

His most important contribution is the analysis of the varying impacts of European ‘floors’ and ‘ceilings’ on rights protection. This is a valuable addition to the literature. It significantly improves on the less nuanced approaches of both ‘sovereignists’ and ‘pluralists’. Fabbrini’s four-part categorization of floors and ceilings deserves to become a standard lens through which to view developments in fundamental rights in Europe.

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**Nicola Perugini and Neve Gordon, *The Human Right to Dominate* (Oxford University Press, 2015, x + 200pp, £16.99 (pb) £64 (hb)) ISBN 978-0-19-936-500-5 (pb), ISBN 978-0-19-936-501-2 (hb)**

This book’s intriguing title sums up a critical, compelling and innovative analysis of human rights. Starting from a detailed analysis of human rights in the Israeli–Palestinian conflict, it formulates general theoretical claims about the way human rights work. The insights which anthropologist Nicola Perugini and political scientist Neve Gordon have to offer are important and fundamental, but would benefit from being elaborated upon and refined within the legal discipline.

The book starts out with the observation that, around the turn of the millennium, conservatives in the USA and elsewhere changed their attitude towards human rights. Whereas before conservatives tended to reject the expanding human rights culture, they now began to embrace it. They began adopting not only the language and the institutions of liberal human rights organizations, but also their methodologies and strategies. This led to a convergence between liberals and conservatives on three points. First, they agreed on the primacy of law and the judiciary in upholding it. Secondly, they agreed on how to gather valid data and what constitutes evidence. Thirdly, they agreed that human rights discourse can be used to allocate guilt and innocence. This process, which Perugini and Gordon call ‘mirroring’, is now used for opposing ends by liberals and conservatives in the USA and elsewhere. Liberal organizations defend gay rights and religious freedom, conservative organizations invoke family rights and criticize Lesbian, Gay, Bisexual and Transgender (LGBT) and women’s rights. Conservatives such as Marine Le Pen and Geert Wilders invoke women’s and LGBT rights to legitimize xenophobia. Amnesty International opposed NATO’s withdrawal from Afghanistan by invoking women’s rights. Human rights discourse is used for different political purposes, a phenomenon which the authors call ‘inversion’.

Perugini and Gordon reject the idea that conservatives use human rights as a pretext and distort the original liberal meaning of human rights. Instead, they argue that

human rights are an epistemic framework—that is, one that ‘shapes the way different actors conceive their own position within social space and the political significance of events that they witness or are concerned about’ (p 12). Human rights are ‘a legal and moral framework in which historical events and political objectives are given a specific meaning’ (p 12). Liberals and conservatives both engage in this enterprise, and the book seeks to analyse the relationship between human rights and domination (the central term is defined quite loosely—‘a broad array of relationships of subjugation characterized by the use of force and coercion’ (p 3)).

The focus of the book is on the ways in which human rights function so as to rationalize, legitimize and make sense of domination. The empirical focus is on Israel/Palestine, but reference is made as well to broader phenomena such as western military interventions and colonialism. In the remainder of their introductory chapter, they formulate the four central claims of the book. First, they reject the *hydraulic model* of human rights, which assumes that more human rights mean less domination and that human rights restrain the state. They note that human rights rely on state power because they have to be put into practice by legislators and courts. Human rights can be marshalled to justify the use of force both domestically and across borders. Human rights may mean more domination and more state intervention, instead of less. Secondly, they reject the idea that there is a true meaning of human rights (which would then be abused by conservatives). They note that human rights do not have a stable, true, original core which can be perverted, but are always contextualized. It is crucial for human rights discourse that human rights are presented as universal, neutral and non-political, but they are always vernacularized. It is precisely this combination of adaptability and the claim to truth which makes human rights attractive for both dominant and oppressed groups. Thirdly, they disagree with the idea that the state is withering away. Quite the contrary, the post-war human rights regime has helped to legitimize the state as *the central entity* within the global order. Fourthly, they point out that human rights help to determine *who is human* and who is a bit less human. Human rights organizations of Jewish settlers take the humanity of Palestinians less seriously than that of Jewish settlers. But, Perugini and Gordon argue, Israeli liberal human rights organizations do the same by ignoring the technological differences between Israelis and Palestinians and finding the (massive) killing of Palestinian citizens by Israeli ‘precise weapons’ collateral damage not amounting to violations of humanitarian law, while finding the (comparatively minimal) killing of Israeli citizens by Palestinian ‘indiscriminate weapons’ war crimes. The authors underpin their central claims in four empirical chapters, which address the Israeli–Palestinian conflict.

