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Opinion

PERFORMING HUMAN RIGHTS IN THE CONTEXT OF THE ISRAELI-PALESTINIAN CONFLICT

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Introduction

Why is it that distinct academic disciplines sometimes have a hard time understanding each other? The discussions at the law faculty of the VU University Amsterdam and the University of Amsterdam on 20 and 21 April 2017 with the authors of the book 'The human right to dominate'[1] - Nicola Perugini and Neve Gordon - showed that legal scholars and social-political scholars have a different understanding of human rights (i.e. what human rights are). More so, social-political scholars, such as Perugini and Gordon seem to be more interested in the consequences of invoking the human rights beyond the immediate legal setting of a national or international court (i.e. what human rights do).[2]

The confusion between the legal scholars present at the book discussion sessions and the authors was played out in three ways. First, some legal scholars seemed to understand human rights primarily as those (universal) rights which are expressed in several international treaties, national constitutions and national law provisions and which generally aim to protect the citizens from the power of the state. The authors, on the other hand, view human rights as 'intrinsically political in the sense that the very process of adopting, claiming, and deploying human rights (…) is always politicized'.[3] For them, this interpretation of human rights should be distinguished from the belief, adopted by conservative NGOs in Israel, that human rights are 'grounded in (…) "the illusion of the original" (…) that is external to empirical-historical

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[1] N. Perugini and N. Gordon, *The Human Right to Dominate*, Oxford: Oxford University Press 2015.

[2] According to Perugini and Gordon, 'the paradox intrinsic to the post-World War II human rights regime (…) is characterized by a tripartite configuration operating as a complex (…) combination of protection from, protection by, and protection of the state' (*Idem,* p. 28), implying that citizens and non-citizens are to be protected from state domination by International Treaties that confer the responsibility to protect to the state. Hence, protection *by* the state. At the same time these International Treaties serve as a recognition and legitimation of the state as the state is central to the enforcement of these Treaties. Hence, protection *of* the state.

[3] *Idem*, p. 53.

social relationships'.[4] These different understandings of what rights are, was reflected in a discussion on 'the right to kill'. While some of the legal scholars wondered whether the human right to kill existed at all according to international legal standards, Perugini and Gordon argued that, for them, the human right to kill follows from the fact that human rights are constantly deployed to legitimize the act of killing.[5]

Second, whereas a part of the audience expressed a firm belief in the objectivity of courts, which impartially weigh different right claims according the proportionality test, Perugini and Gordon pointed at the 'colonial courts' of the Israeli state which 'has a long record of legitimizing colonial violence and granting impunity of its perpetrators'.[6] The authors thus argued that the context in which human rights are invoked matters.

Third, instead of focusing on the question of whether people legitimately invoke human rights, the authors pointed at the unintended effects of the act of claiming human rights by liberal NGOs in the name of Palestinians. These not only included the implementation of exceptional measures against these same NGO's, but also instigated processes of mirroring and inversion of human rights claims by conservative NGOs representing the interests of the Jewish settlers in the Palestinian areas. Perugini and Gordon thus showed that human rights claims made in name of subjugated groups in the end confirmed the power of dominating groups.

In this paper I seek to disentangle and to theorize these distinct views on human rights (claims) by exploring human rights and human rights claims as speech acts. Drawing on the work of Austin, I will firstly consider the first point of discussion - what rights are - as the constative dimension of a speech act. The second point of discussion - what rights claims do within a specific juridical context or court - as the illocutionary dimension of a speech act. And the third point of discussion - what rights claims do beyond the context wherein which they are claimed - as the perlocutionary dimension of the speech act. For this analysis I am indebted to Karen Zivi's book 'Making rights claims' which inspired me to delve more in the performativity of rights and political struggle.[7]

I. Rights claims and speech act theory

For those not familiar with speech act theory, I will briefly outline the main points of Austin's theory. Austin distinguishes between different kind of utterances, which I already briefly mentioned in the introduction. First, he distinguishes between constative and performative utterances. Constative utterances are those speech acts that state facts about the world. These acts can be verified empirically, such as the utterance, 'the cat is on the mat'.[8] Performative utterances, on the other hand, are those speech acts that cannot be verified, but where it is in the saying that the act is done. Well known examples are 'I do' or 'I bet'. Austin realized, however, that not all speech acts are either constative or performative. Take the example of the phrase 'there is a bee near your head'. On the one hand, this statement matches reality. Hence, a constative speech act. On the other hand, the utterance has a force and effect that are not captured by this understanding. For example, the speaker may warn you, because you are

