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Constituent Human Rights

A Spinozan study of the radical
within human rights theories
and the Capitol Hill Occupied Protest

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Abstract

The global human rights regime can only recognise rights that are already known and given, what I'm calling *constituted human rights*. This mantra poses some immediate obstacles: it effectively invisibilises issues of the productivity and antagonism of human rights movements, the unknown and indeterminate future, and human rights that don't yet exist. This thesis is an effort to disclose, through critical hermeneutics and ontology, a radical form of human rights. From Spinoza's idea that right is co-extensive with power, I logically extend Antonio Negri's concept of constituent power to produce the concept of *constituent human rights* as an ontological and inalienable way of expressing human rights. My purpose is to explore what constituent human rights can say about human rights theory and praxis, and *vice versa*. I'm therefore traversing radical human rights theories and the human rights movement of Capitol Hill Occupied Protest in Seattle. In an open-ended and continuous hermeneutical understanding, I'm then building and producing the concept of constituent human rights throughout. Constituent human rights, I find, are produced as inalienable to our being. Human rights are expressed as temporally indeterminate, exploding any contingent boundaries in going far beyond the fabric of the known and the present. In this way, constituent human rights are independent of the global human rights regime, its conventions, and the already-given. Instead, constituent human rights unfold from everything we do, and everything we express. By virtue of our existence, we produce human rights as our immediate nature.

Keywords: *Spinoza, constituent human rights, production, Negri, constituent power, human rights, power, radical human rights theory, Capitol Hill Occupied Protest, ontology*

Thank you to my friends and family for support.
Thank you to the people more knowledgeable than me that have
answered my numerous questions.
Thank you to my supervisor for giving me the space to explore
the hidden abodes of human rights.

by believing passionately in something which still does not exist, we create it. The
nonexistent is whatever we have not sufficiently desired, whatever we have not irrigated
with our blood to such a degree that it becomes strong enough to stride across the
somber threshold of nonexistence.

— Nikos Kazantzakis

Abbreviations and Terminology

In my references to Baruch Spinoza, I'm using Edwin Curley's English translation, found in his two translated and edited volumes, *The Collected Works of Spinoza*. Spinoza's work *the Ethics* (E) is found in volume one, and the *Tractatus Theologico-Politicus* (TTP) and the *Tractatus Politicus* (TP) are found in volume two. When I'm citing Spinoza's letters I'm referring to them as *Letter* followed by Arabic numerals and Curley's respective volume in Roman numerals. References are not to specific page numbers but to the propositions within Spinoza's works. Roman numerals connote the Part of the works and Arabic numerals connote the respective propositions. Furthermore, when referring to Spinoza's *Ethics*, I'm using the following abbreviations:

P = Proposition

D = Definition

A = Axiom

S = Scholium

Dem. = Demonstration

In my discussion of occupancy of Capitol Hill, I'm exclusively using the nomenclature *Capitol Hill Occupied Protest* (CHOP). However, the occupancy was also referred to as *Free Capitol Hill*, *Capitol Hill*, *Capitol Hill Organized Protest*, *Capitol Hill Free Zone*, and *Capitol Hill Autonomous Zone*. Furthermore, in my references to Capitol Hill Occupied Protest:

Recorded speeches, teach-ins, and discussions are referenced with the name of the speech together with the date (DD/MM/YY). These names refer to what's in the video and will be found in my notes corresponding to the uploaded title of the videos.

Tweets are referred to by Arabic numerals, the date (DD/MM/YY), together with the hashtags that the author used to codify their statements.

Images are referred to by Arabic numerals corresponding to my notes, e.g. "Image 1".

Table of Contents

1. The Untimeliness of Human Rights	1
1.1 Human Rights Critique	4
1.2 Beyond Human Rights Critique	7
1.3 Theory Beyond Critique	9
1.4 Method Beyond Critique	14
2. Spinoza: Being, Power, and Rights	18
2.1 <i>Potentia</i> and <i>Potestas</i>	19
2.2 Being-in- <i>potentia</i> and Production	21
2.3 Constituent and Constituted Power	22
2.4 <i>Ius, sive Potentia</i>	27
2.5 Constituent and Constituted Human Rights	29
3. Radical Human Rights Theory	32
3.1 Human Rights Constitutionalism	34
3.2 Rancière and the Contingency of Order	38
3.2.1 Human Rights Dissensus	40
3.3 Temporality and Performativity	43
3.3.1 Performing Human Rights	44
3.3.2 Human Rights Expressionism	48
3.4 Lefebvre, Immanence, and Human Rights	54
3.5 Capitol Hill Occupied Protest	57
3.5.1 Occupation, Constitutionalism, and Human Rights	57
3.5.2 Occupied Immanence and Constituent Human Rights	64
3.6 The Constituent Right to Have Rights	68
4. Constituent Human Rights: a nonconclusion	75
5. Bibliography	80

1. The Untimeliness of Human Rights

In the face of human rights abuse, global precariousness, and planetary capitalism, the legal ways to enjoy and access human rights are severely restricted. In the war on terror, human rights are brought to Syria and Yemen in modern civilising missions, with daily aerial bombings and drone strikes and in the war's aftermath the victims have to, left with no legal passage to Europe, cross borders illegally. The rights of refugees are routinely ignored and abused as the European community observes passively, as refugees are drowning in the Mediterranean Sea, behind an armed-and-ready Frontex and barbed-wire fences. The human rights "fantasy of progress" has been met with disappointment: the global human rights regime doesn't help refugees part the sea and escape annihilation.¹ Paradox and hypocrisy exist in broad daylight, as the global human rights regime can reaffirm the rights of refugees in law, whilst at the same time denying them the right in practice.²

In this sense, the word of the law and the legal catalogues of rights are universally applied, but at the same time alienated from whether or not they're actually experienced and enjoyed. When the time of human rights doesn't reflect the time we're living in, it might appear the time of human rights is finally up.³ Human rights temporality often depends on freezing time in place insofar as theories and legal documents portray human rights and nature as inert or absolute. There is, to use Elizabeth Grosz's term, an *untimeliness* to human rights, which is to say that the time of human rights law functions from a disjunctive synthesis that doesn't correspond to their lived experiences of human beings.⁴ This rift produces rightless subjects: subjects whose juridico-political rights are omitted from their everyday lives. In this sense, the triumphant age of human rights, with its mantra of "more and more human rights," has been replaced by an age of rightlessness.⁵

¹ Zigon, 2017, p. 56.

² Marks, 2011, pp. 74 et seq.

³ McNeilly, 2019, p. 818.

⁴ Grosz, 2010, p. 49.

⁵ For an analysis of the age of rights, see Henkin, 1990, and Bobbio, 1996. On human rights as paradox and crisis, see Douzinas, 2013; Brown, 2002; Gündoğdu, 2015.

If we're going to continue using human rights as a useful concept, how, then, can we go beyond the impasse of *rights in an age of rightlessness*? I don't espouse a nostalgic return to a radical time long lost, I believe we must instead notice how human rights are already expressed in radical and *constituent* ways. Despite the rift between juridico-political and experienced rights, human beings continue to desire better worlds for themselves in claiming, performing, and expressing human rights routinely denied to them or non-existent as such. Tackling this issue, radical human rights theories and social movements demonstrate how human rights go far beyond the limitative scope of what I'm calling *constituted human rights*, that is, human rights that have already been constituted and legislated in place. In going beyond this already-given, my purpose is to conceptualise and produce the concept of *constituent human rights*, a concept corresponding to the produced, lived, and expressed human rights outside of statist, international, or legal politics of recognition and juridico-political human rights. In this sense, rights become possible in an age of rightlessness since constituent human rights don't depend on the time, presence, or absence of constituted human rights.

An event that expresses this multifaceted and excessive character of human rights is the occupation of Capitol Hill in Seattle, Washington, in the summer of 2020. The so-called Capitol Hill Occupied Protest, or CHOP, was part of the Movement for Black Lives and the George Floyd Rebellion, following the murder of George Floyd by the Minneapolis police. The antecedent protest and the subsequent occupation were a cry and demand against having their lives brutally policed. Instead of restricting themselves to appealing before the courts and arguing their constitutional rights, the Seattleites occupied a six-block area and effectively cleared the space of policing when they pushed out the police from their own precinct.⁶

The occupiers were fully aware of the untimeliness of human rights law induced by the lived experiences of human rights, noticing that their constitutional rights were insufficient when it's the agents of the state that's oppressing you. As one occupier rhetorically asked: "How do you ask your oppressor to free you?"⁷ In fact, the space was occupied precisely because the oppressive regime cannot free its subjects. The US, as another occupier said, has "either [been] unwilling or unable to do what is necessary

⁶ Harrison Green, 8th June, 2021.

⁷ Video, "Teach-in", 11/06/20.

to facilitate our freedom. So if our freedom is to be won, it must be won in the streets.”⁸ In themselves pushing out the Seattle Police Department (SPD), refusing them re-entry, and declaring the zone police-free, they effectively acted on and claimed a human right of life ungoverned by policing because, for a short duration of their lives, lived their lives without the police.

Inside CHOP, forms of horizontal institutions were produced and affective ties were built around “food, security, bathrooms, art, love, public discourse, action, education, film viewing, and much needed community building.”⁹ It’s within this immediate expression of action and desires that human rights went beyond their constituted forms. Communal and guerilla gardening acted against the policing of unproductive lawns, turning an occupied park into a place of food cultivation and racial food equality.¹⁰ A “No Cop Co-Op” reflected the idea of communal caring and cooperation without policing, whereas food trucks aimed to “feed the revolution” by turning against the policing structures of unequal food distribution.¹¹ In this sense, I’m reflecting on how human rights came into being through CHOP’s “own working existence.”¹²

CHOP paints a picture of an active utopia or a prefigurative politics that projected the kind of society the occupiers desired for themselves. In this sense, they expressed a right of life ungoverned by policing correlating to making themselves less governed by policing. In order for me to be able to discuss human rights as going beyond what’s already constituted, my work centres around a hermeneutical understanding of radical human rights theories that notice an excessiveness of human rights praxis beyond constituted human rights.¹³ However, it was not until quite recently that human rights became an object of interest for radical and critical studies. This movement is, what Costas Douzinas calls, right revisionistic.¹⁴ Human rights movements have come to involve a “strategically essential point of engagement,”¹⁵ and it’s these works I’m

⁸ Video, “DefundPolice” 09/06/20.

⁹ Tweet 1, 09/06/20, #CHAZ.

¹⁰ Weinberger, 15th June, 2020.

¹¹ Hiruko, 2nd July, 2020.

¹² Marx, 1974, pp. 213, 217.

¹³ For the purposes of this thesis, radical human rights theories signify productive interventions within the discourse of human rights from Marxist and post-Marxist thinking.

¹⁴ Douzinas, 2010, p. 81.

¹⁵ Manfredi, 2013, p. 7. Cf. Gassama, 1996, p. 1540.

delving into to make human rights say everything that it can say. In this manner, human rights theory and praxis are interwoven—through radical human rights theory and CHOP.

My work is an intervention within radical human rights theories, and, most importantly, an open-ended path away from the straitjacket of human rights critique. In the next chapter, I'm discussing the form of human rights critique that conceives of human rights as constituted. It's my belief that this only tells half the story. Neither constituted human rights nor human rights critiques focusing solely on human rights as constituted, exhaust the spectra of human rights expressions. This is why I'm producing, throughout this work, my concept of *constituent human rights*: a radical concept of how human rights can be produced outside of any “centralized, mediating, transcendental force of command.”¹⁶ That is, a concept that corresponds to those human rights that don't already exist and aren't already known within the sphere of constituted human rights.

1.1 Human Rights Critique

Although I believe human rights offer many radical potentials for engagement, many critical scholars view human rights as something reactionary and inescapably hegemonic. Their human rights critique is primarily an operation supposed to distance radical social movements and theory from the limitative scope of human rights.¹⁷ This chapter is meant to provide an overview of the sort of critique which abounds, and, in the subsequent chapter, a way of going beyond such critique, without losing its radical potential.

It's *the shared temporality*, to use Sumi Madhok's expression,¹⁸ of human rights and other global hegemonies that has made many radical scholars wary of human rights, since it disarticulates human rights law from its lived experiences. Whereas I think constituted human rights are filled with cracks that disclose the untimeliness as a

¹⁶ Hardt, 1991, p. xiii.

¹⁷ Since my critique of human rights critique isn't informed by their initial object of critique, I'm not going to present an exhaustive list of human rights scholars or concepts that represent this heterogeneous field. Nonetheless, human rights critique is often critical of the juridico-political, institutional, liberal, capitalist, sovereign, and transcendent associations of human rights, amongst many other structures and concepts. For some symptomatic readings of these concepts, see Orend, 2002; Sikkink, 2017; Shue, 1996.

¹⁸ Madhok, 2021, p. 21.

productive encounter, many theorists conceive of human rights as univocally hegemonic.

It's commonplace for human rights critique to imbricate human rights with global hegemonies, whether it be capitalism, liberalism, or religious foundations. The discourse of human rights, a wide range of authors argue, appropriate, domesticate, and silence radical politics.¹⁹ Samuel Moyn and Upendra Baxi, amongst many others, argue that human rights morally justify or permit planetary inequality.²⁰ According to Baxi, the tandem movements and times of the global human rights regime and capitalism have transformed human rights into "trade-related, market-friendly human rights."²¹ Quinn Slobodian, similarly, argues that neoliberal and constituted tendencies co-opt human rights in order to "cover clearly capitalist prerogatives."²² Whilst Joseph Slaughter believes that it's human rights itself that "domesticate the impulse of the revolutionary plot of rebellion."²³ In this sense, there's an insolvable bind between oppressive apparatuses and human rights.

Following the same line of argument, Jessica Whyte and Susan Marks believe it impermissible to view human rights as an empty signifier lacking any univocal meaning. In this way, human rights are always constituted insofar as they reproduce existing power relations; opening up for the possibility of human rights as constituent, as I'm doing, would be to, as Marks puts it, "silently... signal that [human rights] are isolated problems, unrelated to wider processes, tendencies and dynamics at work in the world."²⁴ These critiques mirror my concerns of constituted human rights conceived as wholly representing our political imaginary of right. There's a justified worry about how the discourse of human rights is transcendent, abstract, and cut off from our material world. However, this is a parallel erasure of radical human rights praxis, which invisibilises the counter-processes, counter-tendencies, and counter-dynamics in the world.

¹⁹ See Kapur, 2018; Brown, 1995; Brown, 2002; Brown, 2004; Whyte, 2019; Slobodian, 2018; Slaughter, 2007; Hopgood, 2013; Hopgood, Snyder, and Vinjamuri, 2017; Marks, 2019.

²⁰ Moyn, 2018a; Marks, 2019; Baxi, 2006; Whyte, 2019.

²¹ Baxi, 2006, pp. 6-7.

²² Slobodian, 2018, p. 136.

²³ Slaughter, 2007, pp. 91-92.

²⁴ Marks, 2009, p. 17.

It's not altogether strange that many human rights critics centres on human rights belonging to a long-lost tradition of authoritarianism and absolutism, where human rights depend on some form of sovereign power. The authoritative word of God, as the foundation of rights and morality, has been replaced by hegemonic regimes and the UDHR. Human rights, then, are often conceived of as traces of the natural right of God.²⁵ Human rights dances to the flute of sovereign nation-states, whilst the intrapersonal morality of human rights and duties, emanating from the UDHR, morally transfixes its legal positivism. In this way, the UDHR and the UN global human rights regime together compose, as Stephen Hopgood says in his human rights critique, *the Church of Human Rights*.²⁶ It's thus impossible to conceive of human rights outside of constituted human rights, insofar as the word of God and the word of the law constitutes a self-evident symbiotic relationship. Morality and rights exist, as Emmanuel Levinas said, "thanks to god."²⁷ The word of God conceptualised as morality has been turned into formal human rights law in a process Moyn calls "religious constitutionalism."²⁸ The logic stipulated by the International Bill of Human Rights gained momentum precisely because it depended upon a synthesis of theology and right, constituting the "dignity of the human person as basic principle."²⁹

It's my belief that human rights are possible in a rightless world, whereas human rights critique generally believes that human rights depend on a transcendent structure. Human rights, as Moyn explains it, is *the last utopia*, "the god that did not fail while other political ideologies did."³⁰ Human rights are traces of sovereignty and transcendence, and recognising the untimeliness of God as the friction between our human condition and the death of God, would mean to denounce human rights as artefacts of yesteryear.³¹ God-given absolute rights cannot be the basis for right and wrong and in this way, just as constituted human rights won't part the Mediterranean Sea for refugees, neither the UDHR nor God-given rights will transform us into Moses.

²⁵ See MacIntyre, 2013, p. 83.

²⁶ Hopgood, 2013, pp. 24-46.

²⁷ Levinas, 1974, p. 158

²⁸ Moyn, 2015, pp. 26-27. See also Manent, 2020.

²⁹ Ibid. Cf. Shklar, 1989, p. 23.

³⁰ Moyn, 2010, p. 5.

³¹ De Benoist, 2011, p. 22.

Human rights critique goes a long way in disenchanting human rights from its transcendent and otherworldly qualities and brings back the project to a contextualised and material plane. Their logic implies that to combat capitalist induced planetary inequality, one must denounce human rights. However, this idea of a master-signifier discards what I'm calling constituent human rights, that is, the ways in which human rights exist independently of constituted apparatuses and structures. If constituent human rights aren't subsets of capitalism, transcendence, sovereignty, or any other hegemony, then their conclusive denunciation of human rights doesn't logically follow. Furthermore, it's my argument that these authors are actually forced to bracket these parasitic uses of human rights in order to incriminate human rights as a whole.

1.2 Beyond Human Rights Critique

Although the aforementioned authors criticise human rights as such, their critique also opens up some productive tensions within the discourse of human rights. In this way, Whyte makes a distinction between “hegemonic conceptions of human rights” and “uses of human rights by marginalised and subaltern groups.”³² Here, I'd argue that the former hegemonic conception of human rights represents constituted human rights, whilst the latter is a constituent form of human rights. Thus, in order to potentiate a human rights critique, the latter form of human rights must be bracketed. Similarly, Hopgood's critique of human rights centres on the global human rights regime which has turned the constituent and “non-hegemonic language of resistance” into the global human rights regime of “laws, courts, norms, and organizations... that claim to speak with singular authority in the name of humanity as a whole.”³³ In this argument, there's no excess, residue, or surplus left in the productive masses. I believe, however, that the distinction these authors make constitutes the very ontological stuff of constituent and constituted human rights, a distinction that cannot be subsumed and enveloped in the shadow of constituted human rights.

Human rights critique that only focuses on oppressive apparatuses of human rights aligns itself with its object of critique insofar as the predetermined premises of

³² Whyte, 2019, p. 33.

³³ Hopgood, 2013 p. ix, 178,

constituted human rights are reproduced and accepted. Other human rights scholars, however, conceive of this negative critique as the path towards other possibilities. Drawing upon Giorgio Agamben and his concepts of destituent power, biopolitics, and destruction, they propose a negative conception of human rights that would make constituted human rights inoperative. They conceptualise the “other” of constituted human rights as a destituent or destructive form of human rights.³⁴ In this way, they go beyond aforementioned authors, whilst still focusing on the negativity of critique. Illan rua Wall and Upendra Baxi distinguish the constituted sphere of the already-given and ways of making such givenness inoperative.³⁵ Human rights would, in these accounts, work to “decreate” already-existing forms of human rights and thence open up other ways of being-in-the-world.³⁶ In a similar fashion, Ratna Kapur believes that human rights “cannot give us what we want,” and human rights critique must make the limitative fishbowl of liberal human rights inoperative.³⁷ Remaining within the fishbowl of human rights would mean that “the more we invoke rights,” according to Ayten Gündoğdu’s reading of Agamben, “the more entangled we become with sovereign power.”³⁸ What this means is that human rights can only decrease constituted human rights, lest they should themselves reproduce the sovereignty of the human rights regime.

It’s thus possible to make a distinction between two forms of human rights without presupposing that constituent human rights is a radical production outside of constituted human rights. Staying with Gündoğdu’s reading of Agamben, however, shows how the potentials of human rights always escape their constituted settings insofar as they can be claimed in new and unanticipated ways, continually contesting our current understanding of what human rights actually mean.³⁹ Whereas going beyond human rights critique often implies, as Agamben puts it, a “politics *beyond* human rights,”⁴⁰

³⁴ See Lechte and Newman, 2013, esp. p. 127; Whyte, 2013; Whyte, 2019; Cheah, 2014. See also de la Durantaye, 2009, for an introduction to Agamben.

³⁵ Baxi, 2006; rua Wall 2012; rua Wall, 2015. In rua Wall, especially, constituent power is read as a destituent form of power. Both the Greek potentiality (*dunamis/dýnamis*) and Spinoza’s power are translated into Latin as *potentia*. Rua Wall doesn’t read *potentia* in the Spinozan sense of a power contrary to *potestas*, but in an Agambien/Aristotelian sense of potentiality. Followingly, rua Wall discards Negri’s conceptualisation of constituent power, which furthermore distinguishes my approach from his.

³⁶ Baxi, p. 2 et seq.

³⁷ Kapur, 2018, p. 240. See also pp. 163 et seq., 239.

³⁸ Gündoğdu, 2012, p. 9.

