

## Reading Our Rights

One of the features that has characterized political struggle over the past two decades has been the resurgence of a discourse on rights. As a wide variety of recent scholarship attests, this resurgence has forced upon the Marxist critique of the merely privative nature of rights discourse (as well as upon the “postmodern” variants of that critique) a reconsideration of its terms. Specifically, it has forced upon that critique a recognition of the irreducibility of political claims (and the forms of incorporation and enfranchisement to which those claims give rise) to any economic or “material” determination. It might therefore be tempting to see in the “return to rights” a vindication of the principles of a liberal polity, that is, of a polity which seeks to maintain a more or less rigorous distinction between the rules according to which its citizens gain political franchise and those according to which they gain material well-being. In this view, the recent proliferation of rights claims would need to be seen within the more general context of the ascendancy of a “democratic”/capitalist world order, an ascendancy which would then be taken to arise not merely as a result of historical contingencies but as the realization of universal principles of justice. As examples of this interpretation, we need only consult the self-congratulatory readings the Western media has offered of recent events in East Germany, the Soviet Union, and communist China.

A few observations will serve to give the lie to this account. To begin, we may note that part of what is specific to those claims which have emerged so startlingly in contemporary political discourse is their contestation of any version of right which would suggest that the material conditions of the claimant’s existence have a merely contingent bearing on the fact and quality of their political franchise. Of course, were this the extent of the novelty forwarded by these claims, they could hardly be thought to pose any grave threat to the principles of liberal polity. Notwithstanding liberal theory’s recourse to a distinction between civil and political societies which is at once cynical and selective, the modern liberal state has found it impossible to manage those crises occurring at its margins without some version – however implicit or disavowed – of a social right. For what characterizes the modern state in its neo-liberal no less than in its Communist forms is its transformation of a question regarding the adjudication of right into one of the administration of

life. In the face of this transformation, however occulted or incomplete, any attempt to rigorously distinguish between right and need, political franchise and material well-being, must prove as illusory as their revolutionary identification.

Having acknowledged the above, what proves crucial, and crucially original, in the claims under question is that while they can no longer find their source and guarantee in the sovereign political institution of the State (they lie outside the purview of the political narrowly defined), they nevertheless continue, and of necessity, to place upon that State a demand for recognition. Indeed, the capacity to respond to these claims as they arise at the State's periphery has become the condition of the State's legitimacy. This peculiarly modern coimplication of civil and political societies (thanks to which the self-legislating autonomy of the state can only be forwarded at the expense of a recognition of the constitutive alterity of the social) has been brilliantly described by Claude Lefort. What for Lefort characterizes modern democracy is the peculiar role it assigns to the social body: that of providing the locus for the process of consensus building from which both political and legislative imperatives will arise. But there is, I would suggest, an aporia over which Lefort's analysis glosses. For if, as Lefort seems to suggest, the formal mechanisms on whose basis the State asserts its self-legislating autonomy must have recourse to a social body which would fill out the lacuna left by the disappearance of substantial social ties, the supplement offered by that body cannot fail to return that substance in the very form the state had thought to expunge; that is, the social body can only lend its authority to the political institution in forms that are less self-legislating than customary, rooted in traditions that are stubbornly recalcitrant in the face of every attempt to recuperate their origins.

The above statement can be granted, however, only on condition that we supplement it with an acknowledgement of the extent to which modernity's reconfiguration of the social had the effect of mitigating – without ever entirely evacuating – the customary dimension of our relations with others. As Marx emphasizes in "On the Jewish Question," the separation of state and civil society had the effect of robbing society of both its traditional and its public character, reducing it to a "mass" of competing drives and interests stripped of any customarily acquired normative horizon. In order to close the crisis of authority opened by this withdrawal of political substance from the civil sphere, it was necessary that the state then reintroduce itself in the form of a legal/administrative apparatus. (Hence Hegel's recognition that the police and the corporation mark the limiting conditions on that freedom which characterizes the civil sphere.) The state of right (whose customary horizon is putatively that of the "nation") is already, at its very inception, the

right of state. The question of the people's sovereign articulation is always also that of a population's technical administration.

