

Whose Criticism of What? Ethical Reflection On Postcolonial and Decolonial Criticism of Human Rights

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Post- and decolonial approaches reveal colonial patterns in political practice, in thinking - and in norms. Also, Human rights are the subject of this criticism. The article traces and discusses three central lines of this criticism: the question of the holders of human rights, the problem of economic inequality and the accusation of individualism. The central thesis is that post- and decolonial criticism uncovers problems in human rights theory and practice and that this criticism should be taken seriously for the sake of human rights. This is because it can strengthen their credibility and assertiveness. A human rights claim framed and contextualized in this way is defended in the article.

Introduction

There are different forms of criticism of human rights from countries in the Global South. Some of these criticisms are linked to post- and decolonial discourses. This is the subject of this article. However, it should be pointed out at the outset that there is, of course, not only criticism from the countries of the South, but also - and above all - demands for human rights. People everywhere are demanding their rights. And everywhere people in the streets are resisting the denial of these rights by their governments.

The following, however, is about criticism linked to post- and decolonial discourses. They are not the only voices, and they are not one voice. Rather, there is a great diversity which cannot be captured here. Even the use of terms such as “north” and “south” simplifies complex issues, and yet the text does not manage without them.¹

This paper is based on the view that there is no such thing as *one* postcolonial criticism of human rights. Only with great caution can basic lines be defined. The main thesis is that postcolonial human rights criticism does not primarily reject the idea of human rights themselves, but rather colonial thinking, which is also reflected in human

¹ For lack of a better term, I will refer to “Global South” (and “Global North”) in the following. The term attempts to focus on the political, economic, cultural and epistemic marginalization that still exists and at the same time to take account of the fact that purely geographical or geopolitical concepts of “North” and “South” are no longer viable.

rights. Against this background, it will be argued that post- and decolonial critique is indispensable, but that a universal normative claim must be defended.²

The understanding of human rights on which this article is based encompasses a moral, legal and political dimension: human rights are moral claims that belong to every human being as rights; they must be fought for politically and realized politically, and they must be implemented legally.³ All three dimensions are important. At the same time, there can be tensions between them: for example, when rights are demanded in political struggles that appear to be in tension with established legally posited rights. In addition, the realities of experience differ greatly around the world. In result, "human rights often mean different things to different people."⁴ Also criticism can be directed at the various dimensions and the claims understood in this way. They cannot always be clearly distinguished from one another.

Whose criticism? Post- and decolonial approaches

The terms *postcolonial* and *decolonial* are widely discussed, so they will be introduced only briefly and then placed in the context of criticism of norms and human rights.

The prefix post- in "postcolonial" is not to be understood in a temporal-linear way. It does not suggest that colonialism, understood as the expansion of the power of European countries into non-European territories with the primary aim of economic exploitation, is over; on the contrary, it suggests that the effects continue to this day (and that some of the structures persist) and that they extend far beyond the economy. Colonialism has not only shaped the economy and politics, it has inscribed itself in relationships, in thinking and in the understanding of terms and concepts. It has also inscribed itself in people - individuals and collectives - as a solidified experience of power asymmetries that (co-) determines our self-understanding. Mignolo speaks of the "herida colonial"⁵, the colonial wound. This wound is sometimes open, sometimes badly scarred, but never completely gone. An understanding between the people of former colonizing states and those of colonized states requires that these wounds be seen and recognized.

"Postcolonial" also refers to research approaches that deal with the effects of colonialism. While the term "postcolonial studies" is used in English-speaking countries, the dominant concept in Latin America - in the wake of the "Modernidad/colonialidad"⁶ project - is "decolonialidad". The two currents have different focuses. Postcolonial studies originated in the former states of the British Empire and had a strong focus on cultural and literary studies. But topics and regions have diversified and expanded. Decolonialidad

² There is a form of human rights critique from the Global South that is practiced by those in power, that is, by those who deny those rights to the people. This is not the critique of post- and decolonial approaches and is therefore not addressed here. However, there is a danger that academic criticism will be instrumentalized by authoritarian rulers.