³⁹ Gündoğdu, 2013, p. 125. See also Gündoğdu, 2012.

⁴⁰ Agamben, 2000, pp. 15 et seq. See also Agamben, 1996.

Gündoğdu points towards a productive potential as a politics for constituent human rights *beyond* constituted human rights. My work is an exploration into what human rights can say when we stay *within human rights*, whilst simultaneously *going beyond constituted human rights*. In this way, negative critique can only be, as Sumi Madhok puts it, “the starting point for the production of new intellectual and conceptual histories, geographies and epistemologies of rights.”⁴¹ The concept of constituent human rights is such a starting point: an attempt to make human rights say everything it can say without freezing its potentiality in its determinate modes. My project is a critical hermeneutics that attempts to notice, understand, and conceive of productive and positive forms of human rights as a critique that opens up understanding, instead of closing it down.⁴²

1.3 Theory Beyond Critique

Throughout this work, I’m constructing an argument around radical human rights, as well as—or more precisely, through—my producing the concepts of constituent and constituted human rights. In this way I’m hoping to go beyond constituted human rights. The conceptualisation of these concepts comes from my noticing how radical human rights theory divides hegemonic and inert forms of human rights from radical and open-ended forms of human rights. Sometimes criticised human rights in the former sense, and sometimes using it instrumentally in the latter sense. I believe this aleatoric differentiation stems from a conceptual and ontological lack *vis-à-vis* human rights, and my work is an attempt to address this gap whilst following the intuitions of other radical human rights scholars.

First and foremost, the concept of constituent human rights will be explored and developed as a theoretical concept, derived from Baruch Spinoza’s *oeuvre*, together with Spinozist literature. My reading of Spinoza allows me to make ontological arguments concerning human rights that have been historically limited to questions of being and

⁴¹ Madhok, 2021, p. 174.

⁴² For my use of hermeneutics as a way of opening up understandings and possibilities, see Ricœur, 1991, p. 131 et seq.

power.⁴³ Secondly, these concepts will be used deconstructively and hermeneutically in order to understand radical human rights theories as well as Capitol Hill Occupied Protest, whilst simultaneously allowing theory and praxis to add meaning to constituent human rights. In this sense, constituent human rights is an ontological concept, heuristic device, and something that can be practised. I'll briefly address the first step in this theoretical conceptualisation below, and continue with my methodology and method in the next chapter.

In the first instance, I'm reading constituent human rights *through Spinoza* as "an optical instrument," that is, as a pathway to ontological arguments that can open up one's understanding of human rights.⁴⁴ Secondly, Spinoza continues to provide the world with one of the most radical conceptions of being, power, and right. Spinozism is instructive in disenchanting any sovereign or transcendent form of representation whilst parallelly infusing human beings with immense radical potential. It's in this way that Spinozan ontology and metaphysics can make sense of human rights through and beyond critique.

Spinoza begins his *Ethics* with definitions, axioms, and propositions, providing a clear geometrical model for God and human beings. Spinoza's God stands at the centre point of his ontology and is conceived from determinate concepts and logics. Spinoza's concept of God is distinguished from the ecclesiastical tradition and traditional Talmudic and biblical exegesis. When Spinoza speaks of God, he doesn't imply a transcendent being, nor an anthropomorphic or personal deity.⁴⁵ Instead, as Spinoza says, God is immanent: God doesn't exist above or outside the world as a deliberative force that can decide anything it wants, but is wholly within what it conditions. This is clearly reflected in Spinoza's idea of God's power (*potentia*). God's power is the motor of affirming the power of human beings as the conceptual and logical implication of God as cause. Although *potentia* is a concept of power, it's far removed from, for

⁴³ Even though Spinoza has a theory of right, he's not a household name within human rights theory. Although beyond the immediate scope of my work, a derivative aim of this thesis is to show his immense usefulness and radical potential for human rights thinking.

⁴⁴ Macherey, 2021, p. 610. Needless to say, my use of Spinoza is tailor-made towards pushing the argument of constituent human rights forward, and whilst my arguments are Spinozan in nature, the vast majority of his conceptual catalogue is nowhere to be found in my work. For critical introductions of Spinoza, see Lord, 2010; Melamed, 2017; Sharp and Melamed, 2018.

⁴⁵ Spinoza, in fact, compares God to Nature and substance: *Deus, sive natura, sive substantia*.

example, the Marxist idea of power as the interests of the ruling classes.⁴⁶ Similarly to how it's impermissible to think of God as anthropomorphic, we cannot conceive of God's power as resembling the human power of sovereigns or monarchs. We make a categorical error when we conceive of God as an almighty ruler with the freedom of will, as if God was made in our image. As Spinoza wrote: "if a triangle could speak, it would say... that God is triangular in an eminent way."⁴⁷ Moreover, since God isn't a sovereign power, God could never "bring it about that it would not follow from the nature of a triangle that its three angles are equal to two right angles."⁴⁸

Because God isn't posited as transcendent and otherworldly, Spinoza constructs a passage between metaphysical power and the political power of human beings. Human beings thus express God's power. This is something Spinozists generally conceive of as *constituent power*: an immanent capacity to produce and create things that haven't existed before, directly derived from Spinoza's conception of *potentia*. *Constituted power*, asymmetrically, is an authoritative form of command and power derived from *potestas*.⁴⁹ My argument will explore this relationship, generally arguing with Antonio Negri that it's possible to connect God's power to the constituent power human beings express.⁵⁰

Although Negri introduces productive and inalienable concepts of power, these are not extended towards human rights. In many ways, Negri, in his collaborative work with

⁴⁶ Spinoza makes an important distinction between *potestas* and *potentia*, both translated into "power" in English, something I'll return to later.

⁴⁷ Letter 56, vol II.

⁴⁸ EIP17S1.

⁴⁹ Whereas the differences of *potentia* and *potestas* comes to light in many other languages, *potentia* as a form of constituent power is intuitively lost in the English language. In French then, *puissance* corresponds to *potentia* and *pouvoir* to *potestas*, whilst the Italian uses of *potenza* and *potere* correspond to *potentia* and *potestas* respectively. In Michael Hardt's translator's foreword to Negri's foremost Spinozan study, *The Savage Anomaly: The Power of Spinoza's Metaphysics and Politics*, he writes that Negri's analysis of the Spinozan *potentia* is "the local, immediate, actual force of constitution," whilst *potestas* is "the centralized, mediating, transcendental force of command." Hardt, 1991, p. xiii. In Hardt's foreword to Negri's political work on constituent power (*Insurgencies: Constituent Power and the Modern State*), the respective politicised forms of *potentia* and *potestas*—constituent and constituted power—are developed further. Here Hardt explains that "[c]onstituent power names the democratic forces of social transformation, the means by which humans make their own history," whereas "[c]onstituted power, in contrast, defines the fixed order of constitution and the stability of its social structures. History is closed by constituted power or, rather, the history it determines is restricted to a continual repetition of the same social divisions and hierarchies." See Hardt, 1999, pp. vii-viii. I'll explore these dynamics further in chapter 2.

⁵⁰ For an overview of Negri's philosophy see Murphy and Mustapha, 2005; Murphy and Mustapha, 2007; Murphy, 2012.

Michael Hardt, reflects the ambiguity of human rights critique, in making a distinction between two forms of human rights that aren't ontologically motivated. Hardt and Negri oftentimes argue that human rights are part and parcel of hegemonic practices, used as pretext for imperial wars, racial subjugation, and neoliberal austerity measures.⁵¹ In this way, human rights are part of constituted power. However, this doesn't exhaust the possibilities of what they believe human rights can do. Constituent power is conceived as opening up revolutionary and emancipatory instrumentalizations of human rights, whereby human rights can be radically used within certain power configurations.⁵² Hardt and Negri vacillate between constituted and constituent forms of human rights and the way they function, but they don't attach any ontological and conceptual weight to the concepts. I believe that constituent power and constituent human rights are correlatives, equally ontological. It's when human rights lack ontological reasoning, that its use becomes co-opted by hegemonic practices—as seen in chapter 1.1. As a consequence, Hardt and Negri's off-hand use of human rights has been rightfully met with criticism.⁵³ My theoretical argument reads Negri against the grain, insofar as I believe constituent power derived from *potentia* extends logically to human rights as well, and it's only with ontological force that human rights can go beyond constituted human rights.

In order to make this argument, in the end of chapter 2 I'm returning to Spinoza's ontology of *potentia*, and I'm discussing his theorem of *ius, sive potentia* (right, or power). Our power to act, Spinoza argued, always implies our right to act.⁵⁴ This idea is straightforward enough, insofar as everything one has a power to do, one has a corresponding right to do. In this sense, Spinoza wrote, the larger fish always has a supreme right to eat the smaller fish.⁵⁵ If the equation of power and right sounds

⁵¹ Hardt and Negri, 2001, pp. 34-38, 180-181; Hardt and Negri, 2004, p. 27; Hardt and Negri, 2017, p. 29. Deleuze and Félix Guattari's critique of human rights is similar in criticising human rights from a Spinozan line of argumentation, but neither attribute to human rights any ontological weight. See Deleuze and Guattari, 1994, pp. 107 et seq. For a Deleuzian approach to human rights, see Marneros, 2020.

⁵² Hardt and Negri, 2001, pp. 402-407; Hardt and Negri, 2004, pp. 273-277; Hardt and Negri, 2009, pp. 380-381.

⁵³ Laclau, 2004, p. 30; Žižek, 2001, p. 192; Casarino, in Casarino and Negri, 2008, p. 111.

⁵⁴ Deleuze, 1990, p. 258; Del Lucchese, 2018, p. 32. The strategy of the *sive*, meaning “or,” should not be read as an “either/or” operation, but more akin to “in other words.” I thus disagree with a reading of the strategy of the *sive* as “or better yet...”. For the idea of *ius* disappearing into *potentia*, see Montag, 1999, p. 5. A common perception of the *sive* is that God disappears into Nature, and right into power. Although the transcendent concepts of God and right are translated into their “others,” this in turn redoubles the the immanent meaning of God and right, without erasure.

⁵⁵ TTP XVIIIP2.

normatively bankrupt, that's to be expected. In fact, many Spinozists are themselves opposed to Spinoza's equation and have found it to reproduce a "might is right" or "anything goes" mindset.⁵⁶ However, Spinoza's concept is supposed to be anormative. Étienne Balibar explains this well: "Spinoza's purpose here is not to justify the notion of right, but to form an adequate idea of its determinations, of the way in which it works."⁵⁷ Spinoza doesn't condone any use of force as righteous: *ius, sive potentia* simply explains that actual rights accompany one's power to act, rather than depending on any abstract or theoretical law. It's precisely this indeterminateness of the *ius, sive potentia* theorem as an *empty signifier* that affords me its radical potential. The radicality of the *ius, sive potentia* theorem is its potential to become meaningful through productive encounters with my hermeneutical understanding of radical human rights theories and praxis.

My production of the concept of constituent human rights is developed from the ontological implications of the *ius, sive potentia* theorem, and I therewith extend the logical relationship between *potentia* and the Negrean constituent power to *ius* and constituent human rights. It's my reading of the *ius, sive potentia* theorem that gives me the ontological and optical tools to go beyond Negri's reading. In this manner, the concepts of constituent and constituted human rights are disclosed from the equation of *ius* and *potentia* and an antecedent reading of *potentia* as constituent power.

Summarising this line of argumentation, the logic is straightforward: if we can derive constituent power from *potentia*, and *ius* equals *potentia*, then the corresponding right must exist in a constituent form, i.e., *constituent human rights*. Spinoza's ontology and equation of right and power thus acts as a fulcrum for a productive philosophy of human rights. First of all, this is the theoretical production of a concept that can describe and disclose radical, inalienable, and autonomous forms of human rights, and secondly, constituent and constituted forms of human rights can notice pluridirectional tendencies within human rights theory and praxis. In this sense, the concepts of constituent and constituted human rights opens up a path towards fully affirming everything human rights can say. In the next chapter I'll spell out how the concept of, particularly,

⁵⁶ See Curley, 1996; Strauss, 1965, p. 233; Den Uyl, 1983, p. 7; Matheron, in Curley, 1996, p. 322.

⁵⁷ Balibar, 2008, p. 59, author's italics. Cf. Balibar, 2020.

constituent human rights informs my methodology of reading and understanding radical human rights theories and praxis.

1.4 Method Beyond Critique

After I've discussed constituent human rights as a Spinozan ontology, the concept will be hermeneutically developed in tandem with radical human rights theories. My project, then, is to produce a concept of constituent human rights whilst parallelly analysing how the idea of constituent forms of human rights is already present within radical human rights theories. Overall, my work is focused on the synchronous interpretation and understanding of radical human rights theory from the optics of constituent and constituted human rights, with an understanding of the concepts of constituent and constituted human rights through radical human rights theories.

The theories I've chosen primarily see human rights as a "theater of contestation," far removed from the smooth realm of the global human rights regime. In this sense, these theories point to an excess within constituted forms of human rights that, in the words of Claude Lefort, "go beyond any particular formulation which has been given of them."⁵⁸ Furthermore, these theories also identify human rights with an inalienability and irreducibility commensurate with Spinoza's *ius, sive potentia* theorem. These chapters will continually introduce radical human right thinkers in order to understand these theories within the tendencies of constituent and constituted human rights as well as continuously fleshing out the concept of constituent human rights.

In this critical hermeneutics I simultaneously employ deconstruction—in a form of critique and division—as well as a positive and additive understanding that always ends up producing new ways of understanding constituent human rights.⁵⁹ The use of the concept of constituent human rights is thus twofold: on the one hand, it aids in making sense of trajectories and tendencies already existent within radical human rights theories, and on the other hand, its open-endedness allows it to be conceived and produced throughout. Embarking on a theoretical analysis without a clear-cut and

⁵⁸ Lefort, 1986, p. 258.

⁵⁹ See Ricœur, 1976. In more philosophical terms, this is a parallel operation of *pars destruens* and *pars construens*.

defined concept is thus in line with a critical hermeneutics, whereby the concept of constituent human rights is an empty or unstable signifier: open to a multitude of new meanings.⁶⁰ Theoretically, the task of producing a concept of constituent human rights is an attempt to, in the words of Foucault, conceive of a signifier that breaks free from “the theoretical privilege of law and sovereignty.”⁶¹ This concept thus works from a conceptual and ontological human rights approach that aims to break with the master-signifier and abstractions of constituted human rights.

The Capitol Hill Occupied Protest (CHOP) is an interlocutor in my discussion of radical human rights and constituent human rights: discussed at the end of this work, it interweaves theory and praxis. The concept of constituent and constituted human rights, intermixed with radical human rights theories, codifies the occupants’ experiences as expressive of a production of right. Moreover, CHOP itself continues to hermeneutically flesh out the concept of constituent human rights. The occupation isn’t of interest in any anthropological, ethnographic, or netnographic sense. Instead, the expressions and actions of the occupants are of value insofar as they say something about constituent and constituted human rights, and the concepts of constituent and constituted human rights insofar as they address CHOP. This means that my reading of CHOP is precoded by this conceptualisation, but the occupation nevertheless continues coding the concepts through my reading. Coding CHOP is thus not an anthropological reading that “in the last analysis” closes down the horizon of meaning, but a philosophical reading that continually opens up further understandings.⁶²

This is evident in the occupation insofar as it problematizes it representing either constituent human rights or constituted human rights. The occupants expressed desires tending towards inclusion and recognition within the constituted order of right, as well as actions that were disinterested by the fabric of the constituted. The parallel operations of constituent and constituted human rights within radical human rights theories are thus reflected in CHOP as a centripetal and centrifugal movement. Whereas some made use of their new-won power in order to get concessions from the powers that be, e.g., demanding that the police be defunded, and altering the meaning of certain rights,

⁶⁰ Perugini and Gordon, 2015, p. 129.

⁶¹ Foucault, 1990, p. 90.

⁶² Derrida, 1982, p. 329.

others saw CHOP as its own working existence that had itself produced and facilitated the kind of rights they wanted for themselves.⁶³ The narrative of CHOP thus tells of a particular story between constituent and constituted forms of human rights. Whether interpreted as a story of constituent or constituted human rights, the expressions of the occupants pointed towards the desire of a human right of life ungoverned by policing, i.e., about police abolitionism, defunding, or reformism. It's precisely because such a right is nonexistent within the constituted sphere of human rights that it becomes analytically interesting to discuss *vis-à-vis* the theories traversed, as well as particularly helpful in disclosing how constituent human rights are corporeally embodied.

Constructing the different narratives of CHOP, the constituent and constituted forms of human rights are read from an empirical material of recorded and live-streamed videos; data in the form of so-called tweets from the social-media site Twitter; articles and interviews; and photographs.⁶⁴ CHOP spanned from the 8th of June until the 1st of July, and the majority of my material is from its birth and a week onward, simply because the first week was a hotspot of assemblies and activities on online fora. My main source of data have been recorded videos of assembly meetings, speeches, and teach-ins, mainly found on Youtube, these speeches have been transcribed and coded. Secondly, tweets from Twitter have been collected through a tripartite searching method: limiting the date of the tweets between the 7th of June until the 25th; using geotags to limit the origin of the tweets to authors within Seattle; and searching with the help of certain hashtags “#”, that is, self-coded data that signify ties, associations, and connections.⁶⁵

The narrative of CHOP that I'm interested in concerns the centrifugal and centripetal tendencies: those that tend towards inclusion into the constituted sphere of human rights and politics, and those that tend away from such governmentality. Although CHOP was made up for a variety of heterogeneous experiences and desires, I'm viewing CHOP as

⁶³ See chapters 3.5.1 and 3.5.2 for these respective tendencies.

⁶⁴ When I conducted my research, many personal social-media accounts had been removed by the social-medias, tweets removed for breaching policies, and the subreddits on CHOP blocked by the website *Reddit*. Furthermore, much communication on the ground occurred unrecorded, and the application *Signal* was used as an encryption messaging device. Although I'm not interested in the cultural and political underpinnings of CHOP in any anthropological manner, these omissions necessarily affect what kind of statements and expressions are included in my discussion of CHOP.

⁶⁵ The hashtags searched for were: #CHOP, #CHAZ, #capitolhillautonomouszone, #seattleprotest, #seattleprotests, #seattleprotestcomm, #BLMseattle, #capitolhilloccupiedprotest, #freecapitolhill, #DefundSPD, #DecriminalizeSeattle, #blacklivesmatter.

made up of one text.⁶⁶ Here I follow Lynn Hunt's methodology in analysing different historical texts. As Hunt says, seeing an event as singular does not reduce multiplicity into something unitary, but instead shows how the *logos* employed within a singular event simultaneously contain contradiction and contraction, "mak[ing] possible unity and difference at the same time."⁶⁷ Followingly, I'm not interested in arguing that CHOP, or any concept of radical human rights theory, should act as a "fundamental master code or 'ultimately determining instance.'"⁶⁸ In this way, theories and events shouldn't "subsume all differences under the one, the same and the necessary."⁶⁹ A critical hermeneutics should always be open to possibility and multiplicity, therefore my hermeneutics of human rights doesn't conclude with an exhaustive list of specific human rights

My trajectory is to first lay out, produce, and explore the logical underpinnings of constituent human rights through the work of Spinoza and Spinozists. Secondly, the concept of constituent human rights will traverse and criss-cross radical human rights theories and praxis, simultaneously as theory and praxis flesh out the concept of constituent human rights. The purpose of this work is to explore ontology and human rights and how the concept of constituent human rights corresponds to this interrelationship: noticing, through my conceptualisation of constituent human rights, everything human rights can say.

⁶⁶ Hunt, 1984, p. 25.

⁶⁷ Hunt, 1989, pp. 16- 17.

⁶⁸ Jameson, 1981, p. 58.

⁶⁹ Olkowski, 1999, p. 185.

2. Spinoza: Being, Power, and Rights

In this second chapter I'm conceptualising and producing my concept of constituent human rights, this is done by constructing in a combinative manner Spinoza's ontology and Negri's ontopolitics. Whilst this is a circuitous trajectory, it's necessary for the full ontological affirmation of constituent human rights.

I start off from Spinoza's idea of God's power (*potentia*) and the fact that every single human being is expressive of this form of power; this introductory chapter will explain the logic of Spinoza's God. Chapter 2.1 lays out the differences between two forms of power, that is, *potentia* and *potestas*. In chapter 2.2 I focus on how *potentia* and human beings are connected and how this relationship implies a form of productivity. In 2.3 I'll explore how *potentia* and *potestas* can be translated into the political forms of constituent and constituted power. In this sense, I follow in the footsteps of a wide range of Spinoza scholars, especially Negri, in viewing *potentia* as a form of radical expression of an inalienable and political power.⁷⁰ Finally, in 2.4 and 2.5, I'm returning to Spinoza and the co-extension of power and right. This is where the concept of constituent human rights attains ontological import. Analysing Spinoza's *ius, sive potentia* theorem, I'm showing how the inalienability and immediacy of *potentia* extends to *ius* as well. Thereafter, I produce my concept of *constituent human rights*, where my combined logics of Negri's constituent and constituted power and Spinoza's *ius, sive potentia* theorem unfolds in its corresponding forms of constituent and constituted human rights.