[4] *Idem*, p. 53. Note that in both instances we can judge a claim based on its accuracy in relation to existing law, moral philosophy or an empirical assessment which leads us to either endorse or reject the claim.
[5] Also see *idem*, p. 77-81.
[6] *Idem*, p. 63.
[7] K. Zivi, '*Making Rights Claims. A Practice of Democratic Citizenship*, Oxford: Oxford University Press 2012.
[8] Zivi 2012, supra note 7, p. 14.

allergic to bees. Explaining that each speech act contains a kind of performance, Austin thus refers to the total speech situation, containing the locutionary act that refers to the sound one makes; the illocutionary act, that refers to what one does *in* saying something; and the perlocutionary act that refers to what one does *by* saying something.[9]

What are the implications of Austin's speech theory for the act of claiming (human) rights? Well, where we view rights claims as claims that correspond to law or morality, we conceive rights or rights claims only as a constative utterance: a verification of reality. However, viewing rights claims as performative utterances opens up the possibility of the new, which is, according to Zivi, 'precisely what makes it suitable for contemporary democratic politics'.[10] Considering the act of claiming human rights as a democratic practice, Zivi provides an alternative for critical legal scholars, according to whom (human) rights claims are 'dangerous' in that they re-enforce existing relations of domination. This is true, in particular, for perlucotionary speech acts, which instead of focusing on the rules of the game (i.e. the illocutionary speech act, section III), foregrounds the rule breaking dimension of speech acts (section IV).[11] However, as I will argue in this paper, the case of the Israeli-Palestinian conflict also shows that the act of claiming human rights (in its perlocutionary dimension) does not necessarily enhance democratic practices.

II. Play the game the right way

A great deal of the juridical understanding of rights refers to the constative dimension of rights that revolves around the question of whether a specific rights claim is accurate in relation to the law. Yet, legal scholars normally also acknowledge the performative force of rights claims as they are often interested in particular in the outcome of rights claims. In the terminology of Austin, it could be argued that legal scholars consider a rights claim as a speech act whose force creates a potential effect – the illocutionary dimension. The illocutionary speech act should be distinguished from a constative speech act. Where a constative speech act can be verified or falsified, the effect of an illocutionary speech act is to succeed or fail to produce an effect. The effectiveness or success of the utterance, what Austin refers to as its felicity, is a matter of citing the proper conventions. To put it otherwise, what we do *in* speaking (i.e. the illocutionary dimension) has not so much or not only to do with the specific words we use, but also with the context in which we utter these words. For example, when a speaker says 'I do' to her friend this does not necessarily mean that she is marrying her friend. This might only be the case if she utters these words in front of a properly designated official. Hence, for rights claims to be felicitous, they should follow the rules of the game. They have, for instance, to be claimed by citizens of a nation, they have to be uttered in the right language, the proper procedures have to be followed, the right conventions have to be cited, et cetera.[12]

Perugini and Gordon present numerous examples of rights claiming practices as illocutionary speech acts. For instance, they point out how liberal and conservative human rights NGOs agree on the rules of the game of rights claiming ('the felicity conditions'). As they put it, these rival NGOs 'share certain juridical assumptions about the authority of the law, the court's decisive role as the arbiter of disagreement, and what constitutes adequate language to discuss

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[9] Compare Zivi 2012, supra note 7, pp. 15-16.
[10] *Idem*, p. 19.
[11] See for example W. Brown, '"The most we can hope for...", Human Rights and the Politics of Fatalism', *The South Atlantic Quarterly* 2004-2, pp. 451-463.
[12] Zivi 2012, supra note 7, pp. 24-42.

evidence, such as the legal vocabulary of human rights. These convergences (also) include an agreement on the appropriate techniques for gathering data, what constitutes valid data, and, consequently, what constitutes evidence'.[13] The authors call this deployment of the same strategies by diverging organizations 'mirroring'. Yet, 'The human right to dominate' also discloses that the game is played according to the rules of the national court, and does not necessarily ameliorate the plight of the Palestinians.[14]