³ Cf. Michelle Becka, 'Menschenrechte', in *Christliche Sozialethik. Grundlagen – Kontexte – Themen*, edited by Marianne Heimbach-Steins et al. (Regensburg: Pustet, 2022), pp. 187-202.

⁴ Shetty Salil, *Decolonizing Human Rights*, Speech delivered on May 22, 2018, online at <https://www.amnesty.org/en/latest/news/2018/05/decolonizing-human-rights-salil-shetty/> (accessed 2025-03-14).

⁵ The wound stands for a deep pain that cannot simply be ignored. At the same time, it represents a unifying element and is even the starting point for a new concept of decolonial coexistence. Cf. Walter D. Mignolo, *La idea de América Latina. La herida colonial y la opción decolonial* (Barcelona: Gedisa, 2007).

⁶ Key representatives are Aníbal Quijano, Enrique Dussel, Edgardo Lander, Arturo Escobar, Catherine Walsh, Nelson Maldonado-Torres, Zulma Palermo, Santiago Castro-Gómez, Fernando Coronil and Walter Mignolo.

thinking is younger and deals intensively with the coloniality of power and knowledge.⁷ It is in permanent critical confrontation not only with the colonial past through Spain and Brazil, but also very strongly with the economic imperialism of the USA - a state that is not a classic colonial state at all. Originally, the relationship between decolonial and postcolonial thinkers was distant, but today there are far-reaching networks.

A fundamental characteristic of postcolonial approaches was (and is) to expose and criticize the construction of cultures as homogeneous units, as well as the sharp polarizations that "the West" has made in terms of "us and the others". The most influential publications on this issue are Stuart Hall's "The West and the rest"⁸, and Edward Said's "Orientalism"⁹, in which he shows how much "the Orient" is a construct of the West. And Homi Bhaba¹⁰ showed that cultures are always hybrid and diverse, he emphasized the "mestizo" and melange, the overlaps and the polyphony. With others he emphasizes difference, which is always in danger of being homogenized by more powerful agents.

Post- and decolonial critique has called many things into question in recent decades - not only power relations in politics and the economy, but also the production of knowledge. Questions like who determines research topics, who defines concepts, where are the publishers located are extremely relevant in the knowledge system which still has colonial imprints. There is also a great skepticism in the approaches towards the use of unifying terms such as "the Africans", "the Orient" etc. because of homogenizing differences. This skepticism is partly linked to a fundamental reservation about norms, because they run the risk of not doing justice to different situations or of generalizing particular claims. In this view, universality is nothing more than a particular view that claims to apply to everyone.¹¹

Rejecting human rights? Main features of the criticism

Post- and decolonial criticism of human rights stems partly from the mentioned general skepticism towards norms, and partly from a (deficient) human rights practice.

One of the basic assumptions of decolonial thinking is that power structures associated with colonialism still pervade global relations, practices and discourses today. Post- and decolonial lawyers, philosophers and social scientists investigate the repercussions of colonialism and imperialism in human rights (an International Law). Rosillo Martínez aptly summarizes the conviction that characterizes many discussions on the subject. "[T]he Eurocentric human rights discourse has been a component that has contributed to the coloniality of power, knowledge and being. The ways in which it concretizes the understanding of human dignity and, in particular, the forms and mechanisms of its protection, are ways of exercising coloniality."¹² The human rights discourse is therefore not innocent, it is permeated by coloniality. In addition, the abuse

⁷ Cf. Aníbal Quijano, 'Colonialidad y modernidad/racionalidad', *Perú Indígena* 13:29 (1992), pp. 11-20.