As I argued before, Spinoza doesn't imply with "God" the image of a sentient entity with the freedom of will. Spinoza's God implies, instead, a pantheism where God is equal to everything that exists. Spinoza signifies with God that which is philosophically called substance, i.e., the fundamental entity of reality. In Spinoza, God is the only substance that exists and everything else in the universe is a mode, affection, or modification of God.⁷¹ Because God is the necessary substance of reality, God is

⁷⁰ Del Lucchese, 2018a, p. 192; Del Lucchese, 2018b; Del Lucchese, 2016, pp. 182 et seq.; Negri, 1999; Negri, 1991; Vatter, 2021; Christodoulidis, 2003, p. 428.

⁷¹ EIP14; EIP14Dem.

necessarily self-caused and conceived wholly in itself.⁷² In other words: God cannot not exist.⁷³

God is thus “in itself” since God’s existence depends on nothing but itself.⁷⁴ “In” connotes a logical and conceptual relationship, so that God logically depends on nothing but God. Axiomatically, Spinoza writes, everything is either “in itself” or “in another.”⁷⁵ Whereas God depends on itself as a self-caused substance, human beings always depend on the logical existence of God as their cause.⁷⁶ In this sense, since we are “in another,” as Spinoza argues, we’re conceptually involved “in God,” and cannot exist or “be conceived without God.”⁷⁷ To exist, as the Spinozist Hasana Sharp argues, “is to have your being in something else.”⁷⁸ Human beings are thus beings-in-God. It’s this idea of a self-caused substance and a necessary and *immanent relationship with substance’s immediate modes*, that interconnects metaphysics with human modal beings.

2.1 *Potentia* and *Potestas*

The fact that God, or substance, is self-caused means that God simply is the affirmation of everything that exists. It’s impermissible, Deleuze wrote, to compare God to any transcendence, the freedom of will, or sovereign Power.⁷⁹ This form of capitalised Power that God is incommensurable with, is what’s termed *potestas*, that is, a form of deliberative power that can ultimately decide on what to consciously bring into existence: a *transitus de potentia ad actum*. God, however, doesn’t deliberately choose from a range of potentialities only to actualise a handful of them. Instead, God’s

⁷² EID1; EID3.

⁷³ EIA1. See also Sharp, 2005, pp. 29-30; EIP7; EIP8; EIP8S1.

⁷⁴ EID3

⁷⁵ EID5. See also Lord, p. 20.

⁷⁶ EID5. Cf. EIP15D.

⁷⁷ EIP15. See also Grosz, 2017, p. 60; Deleuze, 1990, p. 230; EIA3. Since we cannot be, nor be conceived, without God, human modes being “in” God means, furthermore, that the logical dependency in God is also a *conceptual involvement*. The entire Proposition 15 of the first Part of the Ethics goes: “Whatever is, is in God, and nothing can be or be conceived without God.” This parallels Spinoza’s definition of God as substance, as he defined it: that which “is in itself and is conceived through itself, i.e., that whose concept does not require the concept of another thing, from which it must be formed,” EID3. There’s not only a logical causation as such, but the concept of “human beings” is wholly *conceived through* the concept of God. To give an account of causal relations is to give an account of conceptual involvement. Logical relations are not, then, sequential, but immanent.

⁷⁸ Sharp, 2005, p. 41.

⁷⁹ Deleuze, 1988, pp. 97-98.

potentia is a power that actively unfolds everything that exists.⁸⁰ This immediate affirmation of everything that exists is a so-called immanence, which means that God's power is "the *actuality* of producing all that exists."⁸¹ Spinoza himself regarded this distinction as significant, insofar as one must take "great care not to confuse God's power with the human power or right of Kings."⁸²

Because substance is self-caused, *potentia* is an immediate form of power—in contradistinction to *potestas*, as Deleuze says, there is "no power that is not actual."⁸³ There's thus an "asymmetry between *potentia* and *potestas*," and insofar as our *potentia* can never be represented or subsumed within forms of *potestas*, we're not dependent upon conduits of representative or sovereign power to exist, express, and act in the world.⁸⁴ Every single thing that's conceived, is, in God's power to act, immediately actual.⁸⁵ This is the logical and conceptual involvement where we're "in God," and since God's power affirms everything that exists, then what "we conceive to be in God's power, necessarily exists."⁸⁶ We could say that we're constituent parts of God and this would imply that God is, as Spinoza wrote, the "power of all individuals together."⁸⁷ If we're in-God, but God is nothing but everything in-God taken together, there's an immanence of God and "all individuals," this doesn't only mean that "God is all," as Negri put it, but also that "all is God."⁸⁸

A monumental point that Spinoza makes is that we, as modes of God, are expressive of God's power.⁸⁹ When we exist, when we desire, and when we act, we always affirm and express *potentia*.⁹⁰ Thus, Spinoza wrote that "the power of natural things, by which they exist and have effects, is the very power of God."⁹¹ The conceptual involvement of us being in God, means that God's *potentia* constitutes human beings as the surface-level

⁸⁰ Lord, 2010, p. 35.

⁸¹ Hardt, 1991, p. xiv, author's italics.

⁸² EIIPS. An implication of God as a logical relationship and conceptual involvement, is, as said, that God doesn't have any freedom of will. As Albert Einstein—a famous Spinozist—said: God doesn't play dice.

God is a determinate relationship that affirms and produces everything that exists, or as Spinoza wrote: "God acts from the laws of his nature alone," EIP17.

⁸³ Deleuze, 1990, p. 93.

⁸⁴ Negri, 2013, p. 9.

⁸⁵ Deleuze, 1988, pp. 97-98.

⁸⁶ EIP35.

⁸⁷ TTP XVP3.

⁸⁸ Negri, 1991, p. 64.

⁸⁹ EIID1 and EIIP1Dem.

⁹⁰ Grosz, 2017, p. 74.

⁹¹ TP IIP3.

effect of *potentia*, whilst God still remains as the causative *potentia* in the effect. God remains immanently as the perpetual condition in whatever is conditioned, and in this way we are beings-in-*potentia*. Immanence thus “presents a philosophy in which existence is not dependent on a higher power external to it.”⁹² Furthermore, since *God is all, and all is God*, and God is the *power of all individuals together*, we are a degree of God’s power whilst simultaneously affirming God’s existence. It’s from a logical conception of God as immanent causation that it’s possible to conceive of ourselves as the surface-level effect of *potentia*, whilst never leaving *potentia* as productive cause.

2.2 Being-in-*potentia* and Production

If I’m going to attempt to make human rights say everything that it can, it’s necessary to hearken to the siren call of *potentia*. In essence, *potentia* means a power to act and exist that’s inalienable from our lives, which is why I’m referring to human beings as beings-in-*potentia*. We have, at our most basic being, an immediate power that doesn’t depend on sovereignty or representation for it to appear. Immanence and conceptual involvement effectively opens up an understanding of human beings beyond *potestas*.

Being-in-*potentia* also presupposes that *potentia* is in being: because, on the plane of immanence, God’s power as cause never leaves its effects. Negri thus argues that God’s “legislation of being is activated up to the point where it bases its own foundation on each thing, on the horizon of all things, on the power of the thing.”⁹³ *Potentia* is in every single human being, affirmed when we act, speak, and produce things. It’s this productivity that “determines the constituent motor of the ontological process.”⁹⁴ Which is to say that it’s not from a constituted conduit wherefrom our power to produce and change the world emanates, but from the fact that our existence is itself a degree of *potentia*.⁹⁵

Since God causes and produces *being* as an ontological process from its power to act, and this form of productive power remains *in* human beings as the cause-effect nexus,

⁹² Gilliam, 2017, p. 7.

⁹³ Negri, 1991, pp. 52-54.

⁹⁴ Negri, 2013, pp. 94-95.

⁹⁵ EIID1 and EIIP1Dem.

then human beings, it stands to reason, are necessarily productive too. In other words, beings-in-*potentia* expresses God's causative and productive *potentia*. Speaking of our being must be done "in terms of production," since, as Negri adds, existence always implies "production within the structure of being."⁹⁶ At its metaphysical and ontological plane of existence, being-in-*potentia* means that human beings are irreducibly productive. The inert force of *potestas* that denies the existence of some possibilities is always transgressed by *potentia*. Apparatuses of Power that denies actions, rights, and liberties, always comes up against a very real and material form of power. As Negri says, *potentia* is a "power against Power": *Potenza contro potere, potentia contra potestas*.⁹⁷ Being-in-*potentia*, or so my argument goes, is itself this irreducible and inalienable productive fabric that always resists: a power against. It's this otherness that eventually makes possible constituent human rights as different from constituted human rights. Speaking of constituent human rights is likewise impossible *except in the terms of production* that goes beyond inertia.⁹⁸

2.3 Constituent and Constituted Power

From what has hitherto been said regarding *potentia* and *potestas*, as well as the productivity of being-in-*potentia*, this chapter lays out the anatomies of constituent and constituted power. In this chapter the emphasis will be on the epistemological implications of constituent and constituted power, but also on temporality and production. Spinoza and Negri continue being important interlocutors here. Adding to the discourse on constituent and constituted power, I address Elizabeth Grosz's theory of temporality, which will be important for my later discussion on constituent and constituted human rights. It's commonplace within constitutional theory—the field that most commonly employs the concepts of constituent and constituted power—to see constituent power as something once invoked, for it to be subsumed within constituted forms of power.⁹⁹ For example, revolutionary action is often conceived as a form of constituent power that upends governance and constitutions, only to institute new forms

⁹⁶ Negri, 1991, p. 224.

⁹⁷ Negri, 2004, p. 97.

⁹⁸ I'll return to this form of being-against in chapter 3.2, when discussing Jacques Rancière's antagonism.

⁹⁹ For a variety of constitutional perspectives on constituent power, see Lindahl, 2013; Loughlin, 2010; Loughlin and Walker, 2008; Arato, 2017. For a historical overview of constituent power, see Rubinelli, 2020.

of constitutionalism and transform itself into constituted power. I'm exemplifying the problems with the privation of constituent power outside of constitutionalism through Kantian constitutionalism. From this discussion the relationship between *potentia* and constituent power will be laid out, later on providing a corresponding thoroughfare between *ius* and constituent human rights.

Spinoza, and many Spinozists, extend the excessiveness of *potentia* onto the political scene. The fact of being-in-*potentia*, insofar as it's inalienable to our human condition, means that no one, according to Spinoza, is

able to transfer to another his power, or consequently his right, in such a way that he ceases to be a man. And there will never be a supreme power that can get everything to happen just as he wishes.¹⁰⁰

Not only is God incommensurable with sovereign power, but any sovereign ruler or “supreme power” is in fact impossible. Since we cannot transfer away our power or right through the social contract, we cannot constitute a transcendent Sovereign. *Potentia* “is accompanied by a rejection of all types of finalism, whether ontological or political in nature”¹⁰¹ We always keep some degree of power and right over our lives, and this is, as Hannah Arendt saw in the masses of the French Revolution, a “natural” force whose source and origin lay outside the political realm.”¹⁰² The inalienability and naturalness of *potentia* is the common name for the political form of constituent power.

The anatomy of constituted power, by contrast, defines, according to Michael Hardt, “the fixed order of constitution.”¹⁰³ It's an appropriative form of power that attempts to fix what already exists, and make away with motion, the future, and the unknown. In this manner, constituted power is dependent on the epistemologically “known,” and it applies an epistemological perspective that reads, as it were, actions, relations, and human rights claims through the prism of *the already known*. Although Grosz doesn't discuss constituted power as such, her description of order is informative: constitutedness is the attempt to “contain unpredictability, the eruption of the event, the

¹⁰⁰ TTP XVIII2.

¹⁰¹ Del Lucchese, 2009, pp. 115-118.

¹⁰² Arendt, 2016, p. 181. Force is, *faute de mieux*, an English translation of *potentia*. *Natural force* only emphasises the inalienable character of *potentia* itself.

¹⁰³ Hardt, *supra* note 49.

emergence of singularities, and the consequent realignments of power.”¹⁰⁴ Constituted forms of power make, as Grosz explains, “the eruption of the event part of the fabric of the known.” As a consequence, “the new is made recognizable and tied to the known.”¹⁰⁵ In this sense, constituted power operates from an epistemological point-of-view that appropriates the production of beings-in-*potentia*, thus tying what they produce to constituted forms of relations of production and *the fabric of the known*.

This epistemological rigidness is contemporaneous with a fixed form of temporality. Constituted power transfixes the present and makes the already-existent into the yardstick of every futural difference: a monorhythmic and epistemological perspective that attempts to coordinate the flux of plural and singular temporalities.¹⁰⁶ In this sense, constituted power presupposes a fixed historical rhythm that linearly and progressively evolves through time. In this way, any desire of human rights that doesn’t exist cannot yield any productive result since everything new *is made recognisable and tied to the known*.

Lastly, constituted power depends on certain relations of production. In terms of the production of institutions, rights, and other political compositions, the commonplace perspective regards production as occurring above the everyday workings of intrapersonal sociability. The example of human rights production is most informative in this regard, a question I’ll return to throughout chapter 3, and especially in my discussion of Samuel Moyn in chapter 3.1. Within the discourse of human rights, the production of human rights is normally determined by national or international relations. For example, production of human rights is exhaustively noticed within intrastate and interstate relations and as a product of UN procedures. In this sense, constituted power and human rights are directly tied to *potestas* and the function of command, whereby production is concomitant with the action of sovereign deliberation.¹⁰⁷ Nation-states discuss, deliberate, and debate human rights, and finally derive new human rights from the production of internationally binding conventions.

¹⁰⁴ Grosz, 1999, p. 16.

¹⁰⁵ Ibid.

¹⁰⁶ Lowenhaupt Tsing, p. 131.

¹⁰⁷ See Rua Wall, 2012, esp. p. 19.

The constitutional view of constituent power generally aligns itself with these forms. My argument builds on the fact that constituent power and *potentia* lay outside the exhaustiveness of constitutionalism. Immanuel Kant's constitutionalism, in contradistinction, removes any notion of autonomist constituent power and reflects the commonplace view of human rights. Within the confines of constitutionalism and constituted power, Kant argued that all exercises of constituent power and human rights are non-existent. However, this is precisely my point: not that constituent potentials ought to be read from within the constituted—but precisely that they cannot, and it's necessary to go beyond constituted epistemologies in order to notice constituent potentials.

Kant wrote that a right to revolution is inexistent insofar as its existence as “resistance against the supreme legislative power... destroys [the constitution's] foundations.”¹⁰⁸ In this way, constitutionalism is commingled with the categorical imperative since any “right to revolution” would necessarily “nullify the entire legal constitution,” which means, Kant added, an end to right itself.¹⁰⁹ What Kant described was a constitutional perspective whereby any closed system cannot allow for paradoxes that would undermine its own authority. Human rights constitutionalism, e.g., the workings of the UN, posits their own authority as a cosmopolitan social contract—derived from the consent of nation-states—wherefrom all human rights are adequately disclosed. At his most descriptive, Kant was entirely correct: from an epistemological point-of-view, the archaic principles of constitutionalism cannot recognise its own non-being. However, this since it begs the question as to whether or not the spectra of actions and rights are wholly represented within the constitution's enclosed setting, especially given the fact that it's states that are the world's foremost abusers of human rights.

It's important to emphasise the idea of constituent potential as an empty signifier, in itself inalienable and autonomous of constituted power. Negri explains that the critique of constituent power from the perspective of constituted power, that is, “according to any juridical-political criterion,” is precisely the problem that constituent power attempts to go beyond.¹¹⁰ From the perspective of constituted power, constituent power

¹⁰⁸ Kant, 1991a, p. 81.

¹⁰⁹ Kant, 1991b, p. 145.

¹¹⁰ Casarino and Negri, 2008, p. 157.

is *always tied to the fabric of the known and the always-already*. Negri, in dialogue with Cesare Casarino, says that constituent power is never in need of asking “itself whether or not it exists: it exists,” and it’s always *there*.¹¹¹ Negri puts this in more explicit terms elsewhere: “Existence is not a problem.”¹¹² What this means is essentially an epistemological and ontological argument whereby the justificatory problem of the existence of constituent power doesn’t require conduits of constituted power. Casarino rephrases Negri’s argument appropriately: “the problem of ascertaining, defining, and containing the existence of constituent Power—is not at all constituent Power’s problem; it is, rather, a problem for constituted Power.”¹¹³ In this way, although a constitution cannot recognise the right to revolution, revolution is always a possibility and thus, *per necessity*, exists outside constituted power.¹¹⁴ For constituent power to exist, then, it doesn’t “require nor depend on the ability to petition the state for legal status.”¹¹⁵ The most important difference between my variations of constituency and Kantian constitutionalism, is that my idea of constituent potential must always be understood as an ontological process: it can never be fixed, because the moment any constitution tries to represent movement in fixed forms, it misrepresents reality.¹¹⁶

The inalienable existence of *potentia* and being-in-*potentia*, as Negri explained, comes up against constituted power.¹¹⁷ This is, furthermore, exactly what induces the untimeliness of constituted power and human rights.¹¹⁸ According to Grosz, the openness, irreducibility, and inalienability of being make contingent the strategies of constituted power.¹¹⁹ Constituent power as an empty signifier is always “unattainable and unknowable in the present,” and it thus precludes predetermination according to some constituted or constitutional criterion.¹²⁰ *Potentia* and constituent power flow autonomously *vis-à-vis* the known and already-there, and insofar as being is always productive, *potentia* opens up “the possibility of... the constitutive rhythm toward a

¹¹¹ Ibid.

¹¹² Negri, 1991, pp. 45-46.

¹¹³ Casarino and Negri, 2008, p. 157.

¹¹⁴ See Arendt, *supra* note 102.

¹¹⁵ Skott-Myhre and Tarulli, p. 256.

¹¹⁶ Negri, 2020, p. 43. See my discussion below on the philosophy of *becoming*, pp. 52-53.

¹¹⁷ Negri, 2004, pp. 97-99.

¹¹⁸ Grosz, 2004, p. 14.

¹¹⁹ Grosz, 2010, p. 49.

¹²⁰ Grosz, 2005, p. 1.

philosophy of the future.”¹²¹ Constituent power thus escapes final subsumption and synthesis in the constituted order.

Being-in-*potentia* and expressions of constituent power shoots through the paradigm of fixed epistemologies. The excessiveness of constituent power insofar escapes the clutches of determinedness, the known, and the always-already. Constituent power is a force, as Warren Montag argues, that “no one can alienate or transfer insofar as it is necessary to life itself.”¹²² Therefore, the fact that human beings are beings-in-*potentia* and expressive of a degree of God’s power, makes us into “the permanent excess of force over law,” productively independent of the recognition, appropriation, or representation of constituted power.¹²³ Constituent power is productive without transitioning or transferring some ontological part of ourselves into constituted power. Having hitherto traversed *potentia* and constituent power, it’s now time to turn to the *ius, sive potentia* theorem and how constituent power is connected to constituent human rights.

2.4 *Ius, sive Potentia*

God has the power to do anything, and, by extension, God necessarily has the right to do anything. Spinoza’s *ius, sive potentia* theorem is a logical consequence of his axiom of modes “in God,” and God as all modifications in the world taken together. Followingly, if God’s power equals God’s right, then, Spinoza argued, that if someone does something as an expression of God’s power, this is parallelly an expression of God’s right.¹²⁴ According to Spinoza, this means that “the right of each thing extends as far as its determinate power.”¹²⁵ Simply put, if we have the power to do something, we necessarily have the right to do it. This chapter will briefly discuss what Spinoza meant and how it provides me with the tools to produce the concept of constituent human rights as the logical extension of Negri’s connection between *potentia* and constituent power.

¹²¹ Negri 1991, pp. 69-70.

¹²² Montag, 2005, p. 663.

¹²³ Ibid.

¹²⁴ TP IIP3.

¹²⁵ TTP XVIP4. Cf. Matheron, 2020, pp. 302-303.

Our “power to exist,” as Spinoza wrote, is the same as our right to exist.¹²⁶ The *ius, sive potentia* theorem is a description of an ontology of right: it doesn’t have anything to do with normativity or morality, nor correlative Hohfeldian duties.¹²⁷ This is a form of right that, according to Spinoza, “prohibits nothing.”¹²⁸ The idiom “to be in the right” is apt here. Similarly to us being-in-*potentia*, we are subsequently always *in the right*: we are being-in-the-right whenever we express our power to act. Andre Santos Campos, commenting on Spinoza’s right, puts the *ius, sive potentia* theorem thusly: “One has a right to do something if one does it – it is as simple as that.”¹²⁹ However, if right and power are absolutely coterminous their conceptual separation is superfluous. It’s apposite to conceive of the equation, not as a dialectical synthesis, but as the parallelism of right and power *vis-à-vis* their conceptual involvement in the order and connection of God’s being.¹³⁰

Since constituent power isn’t subsumed within constituted power, consequently, the *ius, sive potentia* theorem means that natural right likewise continues being part of our existence within civil society.¹³¹ Oppositely contractarianism, and especially Thomas Hobbes, Spinoza believed that natural right cannot be negated, but is always preserved in its entirety.¹³² Commenting on Spinoza’s idea of right, Hardt writes that “[n]atural right is not negated in the passage to civil right, as it is in dialectical conceptions of society, but... preserved and intensified.”¹³³ Since this inalienable expression of right and power never leaves our being, Hardt connects the productivity of being to right; in fact, Hardt argues that production “is the motor that animates the entire discourse on right.”¹³⁴ The negation of a sovereign power logically extends to the falsification of rights endowed by sovereign decree.