In the chapter *The Paradox of Human Rights*, Perugini and Gordon argue that human rights have functioned to grant legitimacy to nation–states after World War II. The nation–state, they observe, was fundamental for the ability of individuals to acquire human rights. In the case of Israel, statecraft was conceptualized as reparation for the Holocaust, itself represented as a unique event (and thus uncoupled from its genealogy in European settler colonialism). The idea that a re-occurrence of the Holocaust had to be prevented governed the way Israel related to its Arab neighbours. Arabs were transformed into an ultimate threat; Israeli Jews into perpetual victims of human rights violations. During the first Intifada, Palestinians adopted the

language of human rights to justify their resistance and to critique Israel's military rule. This led to a gradual shift in international public opinion towards the plight of Palestinians, and to denaturalizing Israel's occupation. However, this human rights activism led to litigation in Israeli courts, which ruled that Israel could continue its activities with only marginal adaptations to comply with human rights. In addition, Israeli officials began using human rights language to justify their behaviour. As one Israeli human rights advocate stated, 'the opposition, when it uses internal means of combat [including human rights litigation], becomes part of the practice to which it objects' (p 43). After the breakdown of the Oslo peace process, the second Intifada broke out, and Israeli military operations intensified. In that context, the effect of human rights advocacy was mainly to normalize Israeli domination; it did not function as a structural critique. Structural violence was reduced to a series of symptoms, for which appeal to the violating state was the appropriate response. As a consequence of this, Perugini and Gordon argue, the state could continue its domination and claim this was in accordance with human rights standards. In this manner, human rights advocacy normalized and even entrenched the very institutions which produced the human rights violations which it sought to combat.

In the chapter *The Threat of Human Rights*, Perugini and Gordon address the question of why, if human rights naturalize and legitimize domination, they are also experienced as threatening by states. The Goldstone Commission was instituted by the UN to investigate Israel's Operation Cast Lead (2008–09) in Gaza. In response, Israel's establishment and conservative NGOs began opposing 'the politicization of human rights' by the likes of Goldstone and others who were said to be engaging in 'lawfare' or even 'legal terrorism'. This response implicitly assumes the existence of a non-political, objective version of human rights. Liberal human rights advocates, not just in Israel but at a global level, reacted to this criticism by taking increasing care to appear non-politicized, accountable and transparent. The effect of this is exemplified by the analysis of the Israeli human rights NGO B'Tselem of Israel's Operation Pillar of Cloud in Gaza in 2012. The NGO accused Hamas of committing war crimes, while merely saying it suspected Israel of violating international law. Given the major imbalances in the number of victims on the two sides, for Perugini and Gordon, what B'Tselem did was to insert symmetry into an asymmetric situation, thus validating and justifying Israel's domination. This analysis shows that human rights can both strengthen power (B'Tselem's response to Operation Pillar of Cloud) or destabilize it (Goldstone report), and are not external to politics but always intertwined with it. They have destabilizing potential whether it is applied outside the nation--state (the Goldstone report was issued by a UN Committee) or beyond the nation--state (protect non-Israelis against Israel). If that potential is realized, the state will seek to regain control by inserting human rights back into the nation--state.

In the chapter *The Human Right to Kill*, Perugini and Gordon argue that human rights do not so much limit the use of force, but legitimize it. Armies have begun to integrate international lawyers, and human rights organizations use military analyses in their reporting. This leads to a 'culture of ethical violence'. Human rights are used to justify military actions. A categorical imperative has developed: the way in which violence is deployed has to conform to international humanitarian and human rights

law. A non-categorical imperative is that 'killing should be used to advance human rights' (p 80). An extensive discussion of human shielding serves to illustrate their point. Whereas human shielding was introduced in the Israeli context by B'Tselem to criticize Israeli army actions, the Israeli army began using the term to justify the killing of civilians. The killing of Palestinian civilians during the Gaza campaigns was justified by arguing these were collateral damage caused by Hamas using civilian objects to launch rockets. In this manner, all civilian objects in Gaza became legitimate targets, the entire population of Gaza became the legitimate target of violence, and all civilian deaths were portrayed as occurring despite the targeted use of smart weapons. Perugini and Gordon argue that this ignores two asymmetries. First, in modern urban warfare there are always civilians around, hence the idea of shielding (putting civilians in the line of fire) becomes problematic because there are bound to be civilians. To the extent human shielding is used, Perugini and Gordon state it is typical of weaker parties to military conflicts. Secondly, humanitarian law favours technologically superior parties to a conflict, because Israel's high tech, smart weapons are more easily argued not to be indiscriminate than Hamas' low tech missiles. This led B'Tselem to find that it was clear that Hamas had committed war crimes, while a human rights analysis of the Israeli side was considered not simple. The Israeli army and NGOs thus construct a common, dominant interpretation of humanitarian law according to which the killing of civilians is justified if the opponent engages in what can be labelled as human shielding and therefore the deaths were 'collateral'.

