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WHAT'S

WRONG

WITH

RIGHTS?

SOCIAL MOVEMENTS, LAW
AND LIBERAL IMAGINATIONS

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Social Movements, Law and Liberal Imaginations

*During most of human history, historical change has not been visible to the people who were involved in it, or even to those enacting it. Ancient Egypt and Mesopotamia, for example, endured for some four hundred generations with but slight changes in their basic structure ... But now the tempo of change is so rapid, and the means of observation so accessible, that the interplay of event and decision seems often to be quite historically visible, if we will only look carefully and from an adequate vantage point. (Charles Wright Mills, *The Power Elite*, 1956, pp. 20–1)¹*

This book is about rights, not ‘human’ rights. Throughout this book ‘human’ in human rights is used in inverted commas, so as not to reduce rights, a broader concept, to ‘human’ rights, and also to remind the reader not to lapse into reading rights as ‘human’ rights from sheer force of habit. The book is about what is entailed in reducing rights to ‘human’ rights.

SOCIAL MOVEMENTS AND RIGHTS

At least since the 1990s the motto of most contemporary social movements appears to be ‘every wrong must have a corresponding “human” right’. Even a cursory survey of contemporary social movements is enough to see that the clamour for more ‘human’ rights continues to expand. The

expansion of rights continues notwithstanding the contradictory, even antithetical, right claims. The ‘human’ right to water comes hand in hand with new proprietary rights to water, the ‘human’ right to food with property rights to land titles, rights of homosexuals to marry with rights to religious beliefs opposed to it, the right to wear a hijab *and* the right to set up nudist colonies, rights of indigenous peoples *and* to private property, right to self-determination *and* security, rights to privacy *and* transparency, right to statehood *and* integrity of existing state boundaries, cultural *and* political rights, rights of migrants *and* ‘sons of the soil’, rights to health, the internet, even the ‘human’ right to happiness. After the United Nations (UN) was established at the end of the world wars in 1945, the Universal Declaration of Human Rights (UDHR) enumerated twenty-eight rights. Today, it is estimated that international law recognises more than three hundred rights.² Typically, an excellent diagnosis of a problem is followed with a proclamation of a new right and mobilisation for struggles that demand legalisation of that right. Eventually, notwithstanding the scepticism of many about the efficacy of rights, right claims seek out law courts. In the seventeenth and eighteenth centuries right claims inspired millions of disempowered men and women in Europe to rebel against the oppressive European feudal order under which they lived at that time. Today the demands for evermore rights and the reasons why diverse actors advance them are less straightforward.

Consider the recent demand by New Social Movements (NSM), by which I mean social movements that emerged in the Euro-American countries in the mid 1960s and in the Third World two and half decades later in the early 1990s, on one of the most important questions for people around the world today: land. The International Land Coalition (ILC) formed in 1995 is a global alliance of just about every type of organisation: G7 and Third World states, International Economic Organisations (IEO) and International Organisations (IO), bilateral and multilateral aid and development organisations, International Non-Governmental Organisations (INGO), national Non-Governmental Organisations (NGO), grass root social movements, and global, regional and international land alliances like the Via Campesina.³ The ILC argues, correctly, that the roots of rural

poverty in the Third World lie in land alienations and displacement. The solution to the problem is the demand for ‘human’ rights to land titles, fair compensation for land acquisitions and resettlement and rehabilitation of displaced people.⁴ The ILC fuses diverse voices, interests and standpoints and brings about a convergence in the positions of actors as varied as the World Bank and Via Campesina, Group of 7 (G7) and Group of 77 (G77) states, and INGOs and anti-imperialist social movements. The glue that holds the convergence together is their common commitment to the language of rights. Rights are no longer adversarial as they were in the seventeenth and eighteenth centuries. Far from challenging existing orders or authorities and inspiring historical transformations in the dominant architecture of global power, the world’s most powerful economic, political and military alliances – the IEOs, the IOs, the G7 states, the corporations, influential ‘think tanks’ and INGOs, even the North Atlantic Treaty Organization (NATO) – champion rights alongside the disempowered, the working people, the unemployed and the discriminated. From coalitions such as the ILC at least it would seem as though we live in a world where lions and lambs have at long last recognised their common claims to water, forests and land and tigers have become vegetarians. What kind of micro and macro processes produced this convergence? Answers to these questions must await the chapters in Part II of this book. What is important here is to grasp what is entailed in the claims for ‘human’ rights to land and the reality of our relationships to land.