¹²⁶ TP IIP3.

¹²⁷ See my discussion, pp. 12-13, in this thesis.

¹²⁸ TTP IIP8.

¹²⁹ Campos, 2012, p. 99.

¹³⁰ Although God is all, and all is God, because God’s power is nothing but the power of all individuals together, they’re not strict equivalents. The *ius, sive potentia* theorem, likewise then, equates right and power only insofar as they conceptually involve each other. This is why Spinoza uses conjunctions such as “sive”, “veluti” and “quasi” (the latter two meaning “as it were”).

¹³¹ See my discussion of the inalienability of *potentia* in chapter 2.3.

¹³² Letter 50, vol. II.

¹³³ Hardt, 1993, p. 110.

¹³⁴ Hardt, 1993, p. 108.

Although my reasoning, going from the *ius, sive potentia* theorem onto a concept of a constituent form of right, follows a clear trajectory, the leap from *ius* to human rights might seem obfuscating. Because we continue to express *potentia* and *ius* far beyond the advent of civil society, natural right isn't a pre-contractarian concept. Whenever we follow or break laws, obey and disobey, claim human rights that exist and don't exist, we, the Spinozist Susan James argues, "continue to exercise our natural right to do anything in our power."¹³⁵ Although human rights assume different practical and theoretical determinations in the ethico-political sphere, in my technical sense of "constituent human rights," it simply connotes *humans expressing a form of natural right within civil society*. Formulating human rights in this sense is completely in line with my Spinozan argumentation, insofar as human rights are something we cannot do away with.

2.5 Constituent and Constituted Human Rights

My argument started out with Spinoza's ontology, where immanence implied a cause-effect nexus between God's power and the power human beings express. This was seen as politicised in our political and civil society, expressed as a form of productive, inalienable and irreducible *potentia*, or what has otherwise been referred to as constituent power. Constructing a passage between power and right, from Spinoza's *ius, sive potentia* theorem, opens up new paths for a parallel productive, inalienable, and irreducible right. It's this kind of right that I'm exploring in this chapter, before turning to a critical hermeneutics of radical human rights theories and praxis.

In my reading of Gündoğdu, constituent human rights are disclosed in inexhaustible and inalienable "possibilities that are not fully consumed in any of their determinate actualizations."¹³⁶ According to Gündoğdu,

rights can be claimed in unanticipated ways... future reappropriations can put into question the underlying presuppositions of rights declarations; contest the naturalized divisions,

¹³⁵ James, 2020, p. 111.

¹³⁶ Gündoğdu, 2013, p. 122.

hierarchies, and exclusions justified according to their prevailing conceptions; and change our understanding of their constitutive terms.¹³⁷

Spinoza's *ius, sive potentia* theorem, then, becomes part of human rights not on account of its discourse as juridico-political and administrative practices, but because constituent human rights can be seen in indeterminate and open-ended ways. That is, as Gündoğdu says, never fixed *in any of the determinate actualizations of constituted human rights*. Changing human rights in their constitutive terms doesn't limit human rights to play on the already-given, but a capacity to change what's actually given as existent.

The respective forms of constituent and constituted human rights parallels the forms of constituent and constituted power, as discussed in chapter 2.3. Constituted human rights depend, first of all, on the epistemologically known, an "epistemic framework" in the constitutions or conventions declaring an exhaustive list of human rights.¹³⁸ Secondly, it depends on a fixed form of temporal presentism that functions according to the already-there; in this sense, the combined sense of epistemological and temporal constitutedness appropriate *the new and makes it recognizable and tied to the known*.¹³⁹ Lastly, as I've mentioned, the relations of human rights production limits the production of new human rights to the sovereign power of the national or international fora (*summa ius*), whilst stripping the particular forces of any producibility.

Sumi Madhok's theory of political cultures of right is instructive in how an understanding of constituent human rights can be opened up. Constituted human rights, or what Madhok calls "the regime of already declared rights," turns particular struggles over rights into unproductive praxis.¹⁴⁰ In this way, constituent human rights are reduced to appropriating or interpreting already existing human rights. Constituent human rights, instead, would be more in line with a vernacular production of rights. This doesn't only "involve a logic of equality and inclusion which dispossessed groups demand already existing rights," but, rather, mobilisations of human rights can transform and bring new rights into being.¹⁴¹ This anatomy of right aligns itself with the Spinozan *ius, sive potentia* theorem and being-in-the-right. That is, our expression of human rights go far

¹³⁷ Gündoğdu, 2013, p. 125.

¹³⁸ Perugini and Gordon, 2015, p. 12.

¹³⁹ Grosz, 1999, p. 16.

¹⁴⁰ Madhok, 2021, p. 47.

¹⁴¹ Madhok, 2021, p. 19.

beyond equality and inclusion insofar as rights production doesn't have to relate itself to *already existing rights*. Expressions of right extend as far as our determinate power, and can thus explode any contingent limits on either right or power. Constituent human rights, then, are neither dependent upon the fabric of "the known," nor on the relations of production that restrict production to the global human rights regime.

Hans Skott-Myhre and Donato Tarulli also build on Spinozan ontology through Hardt and Negri's work. Similar to my argumentation,¹⁴² Skott-Myhre and Tarulli's conceptualisation of human rights unfolds as an ontological concept, thus going beyond Hardt and Negri's lack of ontological attention to the concept of human rights. Human rights, they argue, aren't limited to "disclosing the already-given, ready-made character of human rights."¹⁴³ Contrarily, rights are "produced within the forms of daily life," and "a means of constituting—for the first time, as it were—what that right is."¹⁴⁴ What this means for the concept of constituent human rights is that it unfolds, as an empty signifier, in action. On the one hand, constituent human rights are disclosed within the political encounter, and, on the other hand, the idea of human rights "are always yet-to-be-achieved, always becoming other than they are."¹⁴⁵ Constituent human rights as yet-to-be-achieved means that they're in motion, never subsumable by the fixity of constituted human rights.

I've traversed Spinoza's ontology, disclosing logical relationships between *potentia* and constituent power, and with the help of the *ius, sive potentia* theorem, I've produced the conceptual form of constituent human rights. Constituent human rights is a concept of ontological import: inalienable, productive, and expressive. My aim of the remaining chapters is to employ the concept of constituent human rights in hermeneutical interpellation, continuously producing and fleshing out the concept of constituent human rights through radical human rights theories and the political praxis of CHOP. Similarly, I'm reading theory and praxis from the concept's open-endedness and its capacity to make human rights say everything it can say.

¹⁴² See my chapter 1.3.

¹⁴³ Skott-Myhre and Tarulli, 2010, p. 254.

¹⁴⁴ Skott-Myhre and Tarulli, 2010, pp. 254-256.

¹⁴⁵ Skott-Myhre and Tarulli, 2010, p. 254.

3. Radical Human Rights Theory

This part of the work will traverse several radical human rights theories and, in chapter 3.4.1 and 3.4.2, CHOP as an event of constituent potential. The method of critical hermeneutics means that, for my analysis, every chapter will introduce a new form of radical human rights theory, and every subsequent chapter will, in one way or another, amplify our understanding of constituent human rights.

The radical human rights theories I've chosen conceive of human rights as *going beyond any particular formulation which has been given of them*.¹⁴⁶ Therefore, all of the theories notice some constituent form of human rights within the discourse of human rights, and, in this way, align themselves with the implications of Spinoza's *ius, sive potentia* theorem for my project of going beyond any determinate actualisation.¹⁴⁷ My production of the concept of constituent human rights will continuously unfold through my method of reading these theories.

Samuel Moyn's human rights historiography is an important intervention in the discourse of human rights. It's generally perceived that Moyn upended the idea of human rights as a one-time breakthrough or invention. Human beings continue to produce human rights, and it's thus, according to Moyn, impermissible to freeze the time of human rights in a historical moment. In chapter 3.1, I'm exploring Moyn's historiography, but also his symptomatic tendency to employ mobile and inalienable forms of power and right in order to critique one form of power, and how such

¹⁴⁶ Lefort, *supra* note 58.

¹⁴⁷ Most of the radical human rights theories I've chosen don't directly deal with Spinoza's ontology. Nonetheless, Samuel Moyn has dealt with Jonathan Israel's work on Enlightenment and Spinoza in a critical fashion. Jacques Rancière, although he doesn't deal directly with Spinoza, had Louis Althusser, a Spinozist, as his teacher. Seyla Benhabib held the Spinoza Chair at the University of Amsterdam. Judith Butler has combined Spinozan and Hegelian ideas of desire and un/recognition, see Butler, 2009, p. 14; Butler, 2005, p. 44. Kathryn McNeilly builds on Elizabeth Grosz, who's influenced by Spinoza. Costas Douzinas has written on Spinoza's philosophy of affects. Henri Lefebvre likewise wrote about affects. Hannah Arendt owned Spinoza's works and made annotations in his *Ethics*, and, finally, Étienne Balibar is himself a Spinozist, having published several works on Spinoza. Even though my use of the concept of constituent human rights builds on Spinoza, it's not dependent upon direct references to Spinoza for it to be hermeneutically useful. As such, it's not part of my argument to demonstrate these radical human rights theorists' indebtedness to Spinoza, but only to disclose similarities and differences *vis-à-vis* constituent and constituted human rights.

constituent forms of human rights often become subsumed within new forms of inert constituted human rights.

In order for constituent power and human rights to resist subsumption into a smooth realm of constituted human rights, Jacques Rancière argues that what defines politics and human rights are conflict and dissensus. Rancière's theory of power directly corresponds to his theory of human rights: the antagonistic character of both power and right refuses subsumption. Ultimately, however, Rancière's antagonism always presupposes the constituted as primary. Whereas the intermingling of constituent and constituted human rights is typified in Rancière's writing, it strips constituent human rights of their conceptual involvement in an inalienable form of expression.

In chapter 3.3, I'm mixing the political encounter as discussed in Rancière with temporal and performative elements. These authors adopt Derridean ideas of time and language in order to turn the present state into a contingent temporality; in this way, alternative forms of human rights can be produced and conceived. Discerning how temporality is important for an understanding of constituent human rights some authors employ the idea of performativity, and in this sense tie time to the fabric of the known.

In the subsequent chapter, the Spinozan concept of expression, e.g., human beings expressing God's power, will be explored. I'm exploring expression and production in a dialogue with Henri Lefebvre and his concepts of the right to the city and *autogestion*, that is, a self-sustainment of being, power, and right. In this way I read *autogestion* as a productive immanence. I'm conceiving the right to the city as constituent human rights and how this praxis becomes self-productive *vis-à-vis* autogestive forms of actions. Chapter 3.4 also puts into motion the constituent potentials of CHOP, insofar as the occupation claimed the right to the city.¹⁴⁸

In chapters 3.5.1 and 3.5.2, I turn towards CHOP. What has hitherto been said becomes embodied in the actions and expressions of the occupiers. First of all, the former chapter will discuss radical human rights that nevertheless moves towards constitutedness. Followingly, the second chapter on CHOP will explore its claim to the city and how

¹⁴⁸ Honig, 2021, pp. 107-108.

expressions of power and rights produced human rights immediately. The occupants will also push my own understanding of constituent human rights further.

Finally, in chapter 3.6, I'm drawing some connections between Hannah Arendt's phenomenology and her politics for human rights. Étienne Balibar's interpretation of Arendt's statement of our *right to have rights* informs my understanding. In this ultimate analytical chapter, the implications of constituent human rights within CHOP will be fully affirmed insofar as being-in-the-right and constituent human rights implies a constituent human right to have human rights. Human rights are inalienable, as I've argued throughout, and are, in turn, interconnected with the human condition as an ontological fact of being-in-the-world. Here I'll attempt to make human rights say everything it can say, through the temporal, epistemological, and productive implications of constituent human rights. Having traversed radical human rights theories and CHOP through a critical hermeneutics, the radical concept of constituent human rights can be fully affirmed.

3.1 Human Rights Constitutionalism

The idea of constituent human rights offers immense potential for a productive form of human rights critique. This, as I've discussed in chapter 2.3, works against fixed forms of knowledge, the primacy of the present, and sovereign relations of production and Moyn, in many ways, starts with these implications. Moyn's argument is in many ways straightforward: he disagrees with human rights historiographies that identify human rights as a singular breakthrough or discovery in the 18th century France or US.¹⁴⁹ Instead he shows how the history of human rights is discontinuous, and makes an argument that the modern form of human rights didn't emerge until the 1970's. In this chapter, I'm not exploring the specifics of the 70s inasmuch as I'm interested in the international character of human rights that became hegemonic during this time-period. I'll also specifically discuss Moyn's form of critique, and how this is a Hegelian form of dialectical synthesis and supersession, "which supersedes in such a way as to preserve and maintain what is superseded."¹⁵⁰ Uprooting the fixity of human rights in the 18th

¹⁴⁹ Moyn, 2014a.

¹⁵⁰ Hegel, 1977, § 188.

century, and closing it down yet again in the 70s, his logical conclusions come back to haunt his own arguments. Insofar as being-in-the-right is inalienable, I'm arguing that the concept of constituent human rights make Moyn's argument impossible.

The radicalness of Moyn's historiography is found in his critique that turns stable origin-stories and trajectories of human rights into contingent forms of representation.¹⁵¹ Human rights historiographies, Moyn argues, identifies some origin long ago as the invention of human rights, wherefrom subsequent historical time linearly projects. Lynn Hunt comes to represent this form of history in Moyn's argument. Hunt argues that human rights were invented when the introspective idea of self-possession was conceived in oneself and reciprocated in others.¹⁵² This form of empathy then becomes the foundation of all human rights so that the modern regime of human rights only ever "improve[s] on the eighteenth-century version of human rights."¹⁵³

Moyn's counter-arguments explicitly concern temporality and epistemology: insofar as the present is reduced to a progressive and linear continuation of a past and the past is read retrogressively as a proto-presentism, discontinuous history is distorted and made smooth in order to suit the image of the present.¹⁵⁴ When the living and breathing components of human rights are lost, such as the fact that human beings continually express human rights, human rights are stripped of any discontinuities and ruptures: the past can thus only be read "as the future waiting to happen."¹⁵⁵ Moyn's critique is clear: viewing human rights as continuous and non-conflictual invisibilises how human rights are always produced and reproduced in the cauldron of time and history.¹⁵⁶ The argument aptly presents the importance of constituent human rights as open-ended, temporal, and productive *vis-à-vis* those constituted human rights that exhaust our historico-political imaginary.

In this sense, human beings are the subjects that pushes history onward; going against constituted and fixed forms of human rights, they affirm the indeterminacy and temporality of history. Although Moyn's argument is ontologically perceptive, his

¹⁵¹ Moyn, 2014b, p. 193.

¹⁵² Hunt, 2007, p. 58.

¹⁵³ Hunt, 2007, p. 212.

¹⁵⁴ Moyn, 2014b, p. 198.

¹⁵⁵ Moyn, 2010, p. 11.

¹⁵⁶ Moyn, 2010, p. 1.

critique is not against determinateness or inertia *as such*, but rather against the state-centric idea of rights that was hegemonic up until the 1970s. Before the 70s, according to Moyn, rights claims within revolutions, insurgencies, and rebellions aimed to supersede one form of government with another and thus entrenched and depended upon sovereign and statist power.¹⁵⁷ In this way, Moyn would reaffirm Agamben's human rights critique wherein human rights amplify sovereign power.¹⁵⁸ However, Moyn breaks with this historical imbrication of rights and nation-states since the 1970s introduced our contemporary understanding of human rights. These were capable of transcending nation-states in making human rights claims and demands *vis-à-vis* the supranational community and a cosmopolitan constitution, and its this internationally transcending character that Moyn says constitutes human rights.¹⁵⁹ What Moyn calls human rights is a claim that points "beyond the legal orders of nation-states," as Jürgen Habermas argued, directed towards a cosmopolitan juridico-moral order.¹⁶⁰ In this regard, what ruptures the linear continuity of human rights is a capacity "to transcend that state forum for rights," allowing human rights subjects to disagree with the political determinations of constitutional rights.¹⁶¹

In terms of constituent and constituted human rights, the theoretical sleight of hand becomes visible. Moyn is critical of constituted human rights that have become stagnant and inert *vis-à-vis* the temporality of history. Therefore, constituent human rights opens up the discontinuity of history, since a multitude of expressions of human rights ruptures linear time and singular origins. Moyn, however, criticises human rights from the openness of constituent human rights, only to enfold its mobility within the structures and confines of cosmopolitan and international human rights. In this sense, the constitutedness of the nation-state is transcended and the radical form of constituent human rights augmented within another form of constituted human rights, i.e., the "constitutionalisation without the state."¹⁶² As a critic of Moyn argues, his critique against constituted forms of human rights "hovers over his own argument."¹⁶³

¹⁵⁷ See Moyn, 2018a.

¹⁵⁸ Gündoğdu, *supra* note 38.

¹⁵⁹ See Moyn, 2010, pp. 7, 13, 20, 81, 117.

¹⁶⁰ Habermas, p. 1998, p. 190.

¹⁶¹ Moyn, 2010, p. 20.

¹⁶² Teubner, 2004, p. 7.

¹⁶³ Robbins, 2014, p. 255.

Sumi Madhok, likewise, is critical of Moyn human rights constitutionalism since it attempts to move away from the fixity of 18th century human rights, but inevitably reaffirms human rights from an institutional and supranational time-space provincialism.¹⁶⁴ That is, in order to make human rights constituted again, Moyn brackets his own critical arguments. Hunt has herself noticed the strange form of Moyn's argument, insofar as one constitution is replaced by another.¹⁶⁵ Furthermore, the entirety of Moyn's argument of supersession can never escape the problem of *retaining what is superseded*. Whereas Moyn writes that the rights previous to the 1970s "retains, rather than supersedes, the sanctity of nationhood,"¹⁶⁶ his argument of an alternative supersession towards supranational constitutionalism similarly and necessarily retains the primacy of constituted human rights.

In order to conceptualise constituent human rights, it's necessary to understand how Moyn's arguments cannot hold. On the one hand, constituent human rights are subsumed within the supranational forum and global human rights regime, something which the inalienability of the *ius, sive potentia* theorem cannot accommodate. On the other hand, it's important to stress that constituent human rights is something in-itself, moving its constitution from the nation-state to the international order only defers the question of its excessiveness and irreducibility. Thinking of human rights as constitutional, thus makes "any analysis in terms of movements... blocked."¹⁶⁷ This is true whether or not we conceive of human rights through a national or supranational constitutionalism. It's impossible to notice constituent human rights inside of Kantian constitutionalism, but nor ought we to go looking for them there: since constituent human rights are inalienable to our being, they cannot be subsumed within any constitutional framework. Constituent human rights, or so it logically follows from my argument, cannot be invoked to function as a form of critique only to be subsumed within the dialectical synthesis, this because constituent human rights are always preserved in its entirety. Moyn noticed how history is discontinuous, but subsequently removed such conflict from the sphere of human rights. It's this inalienable and discontinuous conflict that Moyn noticed that I'll continue exploring in the next chapter, in the works of Jacques Rancière.

¹⁶⁴ Madhok, 2021, pp. 13-14. See also Terretta, 2020, p. 217.

¹⁶⁵ Hunt, 2016, p. 324.

¹⁶⁶ Moyn, 2010, pp. 81, 1.

¹⁶⁷ Deleuze, quoted in Marneros, 2022, p. 183.

3. 2 Rancière and the Contingency of Order

Contrary to Moyn's trajectory, where constituted human rights were superseded by another form of constituted human rights, Jacques Rancière's politics for human rights perpetually comes about through action and conflict. This form of political and productive encounter is relevant for constituent human rights as an open-ended and empty signifier. Nevertheless, as I'll explore, Rancière's idea of constituent human rights can only be conceptualised *against* the known and already-given, and in this way it antagonistically depends on constituted human rights. However, his theory provides ample recourse to hermeneutically understand my concept of constituent human rights as productively conflictual.

The similarities between Rancière's politics and my critique of constituted power are manifold. A Rancièrian approach problematizes the smooth spaces and rhythms of politics, and instead views conflict and arrhythmics as what constitutes politics.¹⁶⁸ In this way—reading Rancière through my terminology—the fact that human beings express an inalienable and irreducible form of *potentia*—which comes up against *potestas*, and produces cracks in the constituted order—is what defines politics. Constituted power as a closed system of thought, that is, without constituent power and subsequent clashes, can never wholly represent politics.

What I'm calling constituted power, Rancière conceptualises as *the police*. At other times he more explicitly touches upon the idea of a constituted realm when he discusses *the police* as “the constituted juridico-political sphere.”¹⁶⁹ *The police* is a “set of procedures... [of] the organization of powers, the distribution of places and roles, and the systems of legitimizing this distribution.”¹⁷⁰ It's thus perfectly sensible as a form of constituted power insofar as *the police's* mechanisms of organisation, distribution, and legitimisation posits the known, the already-there, and the relations of production as inert and superimposed constituent power. This idea of politics doesn't exhaust the sphere of politics. Instead, according to Rancière, politics only occurs whenever there's

¹⁶⁸ Rancière, 1999, pp. 32-33.

¹⁶⁹ Rancière, 2009, p. 57.