The problem seems to be that citing the right conventions does not guarantee a successful uptake under all circumstances. As Judith Butler has argued, within a certain political entity rights claims may only be heard when they are uttered by recognizable subjects. To put it differently, playing the game by the rules, does not mean that your rights claim will be heard. The question is 'which human counts as human'.[15] Indeed, where the way we can appear in public space is highly regulated, not all human subjects are equally recognizable. Butler poses the question, which is extremely relevant for the Israeli-Palestine context, 'what makes it possible to even come before the law in order to ask for recognition within its terms?' This is a Kafkian question as one must already be able to appear before the law in some form, to meet the felicity conditions. As Butler argues, this may imply that one has to conform herself to racial norms, or producing oneself as 'post racial'. '[Indeed], the "law" (..) takes the form of a regulatory structuring of the field of appearance that establishes who can be seen, heard, and recognized'.[16] In the words of Perugini and Gordon, this may imply that one has to confer herself to the norms of the partisan colonial court, where certain rights claims are not recognized as such.

Foregrounding the illocutionary dimension of rights claims may also conceal the perlocutionary dimension of these speech acts, or the unintended effects beyond the immediate context wherein the rights claims are uttered. Perugini and Gordon conclude, for instance, that 'the legalistic approach to human rights often negates and even subjugates certain forms of more radical politics, [because] the deployment of human rights in accordance with the law (..) produces the belief that there is an impartial system adjudicating between parties and correcting wrongs'.[17]

This approach 'excludes the constitutive elements of the legal system from its critique [and] helps silence resistance to social, economic and political structures of domination rooted in and supported by the law'.[18] Hence, foregrounding the fact that the game is played by the rules, re-enforces the appearance that the game is also played by the *right* rules, silencing other more radical forms of resistance.

In sum, 'The human right to dominate' illuminates at least three drawbacks of the tendency of lawyers to limit their understanding of the act of claiming human rights to its illocutionary dimension. First, they may forego the fact that playing the game by the rules does not guarantee a successful uptake of a human rights claim (i.e. a successful illocutionary speech act). Second, even a successful uptake of a human rights claims does not necessarily ameliorate the plight of

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[13] Perugini & Gordon 2015, supra note 1, p. 114.
[14] The point is that the game is played at the Israeli court, which according to Perugini and Gordon in their rulings have helped legitimize Israel's policies of dispossession and have created a false symmetry between colonizer and colonized (Idem, p. 115).
[15] J. Butler, *Notes toward a Performative Theory of Assembly*, Harvard University Press, Cambridge Mass., London 2015, p. 36.
[16] *Idem*, pp. 40-41.
[17] *Idem*, p. 133.
[18] *Idem*, p. 133.

the Palestinian people. Third, a focus on the illocutionary dimension of the rights claiming (e.g. winning or losing a particular juridical case) may misrecognize (more radical) effects of human rights claims.

III. Rights Claiming as a Rule Breaking Act

The perlocutionary dimension of rights claiming emphasizes that rights claiming is not only a rule bound practice, but that it is also 'a rule-breaking practice that opens up the possibility of the new'.[19] As Zivi argues, 'a rights-as-trumps conception [that] presents rights claiming as an activity that can and should bring a debate to an end by producing clear and secure winners (…) obscures the fact that the practice is, like all speech activity, fundamentally unpredictable and always changing'.[20] Hence, focusing on the illocutionary dimension of rights claims produces a certain effect that does not only conceal the existence of partisan procedures, it is also at risk of being preoccupied with fixing or stabilizing the norms or conventions in order to guarantee the successful uptake of a rights claims. This stands in stark opposition to the idea that a speech act contains a kind of performance, the effects of which cannot be verified beforehand. We should therefore also consider what one does *by* (as opposed to *in*) speaking (i.e. the perlocutionary dimension). This also means that rights are tools of activism, that reconstitute the contours of community and the nature of our political subjectivity. This perspective on rights claims clearly counters the critique that rights claims eventually result in the depoliticization of a conflict and that it pacifies resistance. Instead of viewing rights claims as claims that close the discussion where they meet the felicity conditions, Zivi holds that 'there is no formula by which we can capture what precisely happens by the making of a persuasive (or other perlocutionary) utterance'.[21]

