adult suffrage, and the fight for labour rights and rights of democratic participation. This would also comprise the history of the gradual 'differentiation' of international human rights law into a distinct sub-field of general international law, through such developments as international humanitarian law, international minimum standards for the treatment of aliens, minorities protection, the emergent notion of genocide and crimes

[19] See, for an introductory overview of the human rights 'movement', in P. Alston, H. J. Steiner and R. Goodman, *International Human Rights in Context*, 3rd edn (Oxford University Press 2007).

[20] M. Ishay, *The History of Human Rights from Ancient Times to the Globalization Era*, 2nd edn (Berkeley, CA: University of California Press 2008).

against humanity, international trusteeship and decolonisation and the anti-apartheid struggle.[21]

A closer look at the terminological histories of each of these lines of development might provide further clues about the conceptual cornerstones of human rights. The term itself is of recent coinage, having been introduced with the UN Charter and the UDHR. Its predecessors were the 'rights of man' and, of course, 'natural rights' – *ius naturale*/*lex naturalis*. The former emerged as *droits de l'homme* in French *physiocrat* and *philosophes* circles, and culminated in the revolutionary *Declaration des Droits de L'Homme et du Citoyen* of 1789; the then generic *hommes* – 'hu-man'[22]- having been chosen as a supposedly non-theist alternative to the older 'natural rights'.[23] The Declaration was very widely received, among others by the English radicals, and, most notably by Thomas Paine and his *Rights of Man*, written in reply to Burke's critique of the revolution.[24] Though in their core meaning, the *droits de l'homme* did not fundamentally differ from 'natural rights' in that both expressed subjective claims based on the universal characteristics of human beings, they nonetheless came to have slightly different connotations; indeed, unlike human rights, which now enjoy near terminological hegemony, the 'rights of man' and 'natural rights' were used in parallel in different *fora*. 'Natural rights' remained the term of choice in moral philosophy, whereas the 'rights of man' came to be associated with constitutionalism and political theory. There is, of course, a subtle difference in each term's approach to universality; whereas both evidently allude to the innate faculties of human beings as such, 'natural rights' have a distinctly metaphysical, if not theistic, undertone to them in which 'nature' connotes the necessary and non-contingent character of rights which are

[21] A. Neier, *The International Human Rights Movement: A History* (Princeton University Press 2012).

[22] It is, of course, a still persistent myth that the inventors and subsequent users of the generic term 'man' – denoting today's human being – were unaware of its male-centredness; although the modern feminist critique should not be smuggled into the late eighteenth century, it is equally mistaken to ascribe some form of serene innocence to authors of that time; 'man' was then, as now, defined in contradistinction to 'woman', with the prototype of the individual being the former, rather than the latter: see J. Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Cambridge, MA: Harvard University Press 1996); see also Douzinas, *The End of Human Rights* 97 ff.

[23] See, for example, Condorcet's statement that natural rights belonged to abstract man, as they were 'defined as a sensitive being . . . capable of reasoning and of having moral ideas', cited in Douzinas, *The End of Human Rights* 97.

[24] T. Paine, *The Rights of Man* (Mineola, NY: Dover 1999).

neither creations of, nor subject, to human will;[25] the 'rights of man', in contrast, while still clearly derived from 'natural rights', nonetheless already point to a belonging to a 'community of men', a form of citizenship of humanity, membership in which is simply the primary attribute of 'men', with any metaphysical cause being of secondary importance.

It is, arguably, this incipient distinction between humans and citizens, clearly articulated in the French Declaration, which also marks the gradual differentiation of moral and legal rights conceptions. The rights of 'men' remain on the level of abstract, universalistic morality, whereas those of citizen are linked to a concrete and particular sovereign that defines itself with reference to its populace and territory, and not by reference to divine grace.[26] Although, within the latter sphere, the effective interlinking of what Jürgen Habermas has called (human) rights and popular sovereignty occurred only very gradually, already the original split between 'man' and citizen represented an irreversible turn towards secularisation and positivation. Yet, the roots of legal rights extent further back: as was seen, the idea of special and, importantly, concrete and 'useable' entitlements goes back at least to the late medieval Italian city states, if not, in a more limited way, to the early medieval charters such as the *Magna Carta*. Both contexts illustrate the features of such concrete legal rights: they were ultimately bestowed by, and existed vis-à-vis, a sovereign community, and they contained certain clearly defined entitlements for the members of the group of rights-holders. It is also clear that in parallel with this development, private rights of commerce and economic production already existed throughout the Middle Ages.[27]