¹⁷⁰ Rancière, 1999, p. 28.

a disagreement or dissensus against the economy of the constituted order.¹⁷¹ In this way, politics is antagonism and conflict: the clash when constituent power comes up against constituted power, the cracks in the structure of the state's edifice.

I've discussed how being expresses and embodies the *ius, sive potentia* theorem, Rancière, however, puts it in the negative sense of "the part which has no part."¹⁷² The no-part is an excess or residue of the constituted order, and this excluded or uncounted part always retains its power to act and express rights *qua* being-in-the-world. In this way, similar to my Spinozan arguments, when the constituted order conceives of a subject as powerless or rightless, the inalienability of right and power still affords people to practise constituent power and human rights. The no-part can always bring forth a dissensus against the constituted order, claiming that which the constituted order denies them, or that which the constituted order conceives of as inexistent.¹⁷³ Politics thus occurs when the no-part speaks up and discloses "*the sheer contingency of any order.*"¹⁷⁴

Whereas Kantian constitutionalism argued that the right to revolution was a non-right, Rancière argues that it is precisely this non-right, exercised by the no-part, that brings to surface the political character of human rights. A right to revolution, then, isn't visible within the law, but in the act of actually revolting against *the police* or constituted power. Even though the no-parts are, in Mae Ngai's terms, "impossible subjects" and the rights they claim are "a legal impossibility,"¹⁷⁵ it's a possible impossibility insofar as the impossibility is itself made contingent when rights that don't exist are claimed. In this sense, politics becomes the enactment of an active equality, staged in *the theatre of contestation*. Rancière's idea of a form of constituent power goes beyond the already-there and known, insofar as politics becomes the antagonism between the constituted order and the "function of the fact that a wrong exists... that needs to be addressed."¹⁷⁶ It's from this antagonistic relationship and dissensus that Rancière's ideas of human rights and wrongs unfurl.

¹⁷¹ For a more thorough breakdown of Rancière's politics for human rights, see López Lerma and Etxabe, 2018.

¹⁷² Rancière, 1999, p. 17.

¹⁷³ Rancière, 1999., p. 30.

¹⁷⁴ Rancière, 1999, p. 17, my italics.

¹⁷⁵ Gündoğdu, 2015, p. 188.

¹⁷⁶ Rancière, 2007, p. 97.

3.2.1 Human Rights Dissensus

Rancière's point-of-departure in discussing human rights comes about from an interplay of his conceptualisation of the political, together with an antagonism that moves beyond Hannah Arendt's agonism. In many ways, Arendt and Rancière's interpretations are similar. According to Agamben, Arendt believes that "human rights are revealed to be without any protection precisely when it is no longer possible to conceive of them as rights of the citizens of a state."¹⁷⁷ Paradoxically, the stateless and rightless subject becomes the human rights subject *par excellence*, since human rights are supposed to protect human beings precisely because of their quality of being human, regardless of political or constitutional belongingness.¹⁷⁸ But, when push comes to shove, the world doesn't find anything "sacred in the abstract nakedness of being human,"¹⁷⁹ that is, in the nakedness of those "who [have] lost all other qualities and specific relationships except that they [are] still human."¹⁸⁰

Human rights become tautological when attached to civil rights, and pure void when existing by themselves: this is an aporia that both Rancière and Arendt identify as paradigmatic of human rights.¹⁸¹ Arendt argued that we have "confused civil rights for human rights and thus [have] to learn that when a person is nothing but human, he cannot embody rights."¹⁸² Rancière, however, wants to go beyond Arendt, whom he believes reduces human rights to their constituted setting, thus making them redundant and logically tautological.¹⁸³ I believe the main reason for this is that Rancière doesn't conceive of Arendt's aporia as productive, whereas Rancière views the paradox as the productive and antagonistic stuff of human rights itself.¹⁸⁴ Thus, the irreducibility and inalienability of the no-part, or being-in-*potentia*, actually turns this paradox into a productive sphere of dissensus, whereby human rights become "the rights of those who have not the rights that they have and have the rights that they have not."¹⁸⁵ In this

¹⁷⁷ Agamben, 1996, p. 92.

¹⁷⁸ See Arendt, 2017.

¹⁷⁹ Arendt, 2017, p. 299.

¹⁸⁰ Rancière, 2004, p. 298.

¹⁸¹ Schaap, 2011, p. 29.

¹⁸² Parekh 2008, p. 24. As Arendt wrote elsewhere, "inalienable political rights of all men by virtue of birth" is "a contradiction in terms." Arendt, 2016, p. 39.

¹⁸³ Ibid.

¹⁸⁴ Chantal Mouffe's agonism reflects in many ways Arendt's approach to politics and human rights, see Mouffe, 2014. For an interpretation of Arendt's aporetic approach as going beyond aporia as an insoluble impasse, see Gündoğdu, 2011, and Gündoğdu, 2015.

¹⁸⁵ Rancière, 2004, p. 303.

sense, the no-part can claim human rights *that they don't have* from their capacities of an irreducible form of power *that they have even when they don't*.¹⁸⁶

The contestation at the heart of human rights, Rancière argues, comes about from the “back-and-forth movement between the first inscription of the right and the dissensual stage on which it is put to test.”¹⁸⁷ That is, the fact that constituent and constituted human rights clash. In this way, when constituent human rights comes up against constituted human rights, constructing “a dissensus against the denial of rights they suffer,”¹⁸⁸ the rights *that someone doesn't have* are tentatively turned into “real rights.”¹⁸⁹ *The first inscription of the right*, i.e., constituted human rights, becomes the preexisting fabric on which dissensus depends: a dialectical *back-and-forth movement*. The first inscription of constituted human rights is the stable moment of fixity, whereas *constructing a dissensus against the lack of rights* negates the moment of fixity. However, since constituted human rights are antecedent to dissensus, the dissensus also preserves what's superseded: leading to a dialectical synthesis whereby the new form of constituted human rights involve the inclusion of the no-part.¹⁹⁰ The conflictual politics of human rights becomes predetermined in its antagonism within these “back-and-forth” pendular-motions. As Madhok says regarding Rancière's politics for human rights, the no-parts or the “non-citizens [can only] seek the right to have rights that *have already been declared*.”¹⁹¹

It's necessary to understand that constituent human rights are disclosed within political encounters, as Rancière argues. Nonetheless, the tendencies guiding Rancière's arguments situate constituent and constituted human rights oppositely one another, continually clashing between the already-given and its disagreement. Since “disagreement” depends on a present lack or present absence, the politics of human rights only materialises when they fill that lack. Constituent human rights, then, doesn't

¹⁸⁶ Jack Donnelly has called this the “possession paradox.” That is, albeit slightly different, the fact that we can have rights *qua* their stipulation in the Universal Declaration of Human Rights, even if they're not protected or enforceable. Donnelly, 1989, p. 11.

¹⁸⁷ Rancière, 2004, pp. 305-306. For a similar approach to human rights, see Foucault, 1997, esp. p. 319.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ See Hegel, 1991, §79-§82.

¹⁹¹ Madhok, 2021, p. 19, my italics. Madhok's not only critical of Rancière here, but also Butler and Balibar, and, especially, Arendt's concept of “the right to have rights.” Whilst I agree with Madhok that Rancière cannot go beyond the already-given, such a conclusion cannot be extended to the concept of “the right to have rights” itself. I'll address this in chapter 3.6.

exist—this is why Rancière speaks of negative rights: “those who have not the rights that they have and have the rights that they have not.” In this sense, constituent human rights enact a dissensus and supersede the constituted human rights in producing new constituted human rights, from which new disagreements can be litigated, and so on, *ad infinitum*.

Rancière’s idiom of “the rights of those who have not the rights that they have and have the rights that they have not,” can be problematized with the concept of constituent human rights. As I’ve argued, constituent human rights unfolds from our immediate being, our existence. Therefore, it’s not the case that constituent human rights are non-being, or non-existent, and only made “real” through dialectical synthesis *vis-à-vis* the determinateness of constituted human rights. From the Spinozan refutation of the social contract, the antinomy of natural and civil rights is not a difference of non-being and being, where human beings enter into a civil state by transferring our natural rights. Rancière’s idea of lack reproduces Kantian epistemologies and constitutionalism since only those rights that exist according to some juridico-political criterion, actually exist.¹⁹² Oppositely, constituent human rights, because they’re an ontological fact of our being-in-the-right, means that we always “have” the rights we exercise: there’s thus no dialectical tension between existence and non-existence, as if only constituted human rights would exist.¹⁹³

Rancièrian politics for human rights go far beyond Moyn’s human rights historiography in representing constituent human rights, since conflict and power can never be removed from the sphere of human rights. Notwithstanding, it’s of equal import that the no-parts aren’t conceived as impossible subjects from their own ontological perspective. It’s only viable to speak of non-rights within a constituted setting, whereas, contrarily, constituent human rights are productive in their own right. I’ll explore more of these productive ideas of human rights in the next chapter, whilst continually refusing to reproduce the reality of constituted human rights as antecedent constituent human rights.

¹⁹² See Negri and Casarino’s discussion, pp. 25-26 in this thesis.

¹⁹³ See Hardt and Negri, 2004, pp. 221-222, on the idea of the non-dialectical “always-already and not-yet.”

3.3 Temporality and Performativity

In this chapter, I'm interchangeably discussing human rights, temporality, and performativity. In the first part, I'm discussing Seyla Benhabib's human rights theory and so-called "democratic iterations" and "jurisgenerative effects," combining speech-act theory and human rights. Benhabib's idea of iteration—borrowed from Jacques Derrida—reflects, in many ways, the problems identified in Moyn and Rancière that tie human rights to the fabric of the known. Judith Butler also builds on Derridean iteration but connects it to more subversive reiterative practices and a temporal process that posits the known as contingent. Constituent human rights are then construed as subversive performativity that refashions constituted human rights. Their theory of subversive reiteration depends upon an inalienable power to co-appear—similar to the *ius, sive potentia* theorem. Nonetheless, as I'll argue, subversive human rights cannot upend the tendency towards and dependency on constituted human rights. The fact that constituent human rights subvert constituted human rights norms in a temporal process ultimately reproduces Rancière's politics for human rights insofar as subversion depends on *the structure it subverts*.

In the second part, I'm hermeneutically traversing through the theories of Kathryn McNeilly and Costas Douzinas. McNeilly conceives of human rights through the Derridean idea of the "to come," that is, an indeterminate idea of human rights that don't exist. McNeilly, however, also constructs this idea interconnectedly to Butler's subversive reiteration, thus reproducing the already-existent forms of constituted human rights. Nonetheless, her radical human rights theory opens up new forms of open-ended temporality, of what she calls "human rights to come." I'll explore this form of the "to come" when discussing Douzinas. Douzinas produces an idea of rights that are in a process of "becoming." Becoming-right, or so I'll argue, is a form of constituent human rights insofar as it exists expressively, outside of the fixed form of subversion.

The point of these chapters is then to deconstructively and hermeneutically understand temporal and performative theories of human rights, and the tendency towards the constituted, whilst also exploring open-ended temporalities and forms of expression within constituent human rights itself.

3.3.1 Performing Human Rights

The radicality of Benhabib's human rights theory comes from the iterative and performative interplay between the universal and the particular. Claiming a right is always also an action, a speech-act. In this way, a simple utterance always extends beyond its structural meaning, so that, for example, claiming that "the people have a right to self-governance," when they lack such a right, can be seen as a narratological device that attempts to actualise a right to self-governance.¹⁹⁴ Derrida argued that our entire language is parasitic, that is, everything we utter is "citational" and is "cited" back in an eternal return of difference.¹⁹⁵ Sovereignty, for example, may signify Hobbesian absolute power for a nation-state, and popular sovereignty for revolutionaries. It's thus possible to iterate and copy the same concept in different contexts in order to infuse it with different meaning.¹⁹⁶

Benhabib conceives of the concept of democratic iterations as the Derridean parasitic speech-acts that "transforms meaning, adds to it, enriches it in ever-so-subtle ways."¹⁹⁷ The fact that there's an inequality between who counts as the "human" of human rights, doesn't hinder people from performing democratic iterations in "claim[ing] that they belong within the circles of addressees of a right from which they have been excluded in its initial articulation."¹⁹⁸ Benhabib constructs a *back-and-forth* pendulum between those excluded from the demos and *the initial articulation* of democracy, thus paralleling Rancière's theory of the relationship between the constituent disagreement and *the first inscription* of constituted human rights.¹⁹⁹

Notwithstanding, the "initial articulation" is conceived of as a particular form of constituted human rights. Constituent human rights is a concept that endows rightless subjects, no-parts, and beings-in-the-right with radical potential in producing human

¹⁹⁴ Zivi, 2012, p. 9.

¹⁹⁵ As Derrida wrote: "Every sign, linguistic or nonlinguistic, spoken or written (in the usual sense of this proposition), as a small or large unity, can be cited, put between quotation marks; thereby it can break with every given context, and engender infinitely new contexts in an absolutely nonsaturable fashion. This does not suppose that the mark is valid outside its context, but on the contrary that there are only contexts without any center of absolute anchoring. This citationality, duplication, or duplicity, this iterability of the mark is not an accident or an anomaly, but is that (normal/abnormal) without which a mark could no longer even have a so-called 'normal' functioning." Derrida, 1982, p. 381.

¹⁹⁶ See Derrida, 1988.

¹⁹⁷ Benhabib, 2006, p. 47.

¹⁹⁸ Benhabib, 2004, p. 197.

¹⁹⁹ Benhabib, 2006, p. 20. See Rancière's "first inscription," *supra* note 187.

rights. But when this capacity for actions is connected to an initial articulation and constituted human rights, constituent human rights are left to reproduce what has already been declared and constituted. Albeit, Benhabib conceives of the constituted order as generative of new forms of iterations, it's nevertheless constituted human rights, and not constituent human rights, that are productive. Jurisgenerative effects are found within supranational human rights organisations, declarations, and treaties, and it's those that "enable new actors... to enter the public sphere, to develop new vocabularies of public claim-making, and to anticipate new forms of justice to come in processes of cascading democratic iterations."²⁰⁰

What makes possible the jurisgenerative effects and democratic iterations of human rights claims are, as Moyn argued, the fact that human rights can "transcend [the] state forum for rights."²⁰¹ Democratic iterations, according to Benhabib, "absorbs new semantic contexts," but only insofar as human rights claims rearticulate global human rights norms in an iterative fashion within the national contexts where these rights are denied to them.²⁰² In this sense, when performing constituent human rights, people can only translate and appropriate constituted human rights into their particular settings, and thus demand inclusion into the global human rights regime.²⁰³ In order to alter the meaning of constituted human rights in their determinate actualisations, the fixed meaning of rights must be grasped from the universal human rights regime. The problem with Benhabib's account, as many others have noted, concerns the fact that Benhabib posits the limit of human rights performatives as those rights that have already been declared in a universal context.²⁰⁴

This form of performativity and iteration doesn't escape Moyn's supersession that transcends national contexts, nor Rancière reliance on constituted human rights in order for constituent human rights to have something to disagree with. Butler also engages with Derridean performativity, and their theory of human rights has less to do with an opposition between particular and universal, and more to do with a theory of how plural

²⁰⁰ Benhabib, 2011, p. 15.

²⁰¹ Moyn, 2010, p. 20.

²⁰² Benhabib, 2011, p. 183.

²⁰³ Benhabib 2006, p. 20.

²⁰⁴ Honig 2006; Pettersson, 2019, pp. 41 et seq.; Gündoğdu, 2015, pp. 185-186.

beings' co-appear. They thus disclose an inalienable form of power and right within the structures of human rights performatives.

It's possible to read Butler as perpetually making a distinction between constituent and constituted forms of power throughout their entire *oeuvre*.²⁰⁵ Constituted power, as it unfolds in Butler, is "a hegemonic cultural discourse predicated on binary structures."²⁰⁶ The binarism between conceived opposites, such as legality and illegality, or man and woman, becomes sedimented through a "temporal process which operates through the reiteration of norms."²⁰⁷ In this sense, both constituent and constituted power depends on "citationality" and the repetition of norms. Who counts as human within the confines of the human right to seek asylum, for example, is performed everyday by asylum courts, human rights organisations, and nation-states: giving asylum to white Europeans, whilst denying it to black Muslims, over time sediments who actually have capacity for the right to seek asylum. The same, however, goes for subversive actions. When people argue that they ought to be able to cross borders freely or people actually cross borders illegally when seeking refuge in another part of the world, this effectively "brings into being the very authority" of constituted human rights in their performances of constituent human rights.²⁰⁸ This is a form of subversive reiteration of constituted human rights, insofar as the present idea of what counts as legitimate human rights claims are made "contingent and fragile."²⁰⁹ The fact that both constituted and constituent forms of human rights must be repetitively "cited" means that human rights can be perpetually performed and "cited" back in wholly different contexts.²¹⁰

Similarly to myself, Butler makes a connection between constituent power and constituent human rights. In this way, the constituent power of co-appearing is performed through corporeal self-stylisations, whereby assemblages of beings take to the streets and in the squares "precisely to show that they are bodies."²¹¹ It's in the performative act of "assembling and reassembling," that power is disclosed.²¹²

²⁰⁵ Butler's entire deconstruction of the sex/gender binarism builds upon a conflict between constituent and subversive reiterations and constituted norms.

²⁰⁶ Butler, 1999, p. 13.

²⁰⁷ Butler, 1993, p. 10.

²⁰⁸ Butler, 1993, p. 109.

²⁰⁹ Butler, 1993, p. 220.

²¹⁰ Butler, 1999, p. 5.

²¹¹ Butler, 1999, p. 63.

²¹² Butler, 2016, p. 54.

Constituent power facilitates assemblages on the streets who can correspondingly perform the human right, or freedom, of assembly, even when such actions are deemed illegal.²¹³ When acts of assembling threaten the constitution, as Kant was well aware, such rights cannot exist as constituted human rights. However, the act of assembling exists outside of the constitution and can be performed regardless of constitutional recognition.²¹⁴ The interrelationship between power and right means that the subversive reiterative speech-act of assembling, chanting, and claiming rights “belongs to the assembly prior to, and in excess of, whatever rights a particular government decides to confer or to protect.”²¹⁵ In this way, as Hardt and Negri argue, here agreeing with Butler and Rancière: the exercised freedom of assembly, conceived through constituent power, “gives flesh to the bare skeleton of the language of human rights.”²¹⁶

Since the power to assemble prefigures constituted human rights, it’s also a potentiality to radically plasticise the meaning of the constituted. As they argue, assembling is “an embodied form of calling into question inchoate and powerful dimensions of reigning notions of the political.”²¹⁷ Assemblies can call into question these inert forms of power because assembling is itself that which “brings into being the very prior authority to which it then defers.”²¹⁸ There’s a relationship between the power to act, and the power to subversively reiterate human rights since assemblies can parasitically “cite” norms in order to resignify the fabric of the known.²¹⁹ Since both constituted and constituent human rights have to continually cited and iterated, neither can once and for all be decided upon. The temporal and breathing fabric of human rights are part and parcel of what it means for human beings to express rights through history, and constituent human rights thus preclude any fixed and predetermined human rights master-signifier. However, Butler’s idea of subversive reiteration, whilst it doesn’t initially depend upon recognition and constituted human rights, becomes justified through its process of disclosing contingency, *giving flesh to the bare skeleton of the language of human rights*. Co-appearing calls into being a past authority, which it interpellates and demands recognition from, and retroactively appears only when the constituted order recognises

²¹³ Butler, 2015, p. 8.

²¹⁴ Butler, 2016, p. 50.

²¹⁵ Butler, 2015, pp. 160-161.

²¹⁶ Hardt and Negri, 2017, pp. 240 et seq.

²¹⁷ Butler, 2015, p. 9.

²¹⁸ Butler, 1993, p. 109.

²¹⁹ Butler, 2016, p. 57.

the assembly “as those to whom the right to have rights is due.”²²⁰ Co-appearing as a performative human rights claim is turned into disclosing plural beings *as those to whom constituted human rights are due*.

In this way, Butler’s approach ultimately subsumes constituent potentials within constituted forms of human rights. As such, Butler recognises some excess within human rights, and how this “logic of rights,” as Hunt would argue, “cascades” beyond its intended purposes in new, parasitic ways.²²¹ However, since subversion nevertheless depends on an initial articulation to “cite” differently, the logic of rights never leaves its constituted setting. The Butlerian subversion, as Hasana Sharp argues, “is reiterative of the structures it subverts.”²²² Human rights performatives become stuck in the fact that its subversion depends upon a successful uptake and recognition by the global human rights regime. It’s instructive to conceive of constituent human rights, as Butler made clear, as possible actions regardless “whatever rights a particular government decides to confer or to protect.”²²³ But this autonomusness is immediately undermined when its subversion is forced to allude to what’s already-known. Turning instead to McNeilly and Douzinas: retaining an open-ended temporality, I’ll show how this involves expressionism, rather than subversive reiteration or performativity.

3.3.2 Human Rights Expressionism

McNeilly and Douzinas both conceptualise human rights from the Derridean idea of the “to come,” or what I’ve previously called the untimeliness of human rights. The discrepancy between what constituted human rights promises, e.g., equality or any particular human rights, and what it actually fulfils, discloses an untimeliness between constituted human rights and constituent human rights.²²⁴ The utopic and aspirational future of human rights belongs to the time of the promise, that is, something which hasn’t arrived yet, that which is *to come*. The promise of cosmopolitanism, of democracy, of universal human rights, can never be fully present, nor fully absent.²²⁵

²²⁰ Isin, 2008, p. 18.