Land is, quintessentially, a *relationship*. Land is not a ‘thing’. It is a bond that ties people to nature and to each other. Land is the glue that holds people and nature together to form *places*. Historically, rights transformed places into property.⁵ It transformed a *relationship* into a *thing*, a commodity. The transformation characterises capitalism as a distinct type of social system. The European Enlightenment transformed land as the ordering mechanism in feudal Europe to commodity production as the ordering mechanism in modern Europe. The breakup of feudal land relations and the transformation of land into a commodity exchangeable in the market place was an essential condition for capitalism to advance in systemic ways.⁶ The modern concept of rights owes its birth to that moment

when land was transformed into a commodity and hundreds of thousands of people were evicted from the places they called their ‘homeland’. New theoretical concepts and legal mechanisms were needed to reconstitute society where both nature and labour could become saleable commodities. The concept of individual rights was pivotal to reconstituting society ordered on land relations to a society ordered on commodity exchanges. The idea of individual alienable rights to land provided the theoretical, political and legal underpinnings for the transformation.

The idea of land rights helped found new social institutions for land transactions including modifications to contract laws, land surveying, state departments like the land registry entrusted with overseeing land transactions, new land laws and land transactions as a source of revenue for the state in the form of stamp duties, inheritance taxes and such. Land rights enabled new right claims by states such as the legal principle of eminent domain. Property rights to land came with its ‘human’ component – the right to fair procedures for land acquisitions, fair compensation and fair dispute resolution mechanisms.⁷ Thus, property rights to land were the first among rights to be instituted in transformations from feudalism to capitalism. Property by its very nature is the very *opposite* of glue that binds nature and people. Being necessarily alienable and transferable, it *unbinds* people from land and nature more generally. Right claims conceal what is entailed in our relationship to land and nature. Indeed, right claims facilitate the transformation of places into properties and homeland into home-market. Yet, even the more radical movements on land such as indigenous peoples’ movements that are opposed to the very notion of land, forests and water as property frequently end up supporting the idea of ‘human’ rights to land.

Speaking for the radical Mapuche movement in Chile, a spokesperson for the Council of All Lands (Consejo de Todas las Tierras), Aucán Huilcamán, relied on the UN Declaration on the Rights of Indigenous People as the legal justification for the creation of an autonomous, self-governed Mapuche region.⁸ Why do indigenous peoples whose land claims arise from being synonymous with Time’s claim to places find the need to invoke an international statute enacted in remote places like the UN

headquarters in Geneva as recently as 2005 to make their claims sound ‘reasonable’? Social movements sometimes argue that right claims are nothing more than conceptual vehicles that validate ethical and moral claims. The need for legal justifications to validate their land claims invite us to consider why ethical claims are articulated as legal claims in the first place. Further, are right claims strictly ethical claims with no ramifications for law and politics? Right claims as ethical justifications do not lead us to questions why the UN Declaration on Rights of Indigenous People was adopted, who the actors driving the adoption were, and the timing of it coming as it did in the wake of sweeping neoliberal reforms of international order.

In a similar vein, the declaration of the Keepers of the Water movement, an alliance of the indigenous Dene peoples in northern Canadian provinces, begins with the statement:

Water is a sacred gift, an essential element that sustains and connects all life. It is not a commodity to be bought or sold. All people share an obligation to cooperate to ensure that water in all of its forms is protected and conserved with regard to the needs of all living things today and for future generations tomorrow.

In the next paragraph the declaration continues with the statement:

All peoples in the Basin have a fundamental human right to water that must be recognized nationally and internationally, and incorporated into domestic law and policy. Progress towards the realization of the right to water must be monitored, and appropriate institutional mechanisms developed to ensure that these rights are implemented.⁹

The same can be said about campaigns for incorporating forests, seas, and everything else that is brought under a regime of ‘human’ rights. Right claims as ethical and moral claims divert attention from the context, the actors and the mechanisms at work in the rights resurgence underway manifestly since the 1980s. The powerful indigenous critique of individual

property rights in nature ends up reifying the dualism of property and ‘human’ rights on which liberal rights are founded.

The voices that converge in the rights discourse, as in the ILC example above, are far from harmonious. Indeed, the rights discourse today is a cacophony of discordant voices. Each actor in coalitions to promote this or that right, such as the ILC, has a different understanding of rights, of its history, its philosophical presuppositions, and above all expectations. Each actor canvassing for this or that right is located within a distinct type of institutional setting and carries a particular ideological orientation to rights. Arguments about rights in international coalitions and campaigns take the form of ‘my version of rights is better than yours ...’ . This argument is analogous to the argument ‘my god is better than yours’, an argument that ultimately relies on faith, a belief that cannot lead a rational engagement about god, yours and mine. As Brewster Kneen observes,

Whether it be in reference to human rights or property rights, the right to life or abortion rights, farmers’ rights, right to water or intellectual property rights, the word itself seems to have become a sort of essential – if powerless – invocation.¹⁰