It is from these roots that the continental, and especially German, term 'subjective rights' developed, referring to the legal recognition of an inviolable sphere of individual autonomy upon which relations between individuals are premised. This, originally Kantian, 'private law' perspective of rights seems to coincide with the Anglo-American use of the term 'rights', except that the latter essentially constitutes the law as such, and hence has included relations to public, political authority, whereas the former excludes what forms, in continental civil law systems, public and administrative law. However, while the original Kantian conception of (private) law

[25] Douzinas, *The End of Human Rights* 85 ff.
[26] Douzinas, *The End of Human Rights* 103, 117.
[27] J. Habermas, *Between Facts and Norms* (Cambridge: Polity 1997) 132.

had as its source the moral conception of individual autonomy, once that conception was lost in the process of modernisation and social differentiation, the source of law came to be located not in individual subjectivity, but in the objective, institutionalised legal order. Subjective rights, hence, became derivative of objective law – objective in the sense of empirically, not deontologically, valid – and lost their connection not only to the moral subject, but also to the natural person, as the legal system came to be seen as self-contained in its own legal fictions or its code. This change in the source of validity of subjective rights corresponds, of course, to the move from a concept of law intimately linked with morality, to a positivist one, in which it is autonomous.[28]

The objectification of subjective rights is, however, also referred to in a different context, namely in relation to the materialization of law in the modern welfare state. Here subjective rights come to be increasingly interpreted not as delimiting a sphere of personal autonomy, but as serving general social interests, which condition their nature and scope.[29] That the positivation of rights in the domestic sphere was intimately linked with the emergence of the sovereign, later liberal, and yet later democratic nation state also meant, of course, that legally, human rights had to take the shape of inter-national ones, conceded by nation states with respect to acts suffered by individuals (and later groups) within their national boundaries. The innovation here was not the often alleged expansion of domestic rights regimes to a supranational one, but the extension of (some) citizenship rights to non-citizens and, only very gradually, the creation of international institutions to serve, in the best of cases, as a last appeal chamber for cases that failed in domestic jurisdictions. The international sphere recognised by the law is, in its classical design, derivative of the national and, thus, in stark contrast with the universal aspirations that the moral conceptions of (human) rights continued to have. The UDHR is, of course, a hybrid creature, speaking to a moral universe of humankind, but having been negotiated and enacted by way of international law, granting moral human rights to all persons irrespective of their citizenship and *qua* their being human, while not imposing any international legal obligations on the states who signed it. To an extent, this ambiguity between moral universality and legal internationality has marked human rights ever since, even in those cases in

[28] Habermas, *Between Facts and Norms* 112 ff.
[29] Habermas, *Between Facts and Norms* 113.

which states have consented to positivise them domestically and internationally.[30]

In terms of the spatiality of human rights, universality and relativity are already built into the semantic texture of human rights. Historically, the idea of the universality of rights is probably inseparable from the emergence of the concept of rights as such, though not as a quantitative or geographical attribute, but rather as a qualitative and spatial one. For, as was just seen, the concept of the universality of rights can be linked to the post-feudal, conciliarist and constitutionalist discourse that has accompanied the process of European state formation from the late Middle Ages onwards.[31] Here the *universitas* can be said to refer to that group of people who, by sharing certain essential attributes, constitute a common whole, and who, conversely, 'belong' to that whole. In constitutionalist discourse, which conceptually accompanied the gradual broadening of the personalised feudal relationship into an abstract political community, this sense of universality is expressed in the figure of the citizen: citizenship is, first of all, the 'included-ness' in the political community, and rights are no longer personal claims, but the abstract characteristics of 'the citizen', redeemable vis-à-vis the institutions of political society, i.e. the state.[32] Hence, the network of particularised relationships is transformed into a singular and general one, namely between (individual) citizens and the state. The *universitas* of citizens is qualitative in that it re-conceives individuals in abstraction from their particular social relations with reference to assumed common traits – expressed through the membership rights of citizens – and, conversely, in that it postulates an imaginary whole, the belonging to which entails those traits. It is spatial in that it implies the idea of a limit which divides between those inside and those outside, with those inside being determined by their essential sameness and equality, and those outside being undetermined others, such as, historically, 'strangers', 'women', 'heathens', 'savages', 'barbarians' and the like. Hence, the universe of rights-holders merely refers to a relative space, the contours of which are

[30] See W. Sweet (ed.), *Philosophical Theory and the Universal Declaration of Human Rights* (University of Ottawa Press 2003).