Where, then, does this leave us with respect to what I am claiming to be the customary horizon of recent rights claims? That is, given the fact that these claims aim at some form of juridical/political enfranchisement, given, moreover, that they do so even as their substance remains heterogenous to the modern state's formal mechanisms for ratifying competing versions of the Good Life, how are they to be legally instituted in such a way as to retain the challenge they present not to any particular article of the law but rather to the formal horizon of modern law in general and as such? Here it is a question not merely of getting the law to enforce these claims, but of forcing these claims upon the law, of forcing the law to recognize them as the limit placed on the State's capacity to rationally recuperate its own origins. This is clearly the case with respect to claims currently being made by Canada's native peoples, as well as with respect to those being made under the rubric of a politics of ethnicity. But I would suggest that it is equally, if less obviously, the case in the articulation of the political interests of gays and women as well: for here, too, it is a question of recovering histories which are not the histories of the nation and its legally protected subject, but of collectivities operating unofficially at the margins of the state and its legal apparatus. In the extent to which the subjects of such histories are neither the individual as sovereign moral agent nor the nation as sovereign political agent, their articulation of historically contingent forms of collectivity could be said to return to the civil sphere something of that public dimension which had once surrounded it.

9

\* \* \*

The "contractual" reduction of forms of public responsibility to a negotiation between atomized liberties is well-known – not least from its Hegelian critique. However, despite the fact that Hegel rejects not merely the contractual ideal of social life in general, but, specifically, the contractual understanding of marriage as the mutual holding of property in persons, it remains the case that, as Carole Pateman suggests, his definition of marriage as the mutual recognition of lovers retains within itself, however covertly, a contractual paradigm, a paradigm which then provides the basis for a passage from private to public sphere. Here Pateman quite rightly points to an equivocation on Hegel's part regarding the question of whether that ethical community represented by the family is to be associated with the sphere of natural necessity or with a freedom which requires the subject's alienation of itself through the mediation of forms of property. This

equivocation is clear in the ambivalence which surrounds the corporational status (or non-status) of the family: on one hand, that “love” which is the ethical substance of the family is prior to the privatized relations that characterize corporations within civil society; on the other hand, in the extent to which marital arrangements implying not merely ethical but juridical sanction emerge as a necessary feature of family life, the family involves something like a contractual binding together of juridically protected and privatized individuals. It is Pateman’s project to show not only the extent to which a contractual privatization of forms of public responsibility is endemic to modern political life (remaining even at the core of Hegel’s critique of the contract), but also to show how this privatization obscures the question of what sort of collective responsibility might fall to us in the face of social bonds which prove resistant to contractual rationalization.<sup>1</sup> In the extent to which such a project would assume the possibility of responsibility to these bonds, it assumes that their being in excess of the contract demands something other than quasi-stoic resignation in the face of biological necessity; it assumes, in other words, the historical, humanly inflected character of our needs and the relationships to which they give rise. Conversely, in the extent to which this historical dimension of human being involves something other than the progressive mastery of necessity by a sovereign agent (cognitive, practical, and moral) – that is, in the extent to which such an agent will always require, as the enabling condition of its freedom, not any particular historical condition but history as conditionality in general – the movement from nature to history, from necessity to right, cannot be thought on the basis of that agent’s self-legislating capacity for recuperating the pathogenesis of its origins. In sum, Pateman’s project involves vindicating the presence of collectivities that find the basis for their legitimacy neither in the sovereignty of the nation state, nor in the contractual binding of privatized individualities, but in the carnal implication of our destinies as we occupy, however contingently, a common space and time.

By carnality, we must understand not simply the corporeal conditions of identity (our skin as limit) but also the very limen in and on which that identity is complicated (that same skin as threshold). This means that the appeal to the body must involve something other than the recovery of an identity or substance (being woman, being black, etc.) which the law’s formal abstractions would have excluded; it must involve a recognition that the body has no given substance prior to the inscription of the socius on it. Now, in the extent to which that inscription is identified as “customary,” it is seen as arising more or less organically from the needs of the body itself (rather than as being imposed by a force which acts over against those proper to the body). As Peter Goodrich suggests in “The

Jurisprudence of Difference,” according to the customary paradigm of law: “Nature herself was deemed the ultimate origin of rules that were older than the oldest human law.”