At the same time, there is growing disenchantment with rights among critical scholars and social movements alike.¹¹ The disenchantment with rights is not new. It goes back at least to the nineteenth century. By the nineteenth century, as European feudalism became history and rights revealed new realities, the euphoria about rights died down. With rights came new class polarisations, new forms of poverty, displacement, dispossession, large bureaucracies, states, armies and wars.¹² In the United States (US), ideas from the European Enlightenment inspired the expansion, construction and consolidation of the American state on the backs of the lands and resources of indigenous peoples and the labour of African slaves. Rights to trade freely, far from abolishing slavery, *revived* and *modernised* the ancient institution of slavery.¹³ In Europe, expropriation of indigenous lands and slave labour were located in far-flung colonies removed from the sights of ordinary people on the streets of European cities. In the US,

liberalism did not have to struggle against an existing feudal order. Instead in the US liberal capitalism came hand in hand with colonial expropriation and slave labour located in the *same sites*, where slavery and expulsion from land occurred in full view of all the actors as part of the same processes of nation building and liberal constitutionalism. The mythology of rights should have broken down first and foremost in the US. Instead the US became the bastion for rights where the ideology of rights remains strongest even as it wages wars, displaces people and drives them to destitution around the world.

The mythology of rights *did* break down in those parts of the world where capitalism *also* broke down towards the turn of the twentieth century. Since the Paris Commune at least, rights were challenged both in theory and practice by the socialist movements in Europe, movements of indigenous and black Americans and anti-colonial movements. These challenges to rights occurred against the backdrop of crises of capitalism. At least since the 1960s Euro-American capitalism has undergone a series of crises that shows no signs of abating. While radical scholars and social movements have become more sceptical about rights, their critique comes hand in hand with a critique of the Old Social Movements (OSM) of the early twentieth century. Disenchanted with socialism *and* liberalism and unable to embrace the critique of imperialism wholeheartedly in its totality, rights scepticism flounders and gropes for theoretical moorings.

The irony is that the environmental crises everywhere, the ever deepening poverty and destitution in Third World societies and the general crises of human alienation, call it aesthetic, emotional, whatever that we see everywhere impels us to ask the very questions that dominated discourse in the seventeenth and eighteenth centuries. What is a human being's relation to land and nature, to law and state, to one another? Can land and nature be commodities like shoes or clothes? Can people live without ties to places? Are relations between people formed on the basis of economic self-interest alone? Can a person's inner life flourish when their material 'real' life is driven by economic self-interest? These questions dominate contemporary consciousness, debates and concerns within social movements, academia and popular media. Such questions invite us to challenge European

Enlightenment's answers to the questions. Instead, most social movements turn to right claims in evermore qualified and conceptually nuanced forms. Why is it that social movements and critical scholars are unable to 'let go' of their invocation to rights even when they recognise that those rights have always been an essential precondition for capitalism and colonialism, for displacement and dispossession throughout capitalism's history? This book addresses these questions.

WHY DO 'THEY' WANT RIGHTS?

The answers to our problems are directed by how we frame our questions. Or, in Marx's words '[t]o formulate a question is already to solve it'.¹⁴ The question about rights is usually framed as: 'what do *we want* rights to do in *our* world?' Consequently, the answers lead to aspirational statements that are disconnected from a comprehensive understanding of the way the world works and the complicity of right claims in it – the various actors, mechanisms and processes that drive the trajectory of rights. In the domain of ideas, rights remain secure and insulated from the reality of dramatic, disconcerting and violent changes in the world around us. The question for social movements and critical scholars wanting to change the world we live in is to ask, what do rights actually *do* in this world? Who are the actors promoting it and why? What mechanisms do the proponents of rights adopt and what does that mean for those that aspire for a just and humane world? In other words, to rephrase the question as 'why do *they* want rights?' instead of 'what do *we want* from rights?' The question for social movements and critical scholars, at least, is, 'can more rights help us walk the road of human emancipation?' By reformulating questions about rights as 'why do *they*: the US and G7 states, the IEOs and IOs, the INGOs and NGOs want rights', this book addresses what *they* want from rights and what *we* hope to get from rights.

Two aspects of right claims in the post-World War II (WWII) order become clear when questions about rights are reframed contextually. The first is the internationalisation and universalisation of rights and the second is the de-politicisation, juridification and legalisation of rights.

Juridification and legalisation invariably presuppose institutionalisation. Institutionalisation, legalisation, de-politicisation and internationalisations more generally are key components of post-WWII liberalism whether of the Keynesian or the neoliberal type. The chapters in this book address these key components of post-WWII liberalism.