²²¹ Hunt, 2007, p. 147.

²²² Sharp, 2011, p. 43. For a critique of Butler’s Hegelianism, see also Braidotti, 2002, p. 50; Negri, 2008, p. 281, fn 15, see also Negi, 2008, p. 196, how Butler is limited in their “critique of patriarchal Power.”

²²³ Butler, 2015, pp. 160-161.

²²⁴ Grosz, 2010, p. 49.

²²⁵ Derrida, 2005, p. 306.

Promises of utopic human rights are never reachable, they must, instead, always be deferred; and it's precisely this paradox of the impossible possibility of the promises of human rights that transforms *human rights to come* into a field of temporal and productive conflict.

Human rights are perpetually found in a future *to come*, and this is, according to McNeilly, the radical *sine qua non* of human rights.²²⁶ Human rights, she argues, are wholly driven by the tension between *human rights to come* and the fact that its contemporary hegemonic and discursive meaning is contingent. It's possible to say, as Gilles Deleuze and Félix Guattari do, that the present is "what [is] already ceasing to be."²²⁷ This signifies that an untimeliness of human rights is irreducibly excessive, or, inversely, that the tension between present and future is productive.²²⁸ According to McNeilly, "human rights is a discourse that exists in excess of attempts to contain it."²²⁹ In this way, McNeilly's idea of the promise of human rights exists because it's impossible to finally coordinate and control human rights. McNeilly's argument thus resembles Gündoğdu and Skott-Myhre and Tarulli's, as well as Rancière and Butler's identification of an excessiveness within human rights. As Rancière puts it, politics cannot but fail to deliver on its promises.²³⁰ *Human rights to come* is the incessant conflict between human rights as an unfulfilled promise and claiming human rights that don't exist as of yet.

The indeterminate disposition of the future that's disclosed by the impossible promise of human rights opens up for infinite possibilities of human rights. McNeilly explains that human rights are temporal actions that actually occur in the future, which would effectively turn constituent human rights into a form of action wholly autonomous of the primacy of the present. As McNeilly says, referring to Grosz, this is the fact that "any politico-legal activity seeking radical social change... [cannot] predict or contain the future or... conceive of a progressive connection between past, present and future, but [must] be open to and induce the untimely."²³¹ This idea of human rights temporality aligns itself with constituent human rights, whilst pushing forth an understanding of

²²⁶ McNeilly 2018, p. 23. See also McNeilly, 2015.

²²⁷ Deleuze and Guattari, 1994, p. 112.

²²⁸ McNeilly, 2018, p. 7.

²²⁹ McNeilly, 2018, p. 22.

²³⁰ Rancière, 2010, p. 80.

²³¹ McNeilly, 2019, p. 7.

human rights as a futural concept. This is why McNeilly says that performing *human rights to come* is “a doing in futurity.”²³² McNeilly takes Moyn up on his ambitions in refusing a continuum between past, present, and future. However, despite McNeilly’s interpretation of human rights temporality, she argues that subversive reiteration and performativity are needed in order to induce the untimeliness of the present. According to McNeilly, although temporality is open, subversion “does not advance a radical break with already existing understandings and practices,” but performs “subtle shifts, using tools already available in modified ways.”²³³ As such, constituent human rights would always be in a “translational dialogue with the currently dominant universal,” in a relationship that reproduces the Rancièrian dialectical bind.²³⁴ Thus tending, as it were, towards the “already given discourses and ideas.”²³⁵

I believe it necessary to deconstruct and separate McNeilly’s conceptualisation of temporality from her use of subversive reiterative practices. Reiteration cannot, as Butler and McNeilly themselves argue, advance a break from constituted forms of human rights. But then this contradicts Grosz’s concept of temporality as that which refuses any *progressive connection between past, present, and future*. As far as subversion goes, the future is preordained by the present, no matter how contingent it might be.²³⁶ Understanding constituent human rights through a critical hermeneutics means that it’s possible to separate McNeilly’s theory of performativity from her theory of temporality. *Human rights to come*, as McNeilly puts it, “may productively be conceived as a doing in futurity towards a self-refuting horizon that sustains the critical.”²³⁷ Sustaining the critical means refuting that which ties constituent human rights to the fabric of the structurally constituted.

The temporality of constituent human rights cannot be conceived through its process of becoming constituted, or emanating from the fabric of the temporally fixed and epistemologically known, as if constituted human rights were the last utopia where it alone could promise the future of human rights. As I’ve shown in regards to Rancière, constituent human rights doesn’t have less *being* than constituted human rights, and

²³² McNeilly, 2018, p. 43.

²³³ McNeilly, 2018, p. 117.

²³⁴ McNeilly, 2016, p. 266.

²³⁵ McNeilly, 2018, p. 117.

²³⁶ See Sharp, 2011, p. 43.

²³⁷ McNeilly, 2018, p. 43.

constituent human rights are existent in their own right, autonomous of their relationship with the already-given. Doing something futurally, inverting McNeilly's dependency on *the already given discourses and ideas*, means that constituent human rights can never be wholly represented, appropriated, or domesticated by the promise of constituted human rights.

Constituent human rights immanate from our being-in-the-right expressive of God's *ius, sive potentia*. The difference between *expression* and *performativity* is essential for an understanding of everything human rights can say. Whereas performativity reiterates constituted human rights in subversive ways, adding meaning to what already exists, expression comes from us being-in-God and expressing a degree of God's power. We always express an inalienable form of power and right simply by existing. We are, as explored in chapter 2, always productive, and inescapably so; this production exists in and through time, and there's nothing constituted human rights can do to stop constituent human rights from being expressed over time.

In this way, it's possible to accept the temporal implications of McNeilly's argument—moreover, we *ought to* accept them—without limiting the function of constituent human rights to its subversion of constituted human rights. McNeilly's idea of indeterminate temporality can be fully affirmed with the *expression* of constituent human rights. Constituent human rights doesn't depend on the promise of constituted human rights: this is evident from Spinoza's refutation of the transfer of power and right into the social contract as a mutual agreement or promise. Instead, constituent human rights have ontological being, and its futural indeterminateness always remains as a horizon of possible possibilities that naturally unfold from our political encounters.

An affirmation of human rights temporality can be explored in and around Douzinas's concept of "right-ing being" as an expression of constituent human rights.²³⁸ Instead of connecting temporality and human rights to subversion, Douzinas connects this, as his concept connotes, to being. Human rights, Douzinas argues, "are the projection of the

²³⁸ I owe this connection to Illan rua Wall's discussion of "right-ing being" as "a process of creation, an exercise of constituent power," and, furthermore, as "a creative praxis." My trajectory diverges from rua Wall insofar as, as discussed in chapter 1.2, he dismisses the Spinozan idea of *potentia* and the Negrean idea of constituent power. See rua Wall, 2012, pp. 145-146.

‘not yet’ into the ‘always there’, a necessary but impossible promise.”²³⁹ The “not yet,” however, cannot be subsumed by the “always there” insofar as it unfolds from our inalienable *potentia* and being-in-the-world.²⁴⁰

The projection of the not-yet of human rights into the always-there is possible because our being expresses “a will that wills what does not exist.”²⁴¹ In this sense, we express constituent human rights that aren’t recognised by constituted forms of human rights. Douzinas argues that expressions of human rights “finds its force in itself and its effect in a world not yet determined all the way to the end.”²⁴² This temporal process is continually one of “right-ing being,” that is, how being and right are entwined in their own right. This is, to be sure, an expression of what I’ve discussed as Spinoza’s *ius, sive potentia* theorem.²⁴³ Douzinas writes that right-ing being

is a temporal process, a project of *becoming right*. It changes all aspects of the practice of rights and life by gradually removing the hurdles stopping an autonomous life in community.²⁴⁴

Becoming-right situates being-in-the-right on a temporal plane of existence. When we’re in the right, we’re perpetually expressing human rights through and in time; and everytime constituted forms of human rights try to grasp the flux of time and transfix it, they try in vain. Righting, as I’m interpreting it, signifies how human beings express a degree of God’s power insofar as becoming-right is conceived as a future tense verb: it’s an action and expression “to right” that’s inalienable to our being. The temporalities of human rights, as explored here, are connected to expressionism in such a way that constituent human rights are conceived of as perpetually becoming-other and becoming-right.²⁴⁵ This means that every state of being, or constituted forms of human rights, are dissolved in their “becoming.” The traditional philosophical view of *becoming* and *being* is such that “[b]ecoming... becomes the mere process that simply vanishes once the transformation is complete and as such our tendency is to think of the

²³⁹ Douzinas, 2000, p. 318.

²⁴⁰ Douzinas, 2000, p. 81.

²⁴¹ Douzinas, 2000, p. 190.

²⁴² Douzinas, 2000, p. 190. See also Douzinas, 2007.

²⁴³ *Righting being*, however, shouldn’t be conceived as a determinate point where constituted and constituent human rights becomes synonymous, but more in line with the continuous unfurling of *becoming something different*: the permanent revolution.

²⁴⁴ Douzinas, 2019, p. 192, my italics.

²⁴⁵ Patton, 2012, pp. 26–29. On human rights, law, and Deleuze, see Marneros, 2020.

notion as secondary to the fixed points.”²⁴⁶ This view of becoming is nothing else than the traditional view of constituent power and human rights that’s subsumed or tends towards constitutedness. Which is to say, human rights are an indeterminate way of *doing something in futurity*, and, more importantly yet, a way “of thinking the production of the new.”²⁴⁷

Constituent human rights are not “an outside unrealized utopia but is in fact an ongoing reality that *prefaces* the state’s appropriation of rights through the juridical.”²⁴⁸ Instead, Skott-Myhre and Tarulli argue that human rights are “*the immanent force of self-production as an ontological capacity of becoming that will not be denied...* premised in the infinitude of life’s virtual surplus of that which has not yet been... rights as acts refuse the semiotic in favor of the instantiation of the actual.”²⁴⁹ The immanence of constituent human rights means that it prefaces, or preexists, constituted human rights in an autoproductive manner, and this productive nature of human rights unfolds immediately from our becoming. Instead of the *jurisgenerative* form of human rights conceived by Benhabib or Moyn’s cosmopolitan constitutionalism, which posits the constituted order as the productive sphere, constituent human rights are in themselves productive and generative. The relationship is inverted: constituted human rights are contingent, and the present state of things is always, in the face of becoming-right and human rights production, “already ceasing to be.”²⁵⁰

Constituent human rights are indeterminate, as McNeilly and Grosz’s concepts of temporality shows, and without enfolding human rights within a subversive reiterative praxis or dialectical synthesis, they can be conceived of as an expression of right that’s immediately affirmed in our productive being. Emphasising the temporality of human rights together with a Spinozan expressionism of being, it’s thus possible to affirm constituent human rights as wholly autonomous, excessive, and inalienable. In order to understand how constituent human rights are immanent and productive, I now turn towards these autogestive modes of production.

²⁴⁶ Mamerros, 2022, p. 189.

²⁴⁷ Deleuze, 1989, p. 12. That is what I’ve developed before, as human rights production that isn’t tied to the fabric of the known. See my discussion of Grosz’s temporality in chapter 2.3.

²⁴⁸ Skott-Myhre and Tarulli, 2010, p. 252.

²⁴⁹ Skott-Myhre and Tarulli, 2010, p. 259, my italics.

²⁵⁰ Deleuze and Guattari, 1994, p. 112.

3.4 Lefebvre, Immanence, and Human Rights

Opening up a conception of constituent human rights as self-production, or autoproduction, I'm reading Henri Lefebvre's concepts of the right to the city (TRC) and *autogestion* as expressions of constituent human rights. In this sense, it'll be possible to see the practical implications of the Capitol Hill Occupied Protest as the self-production of human rights in *its own working existence*.²⁵¹ Lefebvre's idea of the right to the city provides a natural passage into the working existence of CHOP insofar as the occupation itself was a claim to the right to the city that unfolded from its own autogestive compositions.

Lefebvre's concept of TRC is "a geographical right to occupy the centre of the city," where the urban proletariat claims spaces, rights, mobilities, etc., and effectively perform the democratisation of "producing space."²⁵² This is, in a way, a Marxist right that depends on sameness and exclusion insofar as the rights of different social classes are pitted against each other and groups aim to exclusively occupy space. It's clear to see how TRC becomes entrenched in the same tendency towards constitutedness as previously discussed.²⁵³ Opposite this reading, TRC and the rights such a claim expresses, are read more in line with those urban theorists that view the kernel of TRC as an existential right.²⁵⁴ That is, my reading doesn't presuppose that geographical exclusivity and sameness must haunt political claims to the city. Claiming TRC, can be read through Lefebvre, as that which goes beyond whatever is contingently signified by "the city."²⁵⁵ "The street," he argues, "is disorder."²⁵⁶ This disorder becomes part and parcel of the temporal indeterminateness one claims when expressing constituent human rights. Thus conceiving of human rights as empty signifiers that produces lived spaces and spatial lives, unfolded as the immanent desire of the occupancy of the city itself.²⁵⁷

Whereas Rancière's politics for human rights only materialises as praxis that attempts to fill the present absence of human rights, TRC doesn't presuppose that something must

²⁵¹ Marx, 1974, pp. 213, 217.

²⁵² Lefebvre, 1991, pp. 94-95.

²⁵³ For a critique of Lefebvre, see Pettersson, 2019, esp. pp. 79 et seq.

²⁵⁴ See Merrifield, 2013.

²⁵⁵ Lefebvre, 1996, pp. 67-68.

²⁵⁶ Lefebvre, 2003, p. 18

²⁵⁷ Marcuse, 2012, pp. 29-30.

be lacking. Although the aforementioned radical human rights theories provide ample configurations to the concept of constituent human rights, constituent human rights only become visible when they're lacking *vis-à-vis* the constituted order in transforming into constituted human rights in a dialectical synthesis. Contrary, claiming TRC, as the Marxist urban theorist David Harvey explains, depends on what sort of expressions “fill it with meaning.”²⁵⁸ Therefore TRC “is an empty signifier.”²⁵⁹ Whereas sameness comes back to haunt difference, in the case of McNeilly’s subversive reiteration, or Rancière’s human rights dissensus, when inverted, that is, when constituent human rights expressions immanates from our being, it’s instead difference that perpetually haunts sameness. TRC, conceived as constituent human rights, is “an empty signifier full of immanent but not transcendent possibilities.”²⁶⁰ Claiming an active right to the city goes hand-in-hand with the immediacy of our productive being, unfolded constitutively through our actions, and goes beyond constituted human rights. This self-sustainment of the production of being, what I’ve been calling being-in-*potentia* or being-in-the-right, is what Lefebvre calls *autogestion*.²⁶¹

Claiming TRC within autogestive modes of actions does not mean that the city is claimed as it is, with its presuppositions of exclusionary boundaries and divisions of labour. According to Lefebvre, “[a]utogestion, far from being established once and for all, is itself the site and the stake of struggle.”²⁶² It’s this fluidity, together with its self-sustainment of being, that makes autogestive right praxis co-appear with the object of right. According to Rua Wall’s discussion of Lefebvre, *autogestion* expresses how

the right folds into its object. It is the right itself that becomes self-forming, it is digested by the autogestion, emerging at once utterly different and uncannily similar to other conceptions of rights. The radical in rights is retraced, rendering the right itself in the process of creation as it acts out, creates or performs its own object.²⁶³

Oppositely most of the aforementioned radical human rights theories, where constituent human rights had to interpellate constituted human rights in order to sustain themselves,

²⁵⁸ Harvey, 2012, p. xv.

²⁵⁹ Ibid.

²⁶⁰ Harvey. p. 136.

²⁶¹ Brenner, 2001, pp. 788-789.

²⁶² Lefebvre, 2009a, pp. 134-135.

²⁶³ Rua Wall, 2012, p. 138.

autogestion is the life force of constituent human rights. The fact that *the right itself becomes self-forming*, that it *folds into its object*, means that autogestive modes of expressing human rights become constitutive of the right itself. This points to the becoming-right of human rights, that expressions of human rights immanently produce and fold into the right they express, reflecting Douzinas's concept of *right-ing being*.²⁶⁴ Claiming rights from one's own being doesn't imply claiming human rights *as they are*. In contradistinction, constituent human rights means producing the human rights and spaces for such actions in the immediate act and expression of claiming the city.

Because constituent human rights unfolds immediately, or immanently, with the object of right—as an expression of an inalienable *potentia*—it points towards the indeterminateness and open-ended temporality of human rights as an empty signifier. This is why constituent human rights cannot *a priori* be determined: it always aligns itself with the praxis and production of whatever human rights are expressed. It's as Lefebvre argued, *an opening of itself towards indeterminate possibilities*.²⁶⁵

The immanence of *ius, sive potentia* turns our actions into immediate expressions of human rights. Insofar as this immanates from our autogestive modes of production, or, what is the same, our being as conceived of in a Spinozan ontology, *the right fold directly into its object*. In the full sense of McNeilly's wording, then, this is *a doing in futurity*. As I'll show, the expression of a human right of life ungoverned by policing, “carries within itself,” as Lefebvre aptly describes *autogestion*,²⁶⁶ the existence of a human right of life ungoverned by policing. We're actively enacting a *prefigurative politics*, or *urgent utopia*, in the instantaneous, affirming our expressions of human rights as indeterminate pushing us far beyond the primacy of the present. This is precisely why, returning to Harvey, constituent human rights are the power “to change and reinvent... after our heart's desire.”²⁶⁷ It's this radical potential to change and produce human rights that goes to the heart of human rights, and which I now turn towards.

²⁶⁴ Rua Wall, 2012, pp. 145-146.

²⁶⁵ Lefebvre, 2009b, p. 150.

²⁶⁶ Lefebvre, 2009a, p. 136.

²⁶⁷ Harvey, 2012, p. 4.

3.5 Capitol Hill Occupied Protest

In these chapters I'm constructing a centrifugal and centripetal narrative concerning constituent and constituted human rights within CHOP. First of all, I'm reading CHOP *vis-à-vis* radical human rights theories, in order to see how the occupants tended towards constituted forms of recognition and human rights. Secondly, I'm interpreting other expressions of human rights occurring at the same time. When claiming the right to the city, these occupants expressed that the occupancy was in itself the constitutive expression of the world, future, and rights that their heart desired. My construction of two different narratives within a single event goes to the heart of human rights multiplicity, that is, of constituted and constituent human rights. An event, however, cannot be separated according to some predetermined criteria. This disposition, therefore, corresponds to a discussion of the concepts of constituent and constituted human rights, and not CHOP itself. CHOP is an object of interest for me precisely because both tendencies towards constituent and constituted human rights expressed *the human right of life ungoverned by policing*, i.e., desires about police abolitionism, defunding, or reformism. It's precisely because this right is nonexistent that it becomes conceptually interesting as a productive expression in its own right.

3.5.1 Occupation, Constitutionalism, and Human Rights

Throughout CHOP there was a recognition of the fact that they exercised *potentia*. Not only had they exercised their collective power and managed to upend the SPD and run the police out of the area, but the occupants clearly realised that their power to act was greater than constituted power. This constituent power was expressed throughout the occupation: "There are more people [here]... than police officers in the Seattle Police Department. This is our power";²⁶⁸ "People-power is our greatest strength";²⁶⁹ "We got the power."²⁷⁰ Moreover, as one occupier put it, "the power of the people don't stop."²⁷¹ There existed an understanding of the differences between *potentia* and *potestas* within the movement and occupation; and the occupiers likewise knew that it was their power as an extra-parliamentary assembly that produced a disruption of the city's "business as

²⁶⁸ Video, "We Want To Live", 07/06/20.

²⁶⁹ Video, "We Want To Live", 07/06/20.

²⁷⁰ Video, "DefundPolice", 09/06/20.

²⁷¹ Tweet 2, 11/06/20, #SeattleAutonomousZone #seattleprotests.

usual.” According to an occupier, who reflected Rancière’s dissensus and Lefebvre’s disorderly streets: “The point of protest is to disrupt.”²⁷²

The disruptive and dissensual act of protesting against the police, and eventually constituting a space ungoverned by policing, made CHOP into a constituent moment directed against constituted power. Although Rancière’s concept of *the police* isn’t concerned with policing individuals enforcing the rule of the law, there’s some overlapping characteristics between them. The human right of life ungoverned by policing was performed by the occupants as a constituent human right precisely because they, similarly to Rancière, conceived of policing as a constituted form of power. An occupier reaffirms as much: “we didn’t just defeat the police, the police are simply the outward face of repression under capitalism.”²⁷³ The human right of life ungoverned by policing became a rallying cry against forms of constituted powers.