As such, Zivi follows thinkers such as Arendt who 'appreciate the importance of cultivating an orientation to politics that embrace unpredictability and fosters practices of discussion, persuasion and disagreement'.[22] For Arendt, rights claims never trump because of their particular definition, they 'are revealed in the context of a public composed of a plurality of perspectives and thus open to differing interpretations'.[23] Arendt holds that politics is essentially about sharing opinions and making claims of persuasion, 'agreements are thus reached only through sharing perspectives on the world with others and seeing the world through their eyes, but such agreements must then be recognized and embraced as contingent and always open to reinterpretation and contestation'.[24] For Arendt, then, to act in concert, sharing perspectives on the world presupposes a common public space that is defined by equality. And it is exactly in the concerted act of exercising the rights to have rights that people who have been non-recognizable as equal humans when the right to have rights comes into being. At this moment, people who have been effectively abandoned from the public stage, enter the state of appearance in order to contest the existing forms of political legitimacy. As such, Zivi argues, the perlocutionary dimension of rights claims shows, above all, how the act of claiming rights may contribute to democratic practices.

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[19] Zivi 2012, supra note 7, p. 19.
[20] *Idem*, p. 38. Therefore, Zivi argues repeating Derrida that 'illocutionary "failure" is a constitutive part of all linguistic activity' (*idem*, p. 39).
[21] *Idem*, p. 45.
[22] *Idem*, pp. 40-41.
[23] *Idem*, p. 49.
[24] *Idem*, p. 53. On this point also see L. Zerilli, *Feminism and the Abyss of Freedom*, Chicago: University of Chicago Press.

In the last pages of their book, Perugini and Gordon argue for the reconstruction of human rights discourses in and by grass root movements such as the Boycott, Divestment, and Sanctions movement (BDS).[25] Emphasizing that this movement has created new political communities of Palestinian *and* Israeli people, the authors in fact foreground the perlocutionary dimension of human rights claims along the lines proposed by Zivi. The authors also implicitly point at the perlocutionary effects of rights claiming activities in other parts of the book. For example, where they describe how fieldworkers of human rights NGOs, record the stories of Palestinians who witnessed human rights violations.[26] These stories, then, in addition to being used as a form of legal evidence, contributed to the political visibility of the Palestinian people.[27]

While the rhetorical strength of human rights as a language of political contestation should not be underestimated, 'The human right to dominate' also reveals that the act of claiming rights did not exclusively, nor necessarily, enhance democratic practices. On the contrary, Perugini and Gordon show that instead of opening up a political debate (and contributing to democratic practices), the rights claiming activities of liberal NGOs resulted in the implementation of exceptional measures against human rights NGOs. Moreover, along with the mirroring and inversion of human rights claims by conservative NGOs,[28] a legalistic discourse emerged that changed the human rights discourse from a tool of the masses to a tool of the experts, which has reproduced and re-enforced the existing political asymmetry between the Israelis and the Palestinians.[29] 'The human right to dominate' thus suggests that the professionalization of

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[25] Perugini & Gordon 2015, supra note 1, p. 138.

[26] *Idem*, p. 92.

[27] Compare A. Eleveld, 'Claiming Care Rights as a Performative Act, *Law and Critique* 2015-1, pp. 95-96.

[28] In this context the question can be raised whether all rights claims (as perlocutionary speech acts) are ethical? According to Perugini and Gordon, only those rights claims should be pursued that challenge existing relations of domination. This argument resonates Honig's argument that those rights claims should be endorsed that attempt to subvert the existing order. According to Honig, rights claiming is a form of democratic activism, guided by two virtues: agonistic respect and critical responsiveness. Agonistic respect demands that we see those holding different commitments as not only equally entitled to those commitments but also as equally entitled to engage in political contestation. Critical responsiveness in turn asks those occupying positions of social privilege to be open to hearing alternative claims and to recognizing the way in which their commitments may in fact harm others (B. Honig, *Political Theory and the Displacement of Politics*, Ithaca, New York: Cornell University Press). In my opinion the ethical dimension of the perlocutionary speech act should be developed further. At the workshop 'Political Struggle and Performative Rights' at the European Workshops in International Studies (EWIS) (University of Tübbingen, 6-8 April 2016), Joe Hoover proposed to look at pragmatist theory, in particular the work of Dewey to find inspiration for an ethical assessment of rights claims as perlocutionary speech acts.