⁸ Stuart Hall, 'The West and the Rest: Discourse and Power [1992]', in *Essential Essays, Volume 2: Identity and Diaspora*, edited by David Morley (New York: Duke University Press, 2018), pp. 141-184, online at <https://doi.org/10.1515/9781478002710-010> (accessed 2025-03-15).

⁹ Edward Said, *Orientalism* (London: Routledge, 1978).

¹⁰ Homi K. Bhaba, *The Location of Culture* (London: Routledge, 1994).

¹¹ Cf. María do Mar Castro Varela and Nikita Dhawan, 'Die Universalität der Menschenrechte überdenken', *APuZ* 20 (2020), pp. 33-38.

¹² Alejandro Rosillo Martínez, 'Repensar derechos humanos desde la liberación y la descolonialidad. Rethinking human rights from the liberation and the descoloniality', *Revista Direito e Práxis* 7:13 (2016), pp. 721-749, online at <https://doi.org/10.12957/dep.2016.21825> (accessed 2021-05-21), at p. 728.

and instrumentalization of human rights by countries of the Global North are etched in the collective memory. Human rights are therefore regarded by many in the Global South as a hegemonic concept.¹³

Some criticism is aimed at the relationship between norm and practice. Some even say that human rights should be criticized because they are not enforced. However, a norm does not become wrong because reality deviates from it. A norm is right if it is justified, if there are good reasons for it and if it comes about in an appropriate way - in certain procedures (morally speaking, we speak of a discourse free of domination, the legal norm in the established way of law-making).

But this does not mean that poor practice has no impact on the norm at all. It certainly does. Because the norm that is not respected loses legitimacy. Human rights lose credibility if they have no social impact (if they are not enforced) - and if too many people have the impression that they do not correspond to their own emancipatory claim. For the sake of the credibility of human rights, this criticism based on the experience of disregard must therefore be taken seriously. So, in the following, three lines of criticism will be traced.¹⁴

a. Holders of human rights

Postcolonial approaches often accuse human rights actors of prescribing norms to others or pretending to "protect" them in human rights practice without knowing what those others want or need.¹⁵ This means that the people who should be at stake and their practices are not seen or are made invisible. Sousa Santos says that people in the Global South have been turned into objects of the human rights discourse. "We will ask for the help of human rights in order to expel them as useless. They have turned us into a multitude of objects of the human rights discourse. If we all become subjects of the human rights discourse, who would remember the concept of human rights?"¹⁶ This view pervades many publications critical of human rights.

The basic assumption of the idea of human rights, is that every human being is entitled to the same dignity and the same rights, i.e. as the bearer of this dignity and rights, they should not be objects. But this does not seem to be experienceable. That is a problem¹⁷

¹³ Sousa Santos, Boaventura de. *If God were a human rights activist*. Stanford, Calif.: Stanford Press California, 2015, pp. 1-9.

¹⁴ There does exist another form of criticism, which will not be dealt with here. They turn human rights in a very general way into a counter-image in order to argue against it. Sousa Santos, for example, in "If God were a Human Rights Activist" makes some oversimplifications. He repeatedly speaks of an "abyssal line" in human rights thinking between Western modernity and the South. "As an emancipatory discourse, human rights was historically designed to apply only on this side of the abyssal line" (p. 22). I cannot recognize this line so clearly. And when he says: "freedom of religion can be secured only to the extent that the public sphere is freed from religion" (p. 7), this is not correct. In addition to the so-called forum internum, freedom of religion also includes the forum externum: the opportunity to practice religion in public. Cf. Boaventura de Sousa Santos, *If God were a human rights activist* (Stanford, Calif.: Stanford Press California, 2015).

¹⁵ Cf. Spivak, Gayatri Chakravorty. *Can the Subaltern speak? Postkolonialität und subalterne Artikulation* (Wien: TURIA + KANT, 2018 [1985]).

¹⁶ Cf. Boaventura de Sousa Santos, *Epistemologien des Südens. Gegen die Hegemonie des Westlichen Denkens* (Münster: UNRAST, 2018), at pp. 32-33.