LAW AND THE PURSUIT OF HAPPINESS

Something more has happened to the idea of rights in the post-WWII years than simple proliferation. Consider the pronouncement in the American Declaration of Independence made in 1776 by the thirteen states that declared independence from Britain. The American Declaration upholds ‘the pursuit of happiness’ as an ‘inalienable right’, one of three ‘self-evident’ truths together with rights to life and liberty.¹⁵ For the signatories of the American Declaration in the eighteenth century ‘pursuit of happiness’ was a statement about their aspirations for greater freedom in the new nation that they were in the process of establishing. They drew their inspiration from their European homelands, ancient European philosophers and the more recent European Enlightenment thinkers.¹⁶ In the nineteenth century the ‘right to happiness’, in the US at least, took a juridical turn as courts were called upon to interpret and apply the right in cases of breach of personal freedoms such as challenges to prohibition laws, dress codes and such.¹⁷ In the twenty-first century, in contrast, the ‘pursuit of happiness’ as an ‘inalienable right of Man’ has surreptitiously metamorphosed into a “human” right to happiness’. From an aspirational statement inspired by certain philosophical precepts in European intellectual history in the seventeenth and eighteenth centuries, to a justiciable utilitarian principle of personal liberty in the nineteenth century, the ‘right to happiness’ today is a statistically measurable goal designed to guide *international* policy makers.

On 19 July 2011 the United Nations General Assembly (UNGA) adopted a resolution titled ‘Happiness: towards a holistic approach to development’.¹⁸ The resolution called on member states, UN agencies and International Organisations to ‘develop new indicators, and other initiatives, ... as a contribution to the United Nations development agenda’.¹⁹ Even as

the target date for achieving the Millennium Development Goals (MDG) drew to a close in 2015, with questionable outcomes one must add, the development of the 'human' right to happiness was well underway. MDG set 2015 as the deadline to end extreme poverty, environmental distress, provide universal education, gender empowerment, end child mortality, promote basic maternal health, and combat diseases like HIV and malaria. The failure of those targets notwithstanding, the UN has initiated measures to advance the 'human' right to happiness in the Sustainable Development Goals 2030 (SDG) that takes the place of MDG 2015.²⁰

The following year, on 28 June 2012, the UNGA adopted another resolution declaring 20 March as the International Day of Happiness.²¹ Consequently, happiness was on the agendas of every IO, IEO, UN agencies, regional organisations and states with reporting requirements and action points. Since 2012 the UN has published the *World Happiness Report* each year.²² The report is produced by a consortium of think tank centres located in leading Anglo-American universities and led by influential academics with close nexus to nodes of power internationally and within states. Academics leading the research include John F. Helliwell, based in the Canadian Institute for Advanced Research at the University of British Columbia, Lord Richard Layard, a Labour peer in the UK and Director of the Well-Being Programme in the Centre for Economic Performance at the influential London School of Economics, and Jeffrey D. Sachs, director of Columbia University's Earth Institute, a special advisor to the UN Secretary General Ban Ki Moon on development, advisor to Eastern European and Latin American states in 'transition' to democracy and named by *Time Magazine* as one of the hundred most influential men in 2004.²³

The *World Happiness Report* develops a 'scientific' methodology for measuring happiness and involves an array of pollsters, statisticians, sociologists, social psychologists, development studies scholars and practitioners and policy 'wonks' who produce a happiness index for the use of policy makers.²⁴ The OECD has published *Guidelines on Measuring Subjective Well-being for National Statistical Offices* for the use of bureaucrats in member states.²⁵ On 14 April 2010 Antonio Tajani, the then

Vice President of the European Commission with responsibility for industry and entrepreneurship, in his opening address to the European Tourism Stakeholders' Conference in Madrid, told the delegates,

The Lisbon Treaty has for the first time given the European Union specific powers to act in a sector as important for the economy and for individuals as tourism. ... Today, taking holidays is *a right*. As the person responsible for Europe's policies in this economic sector, it is my firm belief that the way in which we spend our holidays is an excellent indicator of our quality of life. ... Our unrivalled tourism resources must become fully accessible to those for whom travelling is difficult: the elderly and persons with reduced mobility. ... Concerning accessibility, similar attention must be paid to young persons and families at a disadvantage who – for various reasons – also face difficulties in exercising their *full right to tourism*. ... As Commissioner for Transport I successfully defended passengers' rights. The next step is *to safeguard their right to be tourists*.²⁶ (Italics added)

Mr Tajani's inspiration came from the medieval European philosopher, St Augustine.

Allow me to close by quoting a towering figure in western thought: St Augustine, in his capacity as a great philosopher. Referring to the topic of 'travel', which is foremost in the minds of all present in this room, he said: '*The world is a book, and those who do not travel read only a page.*'²⁷

Mr Tajani of course did not add that for St Augustine travel was a means to knowledge not pleasure. St Augustine could not have envisioned taxpayer-funded holidays for the elderly and disabled as a 'human' right to happiness to revive the sagging fortunes of Europe's tourism industry. More importantly for the discussion here, the 'human' right to happiness far from being idealistic rhetoric is a calculated strategy for expanding the tourism and related industries by relying on legal treaties and health and welfare legislation in European Union (EU) member states. The tourism industry

was naturally delighted by the ‘human’ right to happiness. It is equally true, however, that for many Europeans, Tajani’s argument will appear fair. If the rich can take holidays, Europe’s less privileged should also have the right to holidays.

