

Human Rights and Powerlessness: Pathologies of Choice and Substance

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The human rights corpus is defined by a variety of pathologies—both of choice and substance—that are limited and limiting.¹ Many of these pathologies arise not only from the internal logic of the corpus, but also the tactical and strategic choices that its proponents have made over the past sixty years. One of these is the equation of the containment of state despotism with the attainment of human dignity. This “hands off” logic is an integral, if not the essential, signature of the corpus. Without going into a discussion about the critique of rights—indeterminacy, elasticity, and their double-edge—suffice it to note that the human rights project basically polices the space between the state and the individual, and not between individual citizens. As put by Karl Klare, the dominant understanding of “the human rights project is to erect barriers between the individual and the state, so as to protect human autonomy and self-determination from being violated or crushed by governmental power.”² Yet, there is nothing intrinsic about human beings that requires only their protection from the state and not the asymmetries of power between them.

This definition of the nature of human dignity, which draws heavily from liberalism and political democratic theory, has an atrophied understanding of the role of the

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1. Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 601 (1996).

2. Karl E. Klare, *Legal Theory and Democratic Reconstruction: Reflections of 1989*, 25 U. B.C. L. REV. 69, 97 (1991).

state. Admittedly, the *thick welfare state* is an attempt to emphasize a more robust view of liberalism. In human rights doctrine, this fuller iteration of liberalism is ostensibly contained in the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). However, the flaccidity, impotency, and vagueness of the ICESCR are evidence of the bias of the corpus to the more limited vision.³ As is the case with political democracy, the human rights regime appears to be more concerned with certain forms of human powerlessness, and not others. This certainly has been the practice of human rights by the most influential human rights NGOs and institutions. In fact, there has never been a major human rights NGO in the West that focuses on economic, social, and cultural rights. The problem is not simply one of orientation, but a fundamental philosophical commitment by movement scholars and activists to vindicate “core” political and civil rights over a normative articulation that would disrupt vested class interests and require a different relationship between the state and citizens and between citizens. It seems to have been convenient for human rights NGOs to shy away from questions of economic powerlessness during the Cold War because charities and Western governments frowned upon them. If so, it was a bias that was more than strategic—it was ideological.

These limitations are inherent in liberalism itself. That is why the human rights corpus, which is an expression of liberalism, has conceptual and normative problems with respect to powerlessness. The first limitation is simply one of the idiom in which the rights discourse is formulated. The language of rights, which is central to liberalism, is fraught with limitations which could be detrimental to the project of transforming deeply distorted societies. Inherent in the language of rights are indeterminacy, elasticity, and the double-edged nature of the rights discourse. All these characteristics open the rights language to malleability, misuse by malignant social elements, and make them a tool in the hands of those opposed to reform. South Africa is a case in point where a right-based revolution has been unable to fundamentally transform deeply embedded social dysfunction and the perverse legacy of Apartheid. The

3. David Beetham, *What Future for Economic and Social Rights?*, 43 POL. STUD. 41, 41 (1995).

choice of the rights idiom as the medium of choice to unravel the ravages of Apartheid has been less than successful in spite of continued economic growth.⁴

Another problem of the liberal tradition, which has been inherited by the human rights movement, is its unrelenting focus on individualism. This arises from liberalism's focus on formal equality and abstract autonomy. The human rights corpus views the individual as the center of the moral universe, and therefore denigrates communities, collectives, and group rights. This is one of the biggest problems of the human rights movement. This is a particularly serious problem in areas of the world where group and community rights are deeply embedded both in the cultures of the peoples, and exacerbated by the multinational nature of the post-colonial state.⁵ The concept of self-determination, for example, cannot simply be understood as an external problem: it must, of necessity, be understood as encompassing the many nations within a given post-colonial state. In reality, this means that individual rights of citizens within the state must be addressed in the context of group rights. Thus, group rights or the rights of peoples become important entitlements if the state is to gain the loyalties of its diverse citizens.

I do not deny that individualism is a necessity for any constitutional democracy, but I reject the idea that we can, or should, stop there. That would be a stunted understanding of rights. Indeed, for rights to make sense, one has to go beyond the individual and address group identities in the political and economic framework of the state. Even in South Africa, for example, one of the states with an avowedly liberal interpretation of the rights language, there was an accommodation of group rights to language, culture, and other forms of identity.⁶ One way political democracy deals with the question of multiple

4. Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 68-70 (1997).

5. Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339, 340-42 (1995).

6. S. AFR. CONST. 1996.

nations within one state is to grant autonomy regimes for groups or to devolve powers through forms of federalism.⁷

Secondly, the human rights movement's primary grounding and bias towards civil and political rights—and the impotence and vagueness of economic, social, and cultural rights—is one of its major weaknesses. Political democracy alone—without at least a strong welfare state or a social democracy—appears to be insufficient to address the vagaries of globalization. The bias towards civil and political rights favors vested narrow class interests and kleptocracies which are entrenched in the bureaucratic, political, and business sectors of society and represent interests that are not inclined to challenge the economic powerlessness of the majority. Yet the human rights movement assumes the naturalness of the market and the inevitability of employer/employee, capitalist/worker, and subordinated labor relations. It seeks the regulation of these relationships, but not their fundamental reformulation.

By failing to interrogate and wrestle with economic and political philosophies and systems, the human rights movement indirectly sanctions capitalism and free markets. Importantly, the human rights corpus wrongly equates the containment of state despotism with the achievement of human dignity so that it seeks the construction of a political society in which political tyranny—not economic tyranny—is circumscribed. Thus, it seeks to create a society in which political tyranny is circumscribed, or minimized. But in so doing, it sidesteps economic powerlessness—the very condition that must be addressed if human dignity is to be recovered. Clearly, political freedoms are important, but as South Africa has demonstrated, these are of limited utility in the struggle to empower populations and reduce the illegitimacy of the state. It is an illusion to think of powerlessness and human indignity in purely political terms, as the human rights movement does, and to prescribe political democracy and the human rights doctrine as a panacea.

One of the more interesting pathologies of the human rights texts is their avoidance or reluctance to employ a

7. See Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1539 (1991).

certain vocabulary to describe powerlessness. What is striking about the key human rights documents is their failure to use some of the most important terms of the modern era to describe and formulate societal responses. In terms of power or lack of it, and the consequent violations, there are no more important words than “capitalism,” “imperialism,” “colonialism,” and “apartheid,” among others. Yet, the UDHR—the single most important human rights document—sanctions the right to private property.⁸ How plausible is a document that calls itself a “common standard of achievement for all peoples and all nations”⁹ if it does not recognize that at its writing the bulk of the global South was under European colonial rule and subject to the vilest economic exploitation by the merchants of capital? It is difficult to believe that such an omission was an oversight. At the time, there was an epochal contest between socialism and capitalism. This too appears to have been conveniently overlooked in the basic texts. Or was it? My submission is that there was a surreptitious recognition of secularism, capitalism, and political democracy through the guarantee of the rights that yield a society framed by those systems.

The failure to wrestle with the types of economic philosophies and systems that would best protect and nurture a fuller definition of human dignity has had a devastating effect on the human rights movement. From the start, the movement and its founders did not see themselves as charged with the responsibility to address economic powerlessness. Even though the UDHR addresses some economic, social, and cultural rights, it is clear that they are an afterthought and marginalized within the document. Only the last six articles at the end are devoted to these rights. But even so, the rights are not scripted in a way that directly confronts powerlessness and exploitation. The rights relating to work and labor assume, for example, the fact and legitimacy of capitalism and free markets.¹⁰ Working people are therefore expected to fight for their rights *within* those systems and structures. The same logic

8. Universal Declaration of Human Rights, G.A. Res. 217A, art. 17, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

9. *Id.* pmbl.

10. *Id.* arts. 23-25.

is the basis for the ICESCR that presumably grants rights within a system of free enterprise that protects workers from the worst excesses of global capitalism. In this regard, the ICESCR should be understood as a normative project for a *thick welfare state* within a market economy. It is a document that seeks to mitigate the harshness of capitalism and give it a more human face.