¹⁷ This was notable during the Covid-19 pandemic: Several voices from different African countries made it clear that the realization of the human right to health requires different focuses and practice in different countries - and that the people on the grassroot level know best what that is. But they were not asked why they favor or oppose which measures. Cf. Kafarhire Murhula, Toussaint. *COVID-19 in Africa and the Violence of Prejudices in Western Representations*, Concilium 2022/2, at pp. 44-53.

because the meaning of rights cannot be understood if one does not experience oneself as a bearer of rights. And there is also a disparity in the authorship of human rights. On the one hand, people from Asia, Africa and, above all, Latin America played a decisive role in establishing human rights as international norms. It is worth remembering the enormous influence of the "Declaration for the Defense of Human Rights", which was adopted by the Inter-American Conference in Lima in 1938, on the Universal Declaration of Human Rights in 1948. Although the delegates from Chile, Cuba, Mexico and Panama were unable to push through their own draft of a human rights declaration, together with their allies they did succeed in pushing through key human rights demands, even against the powerful of the time.¹⁸ So there is authorship by countries of the Global South. On the other hand, today people of the Global South don't feel like agents of human rights in the sense that they are not the authors of how rights are interpreted and implemented.

The fact that people become objects in the human rights discourse can be demonstrated on various levels, the legal and the practical being highlighted for illustration. The Kenyan/US-American legal scholar Makau Mutua emphasizes the asymmetry at the level of law: "The grand narrative of human rights contains a subtext which depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other."¹⁹ For him, the problematic role that law played in colonialism persists in human rights, as does the arrogance of the North, which manifests itself in constructions of the alterity of others as "savages" or "barbarians". In human rights discourse, it is usually presented in such a way that the "victims" in the South must be rescued by the actors from the North. In this a strong - colonial - asymmetry continues. This also exerts pressure. Mutua poses the question (and leaves the answer open) as to whether and how countries in the South could reject human rights when these are also considered the epitome of the "civilized".²⁰

Gayatri Spivak argues similarly, but now at the level of human rights practice, especially NGOs. Unlike Mutua, she does not accuse human rights of Eurocentrism in principle. In practice, however, Eurocentrism does exist, because many human rights activists believe they know what is good for others, what rights they need or how they should demand them. What is important here is that for Spivak, the colonial divide does not only exist between "the North" and "the South", but that this divide is reaffirmed by activists in the Global South. In her book "Righting Wrongs", she refers to activists in India. She considers them to be colonial subjects themselves, because they are usually far removed from the people at the lower end of society, the so-called subalterns. This means that human rights discourse in the South is also under pressure from the ideology of the North.²¹ The human rights discourse thus once again serves to reinforce the colonial divide. For Spivak, human rights go hand in hand with too much "well-meaning", reinforcing and perpetuating 'class apartheid' on the ground.²² Often, she explains, local, national or international human rights commissions in certain regions judge "state terrorism, police brutality or gender-based violence"²³ and celebrate the victory achieved in distant

¹⁸ Mary Ann Glendon, 'The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea', *Harvard Human Rights Journal* 16 (2003), pp. 27-39, at p. 29.

¹⁹ Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002), at p. 10.

²⁰ Cf. *ibid.*, at p. 34.

²¹ Gayatri Chakravorty Spivak, *Righting Wrongs – Unrecht richten* (Zürich, Berlin: diaphanes, 2008), at p. 13.

²² Cf. *ibid.*, at pp. 37-40.