While the EU Commissioner advocated the ‘human’ right to tourism for poor Europeans, the poor in the poor countries campaigned for rights to food sovereignty in the face of mounting pressures by the WTO to end food subsidies for the poor and to open up agriculture to global agribusiness. If the right to minimum living standards was the goal in the MDG, the failure of the MDG to meet those goals leads to the new ‘human’ right to happiness that will feed into its successor: SDG 2030. The ‘human’ right to happiness delinks the economic situation of a person from a subjective feeling about their lives. If a poor person *perceives* herself to be happy why fuss about growing income inequality, exacerbating income gaps, cutbacks to education, health and pensions? Conversely, if rich people are also unhappy, then the causes of happiness can be attributed elsewhere to non-material causes and the vulgar, even sickening disparities in the human condition around the world need not weigh on our conscience as much.²⁸

The World Happiness indices, the ‘scientific’ data and country profiles on happiness of citizens, feed into social policies of states, IEOs and IOs. In the process the meaning of rights and of happiness, *both*, undergo profound transformations. Happiness, which for centuries meant a state of being in which there was minimal dissonance between a person’s inner world (emotional, psychological, spiritual, whatever) and outer world (social, communal, institutional and such), is now an aggregated set of statistics that guides social policy making by states, international organisations and corporations. The greatest happiness of greatest numbers, as Jeremy Bentham famously wrote, articulated the individualistic aspirations of European Enlightenment thinkers for an expanding capitalist state. In the twenty-first century, the utilitarian pursuit of happiness as a state building project and constitutional principle is transformed into an affirmative action policy for the world’s most powerful organisations and states for intensified liberalisation and globalisation.

Like MDG projects, it can be expected that SDG projects will be contracted out to a plethora of private enterprises, NGOs, academics and experts. The signs are already there. Corporations regularly include ‘wellbeing’ programmes and ‘work-life-balance’ training for their staff as part of employment and collective bargaining policies. ‘Life coaching’ is now an expanding industry replete with professional coaches, training institutes and certification requirements. A 2012 study by the International Coaching Federation found that there were around 47,000 professional life coaches working globally and the industry’s annual revenue was around US\$ 2 billion.²⁹ An international ‘right to happiness’ could well expand the coaching industry.

At the ideological level, however, the powerful proponents of ‘human’ right to happiness seldom justify the right to happiness in terms of economic benefits to themselves. Instead they claim to being responsive to the critique of liberalism and Enlightenment Thought, and the dehumanisation under capitalism more generally, developed by indigenous, feminist, environmental and other social justice movements. Their responsiveness in turn creates a *general* environment for the acceptance of the ‘human’ right to happiness. The activities of powerful economic actors are mediated, as we have seen above, by academic institutions and think tanks that induct, indeed entice, networks of indigenous people, feminist, environmental and social justice activists desirous of defending ecologically sustainable communitarian ways of life into engaging with the quest for alternatives in particular ways. In other words, it opens up avenues for powerful corporations to appropriate and truncate alternate world views and ‘mainstream’ them within an international neoliberal economic order. The justifications for ‘human’ rights by the powerful economic actors and the oppositional movements elide in new ways. The emphasis on norms by both types of actors obscures the capacities of the actors to institutionalise and operationalise rights. Social movements frequently complain that rights are not enforced. The truth is rights *are* enforced, just not in the way that social movements think they ought to be.

In 2009 the World Economic Forum (WEF) set up the Global Business Initiative on Human Rights. The initiative consolidated the predecessor

initiative launched by seven major corporations in 2003 called the Business Leaders Initiative on Human Rights and chaired by former President of Ireland and former UN High Commissioner for Human Rights, Mary Robinson.³⁰ The 2003 initiative decided to ‘mainstream’ human rights in business.³¹ These initiatives claimed to respond to social movement protests against corporate abuse and the criticism that neoliberal reforms had given corporations a free reign around the world. Nevertheless, their initiatives set the context for the ‘human’ right to happiness enabling corporations to redefine ‘human’ rights in particular ways that enable service sector industries like tourism and human ‘resource’ development to expand.