In this sense, the power of the occupiers came up against constituted power, disrupting, disagreeing, and dissenting from its policing. As I’ve discussed *vis-à-vis* Rancière, dissensus is the political act where constituent and constituted human rights clash; where the demands of the occupiers come into collision with *the police*. The staging of contestation was made in order to voice that a wrong existed, and from this disclosed collective power, many groups demanded concessions, reforms, and resources from the city officials. Although the claims vacillated between complete abolition,²⁷⁴ defunding of the SPD by 50%,²⁷⁵ or reforms,²⁷⁶ these claims were directed towards representatives of the constituted order. In this sense, then, although the power of the occupants had been produced by themselves, they now shifted the burden of action onto the constituted sphere of power. Furthermore, human rights claims and demands *vis-à-vis* the constituted order have to function within what is recognised as constituted human rights. Although *The Collective Black Voices*, who formulated a list of demands, recognised the need to withdraw Black bodies from being policed, their demands were articulated in American constitutional language. In this sense, the human right of life ungoverned by policing was disseminated into already-existing rights and they

²⁷² Video, “CHOP: General Assembly”, 15/06/20.

²⁷³ Video, “DefundPolice”, 09/06/20.

²⁷⁴ FreeCapitolHill, 10th June, 2020.

²⁷⁵ Decriminalize Seattle, 10th June 2020; Video, “We Want To Live”, 07/06/20.

²⁷⁶ Video, “Meeting with Seattle Mayor Jenny Durkan”, 11/06/20.

demanded a ban on police weaponry “especially against those exercising their First Amendment right as Americans to protest.”²⁷⁷

Butler’s performativity of co-appearing in the assembly—disclosing a natural power—and performing human rights in order to have their subversive reiterations recognised, aptly explains this process. Because whereas the exercise of the freedom of assembly doesn’t depend on the First Amendment, the recognition of its demands as constituted human rights does. The protesters and occupants staged the lack of First Amendment rights and demanded that their dissensus be recognised, respected and included as a constituted human right. Disruption and subversive reiteration became the fulcrum for a tendency towards inclusion, or a process of turning constituent human rights into constituted human rights.

This idea of conflictual human rights was seen in Rancière’s dissensus, Butler’s binarism and subversive reiteration, and McNeilly’s *human rights to come*. The performative function of human rights, discussed in the latter two, can be noticed in the performativity of “Black Lives Matter” itself. As one sign read during a rally: “Justice is juxtaposition to us. Justice for all just ain’t specific enough.”²⁷⁸ The untimeliness of constituted human rights was induced by disclosing the discrepancy of the universalism of “All Lives Matter” and, oppositely, the fact that *everyone’s right to life* doesn’t include Black lives. “Black Lives Matter” is thus performed as a subversive reiteration in juxtaposition to the abstractions of constituted human rights where all lives would matter. Human rights to come as the promise of all lives mattering, was constructed in a dialectical back-and-forth pendular motion. The first articulation of constituted human rights, e.g., the First Amendment, is the stage of fixity and universalism, however, although abstractly universal, it depends on uneven distributions of rights, binarisms, and inequality. In this way, although constituted human rights proclaim that all lives matter, the actual way they work contradict such promises. The second moment plays on the fixity of the first articulation and induces an untimeliness or unfixity by disclosing this discrepancy. The rallying cry of Black Lives Matter juxtaposes the Black

²⁷⁷ FreeCapitolHill, 10th June, 2020, Part I, § 2.

²⁷⁸ Image 1. Sign at the “We Want To Live” rally.

bodies who don't matter as human rights subjects against the white bodies who already matter. As one occupier wrote on social media: "Black rights are human rights."²⁷⁹

The clash between the no-part and the already-given, or the subversive reiteration that juxtaposes a given norm with another meaning, are construed from the back-and-forth dialectic between fixity and unfixity, or constituted and constituent human rights. In juxtaposing—through Rancière's dissensus or Butler and McNeilly's subversive reiteration—constituent human rights to constituted human rights, and performing the fact that black lives matter within the assembly as a constituent power, the contingency of the constituted order was called into question. The popular sovereignty of "we, the people" called into being a past authority, as Butler argued, that could reiterate constituted human rights.²⁸⁰ The back-and-forth between constituted and constituent human rights thus rearticulated the rights within the U.S. Constitution. In this sense, although the occupants exercised constituent power, they denied the narrative where that power was to be recognised as constituent, which in the dialectic synthesised into constituted human rights. One occupier argued against the narrative where occupants were violent and "domestic terrorists," and instead argued that CHOP was a genuine fight "for human rights."²⁸¹ In this sense, the struggle strove to becoming-constituted, as a way of the constitution to recognise their human rights claims as legitimate.

As constituent tendencies that litigate the constituted order through a performed dissensus, CHOP was concerned with appropriating and reforming already-existent human rights. This curious amalgamation of constituent and constituted tendencies was performed from the inalienable force of constituent power, that attempted to actualise an equal, inclusionary, and indiscriminate enjoyment of constituted human rights. In this way, they called into being a past authority and staging their claims as something that had to be recognised by the constituted order. CHOP performed the speech-act of "we, the people," in order to rearticulate, or subversively reiterate, what "the people" signify. The constituted human rights of the Constitution were disclosed as unequal and abstract, dependent on a racialised idea of "people." "Since we supposedly had the Emancipation," one protestor argued, nothing much has changed.²⁸² Instead, as another

²⁷⁹ Tweet 3, 12/06/20, #seattleprotest, #chaz #blacklivesmatter.

²⁸⁰ Butler, *supra* note 218.

²⁸¹ Tweet 4, 13/06/20, #chaz #blacklivesmatter.

²⁸² Video, "We Want To Live", 07/06/20.

occupier pointed out, Black people have fought as part of the people and won two revolutionary wars, “only to have [enslavement] codified and shifted in our constitution and our Thirteenth Amendment.”²⁸³

The occupiers disclosed how the constitutional “we, the people,” has been strongly associated with the white, wealthy slave-owners and has since 1787 been performed and resignified by the constituted order as a racially and genderedly charged concept.²⁸⁴ Thus, as an occupier pointed out, “the Civil War never ended in this country, it just went cold.”²⁸⁵ Instead, the idea of popular sovereignty as constituent power evoked a more authentic form of “we, the people,” as one occupier clarified:

For the people, by the people, of the people. That is the lesson that they taught me in their fucking history classes but do not live by. They do not live by those fucking words. So what we do here is we show them a different... we show them the actual narrative, that for what it looks. By coming out and supporting each other the way the government is supposed to.²⁸⁶

This idea of constituent human rights—instead of accepting that constituent human rights lay outside the Constitution, as Kant showed and I’ve argued—situates constituent human rights as the enactment of the way constituted human rights’ supposed to be. “We, the people” doesn’t enact a rupture with the already-given when performing a right of life ungoverned by policing, inasmuch as it attempts to disclose the lack of constituted human rights in filling that lack with constituent human rights: a process that produces “real rights.” Through dissensus, this discloses the misrepresentation of human rights within representative democracy. The assembly was, itself, “of the people, for the people, and by the people.”²⁸⁷ In this way CHOP subversively reiterated the meaning of sovereignty and brought into being a popular sovereignty embodied by the movement: “a movement by the people, for the people.”²⁸⁸

²⁸³ Video, “Black is Beautiful”, 13/06/20. This is a common critique against the US Constitution, in the sense that slavery was never abolished but only shifted, first to the Jim Crow laws, and then to bondage within the prison-industrial complex, see Alexander, 2010.

²⁸⁴ Video, “We Want To Live”, 07/06/20.

²⁸⁵ Video, “Black is Beautiful”, 13/06/20.

²⁸⁶ Video, “Black is Beautiful”, 13/06/20.

²⁸⁷ Video, “Rally Cal Anderson Park”, 16/06/20.

²⁸⁸ Video, “We’re proving the world can change”, 16/06/20. As such, the SPD’s East Precinct was graffitied over in order for it to read “Seattle People Department,” instead of “Seattle Police Department East Precinct.” See Image 2.

The plural being of the assembly is a constituent power that disrupts constituted human rights and subversively reiterates another meaning of human rights. Therefore, the above block quote is perfectly sensible as Benhabib's *democratic iterations* or Rancière's idea of human rights as *the rights of those who have not the rights that they have and have the rights that they have not*. The occupiers recognised, on the one hand, their own being-in-potential and inalienable power but, on the other hand, tended towards constituted human rights and strove towards the known and the already-given. One occupier captured these sentiments when they argued that they didn't desire to produce or institute something new, but were merely "ask[ing] for an end to privilege, the abolition of slavery, equality of rights, and the reign of law. Justice, nothing else."²⁸⁹ Constituent power thus took the Rancièrian or Butlerian form of something to disclose one's power to act as a fulcrum for including new recognisable ways of being within constituted human rights. Constituent human rights were used, as dissensus and subversion, in order to change the meaning of constituted human rights, and, as an occupier argued: CHOP "can't be an autonomous zone if we're still demanding things from the government."²⁹⁰

In general, the full affirmation of constituent human rights was limited by their being-against constituted human rights. A "Know Your Rights" seminar was held online in the middle of CHOP. This reflected in many ways the instrumentalisation of constituent human rights as an inclusionary politics *vis-à-vis* constituted human rights. As such, it was stated that whilst "we keep pushing and advocating for change... the best way to do this is if we're empowered with the knowledge of our rights."²⁹¹ As the Nation Lawyers Guild put it, the "police may be wrong" but may nevertheless act as if they're right in disregarding one's human rights. As such, the Rancièrian tension between *the rights you don't have when you have them and the rights you have when you don't* becomes disclosed. The seminar emphasised that when your First Amendment rights are disrespected in encounters with the police, but nonetheless exist constitutionally, "stating your rights" such as they already exist in the law is the best way of having your rights recognised.²⁹² The radicality of human rights, when

²⁸⁹ Tweet 5, 25/06/20, #chop #chaz.

²⁹⁰ Turnbull, 14th June, 2020.

²⁹¹ Video, "Know Your Rights", 17/06/20.

²⁹² Video, "Know Your Rights", 17/06/20.

constituent human rights cannot break with the already-given, is limited to saturating and making real those rights that already exist abstractly, theoretically, and universally. As an occupier put it, the occupation is about “getting the equity or the leverage of the rights that we have.”²⁹³

In this manner, CHOP was an assembly where human rights were stated and performed, and thus instrumentalised in order to have them recognised as constituted human rights. This is a radical conception of human rights, but one that nevertheless disarticulates constituent power and constituent human rights. It reflects the ontological problems of Negri who doesn't connect constituent power and right through Spinoza's *ius, sive potentia* theorem. CHOP, according to this narrative, realised their own potential as preexisting the constituted sphere, erupting discontinuity through disorder and bringing into being the past authority of an ideal form of constituted people, whilst nonetheless tending towards inclusion. Whereas this narrative undoubtedly occurred and human rights were claimed as constituted, as my hermeneutics of, especially, Rancière, Butler, and McNeilly has shown, this omits the ontological immediacy between constituent power and constituent human rights.

I've used the concepts of constituent and constituted human rights as heuristic tools in order to analyse CHOP as a human rights event. In this way, my hermeneutical reading of radical human rights theories through the concepts of constituent and constituted human rights has allowed me to discuss CHOP as an amalgamation of constituent and constituted human rights. This reading has been possible because of my use of the radical human rights theories as read through my concepts of constituent and constituted human rights. This chapter aimed at an understanding of human rights praxis through the dual tendencies of constituent and constituted human rights. Making human rights say everything it can, it's been important to understand constituent and constituted human rights in tandem. In the next chapter, however, I'll focus on a conflicting tendency within CHOP, unconcerned with being recognised by the constituted sphere of politics, and how CHOP thenceforth thrusts ahead an understanding of constituent human rights as such.

²⁹³ Video, “We're proving the world can change”, 16/06/20.

3.5.2 Occupied Immanence and Constituent Human Rights

Constituent human rights performativity, dissensus, and subversive reiteration, as explored in the previous chapter, depend on the recognition or inclusion into the constituted order. This would mean that the success or unsuccess of constituent human rights wholly depends on their capability of turning into constituted human rights. Contrarily, what I've hitherto argued is that the expressions by being-in-*potentia* and being-in-the-right constitute *their own working existence*. The human right of life ungoverned by policing as a constituent human right wouldn't then depend on it being legislated or recognised by apparatuses of constituted human rights. Instead, the fact that the occupants engaged in the "art of not being governed quite so much,"²⁹⁴ for a brief moment, meant that they constituted and produced the right themselves. There and then, the human right of life ungoverned by policing was expressed and lived out.

In this sense, the actions that actively claimed the occupation of the right to the city—producing CHOP—was an empty signifier that only became meaningful within the existence of CHOP itself. The embodiment of a life ungoverned by policing was the composition of the occupancy itself, whereby the occupation wasn't meant to reenact or replace the role of the police.²⁹⁵ In other words, the concept of constituent human rights meant that the human right of life ungoverned by policing was constitutively produced and unfolded in the immediate moment their actions turned the occupation into a police-free space. The occupation was a microcosm that reflected the future that the occupants desired, grounded in the potentials of their own working existence, or, in other words, founded on nothing but the fact of expressive beings.

CHOP as a place where lives were ungoverned by policing, or, in any case, *not being governed quite so much*, disenchanted any notion that human rights have to depend on the known or what's already-given. The idea of constitutional rights and constituted human rights as the absolute limit of our political imaginary was disenchanted by an occupier who induced the untimeliness of constituted human rights in the clearest terms: "perhaps we're calling it the American dream because you have to be asleep to believe it."²⁹⁶ The American dream and its constitutional rights was presented as a last utopia,

²⁹⁴ Foucault, 2007, p. 29.

²⁹⁵ Video, "People's Assembly", 11/06/20.

²⁹⁶ Video, "Seattle Children's March", 13/06/20.

an impossible promise of human rights. However, this wasn't melancholic, and was instead discarded in favour of the active utopia of CHOP: the fact that constituent human rights were produced immediately from action and expression. In this sense, the idea of dreaming was inverted, not as the impossible promise but as the action of dreaming with one's eyes open. As a guerilla gardener said, being in CHOP was like "living in a dreamland of what the world could be like if people could just come together with the resources that we all already have, and radically change something that isn't working for us."²⁹⁷ The occupants were actively against the police, constituted power, and constituted human rights, but this antagonism didn't exhaust their political imaginary as their immediate counterpower produced active utopias beyond the negativity and dialecticism of antagonism.

Human rights were actively experienced from the composition of CHOP's own working existence, independently of constituted human rights. In the realm of constituted politics, "Police terrorism" as one occupier said,²⁹⁸ is prolific, but within CHOP, as another occupier argued with regards to the murder of George Floyd: "we're living life. There's no knees on necks here."²⁹⁹ Occupiers thus saw CHOP as a "police-free utopia."³⁰⁰ The immediate relationship between constituent power and constituent human rights, that is, Spinoza's *ius, sive potentia* theorem, meant that the occupants' power to act unfolded immediately in the object of right. On a poster at the No Cop Co-Op, handing out free necessities, it thus said: "It is not us helping them. We are them."³⁰¹ Similarly, an occupant said that "[w]e need to stop worrying about the system and everything else. We need to fix this."³⁰² These autogestive modes of production were wholly disinterested by constituted human rights, since they produced the meaning of their rights from an empty signifier put into action. CHOP wasn't claimed as the right to the city in mediation with constituted power, but was instead claimed at the same time as the space was produced.

²⁹⁷ Weinberger, 17th of June, 2020.

²⁹⁸ Video, "We Want To Live", 07/06/20.

²⁹⁹ Cornwell, 24th of June, 2020.

³⁰⁰ Turnbull, 14th of June, 2020.

³⁰¹ Image 3. Sign outside the "No Cop Co-Op."

³⁰² Video, "We Want To Live", 07/06/20.

These autogestive modes of production thus produced, from the “self-activity of protesters” their immediate surroundings.³⁰³ The immanent relationship between *potentia* and *ius* turned CHOP into a “living proof that a world without police is possible.”³⁰⁴ In this sense, the human right of life ungoverned by policing was constituted and existent within CHOP, produced as a right *in its own right*. Not only did CHOP show what utopian realities were possible, “a small look at what that new world could be,”³⁰⁵ but such utopianism was effectively constitutive insofar as it wasn’t just shown or performed, but actively lived out in their multivarious expressions.

These forms of constituent human rights should thus be far read beyond performativity. Since human rights are expressed by beings-in-*potentia*, insofar as they express a degree of God’s power, expressionism immanates from our being. It was beings expressing and acting on the fact that black lives matter as much as any other life that made actual black lives mattering. As an occupier stated in the occupied Cal Anderson Park: “Every single person in this park, whether you’re being here for the first time, or you’ve been here every single day, you are the reason, you are the fuel, for why black lives matter today.”³⁰⁶ Action and power folded into the object of right, and the expressed human right of life became constitutively produced. The right didn’t exist within constituted forms of human rights, but nor did it have to. The expression was a way to make “all lives actually matter,” as the occupants put it “because we make sure black, brown, poor lives matter too.”³⁰⁷ It’s these autogestive modes of production, and CHOP’s own working existence, that actively produced human rights from the nexus of power and right.

Furthermore, the distinction between constituent and constituted human rights was perfectly disclosed by the occupants themselves, beyond any interpretative framework of master-signifiers. This became especially acute when an occupier quoted the Black Panther Stokely Carmichael, also known as Kwame Ture: “If a white man wants to lynch me, that’s his problem; if he’s got the power to lynch me, that’s my problem.”³⁰⁸ Whereas the former part of the sentence indicates a theoretical human right—something

³⁰³ Viewpoint, 17th of June, 2020.

³⁰⁴ Burley, 23rd of June, 2020.

³⁰⁵ Crosbie, 11th of June, 2020.

³⁰⁶ Video, “DefundPolice”, 09/06/20.

³⁰⁷ Video, “Black is Beautiful”, 13/06/20.

³⁰⁸ Video, “DefundPolice”, 09/06/20.

that may exist abstractly without being exercised—the latter concerns a capacity to act, that is, *potentia*. Spinoza’s *ius, sive potentia* theorem is expressed here in clear terms: it’s only the power to act that actually expresses the right to bring about such an action. Human rights critique, as discussed in chapter 1.1, becomes as empty as their object of critique when exhausted by its abstract, theoretical, and legal determinations. *The self* of the statement’s “my problem” signifies the autogestive modes of production and that a counter-reality must be autoproduced. Affective compositions such as CHOP immediately express constituent human rights, effectively counteracting the power–right dynamic of the “if he’s got the power to lynch me.” The production of human rights by CHOP comes into being through its own autogestive modes of production, without interpellation with constituted human rights. “What was so threatening about the Black Panthers,” another occupier said, “was that they stopped asking white people for help.”³⁰⁹ This realisation of autoproducer rights and powers, means that, as James Baldwin once wrote, “in every aspect of his living [the Black American] betrays the memory of the auction block.”³¹⁰ The history of slavery, of racial inequality, and police terrorism becomes counteracted in the production of constituent human rights that unfolds from *every aspect of being and resisting*. The occupants were perfectly aware of their own inalienable power and a right to transgress the constituted, as they wrote on signs: “Black people’s existence is a form of resistance.”³¹¹

These expressions of constituent human rights unfolded within CHOP as an active utopia, where the actions projected the future they desired, whilst simultaneously living in that future “dreamland.” The becoming-right of the human right of life ungoverned by policing was constituted through time and space, without ever becoming appropriated or recognised as constituted human rights. Within CHOP, the immanent politics for human rights and the expressions of *ius, sive potentia* refused any synthesis into a new form of constituted human rights by its mere plural existence as beings-in-the-right. First of all, the occupants acted on their inalienable plural power and threw out the police, effectively affirming their lives as ungovernable. Secondly, their being ungovernable expressed, on Spinoza’s plane of immanence, the immediate human right of life ungoverned by policing. CHOP pushes further this immanentist

³⁰⁹ Video, “Black is Beautiful”, 13/06/20.

³¹⁰ Baldwin, 1955, pp. 122-123.

³¹¹ Image 4. Sign at the shrine for George Floyd inside CHOP.

view of human rights. I'll build on this understanding of immanence and constituent human rights in the last chapter, attempting to notice everything human rights say.

3.6 The Constituent Right to Have Rights

In this chapter I'm combining Hannah Arendt's phenomenology of human rights with my ontological concept of constituent human rights, in order to make human rights say everything it can say. It's important to address Arendt's concept of the right to have rights, here going beyond Jacques Rancière's critique of Arendt and Sumi Madhok's critique of the right to have rights. In this way, contrary to Rancière and Madhok, I'll argue that the Arendtian concept of the right to have rights epitomises the Spinozan *ius, sive potentia* theorem and constituent human rights. Samuel Moyn has said that "the right to have rights" doesn't have any "lasting significance,"³¹² however, the opposite is true: since, as I'll argue, Arendt interweaves human rights with our human condition, their contemporaneity makes its significance indisputable. Furthermore, I'm making use of Étienne Balibar's interpretation of the right to have rights in my understanding, in showing how human rights immanate from our being.

In many ways, the tendency of radical human rights theories to turn constituent human rights into constituted human rights, Madhok identifies in Arendt and Balibar's use of "the right to have rights."³¹³ The right to have rights has generally been conceived of in line with Benhabib's interpretation, that is, the fact that the former singular "right" is disentangled from the latter plural "rights."³¹⁴ The former right is, in Benhabib's argument, a moral imperative that demands the inclusion into the juridico-political sphere of already-given constitutional rights.³¹⁵ Sophie Loidolt, in her phenomenological work on Arendt, thus explains how Benhabib posits "the ontological condition [as] a mere antecedent to the institutionalized public."³¹⁶ It's in the same

³¹² Moyn, 2018b, pp. 61 et seq.