The chapter *The Human Right to Colonize* describes how the Jewish settler movement has appropriated the language of human rights to further their objectives. In doing so, they have mirrored the strategies of liberal human rights advocacy organizations, by insisting on non-discriminatory law enforcement, by reporting on police violence, and by using litigation, lobbying and media. Perugini and Gordon consider this a reaction to the initial success of liberal NGOs in framing the Israeli–Palestinian conflict as one where Israel is the perpetrator and Palestinians are the victims. Bypassing majoritarian fora, liberal NGOs used the judicial system. This was mirrored by settler human rights NGOs. The Israeli disengagement from Gaza and the (rare) enforcement against illegal Jewish outposts are reframed as infringements on settler human rights (they are evicted from their land and homes), and surveillance of settler activism is portrayed as repression of civil disobedience. Bedouin villages in the Negev are portrayed as illegal settlements against which no enforcement measures are undertaken. Settler NGOs use the same legal vocabulary and investigative techniques. Other points of convergence are the insistence on non-discriminatory law enforcement, the authority of law and of courts, the use of evidence, and the idea that, by living up to human rights, Israel can be both Jewish and democratic. These convergences make it possible for conservative NGOs to mirror the tactics of liberal NGOs. The difference is in the inversion of the historical asymmetry between Israel and the Palestinians, where settlers become the dispossessed natives whose human rights need to be protected, and Palestinians become the intruders whose displacement is necessary to realize settler human rights.

In a concluding chapter, Perugini and Gordon investigate whether human rights can be conceptualized and used in a different way, so as to make them advance counter

domination instead of domination. They identify two characteristics that make human rights support domination. First is the dominance of a legal or legalistic approach. This law-centred human rights activism relies on an impoverished version of the politics of human rights, because it primarily focuses on the application (the lack of it, the erroneous or discriminatory application) of law, without raising questions about the morality and legitimacy of law itself. A final example they use to illustrate this is Human Rights Watch's reporting on the US drone wars, which—in their analysis—reinforces the idea that the USA has the sovereign right to kill, provided it follows the rules for doing that. While a legalistic approach 'can sometimes challenge unjust structures' (p 133), usually it ends up supporting them. Going beyond the incidents analysed in the reports and demanding the destruction of oppressive structures is considered as a political instrumentalization of human rights, and not to be done. This negates and undermines more radical politics. Law is 'frequently' blind to underlying asymmetries of power (p 133), and relying on a legalistic approach therefore excludes the constitutive elements of the legal system from its critique. The second characteristic is professionalism, whereby a specific caste of people is empowered to speak about human rights, at the expense of the people whose human rights are violated.

The authors suggest two ways of liberating human rights. The first using non-legal perspectives, which would enable using human rights as a critique of law instead of an application of law (regardless of how unjust it may be). Secondly human rights should be de-professionalized, human rights should be used by 'society', grassroots organizations instead of professionals. And the standard should always be whether a particular application of human rights advances or counters domination.

The strength of this book is that, by focusing on a number of concrete examples from the Palestine/Israel context, Perugini and Gordon are able to make a very fundamental observation about human rights. In doing so, they force readers to reconsider their idea of human rights. Their contribution is not so much that they emphasize the discursive character of human rights (this has been pointed out before), but that they effectively undermine the idea that human rights and state power are antithetical. Both in their formal-legal version in courts and legislatures, and their advocacy version, human rights are widely assumed to limit state power. Instead, the authors argue, they have the tendency to enhance state power, and are crucial in legitimizing state practices such as occupation and extra-legal killings. They do not limit this to particular issues in human rights law, but Perugini and Gordon go much further than that. Although they do state that human rights may function to undermine repression, the gist of their argument is that it reinforces it. The power of their book is that they are uncomfortably convincing. They show how human rights have legitimized occupation and warfare, not just by conservative NGOs flipping human rights reasoning, but also by liberal NGOs being recruited by the rationality of humanitarian law.

The analysis Perugini and Gordon presents deserves further elaboration, and it positively invites it. To me, their book suggests three ways of thinking further. First, they do not relate their critique to existing critiques of human rights law (except a passing reference to Duncan Kennedy's work on human rights,<sup>1</sup> which is inspiring

1 Kennedy, 'The Critique of Rights in Critical Legal Studies' in Brown and Halley (eds), *Left Legalism/Left Critique* (2002).