This failure of imagination and acquiescence to a free market vision of political democracy has robbed the human rights corpus and the movement of the impetus to think beyond markets and systems of exploitation that produce ugly social structures. Fundamentally, the human rights corpus has no philosophy on money and whether, for example, the creation of a Bill Gates would itself be a violation of human rights norms. In political society, an absolute dictator would be impermissible under human rights norms and contemporary understandings of political democracy. Analogously, Bill Gates is the market equivalent of the political dictator, although that is not how he is understood in a political democracy or by the human rights corpus. In fact, Gates is a celebrated and venerated individual, the pinnacle of *success* in society. Yet, the existence of his economic empire, which he personally holds, is a radical perversion of any egalitarian or equitable notion of human dignity. The multiplication of Gates by the number of other obscenely rich individuals and corporate interests yields a graphic over-concentration of power in the hands of a tiny majority. It is very difficult, if not impossible, to articulate a plausible argument of how a system that permits such vast differences among citizens does not violate basic notions of human dignity. In an era of globalization, where capital knows no borders and is virtually unaccountable, questions of economic justice and fairness should obsess the human rights corpus and the movement. It is not enough to decry, as human rights NGOs do, the worst excesses of globalization, or the most shocking practices such as sweatshops and cruel labor and slave-like conditions of work. The corpus must develop a defensible normative project to address economic and social arrangements and systems. Rather than treat the government simply as the regulator of markets—as is the case in a political democracy—human rights norms must do more.

Perhaps one way of addressing this pathology is to reassess the place and role of the individual in society relative to the greater public good of the community and the environment. One of the problems here is the elevation of the individual and his placement above society. This runaway notion of individualism, which is a central tenet to liberalism, has retarded the capacity of human rights thinkers to moderate selfishness with community interests. In other words, the individual should be placed within the society and constructed in a way that he does not overwhelm his fellow beings or the society itself. There is nothing natural, inevitable, or frozen in time about how the individual ought to be constructed. Nor should a reconstruction of the individual necessarily wreak havoc with more defensible notions of popular sovereignty, individual autonomy, and political freedom. But this is an exercise that will require thinkers to look beyond Eurocentric lenses to build a more universal vision of the individual. The individual need not necessarily be placed at the center of the moral universe. Otherwise, the vices and abominations of globalization are bound to overcome the human race.

Finally, the human rights corpus and movement focus too much on process and rights at the expense of politics and substance. This distinction is both a product of the rights idiom in which the corpus is expressed and tactical and strategic choices by movement activists. The movement sees itself as vindicating rights that are coded in positive law. In contrast, politics is partisan, sloppy, and lacking in neutrality. By casting themselves as doing the work of the law, movement activists perpetuate the myth of objectivity. In fact, during the Cold War, the human rights community in the West deliberately distanced itself from the overt promoters of democracy in the global South and the Soviet bloc.¹¹ Instead, human rights activists presented themselves as a community interested in process and the rule of law, not politics or the ideological project of democracy. Partly, this was a reaction to the detriment of being seen as supporting the crusade of the West, particularly under President Ronald Reagan, of rooting out communism in favor of pro-Western market or political

11. Thomas Carothers, *Democracy and Human Rights: Policy Allies or Rivals?*, WASH. Q., Summer 1994, at 109, 117.

democracies. Even so, the human rights movement in the West relentlessly attacked Soviet bloc states and Third World countries for their closed or authoritarian political systems. In this, they worked with pro-democracy human rights advocates in those countries. Objectively, human rights groups were pursuing an agenda very similar to that of the Reagan Administration. Rather than play such a game, human rights groups should only advocate consequentialist and outcome-based agendas instead of hiding behind process and rights. Such a full disclosure approach would demystify human rights and offer a clearer basis for critical thought.

There is little doubt that in the last half century, the world has seen substantial progress in addressing state tyranny. Part of this success is clearly attributable to the human rights movement and its marketing of the liberal constitution and the values of political democracy. But the successful march against state despotism has been conducted as a cloak and dagger contest—pushing a value system without directly stating its normative and political identity. This is unfortunate and need not have been necessarily so, even if one were to allow for the tactical and strategic choices that the movement had to make. Lost in the translation was an opportunity to think more robustly about human rights as a political project and then question its broader prescriptions for the society of the future.

This diffidence has been limiting to the human rights movement. Why hide the ball? Everything should be placed on the open table so that we can openly debate questions of power and powerlessness, and how to reformulate the human rights corpus to address pressing crises. Perhaps we will decide that human rights is not the right language for this struggle. Perhaps it is. In any case, we will never know until we take off the veil. What is clear today is that the movement will lose its relevance unless it can address—seriously and as a priority—human powerlessness in all its dimensions.