³¹³ Whilst I don't agree with Madhok's critique, my interpretation of Arendt and Balibar is only possible after-the-fact of having conceptually and hermeneutically produced constituent human rights. It's thus permissible to read Arendt's politics as a form of agonism and of mutuality, similar to Rancière. For readings of Arendt and human rights, see Brimingham, 2006, and Parekh, 2008. For an overview of Arendt's phenomenology of plurality, see Loidolt, 2018.

³¹⁴ In fact, Benhabib is critical of Arendt's conceptualisation of "the right to have rights," insofar as lacks normativity and foundationalism. See Benhabib, 2003, p. 193.

³¹⁵ Benhabib, 2004, pp. 56-57; Benhabib, 2003, p. 130.

³¹⁶ Loidolt, 2018, p. 135.

fashion that Madhok believes Balibar's interpretation belongs. Thus, Balibar argued that "the right to have rights" is a "universal right to politics,"³¹⁷ whereby constituent human rights would be limited in claiming already-given universal human rights. Balibar has, furthermore, said that human rights movements cannot claim "unknown rights," but only "enjoy rights which have already been declared."³¹⁸ In this way, and in the same way Madhok criticised Rancière, constituent human rights would be reduced to "seek[ing] the right to have rights that *have already been declared*."³¹⁹ Concomitantly, Balibar's conception of the right to have rights would aptly be conceived as "an abstract, unchanging universal in the form of... rights that have already been declared," thus exclusively focusing "on those seeking inclusion into already declared rights."³²⁰

However, Balibar also offers proof of autonomous and productive constituent human rights. Expressing constituent power, as Balibar puts it, is an "insurrectional power... that aim[s] to win rights that do not yet exist or expand those that do."³²¹ In actual fact, then, Balibar's interpretation of the right to have rights as an "immanent practical problem" reflects the possibility to produce wholly new human rights in action.³²² It's this affirmation that I'll focus on in order to make human rights say everything it can say. First of all, however, it's necessary to briefly discuss Arendt's phenomenology of plurality, wherefrom Spinoza's *ius, sive potentia* theorem and Arendt's concept of the right to have rights can combinatively shine light on the concept of constituent human rights.

Arendt's phenomenology of plurality springs from an ontological, and not ontic, plurality, that is, the fact that "men, and not Man, live on the earth and inhabit the world" constitutes our immediate lifeworld.³²³ This plurality depends on natality: we are born into time amongst other beings, we live our lives together with other beings, and we only seize being plural when we die.³²⁴ When we appear in the world, we necessarily

³¹⁷ Balibar, 2014, pp. 50-52.

³¹⁸ Balibar, 2002 p. 6. This is also an interpretation of Balibar's politics for human rights that's further legitimated when Balibar writes that "the right to have rights" is "a kind of right to law." See Balibar 1994, p. 347.

³¹⁹ Madhok, 2021, p. 19, my italics.

³²⁰ Madhok, 2021, p. 47.

³²¹ Balibar, 2014, p. 8. Cf. Balibar, 2002, p. 167.

³²² Balibar, 2013, p. 21.

³²³ Arendt, 2018, p. 9.

³²⁴ Arendt, 2018, p. 178.

co-appear with other beings on a common plane of existence. Being-in-the-right, then, is predicated on being-with-others.³²⁵ This is, in many ways, similar to Spinoza's ontology of God's modifications or modes: our common plurality and the fact that we can act in the world together with other finite beings, depends on our being-in-common as expressive of God's essence.³²⁶ As Arendt writes, inhabiting the world together with other beings "is guaranteed for each by the presence of all."³²⁷ This "all" is nothing but God in Spinoza's *oeuvre*, and, inversely, God is nothing but the "presence of all": "If God is all, all is God."³²⁸ Arendt's idea of plural beings is a hermeneutic onto-phenomenology, that is, our condition of existing and understanding, is predicated on coexisting and cooperatively understanding. This plurality is, as Dana Villa writes of Arendt, "ontologically constitutive of the world."³²⁹ It's a human condition *that becomes what it is* because it springs from our plural being-in-potential as an act of world-building. In that way, Arendt's phenomenology, just like Spinoza's ontology, opens up understanding insofar as implies "a variety of beginnings but no definite end, because it incessantly and critically undermines, deidealises and deformalises itself."³³⁰ From the fact that temporality and plurality unfixes inert presuppositions, our human condition precludes "preconceived categories [and] customary rules."³³¹

Co-appearing, in Arendt's work, is itself a constituent action by plurals being.³³² This is similar to Butler's idea of performativity and co-appearing, but diverges therefrom insofar as the radicality of Arendt's onto-phenomenology of plurality is an interwoven understanding of the inalienable human condition and expressions of human rights. Human rights, then, must be "thought of as a general characteristic of the human condition which no tyrant could take away."³³³ Arendt here, yet again, reaffirms

³²⁵ Nancy 2000, p. 12 et seq. Jean-Luc Nancy reaffirms Arendt's phenomenology of plurality when he writes that "plurality of beings is at the *foundation* of Being," author's italics.

³²⁶ EIID1 and EIIP1Dem.

³²⁷ Arendt, 2018, p. 244.

³²⁸ Negri, *supra* note 88.

³²⁹ Villa 1996, p. 84. Arendt's phenomenology of plurality and Spinoza's concept of the multitude, or *multitudo*, share similarities, left unexplored in this work. The multitude is an important concept for Negri and Montag's Spinozan understandings, amongst many others. I believe the productive encounters between Arendt and Spinoza are manifold here, as well as the relationship between the concept of *multitudo* and human rights. The multitude as the main protagonist for human rights is something worthwhile exploring in the future, this is also in line with Spinoza's preservation of natural rights in opposition to Hobbes's social contract.

³³⁰ Marder, 2014, p. 94.

³³¹ Arendt, 1994, p. 321.

³³² Birmingham, 2006, p. 57

³³³ Arendt, 2017, p. 297.

Spinoza's intuitions of the inalienability of power and right: when this logic is interdependent upon the immanence of Spinoza's God as "the *actuality* of producing all that exists,"³³⁴ constituent human rights becomes nothing less "than to think what we are [already] doing."³³⁵ From the constitutive ontology of our being, human rights logically and conceptually follow from our actual power to act, as Arendt stated: "The only given condition for the establishment of rights is the plurality of men; *rights exist because we inhabit the earth together with other men.*"³³⁶ This has been reaffirmed in a reading of CHOP, whereby the occupants' actions immediately expressed and produced human rights.

Although some read Arendt as a critic of human rights,³³⁷ her onto-political form of a phenomenology of plurality instead informs Arendt as a "thinker of the creation of rights."³³⁸ The right to have rights must be read as a logical consequence of Arendt's phenomenology of plurality and the human condition. In this sense, the Arendtian theorem of the right to have rights is a form of *ius, sive potentia*, that's likewise axiomatic insofar as constituent human rights are affirmed on the plural fabric of co-appearance, or, what is the same, the plane of immanence. In the 1951 edition of *The Origins of Totalitarianism*, Arendt wrote that

The concept of human rights can again be meaningful only if they are redefined as a right to the human condition itself, which depends upon belonging to some human community, the right never to be dependent upon some inborn human dignity which de facto, aside from its guarantee by fellow men, not only does not exist but is the last and possibly most arrogant myth we have invented in all our long history.³³⁹

Redefining human rights as a right to the human condition is, in fact, the form constituent human rights have taken throughout my work. The autogestive modes of human rights productions are enfolded into their immediate objects insofar as existence is a human right to its immediate object. As I've explained in discussing TRC and CHOP: we immediately produce and express constituent human rights because our being is, in itself, expressive and productive. A right to the human condition, a right to

³³⁴ Hardt, 1991, p. xiv, author's italics.

³³⁵ Arendt, 2018, p. 8.

³³⁶ Arendt, 1951, p. 437, my italics.

³³⁷ See Agamben, 1996; Rancière's, 2004.

³³⁸ Ingram, 2008, p. 413.

³³⁹ Arendt, 1951, p. 439.

being, is nothing else than our *potentia* to actually exist. Serena Parekh thus writes, in her monograph on Arendt, that “human rights are the conditions that make human life, understood biologically and existentially, possible... Since acting is necessary for my own self-disclosure, my full human existence is dependent upon instituting human rights.”³⁴⁰

Arendt’s phenomenology of plurality and human rights fully affirms constituent human rights as synonymous with being. The fact that the human condition depends on acting out human rights, is the same as saying being-in-the-right. Separated from the plurality of being, there simply are no human rights. This is why the actions of the occupants, in claiming the right to the city and instituting CHOP, constitutively produced corresponding human rights. “[Arendt’s] idea of rights,” Balibar writes, “is indistinguishable from the construction of the human, which is the immanent result of the historical invention of (political) institutions. *Humans simply are their rights.*”³⁴¹ Being equals right, and right equals being. Our autoproduktive being is, therefore, the metaphysical *a priori* of being that always produces human rights.

Reading “the right to have rights” as a constitutive ontology means that autogestive forms of human rights production and becoming-right always autoproduce constituent human rights as the fabric of our existence. Therefore, “the right to have rights” is nothing else than a constituent human right to be human, to be right. This is not something that requires its actualisation in any constitution or translation into particular or definitive laws, it’s instead the affirmation that human rights are always, everywhere, and all the time, by virtue of our being, in a constitutive flow of becoming-right. In this sense, the active and immanent utopia of CHOP is a paradigmatic example of the *potentia* of the human condition. Insofar as we are forcibly productive, we “cannot not want” rights;³⁴² wherever we go, whatever we do, our existence is itself the autoproduction of human rights withdrawn from the conduits of the primacy of the constituted forms of human rights. An implosion of right and power, that is, the *ius, sive potentia* theorem, traverses fixed and known forms of human rights as a perpetual becoming. “Wherever you go,” Arendt wrote, “you will be a polis.”³⁴³ In this way, the

³⁴⁰ Parekh, 2008, p. 147.

³⁴¹ Balibar, 2007, p. 733, my italics.

³⁴² Spivak, 1993, pp. 45–46.

³⁴³ Arendt, 2018, p. 198.

constituent human right to be in the right is an empty signifier that simply immanates from our being, we're existentially claiming the right to the city in whatever we do.

We are, then, as Balibar wrote, our human rights: our existence is the productive product of autoproduction. The human rights we produce are inalienable to our being, they do not "leave us," as if the product or effect could ever leave its cause. Any alienation of our produced product is nullified from the fact that we cannot not be-in-the-right. The indeterminateness and radical potential of constituent human rights are temporally an active utopia, that is, "the sense of an overflowing constitutive activity, as intense as a Utopia but without its illusion, and fully material."³⁴⁴ This is far removed from the defeatism of the dystopian human rights critique, or the impossible utopic promise, or human rights as the last utopia. The active utopia of constituent human rights is sensible as the double-movement of what CHOP's occupants disclosed as the disenchantment of the impossible promise of the American dream, together with the actively produced dreamland of CHOP.³⁴⁵ Thus, the constituent human right of life ungoverned by policing was actively lived because, for a brief moment, lives were in fact ungoverned by policing, and, furthermore, because the human right of life ungoverned by policing was the immediate product of producing for themselves a life ungoverned by policing. This is the ontological implication of constituent human rights, as seen through radical human rights theories and CHOP. Making and noticing everything human rights can say, when read through the temporal, productive, ontological, and epistemological concept of constituent human rights, means that human rights must always be an unstable signifier, open to its own indeterminacy. Insofar as *we cannot not produce*, and *cannot not express human rights*, the horizon of human rights always remains open-ended and infinite.

³⁴⁴ Negri, 1999, p. 13.

³⁴⁵ See *supra* notes 297, 298.

4. Constituent Human Rights: a nonconclusion

Michel Foucault once wrote that *the boat* “is a floating piece of space, a place without a place, that exists by itself, that is self-enclosed and at the same time is given over to the infinity of the sea.”³⁴⁶ The boat is a heterotopia: encompassing the determinateness of always being there and the indeterminateness of its endless and infinite possibilities. The horizon of the boundless seascape is what constitutes the possibilities for our political imaginary, and “without boats,” Foucault wrote, “dreams dry up.”³⁴⁷ Human rights shouldn’t be conceived as the last floating wreckage we must stick to, reconstruct, and “navigate the storm and plot a new course.”³⁴⁸ Conceiving of human rights as *the last utopia* effectively removes any possibilities of dreaming change. *The floating piece of space, given over to the infinity of the sea*: the philosophical archetype of the boat is indicative of human beings as the surface-level waves of God’s univocity. “We are,” Spinoza once wrote, “driven about in many ways by external causes, and that, like waves on the sea, driven by contrary winds, we toss about, not knowing our outcome and fate.”³⁴⁹ To make human rights say everything it can say, to notice it for what it is, is to wholly give ourselves over to the vacillatory chaos of the stormy seas of chance-encounters. Not to set course towards a predetermined horizon, but to notice human rights from the ever-present horizons in the endlessness and boundlessness of the ocean. This means that understanding everything human rights can say is always a question of opening up the possibilities for understanding.

My entire work has been an attempt to keep the concept of human rights on the indeterminate waves of a boundless sea. Spinoza’s ontology and my interpretation of *ius, sive potentia* as a radical form of human rights, has allowed me to go beyond constituted human rights and human rights critique. The openness of constituent human rights has continuously refused subsumption, through the deconstruction of radical human rights theories, whilst hermeneutic understanding of these theories have pushed the concept further and given it contextual meaning. Whilst I’ve attempted to make

³⁴⁶ Foucault, 1997, p. 336.

³⁴⁷ Ibid.

³⁴⁸ Brysk, 2018, p. 16.

³⁴⁹ EIIIP59S.

human rights say everything it can say, the finalisation of this task is impossible: insofar as the future isn't a mere extension of the present, indeterminacy will always saturate what we express as human rights. Making human rights say everything it can say, then, is about keeping human rights open to its infinite potentialities. Constituent human rights refuses any such closure, whilst ontologically charging human rights as part and parcel of what constitutes beings.

Spinoza's *ius, sive potentia* theorem allowed me to notice constituent human rights as an ontological concept. Constituent human rights is conceptually involved in *ius, sive potentia*, a logical consequence of Negri's reading of metaphysical *potentia* as the politicised constituent power. These concepts have been used in a productive, constitutive, and critical hermeneutics, coupled with a deconstruction that refused mere negation. In this way, Jacques Rancière's antagonistic conceptualisation of *the police* and the no-part, were seen as tending towards and depending on the already-given form of constituted human rights, whilst also disclosing how constituent human rights are conflictual in character. Moreover, the impasse of the human rights aporia is not overcome by disputing the productivity of conflict and critique, but by affirming being as always productive and expressive of constituent human rights. This was effectively noticed in CHOP, where the antagonism of the occupants *vis-à-vis* the police was paralleled with the occupation's production of their own immediate nature.

It's been possible throughout to go beyond frameworks that limit human rights production to the already-given, human rights epistemology to the known, and human rights temporality to the presently existent. In the human rights philosophies of Seyla Benhabib, Judith Butler, and Kathryn McNeilly, human rights were tied to the fabric of the known. Democratic iterations and subversive reiteration were explicitly tied to those human rights that already existed. The emphasis was on the present state of things, insofar as those rights that were becoming had to occur in the sphere of constituted human rights. Similar to Rancière, the rights that existed were conceived of as constituted human rights, and the rights that didn't exist were conceived of as constituent human rights. Subverting became subversive of the structures that already existed, which meant that constituent human rights could only alter the meaning of constituted human rights and thus become subsumed within the already-given after their performative function have successfully been recognised.

McNeilly's work, however, conceived of subversion in an indeterminate temporal manner, as *human rights to come*. This open-ended temporality allowed me to notice an element of indeterminacy and *becoming* within constituent human rights, beyond their respective re/iterative framework. Costas Douzinas's concept of *righting being* and becoming-right, could then be conceptualised as a Spinozan ontology. A discussion of becoming-right, interpreted through my Spinozan framework of a productive being, disclosed how constituent human rights are temporally indeterminate. Therefore, the temporal implications of McNeilly and Grosz could be carried over into the concept of constituent human rights and connecting this to the expressive tissue of being, contra McNeilly's performativity and subversion of constituted and structural human rights. Human beings express constituent human rights from our being-in-God, and can transgress presentism and the known as limitative strategies insofar as expressionism is productive in its indeterminateness, inalienability, and irreducibility.

These temporal, productive, and epistemological concerns came to light within the immanence of Henri Lefebvre's *autogestion* and the right to the city. Autogestive modes of production claim human rights as empty signifiers, autonomously and independently of constituted human rights. This is the immanence of expressing rights and immediately producing them: the fact that *human rights fold directly into their object* as an active utopia. CHOP was itself an interlocutor in my hermeneutics of radical human rights theories, and its occupants directly disclosed the immanence of action and right. That is, the fact that the desire of living a life ungoverned by policing, when expressed and acted upon, produced a "dreamland" or utopia where that right actually existed. The human right of life ungoverned by policing was produced by the occupants themselves, autonomous of any framework of constituted human rights, and independent of whether or not it was recognised as a human right. CHOP, then, transgressed any "impossibility" inferred by Kant's constitutionalism, but also any dependency on already-given human rights found in Moyn, Rancière, Benhabib, Butler, and McNeilly. This productive, temporal, and epistemological immanence of constituent human rights, unfolded simply from a collective's composite being and power to act. Furthermore, the concepts of constituent and constituted human rights, as heuristic tools, could also be used to make sense of two different tendencies within the same event, and from this internal difference disclose constituent human rights further.

Constituent human rights became, through my critical hermeneutics, a concept in its own right. Our power and right exist as an inalienable part of our being and the human condition because we're always being-in-the-world. Accordingly, as Étienne Balibar commented on Hannah Arendt, *humans simply are their rights*: our being is contemporaneous with our rights. The right to have rights is, in a nutshell, its own theorem reflecting the *ius, sive potentia* theorem, and both are conceptually involved in our being as productive. These are not moral or manifesto claims, but the ontological and phenomenological facts of our being. We have a constituent right to have rights simply because we express the right to have rights in everything we do. We cannot say human rights without saying production insofar as constituent human rights are affirmed from the autoproduction of our plural being.

We always act in different capacities in ways that conform with how we desire, wish, and hope to live in and change the world. This tension between the world as it exists now and the inexistent world we can visualise and imagine in front of us is *virtual* in a very real sense. It's not unreal, but a projection of an *image* we wish to enjoy. The inexistent exists: it exists as endless possibilities, and human rights perceived as inexistent from the perspective of constituted human rights are, in fact, expressed and acted upon every single day. We act out this active utopia whenever we express and practise anything and everything denied to us by the constituted order. Furthermore, we act this out beyond what's denied to us, from a power that comes—both epistemologically, productively, and temporally—*before the law*.

Constituent human rights are not the aporetic or paradoxical fields of action whereby we would be limited to disclosing contingency and untimeliness—to be sure, it's this as well—but we produce beyond what constitutedly exists. On the plane of immanence, *this is the world in a grain of sand*: utopia is not some distant future, unattainable except by means of deferring its impossible promise; utopia is the contemporaneousness of hope and action, desire and production, power and right, perpetually made possible by a becoming that refuses final subsumption and synthesis. The immanence of *ius, sive potentia*: this is the constituent right to have rights as a production of production, the incessant autoproduktive and autogestive fabric of being that no representative or constituted apparatus can reign in and control.

Bringing human rights up to the surface of the stormy sea is to try to make human rights say everything that it can say. The elements traversed, its conflictuality, inalienability, temporality, and productivity, amongst others, have opened up possible ways of understanding the radical potential of human rights. The art of noticing human rights as part and parcel of the human condition is an invitation to see human rights as ontological expressions of our being. Rather than limiting human rights to predetermined and clear-bound definitions, human rights theory ought to affirm the praxis of human rights as the joyous feeling of experiences in the vast and open sea of innumerable possibilities. The idea of human rights becomes inert and unproductive when we conceive of it as having a fixed abode in the already-given. In fact, constituent human rights would instead be the daunting and opaque ideas of the infinite sea and its horizons of possibilities, of the empty signifier, and the incessant potentiality that human rights can be used in ever-new ways. This is an affirmation of radical human rights and social movements, of their power to act and change the world, of producing human rights. However, it's also an invitation for human rights scholars, lawyers, NGOs, and more, to reaffirm the lived experiences of human rights, and to move away from legally, theoretically, and strategically predefining and limiting human rights signifiers. The discourse of human rights must notice the ontological productivity and inalienability of constituent human rights, and follow the waves on the ocean. To do otherwise is to effectively reproduce the gap between the wretched of the earth as unproductive garbage and human rights as the product of a select few in their transcendent and secluded ivory towers of expertise.

Affirming the open-endedness, productivity, and autonomousness of constituent human rights, as an expression of our being-in-God, means opening up human rights to the horizon of possibilities. Constituent human rights is always an opening towards the possible: ontologically absolute in our inalienable being, and temporally indeterminate in its infinite potentials. We cannot exhaust the possibilities of everything human rights can say, by contrast, to paraphrase Deleuze, making human rights say everything that it can, can only mean that *we have yet to know the full extent of what human rights can do*.³⁵⁰

³⁵⁰ Deleuze, 1990, p. 226.

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