but hardly belongs to the core of the field). It will be worthwhile to relate their critique to critical race studies, legal feminism, as well as authors whom Marie-Bénédicte Dembour<sup>2</sup> labels as protest and discourse scholars such as Douzinas and Koskenniemi. Secondly, Perugini and Gordon in passing presume that human rights and law are two different things. In such passages, they imply that whereas human rights are discursive and unstable, law is more solid than that. It may well prove to be fruitful to do away with this (frankly: unsophisticated) approach to law, which treats law as almost a hard science. Many critical legal scholars (among whom notably Duncan Kennedy in the work to which they refer) consider law to be as discursive as anything else. Acknowledging the discursive nature of law would strengthen and broaden the analysis of Perugini and Gordon. It would do away with a strawman they use (human rights are problematic when they are legalized) and a concrete suggestion they make (de-legalization) becomes problematic. Thirdly, Perugini and Gordon suggest that human rights may, under some circumstances, be used to counter domination and to legitimize fundamental opposition. However, it remains unclear under what conditions human rights can work against domination. During the first intifada, human rights were used by Palestinians to denaturalize the Israeli occupation, but later Israeli non-governmental organizations ended up legitimizing the use of massive violence. Are human rights not suitable for counter majoritarian politics? But if human rights merely supported the point made during the first Intifada, how crucial was human rights reasoning in denaturalizing the Israeli occupation?

Further exploring the analysis made by Perugini and Gordon is not just relevant for thinking about human rights and law in general and theoretical terms, but can also be fruitful for subfields of applied human rights (law). In the field of migration law, it is remarkable that three decades of human rights activism has led to reinforcing the notion that states have the sovereign right to control migration, with some human rights-based exceptions. This Strasbourg reversal,<sup>3</sup> however, does not follow an inherent logic. The Inter-American Court of Human Rights seems to be developing an approach which restricts state sovereignty much more. And, as critical scholars such as the late Sarah van Walsum have pointed out, the Strasbourg system contains surprises as well—think of the case law from which unlikely candidates like undocumented migrant women sometimes benefit.<sup>4</sup> Such analyses will benefit from the approach which Perugini and Gordon develop in this book—most notably their critique of the hydraulic model, the analytical tools of convergence, mirroring and inversion, and their idea that disregarding or incorporating underlying asymmetries in human rights reasoning fundamentally affects what human rights do.

Perugini and Gordon make a very important contribution to re-thinking the role of human rights—their relation to state power, to domination and oppression and their functioning in social struggles. They present compelling (and frankly disillusioning) case studies, and they convincingly argue that their conclusions are of much wider significance than for the Palestinian/Israeli conflict alone. Their broader

2 Dembour, *Who Believes in Human Rights?* (2006).

3 To use the term coined by Dembour, see Dembour, *When Humans Become Migrants* (2015).

4 Van Walsum, 'Against All Odds: How Single and Divorced Migrant Mothers were Eventually Able to Claim their Right to Respect for Family Life' (2009) 11 *European Journal of Migration and Law* 295.

conclusions are less subtle than the analysis in the concrete case studies, but this is a stimulus to develop their analysis further and cannot serve to dismiss it or to belittle the wider significance of their analysis.

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**John Hagan, Joshua Kaiser and Anna Hanson, *Iraq and the Crimes of Aggressive War: The Legal Cynicism of Criminal Militarism* (Cambridge University Press, 2015, 250pp, £24.99) ISBN 978-1-107-50701-2 (pb)**

A great deal has been written about the process and decisions which led to the 2003 invasion of Iraq. Less has been written about the war itself and the subsequent struggles which engulfed the country as attempts were made to establish a legitimate democratic government. This book contributes to both topics with an interdisciplinary analysis that presents a case that the Iraq War 2003 constituted a crime of aggression in international law.

The thesis offered by the authors at the outset is that events concerning both the *jus ad bellum* and *jus post bellum* combine to reflect actions which can be considered to amount to the crime of aggression in international law. The authors position this thesis in a wider argument which contends that the actions of criminal militarism were derived from, and influenced by, legal cynicism. Criminal militarism refers to a situation in which the laws of war are ignored. Legal cynicism is defined by the authors as a ‘cultural frame or orientation in which law is viewed by a population as illegitimate, unresponsive, and ineffectual in providing security’ (p 4). The results of legal cynicism are varied, but in the context of post-invasion Iraq they included collective violence, which was manifested through insurgent attacks on coalition forces and other ethnic groups. The origins of this legal cynicism are identified in the political elites of both the USA and Iraq, and yet its effects pervade much wider. The book charts how legal cynicism and criminal militarism before, during and after the conflict affected Iraq’s civilian population.

In Chapter 1, the authors provide a whistle-stop account of the history of human rights abuses in Iraq. A detailed focus is given to the ‘Republic of Fear’ which developed under Saddam Hussein’s Ba’athist regime which ruled from 1968 until the invasion in 2003. With frequent references to the involvement, influence and strategic intentions of a series of USA Presidential administrations, the authors chart the gross brutality of Saddam’s regime from the Iran–Iraq War through to the invasion of Kuwait in August 1990. The authors then concisely demonstrate the more strategic brutality Saddam directed towards groups, particularly the southern Shia, after the conflict of the First Gulf War. This discussion is supplemented with heavily