[31] See, *inter alia*, H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press 1983) and K. Pennington, *The Prince and the Law 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley, CA: University of California Press 1993).

[32] J. Coleman, *The Individual in Political Theory and Practice* (Alderley: Clarendon Press 1996).

determined by that which it pretends not to be, and not to an absolute, and thus geographical, space, namely *the* universe as such.[33]

This relative and particular conception of universality has, of course, been partly overshadowed by a parallel root of the concept of rights' universality, notably that implied in the idea of natural rights. Though the concept of natural rights is complex and multi-layered, it is generally based on the core assumption that individuals are endowed with certain essential characteristics that are independent from their socio-cultural context and that are, thus, shared by all; these 'all' are, consequently, elevated to 'human beings', whose very human-ness is expressed through particular rights. These are conceived of as 'natural' since they are not derivative of, and thus dependent on, human will, but are, in this original conception, God-given; 'God' is, of course, here the creator of everything and everybody and, therefore, the source of the unity of humankind and, indeed, 'nature'. *Prima facie*, this would necessarily imply a more quantitative, if not geographical, notion of universality, since 'the universe' is precisely the particular *place* that contains all of creation, and all of creation *belongs* within it. Hence, on the face of it, this seems to be a similar construction to that of the citizenship figure, only vastly expanded to include not only some, but all human beings. Indeed, this notion of absolute universality, in the modern sense of globality, pervades human rights discourse until today: universality of human rights stands for all-inclusiveness, the presumption of some fundamental sameness of all human beings which makes all belong to (i.e. citizens of) an imaginary universal community.

Yet, even the universality of natural rights, like the universality of citizenship rights, only denotes a relative, and not an absolute space, namely one delimited by a particular world view, or paradigm. It is only in the particular metaphysical assumptions of occidental Greco-Judaeo-Christianity that these specific 'human beings' are universal through their God-createdness and some essential common features, i.e, from a particular *internal* perspective. Although different internal perspectives – and their respective universalities – may be partially equivalent if analysed from an external, sociological point of view, they are, in terms of their inner paradigmatic logic, necessarily incommensurable.[34] Hence, the conception of universality

[33] This being, thus, a 'constitutive outside'; for this 'term of art', see E. Laclau, *New Reflections on the Revolution of Our Time* (New York: Verso, 1990) and *Emancipations* (New York: Verso 1996).

[34] See P. Winch, *The Idea of a Social Science and its Relation to Philosophy* (New York: Routledge 2007).

contained in the idea of natural rights is relative to the particular meaning system they refer to. Contrary to common usage, universality is, thus, not an objective and straightforward concept, but is, already on an abstract semantic level, historical and context-specific. Seen from this angle, foundations do not, in fact, provide a foundation, which takes us back to the one foundational non-foundation human rights have, namely law.

Law and its significant others

There are a number of potential fields that come to mind when casually reflecting on where the language of human rights is being used. The most usual suspects would seem to be law, morality, culture, politics, history, sociology, anthropology and religion. Indeed, in most, if not all of the subdisciplines of the social sciences, as well as in a good number of the humanities, the term human rights would seem to be present in some way. Yet, for the present purposes, the most relevant fields will be taken to be the first three, namely law, morality, and culture. The reason for this particular choice is the fact that, when it comes to human rights, many of the other fields can be reduced to one of these three. Hence, references to human rights in religious discourse, for instance, are virtually always in truth either moral or cultural references. Likewise, human rights in political discourse are really references to their legal, moral or, occasionally, cultural nature. Moral discourse will here be taken to encompass references to the rational self-thematisation of political community, i.e. of the relationship of human beings among each other individually and collectively. It denotes, thus, what has occasionally been described as the grand meta-narratives,[35] or the attempt by different groups to rationally reconstruct themselves as political communities, to sketch the world as it ought to be according to some comprehensive, coherent, rational and, thus, (theoretically) universal scheme. Such a moral logic informs virtually all discourses on human rights, attributing to them some purpose or deeper reason for why individuals or groups should have certain types of rights.