[29] In addition to this analysis, in my opinion, the role of NGOs as a platform of making rights claims deserves further scrutiny, also beyond the Israeli - Palestinian context. As I have argued in another paper, an exclusive Arendtian (or Rancierian) perspective on rights claiming practices as democratic practices may overlook the fact that emerging political agents are subjected to governmental practices within the same civil society organizations where they make their rights claims (A. Eleveld and F. Van Hooren, 'Resistance and Government at the Site of the Trade Union. The case of Undocumented Migrant Domestic Workers Claiming Rights in the Netherlands', forthcoming in *Social & Legal Studies*). Civil society organizations, then, like any other institutions may exclude, control and constrain the actors operating within or on behalf of these organizations and - as Perugini and Gordon have shown - these organizations may even become complicit in the discriminatory policies of the state. For example, see how the liberal NGO B'Tselem condemns the attacks of the Palestinian militants, while at the same time

human rights discourses has provided the authorities with new tools to govern the people; it has effectively turned the Palestinians (as well as the Jewish settlers I would add) into governable subjects of rights.[30]

Despite their firm human rights critique, Perugini and Gordon recommend activists to 'appropriate human rights to target the law where and when it enhances domination'.[31] In my opinion, it is understandable that the authors do not want to reject the deployment of the language of human rights altogether. After all, even critical commentators of human rights discourses have argued that a rejection of human rights comes at the risk of a failure to resonate with dominant discourses. As a result, these claims may not be heard at all.[32] I also agree that human rights law is a powerful tool and sometimes the only weapon in the hands of subjugated groups. Moreover, as I have argued throughout this paper - following Zivi -, the act of claiming (human) rights may constitute new political identities and as such enhance democratic practices. However, regarding Perugini and Gordon's own analysis of how human rights have been played out in the Israeli-Palestinian conflict, the question can be raised over why the authors remain faithful to human rights language in *this* specific context?

Conclusion

Perugini and Gordon painfully expose the limitations of human rights discourses. Drawing on speech act theory, I have endeavoured to show how the act of claiming human rights might still be able to transform relations of domination, (i.e. foregrounding the perlocutionary dimension of rights claiming). However, in my opinion, within the context of the state of Israel where the use of the language of human rights has been excessive, it is doubtful whether this language will be able to engender these effects. Perhaps we should look at human rights claims in a different way, by rephrasing the title of Austin's book 'How to do things with words',[33] as 'How to do words with things'.[34] The claim of equal human rights, then, - citing Butler - is 'not only spoken or written, but is made precisely when bodies appear together, or rather, when, through their action, they bring the space of appearance into being'.[35] That is, by collectively assembling at

condoning the Israeli military attack during Operation Pillar of Defense Perugini & Gordon 2015, supra note 1, pp. 94-97).

[30] On the dilemma's involved in human rights resistance as channelling potential radical democratic demands for structural changes see L. Odysseos, 'Human Rights, Liberal Ontogenesis and Freedom: Producing a Subject for Neoliberalism? *Millenium* 2010-3, pp. 747-772 and L. Odysseos, 'The question concerning human rights and human rightlessness: disposability and struggle in the Bhopal gas disaster', *Third World Quarterly* 2015-6, pp. 1033-1040. I

[31] Perugini & Gordon 2015, supra note 1, p. 137.

[32] See for example, B. Golder, *Foucault and the Politics of Rights*, Stanford, California: Stanford University Press 2015.

[33] J.L. Austin, *How to do Things with Words: The William James Lectures delivered at Harvard University in 1955* (ed. J.O. Urmson and M. Sbisà), Oxford: Clarendon Press 1962.

[34] This reversal of Austin's phrase was suggested by Engin Isin at the workshop 'Political Struggle and Performative Rights' at the European Workshops in International Studies (EWIS) (University of Tübbingen, 6-8 April 2016).

[35] J. Butler 2015 supra note 15, p. 89. For Butler, then, the concerted action in the Arendtian sense 'that characterizes resistance is sometimes found in the verbal speech act or the heroic fight, but it is also found in those bodily gestures of refusal, silence, movement and refusal to move (…) in the very action by which they call for a new way of life that is more radical democratic'. For Butler, then, the concerted action in the Arendtian sense 'that characterizes resistance is sometimes found in the verbal speech act or the heroic fight, but it is also found in those bodily gestures of refusal, silence, movement and refusal

the public stage, people may implicitly invoke human rights (hence, 'doing words with things'). Perhaps this performative act is more persuasive than the verbal act of claiming these rights.

to move (…) in the very action by which they call for a new way of life that is more radical democratic' (*Idem*, p. 218).