²³ *Ibid.*, at p. 51.

courtrooms, while the situation on the ground is often even worse, because the problem remains and also the institutions remain the same - or even because the perpetrators remain and let the others feel their power. In the end, the people are still objects of law or objects of charity, they are not taken seriously as agents despite all the rhetoric.²⁴ Unfortunately, there is too much evidence that human rights practice does not recognize the agency of people in the Global South.

b. Economy and extreme inequality

Post- and especially decolonial critique is almost always also a critique of capitalism. Current economic inequality is viewed in its historical context.²⁵ Generally, this does not mean that current problems are reduced to their genesis and other causes are ignored. But the critique does consider the path dependencies by focusing on how institutions that were established in the past are still effective today (structures of statehood - with school systems, legal systems) and how an inequality created during colonialism has not been overcome. Besides, economic inequalities created in the colonial era have been continued and supplemented by others. Regarding human rights, this means that the assumed equality of all people remains abstract. It is a promise that is unfulfilled because the material foundations of equality are missing; it remains empty in contrast to the daily experience of inequality.

Naturally, criticism of capitalism in a human rights context can take different forms. Some complain that human rights are firmly linked to *one* form of economy: capitalism.²⁶ There are differences in how this link is perceived - merely as a factual link or a conceptual one. Related to this is the criticism that market logic permeates everything and capitalism transforms everything into objects of mercantile transaction.²⁷ This is not compatible with the human rights' claim to equality and leaves no room for it, because everything is subordinated to the economy. For some, human rights merely function as an alibi to enforce other interests, especially economic interests. And even if human rights do not directly serve to conceal economic interests, they generally must take a back seat to them. Their observance is only demanded if it is useful.²⁸ Another reproach is that much of what countries of the Global North criticize as human rights violations in countries of the Global South (such as exploitative working conditions) only came about as a result of measures imposed by the North - such as structural adjustment measures by the World Bank or IMF.

For all their differences, these approaches are united by the criticism that, in cases of doubt, human rights claims take second place to economic interests and that human rights are therefore often represented with a certain hypocrisy.

²⁴ Cf. *ibid.*, at p. 53. Related to this is the criticism that the abstract universality of human rights does not do justice to the particular situation. Therefore Rosillo Martínez speaks of a necessary historicization of human rights, based in the local community. Cf. Alejandro Rosillo Martínez, 'Derechos humanos y lo común en perspectiva crítica desde la filosofía de la liberación', in *Poderes constituyentes, alteridad y derechos humanos. Miradas críticas a partir de lo instituyente, lo común y los pueblos indígenas*, edited by David Sánchez Rubio and Pilar Cruz Zúñiga (Madrid: Dykinson, 2020), pp. 141-192, at p. 151.

²⁵ Kerner, Ina, *Postkoloniale Theorien zur Einführung* (Hamburg: Junius, 2012), at p. 53.

²⁶ Sousa Santos, If God were, pp. 2-5.

²⁷ Rosillo Martínez, 'Derechos humanos y lo común en perspectiva crítica desde la filosofía de la liberación', p. 187.

²⁸ Here, postcolonial critiques touch on those of Samuel Moyn and others. Cf. Samuel Moyn, *Not enough. Human Rights in an unequal World* (Cambridge, Mass.: Harvard University Press, 2019).

c. *Individualism*

As early as 1844, Marx criticized the French Declaration of the Rights of Man and of the Citizen of 1793 (which however differs considerably from the Universal Declaration of Human Rights, especially when it comes to who is entitled to these rights) that human rights are "nothing other [...] than the rights of the member of bourgeois society, i.e. the egoistic man, the man separated from man and from the community."²⁹ Of course, it was not least Marx's criticism that - directly or indirectly - stimulated important further developments.

But after all, Karl Marx's old reproach is frequently encountered today - also in postcolonial criticism. It is usually linked to the criticism of ethnocentrism, because individualism is meant to reflect a specificity of Western thought that is culturally defined. Saba Mahmood, for example, criticizes human rights as "apathetic to communal aspirations."³⁰ The suspicion of individualism or atomism is omnipresent in texts by Latin American authors:³¹ according to them, human rights place an isolated self at the center, which is a-social, so that solidarity and connectedness are either ignored or even destroyed.