The cultural discourse of human rights, in turn, will be taken to refer to those conceptualisations of human rights that have, primarily, cultural

[35] See J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (University of Minnesota Press 1984).

significance. This is, of course, a tautological definition, owing to the enormous breadth and controversality of the concept of culture; the latter is due, not least, to the concept's close association, or, indeed, conflation over time with a number of other highly contested terms, such as, *inter alia*, nation, people, civilisation, race and society. It can, generally, be said to have emerged along two opposite conceptual lines, one emphasising difference and relativity, the other sameness and universality.[36] As regards the cultural paradigm of human rights discourse, a definitional starting point would be to take it to be the customs, traditions, habits and practices of individuals and communities in relation to human rights. It is, essentially, fluid and indeterminate, permanently contested and re-defined. It is, nonetheless, distinct from law and morality, as it denotes what, with some caution, could be termed the life-world component of human rights. Whereas law and morality as they are employed here are, by definition, rational discourses, the cultural dimension of human rights would denote the non-rationalised, background notions of human rights that individuals display in day-to-day situations. Law, in turn, will be taken to be a system of behavioural rules which are conceived of as valid both internally, meaning that they follow the criterion of logical consistency, and externally, meaning that they are concretely enforced either by force, the threat of force or simply by the impact of sedimented expectations. As such, it is largely a performative discourse intimately interlinked with institutions and actors.

This strict distinction between law and morality, is, of course, itself a historical construct or, in sociological terms, the symptom of a particular social development. Max Weber notoriously explained law as the rationalised exercise of political power wherein the assumption of the rationality of law is seen as distinct from assumptions or beliefs concerning tradition or religion.[37] This, in turn, is to be seen as part of his already mentioned thesis that the rise of capitalism in Europe after the Reformation led to a steady rationalisation of social relations which caused European societies to re-define themselves on radically different lines. On this account, legitimacy is defined as purely internal to law that, as a concept, merges with its attributed rationality. The importance of this sociological reconstruction of the legal positivist viewpoint lies in this fact, namely that reason is here no longer interpreted as a moral source of (positive) law, as in natural law

[36] See C. Geertz, *The Interpretation of Cultures* (New York: Basic Books 1977).
[37] See Habermas, *Between Facts and Norms* 541.

theories, but that modern law itself is seen as the manifestation of rationality, i.e. that it is the principal distinguishing mark of modern, as opposed to traditional, societies. In Weber's account of modern positive law, legitimacy is not defined as a justificatory and hence extra-legal, i.e. moral, element of law, but it is seen to consist in the very fact that law and morality are totally differentiated and hence uncontaminated by each other. Legitimacy becomes thus simply a predicate of legality. This strictly formalist view of law as value-free rationality was not only always a productive fiction[38] – i.e. a productive misreading of late-nineteenth-century liberal jurisprudence[39] – but it was also contradicted by the evolution of modern law itself, namely in the form of what Weber called its 'materialisation', i.e. its expansion into social regulation and distributive justice. Materialisation was meant to incorporate value judgements based on political morality into law – Weber called it fearfully a 'moralisation' of law – thereby destroying its presumed formal autonomy.[40] With regard to rights it is at this conceptual turning point that, however, occurred in different historical contexts throughout Europe, that a formal view of negative liberal rights is challenged by a substantive view of positive, pro-active ones.

Human rights law beyond foundations

Human rights are, hence, not so much a singular discourse, but a discursive formation in the Foucauldian sense, characterised by 'dispersion, choice, division, [and] opposition'.[41] Within it, the articulation of discursive elements is always only provisional, they never fully succeed in securing meaning. Indeed, a discursive formation may be constituted by several individual discourses that stand in a competitive relation with one another.[42] This does not merely render discursive foundations fundamentally indeterminate, but also unstable, i.e. marked by a permanent and ultimately chaotic movement of the discourses of which they are constituted. While the structural logic of individual discourses

[38] Habermas, *Between Facts and Norms* 553.

[39] See H. Bloom, *A Map of Misreading* (Oxford University Press 1975).

[40] See M. Weber, *Economy and Society* (Berkeley, CA: University of California Press 1992) 160 ff.

[41] See E. Laclau and C. Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, 2nd edn (London: Verso 2001).