The ‘human’ right to happiness is often dismissed as ‘mumbo jumbo’ by social movements and critical scholars. The right appears nonsensical or utopian only if we leave out of consideration the economic actors, the legal persons and *their* reasons for canvassing the right. Framing happiness as a ‘human’ right is the key to the transformation of an ontological human attribute into a commodity for sale in ‘sustainable’ development projects. The right to happiness conceals the fact that happiness is an ontological attribute of being human. Ontologically, as an attribute of human life, even in the most destitute and inhumane conditions human beings will seek joy, solidarity and form human bonds within the limitations imposed by their material and social conditions. As the film *Salaam Bombay* shows, street children in Mumbai are also happy, form communities and human bonds.³² The ontological attribute of life that impels human beings to seek joy, solidarity and form human bonds, i.e. the sociality of human life, is now appropriated by an epistemology reliant on numbers and quantitative reasoning to be incorporated into profitable development projects in which states, corporations and international organisations can invest and harvest returns.

The quantification processes and ‘scientific’ methods render the theoretical, political, legal and social moves through which happiness becomes a ‘human’ right invisible. Once tabled on the agenda of rights, the debate takes on the dualistic form of happiness is/is not a ‘human’ right. Framed in this way the debate prevents the rights agenda from transcending the dualist framing to get to questions about the nature of happiness and the

economic, social and cultural preconditions for it. Instead happiness translates into a set of entitlements and expectations from corporations and states that must be recognised by law. Yet who can argue with the proposition that every human being, rich or poor, has a right to be happy? Who can argue with that proposition even when half the world's population goes to bed hungry?

From the above discussion it is possible to see how an examination of a new right, an apparently nonsensical one at that, reveals the economic, political, legal, institutional, ideological and cultural issues entailed in rights. Thus, whether it is a tangible commodity like land or an intangible commodity like happiness, rights are deeply complicit in constructing market relationships for both types of commodities. Social movements, however, do not consider the two types of rights as constitutive of the totality of a regime of rights. Instead, 'human' rights to land are considered 'serious' matters whereas the 'human' rights to happiness remains a side-show in the analysis of rights.

RIGHTS WITHOUT REMEDIES?

A frequent refrain among social activists and activist scholars is that the problem is not with rights per se but that they are not enforced. Rights are not enforced according to activists and critical scholars because of lack of political will. Framing the problem of rights in this way assumes that law-makers find the political will to make the law but lose it thereafter. Why are rights legislated but not enforced? In his *Commentaries on the Laws of England* William Blackstone, the renowned eighteenth-century English jurist, judge and Tory politician, enunciated the legal maxim: 'that every right when with-held must have a remedy, and every injury its proper redress'.³³ Blackstone's commentaries in England were invoked by his contemporaries in the US Supreme Court against the officers of the US state in the historic *Mardbury v. Madison* decision in 1803. The essence of the decision turns on whether there can be rights without remedies. The decision affirmed the Common Law principle that every wrong must have a

remedy. Justice Marshall who delivered the unanimous decision on behalf of the US Supreme Court reasoned,

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.³⁴

Relying on Blackstone's commentary, Justice Marshall observed that the US government was a government of law not men, and 'it will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested right'. The ideas and ideals in *Mardbury v. Madison* lives on in popular legal imaginations. The problem with these ideals is that they presuppose a certain type of state founded on clear boundaries between public and private law, between state, economy and civil society, a state founded on clear boundaries between the executive, legislature and judiciary. These presuppositions have become highly problematic since the beginning of the twentieth century, as we shall see.

In classical liberal thought political freedoms were the key to unlock economic freedoms. Political freedoms were necessary to challenge feudal constraints on property and democracy was a necessary condition for economic freedoms and to defend market interests. In the post-WWII era of transnational monopoly finance capitalism the relationship between politics and economy is reversed (see Chapters 6 and 7). Economic freedoms and economic institutions are seen as the necessary conditions for political freedoms and democracy. Milton Friedman, a leading neoliberal thinker, makes this point explicitly, reversing the position of Bentham and other radicals who conceptualised political freedoms as the condition for economic freedom in the eighteenth century.³⁵ Friedman turns classical liberalism on its head. Should social movements not question the ramifications of these inversions of classical liberalism for rights which are so central to defining the relationships between economy, state and civil society? As Philip Mirowski writes, neoliberals seek to transcend the contradiction between lack of democratic control and the persistent need to provide a source of popular legitimacy by '*treating politics as if it were a*

market and promoting an economic theory of democracy' (italics in original).³⁶ Should social movements not revisit the role of rights within an *economic theory of democracy*?

Locked in seventeenth and eighteenth-century imaginaries, social movements and critical scholars continue to assume that having rights will provide legal remedies and bring justice. International law for a start is law without judicial remedies. International judicial forums like the International Court of Justice or the International Criminal Court require the states to consent to their jurisdiction. The requirement of consent gives the mechanisms for resolving conflicts between states a quasi-arbitral character. The distinction between arbitration by consenting parties and public justice is an important one in classical liberalism. Nevertheless, international law operates as the international standard that overlays domestic law with particular understandings of rights that must be legalised and judicialised in certain ways within national jurisdictions (as the chapters in Part II show).