The status of this immemorial body would of course become problematic for a modern legal state that understood its legitimacy to rest not so much in the “substance” of tradition (itself grounded in natural law) as in formal mechanisms designed to guarantee free self-legislation in a present undetermined by the superstitions of the past. As we have seen, that past represents a content which must be at once excluded – as extrinsic to the formal mechanisms upon which legal equality depends – and reintroduced – if, indeed, those mechanisms are going to have anything to work on. As Dilip Yogasundrum indicates in “Writing Cultural Differences into the Law,” a paradoxical temporality can be seen to ensue from the peculiar form of this reintroduction: the extraneity of customary claims to the formal principles of the modern legal state can only be recognized *retroactively* as the *prehistory* of that state. This logic of future anteriority effectively guarantees the mythic or figural reification of custom even as it ensures its functional exclusion (a point made by Peter Goodrich with respect to the legal mystification of female subjects). The task given to those discourses which would return to the law’s serial reduction of cultural difference something of that communality which provided its original context of emergence suffers under a similar temporal paradox. In the extent to which these discourses are themselves forced to read the suffering body through its legal inscription, that task must involve something other than a simple recovery of customary (read: natural) forms of sociality. For the logic of such recovery is the logic of legal abstraction itself: it assumes that the immemoriality of custom can be reduced to a past that would be merely a modality of the present. Against this logic we may oppose one which would read immemoriality in terms of a post-Heideggerian “always already,” that “past” whose pathogenesis is immanent and irreducible in the symbolic founding act. It is this *temporizing* logic that Derrida identifies under the term *différance*:

It is because of *différance* that the movement of signification is possible only if each so-called “present” element, each element appearing on the scene of presence, is related to something other than itself, thereby keeping within itself the mark of the past element, and already letting itself be vitiated by the mark of its relation to the future element, this trace being related as much to what is called the future than to what is called the past, and constituting what is called the present by means of this very relation to what it is not; what it absolutely is not, not even as past or as future as a modified present.<sup>2</sup>

Any strategy that would attempt to contest the legal reduction of cultural difference to that seriality of social facts Yogasundrum describes would therefore need to proceed

along a double axis: at once continuing to make its claims on the basis of justice's *possibility* and recognizing as the condition of that possibility, its *impossibility*, that is, the impossibility of justice realizing itself in the present. *In the extent to which there will have been justice, it will not have been in the form of a present.* It is this articulation – which provides, despite its melancholy ring, the very basis of any hope for justice – that Deborah Esch would seem to hear in Alice James's determination to respect the rights of death, not simply the right *to* death (in the extent to which such a right could be invested in the privacy of any singular person), nor even the rights of the *dead* (in the extent to which such a right could be extended to the memory of those who once lived), but the *rights of death*, of death as the operation of the limit that gives us to life. It is death that hollows out that abyss (of original repetition) within life, thanks to which a life can claim itself. Hence, the claimant can claim its first right, the right to life, only on the basis of its already having been claimed *by death*. Certainly, we must resist the temptation to allow this “mystical” dimension of the law to occult the process by which particular, historically derived identities attempt to gain some purchase on social justice. However, we must be equally vigilant in ensuring that the strategic calculations by means of which these identities are endorsed not deafen us to what remains incalculable in the singular suffering of our bodies (a suffering which remains irreducible to any problem of material needs). It is in this double imperative that we may recognize the task given to us in “reading our rights.”

Andrew Payne

#### NOTES

1. See Carole Pateman, “The Fraternal Social Contract,” *Civil Society and the State*, (London: Verso, 1988).
2. Jacques Derrida, “Différance,” *Margins of Philosophy*, trans. Alan Bass (Chicago: University of Chicago Press, 1978), 13.