[42] T. Purvis and A. Hunt, 'Discourse, Ideology, Discourse, Ideology, Discourse, Ideology . . .' (1993) 44 *British Journal of Sociology* 473–99.

within a discursive foundation may be understood, each such discourse is incapable, on its own, of establishing a semantic unity; instead, it continuously attempts to fill this lack by referring to discursive elements outside itself, which belong to other, competing discourses within the same formation. This 'out-referencing' does not only destabilise the systemic functioning of each discourse but, by interlinking the constitutive discourses within a formation, it creates a dynamic network of cross-references. Indeed, the discursive formation as such never appears in its totality, but rather consists of the successive instantiations of the different inter-linkages of its constitutive discourses. Human rights can be seen as just such a discursive formation, made up of several distinct discourses, and itself constituted by a host of actors, practices and institutions, which do not necessarily speak the same dialect (of human rights), yet provide the space within which human rights discourse unfolds.

Law, morality and culture are alternatives which cannot be translated into each other, but which are completely equivalent in that they cover the same 'thing', if only from different perspectives. That 'thing', human rights, is like a master signified, lurking behind each constitutive paradigm, and yet being signified only by all three of them together. As such, human rights would seem to be a typical case of over-determination,[43] i.e. a symbolic order that is signified by a multiplicity of different, but equivalent, signifiers or sets of signifiers. Each paradigm's attempt at full signification, at capturing the totality of human rights, is undermined by the overflow of meaning of that which is signified. Here we have an example of, as Laclau and Mouffe put it, 'field of identities which never manage to be fully fixed is the field of overdetermination'.[44] Importantly, the over-determined character of human rights entails that the concept is not, as one might assume, structurally pre-determined by three stable sets of signifiers which simply signify 'their' respective bit – notably law, morality, or culture; rather, it emerges as a result of the multiple and cross-cutting, yet continuously failing signification attempts by each paradigm. Hence, on the one hand, the concept of human rights is the master signified which firmly binds the paradigms together in a current of mutual cross-references, and, thus, makes them constitutive of itself. Yet, on the other hand, that which is constituted is not a positivity, some transcendental signified providing a firm, unequivocal ground for human rights, but the symptom of its lack and, hence, of the impossibility of signification.

[43] Laclau and Mouffe, *Hegemony and Socialist Strategy* 97.
[44] Laclau and Mouffe, *Hegemony and Socialist Strategy* 111.

Human rights are, thus, not any fixed entity, but emerge as the effects of the continuously failing attempt of signification by each of its different discourses. The concept, therefore, necessarily encompasses all, yet is fully determined by none of them. Law, morality and culture can, hence, be seen as being locked into a chain of mutual allusions that never achieves semantic closure. Human rights are, hence, no static concept, no jigsaw puzzle with neatly fitting pieces, but a dynamic and highly adaptive process. Its elements are not the layers of a scholastic pyramid in which moral foundation form the base, over which comes acculturation and habit and then, at the top, hard legal norms. Rather, each discourse contributes a certain functionality to the process; law provides facticity, moral discourse normativity and culture habit. Out of their continuous recombination grows the infinite diversity of attitudes towards and uses of human rights. Foundational questions are, hence, not beneath or beyond the law, but always engage with it in quite unforeseeable ways.

Further reading

Dembour, M.-B., *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press 2006)

Douzinas, C., *The End of Human Rights* (Oxford: Hart 2000)

Evans, T., *Human Rights Fifty Years On* (Manchester University Press 1998)

Gearty, C., *Are Human Rights Universal?* (London: Cameron May 2008)

Goldoni, M. and McCorkindale, C., *Hannah Arendt and the Law* (Oxford: Hart 2012)

Henkin, L., *The Age of Rights* (New York: Columbia University Press 1990)

Hoffmann, F., 'Shooting in the Dark: Reflections towards a Pragmatic Theory of Human Rights (Activism)' (2006) 41 (3) *Texas International Law Journal* 403–14

'Human Rights, the Self, and the Other: Reflections on a Pragmatic Theory of Human Rights', in A. Orford (ed.), *International Law and Its Others* (Cambridge University Press 2006)

Ishay, M., *The History of Human Rights: From Ancient Times to the Globalization Era*, 2nd edn (Berkeley, CA: University of California Press 2008)

Meckled-García, S. and Çali, B., *The Legalization of Human Rights* (New York: Routledge 2006)

Pennington, K., *The Prince and the Law 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley, CA: University of California Press 1993)

Rorty, R., 'Human Rights, Rationality and Sentimentality', in S. Shute and S. Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures 1993, 1994* (Oxford University Press 1994)