The post-WWII era has seen a vast expansion of quasi-judicial forums like ombudsman, tribunals, independent regulatory bodies set up to 'self-regulate' an industry or sector and administrative authorities making decisions without appeal. These mechanisms provide ad hoc justice in that they do not develop the law or add new meanings to rights and remedies. Public justice following judicial procedures is limited to certain types of cases, generally, related to property or crime. If justiciability of rights is problematic, might it not be that the problem is as much with rights as with justiciability?

In the international domain, economic matters take the legal form of contracts between states or between states and IOs and IEOs. In such international contracts 'the will of the state' is read as the 'will of the people'. The distinction between citizens and state is the bedrock of classical liberalism. Nevertheless, international contracts bind the states even after the people of the state have changed their 'will' through representative politics. Alvarez writes that there are 'nearly three hundred IOs – regional and global' and 'forty institutional dispute settlers' that address 'virtually every field of human endeavour ... modelled on ...

Western models of governance and free markets, and functionalist needs as the drivers of international cooperation'.³⁷

These legal remedies are very different from the promise of public justice that rights made in classical liberalism. Alvarez observes how Woodrow Wilson's statements sound prescient in today's context.

President Wilson's address [to the League of Nations] was particularly prescient given current concerns over the 'democratic deficits' of IOs [International Organisations]. ... He [President Wilson] noted that since it is 'impossible to conceive a method or an assembly so large and various as to be really representative of the great body of the peoples of the world,' the best alternative was to have each government be represented by two or three representatives, though only a single vote, so that a number of voices would speak from time to time for each government.³⁸

Internationalisation of rights appears to have changed the fundamental concept of rights and democracy. The absence of real representation of people in international bodies or delegating/subcontracting the details of substantive law and law enforcement to unelected bureaucrats, experts, think tanks and 'reputed' scholars has become acceptable practice even to social movements campaigning for public accountability. These changes in practices of governance and their ramifications for rights and justice are underplayed in rights-talk amongst critical scholars and activists. Why are rights legislated but not enforced? Perhaps it is because increasingly rights are normative standards to guide administrative actions and less and less the basis for justice.

SOCIAL MOVEMENTS AND LIBERAL IMAGINATIONS

Contemporary debates, critical and mainstream, in philosophy, law and politics, speak, invariably, about 'human' rights and not simply rights in its generic form. The prefix 'human' to rights is relatively recent in the history of rights, one that appeared during the world wars and the efforts to resurrect capitalism and liberalism after their collapse. Nonetheless, post-WWII, 'human' rights invoke ideas about rights in ancient, medieval and

early modern European civilisation to justify them as ‘inalienable’ and intrinsic to being human. This way of engaging with rights fixes the concept of ‘human’ rights as a timeless, placeless concept and obfuscates the changing historical and social character of rights. As abstract ideas, rights-talk in ethics and politics is unable to connect rights to the reality of life and people today. ‘Human’ rights-talk within social movements today remains largely a clash of ideas and ideals. As Samuel Moyn writes, ‘the phrase implies ... the most elevated aspirations of both social movements and political entities – states and interstate’.³⁹

The resilience of ‘human’ rights in the imaginations of social movements is not because other utopias have failed as Moyn argues, but rather it lies in liberalism’s capacity to generate an unending series of new hopes and a feeling of agency even when rights consistently fail to deliver on promises and rarely empower transformative social change for the oppressed, as we shall see. In contrast, when working and colonised peoples in the socialist movements and national liberation struggles challenged the idea of rights, and liberalism more generally, their challenges led to revolutionary structural transformations in the architecture of global power. The subsequent reversals and setbacks in those challenges to liberalism ought not to undermine the significance of that moment for structural social change (see Chapter 8).

Liberalism is first and foremost the ideology of capitalism. It is a world view comprising a complex of ideas, assumptions and beliefs in philosophy, jurisprudence and political theory and praxis about individual and economic freedoms. Underpinning the complexes of ideas in liberalism there is a mode of reasoning that elsewhere I have called ‘epistemological economism’.

Epistemological economism refers to a merchant’s world view inscribed in the very structure of reason such that it extends an accountant’s logic to every sphere of human life. Statistical reasoning, empiricism, cost-benefit enumerations resembling ledger-book classifications – costs in one column, benefit in another – become integral to the way socio-political-cultural questions are analysed. The merchant’s world view is

no longer limited to trade and commerce but extends to all spheres of social and cultural life. Labour, an attribute of being human, is transformed into a tradable commodity like shoes and furniture. Social problems are aggregated numerically to become comprehensible, as in statistical analysis. Even philosophical arguments must be ‘weighed’ so that they may ‘profit’ society in definite ways.⁴⁰

Liberalism’s core commitment is to *alienable* property as an inalienable right. Johann Wolfgang von Goethe wrote in the early nineteenth century,

When I hear people speak of liberal ideas, it is always a wonder to me that men are so readily put off with empty verbiage. An idea cannot be liberal; but it may be potent, vigorous, exclusive, in order to fulfil its mission of being productive. Still less can a concept be liberal; for a concept has quite another mission. Where, however, we must look for liberality, is in the sentiments; and the sentiments are the inner man as he lives and moves. A man’s sentiments, however, are rarely liberal, because they proceed directly from him personally, and from his immediate relations and requirements. Further we will not write, and let us apply this test to what we hear every day.⁴¹

The resilience of liberalism and rights in the imaginations of social movements lies in its ability to sustain the belief that sentiments can be unproblematically translated to political action.

European Enlightenment thinkers took rights as an ethical and moral concept in ancient European philosophy⁴² and used it as a trope for a utilitarian economic and political philosophy supportive of emerging capitalism. As a trope, rights were pivotal to building institutions that replaced feudal institutions. The prefix ‘human’ to rights has invisibilised the institution building role of rights. At the same time, the invisibilisation of rights from its utilitarian purposes has rendered the institutional, legal and ideological conditions for transnational monopoly finance (TMF) capitalism unintelligible to social movements. Therefore, the prefix ‘human’ to rights is an important shift in the old and new rights-talk. It continues to evoke ethical and moral sensibilities and conceals its utilitarian

purpose from view. It should not appear paradoxical therefore that the World Bank and displaced people, both, defend 'human' rights.

As Jewei Ci points out, liberalism sees the economy as morally neutral and generates a 'human' rights discourse that is related to but independent of the economy. Liberalism, according to Ci,

... redescribes the existing behaviour of economic actors within morally neutral framework of capitalist ethic. What happens here may be described as willing after the fact.

Quoting from Koslowski Ci writes,

... '[c]apitalism as a system of contractual freedom and technical innovation, historically required the weakening of rigoristic morality and the toleration of external effects.' Willing after the facts is willing one's self-interest, not willing moral freedom. It testifies to the power of bourgeois ideology that the case is often thought to be otherwise, that the positions of the horse and carriage are reversed without being noticed most of the time.⁴³

The feeling of agency stays with individuals as does the moral sentiment, but only as a feeling and sentiment. Social movements therefore continue to press for this or that right, argue about 'human' rights of subaltern people even as transnational corporations, IEOs, G7 states and IOs continue to use 'human' rights for building institutions and embed them within the global architecture of power. For example, the critical scholar Oche Onazi argues correctly that states and social movements have different understandings of 'human' rights.⁴⁴ From there he draws the conclusion that the concept of legal pluralism very much aids the subaltern view [of 'human' rights] because

legal pluralism helps to paint a picture of human rights as a system founded on diverse sources of legitimacy. This view of legal pluralism in my opinion appears not only to liberate human rights from their state-centred world view but also opens up the possibility of reading them in

social and other imaginative terms. Seen this way, I argue that human rights would thus effectively recognize the aspirations and, indeed, the agency of the poor, marginalized or oppressed.⁴⁵

In this argument, there is no recognition of what the actors proposing state-centric view of human rights might be doing with it and what the 'subaltern' need to do to counter it. More importantly, pluralism presupposes the possibility of co-existence of state-centred and subaltern views. It unhinges rights from citizen-state relations and transforms it into a normative concept without moorings in the materiality of the world. Challenges to 'human' rights remain as a contest of norms in the domain of ideas (see Chapter 3).

The purpose here is not to belittle the efforts of social movements or critical scholars. Struggles present activists with difficult ethical choices. Action is always in the present. Action mediates between the past and the future. Action presents activists with what I have called the 'temporal tension' in rights:

By temporal tension I mean a tension between the situation that activists have inherited which is not of their own making but which nonetheless circumscribes what they can or cannot do, and the ways in which their actions, and responses to the situation reify, modify or change future structural contexts.⁴⁶

The temporal tension usually takes the form of an ethical dilemma in decision-making about the extent to which the present is to be prioritised over the future. In other words, 'do we live to fight another day' or 'do we die for what we believe in today'. Social movement stories are replete with stories of martyrdom. In the absence of an understanding of the place of rights within contemporary TMF capitalism and the legal and institutional context for rights, a utopian understanding of rights including ideas about subaltern rights do not offer easy choices. The temporal tension then is at the same time the source for continued disillusionment about rights in practice which co-exists with their idealisation in theory (see Chapter 8). The purpose of this book is to contribute to making more enlightened

decisions when activists are confronted with the 'temporal tension' in rights-talk.