This criticism is often accompanied by the reproach that the concept of human rights is closely linked to the tradition of political liberalism. This is where the discourse becomes complicated because it is often not defined which liberalism we are talking about: That of the 19th century or today? American liberalism or that of another region? A concept or an experienced practice? The lack of clarity in the reference makes understanding difficult at this point.

What most critics seem to agree upon is that human rights imply an understanding of freedom that assumes an unbound self. In such an understanding, others are primarily a threat to my freedom. Moreover, human rights in their institutional anchoring are part of an international order that can be understood as a liberal order. This order comprises political, economic and international liberalism (the latter based on rules-based multilateralism). According to Börzel and Risse, individual and collective self-determination is at the center of this order.³² In part, the criticism of human rights can be explicitly understood as a criticism of this order. And individual and collective self-determination are not always in a tension-free relationship with one another and countries of the Global North and countries of the Global South (despite the ambivalence of this generalization) generally set different priorities in the emphasis of these rights. For this reason, the reservation towards liberalism is often associated with the criticism that collective rights are devalued in the international human rights discourse, as expressed by the discussion on so-called third generation of human rights.³³

²⁹ Ibid., at p. 364.

³⁰ Saba Mahmood, *Religious Difference in a Secular Age. A Minority Report* (Princeton: Princeton University Press, 2016), at p. 51.

³¹ This is because the "decolonialidad" project was closely linked to the critique of modernity from the very beginning.

³² Tanja A. Börzel and Thomas Risse, 'Liberale Ordnungen jenseits des Nationalstaates – global und regional', *Leviathan* Sonderband 42 (2024), pp. 138-160, at p. 140f.

³³ On the one hand, collective rights are considered important, but on the other hand, the scope of protection remains undefined. It is not easy to determine who is entitled to and who is obliged to exercise these rights and to derive concrete duties and rights from them. In addition, individual and collective rights can conflict with one another. This is particularly evident in the complex discussion about the right to development, which was introduced by the Senegalese M'Baye in 1972 and adopted by the United Nations in 1979 in Resolution 34/46. Cf. Norman Paech, *Menschenrechte. Geschichte und Gegenwart – Anspruch und Realität* (Köln: PapyRossa, 2019), at pp. 107-115.

In defense of human rights? Reaction to the accusations

In the following it has to be discussed if the human rights claim and practice be defended in light of these reproaches and criticism. They will be discussed in reverse order.

a. *The accusation of individualism - and an understanding of freedom*

Human rights are the rights of individuals. This is important and, I am convinced, must be defended. They are independent of social status, gender, marital status, religion etc. But individual rights are not the same as individualistic rights. "[However], rights held by individuals are not necessarily 'individualistic' in the sense of focusing on the isolated individual. Confusing rights held by individuals with an 'individualistic', unencumbered way of life has become the source of countless misunderstandings."³⁴

Human rights are rights of individuals, but they are exercised with others, they have a relational structure. This can also be demonstrated in legal terms. Because there are rights that we can only exercise with others or even through others.³⁵

However, this relationality also characterizes the self and its exercise of freedom on a moral level. We have learned in recent decades - from feminist theory, care ethics, intersubjectivity theories, indigenous cultures, in the discourse on the Convention on the Rights of Persons with Disabilities, etc. - that autonomy and freedom on the one hand, and vulnerability and relationality on the other, are not opposites. They belong together. In our autonomy, we are both dependent on others and vulnerable (all of us). In this context, Hille Haker speaks of "vulnerable agency"³⁶. We are limited in our realization of freedom. We shape our freedom with others - this can be a restriction, but it also can be enabling.

On the one hand, these relational aspects can be found in human rights conventions and in the general comments on individual rights (not only on economic-social-cultural rights, but also on classic freedom rights). On the other hand, the insights into the relationality of freedom and freedom rights do not shape the public discourses of the countries of the Global North or the human rights discourses, so that the criticism is still justified.

And, even if we succeed in understanding individual rights in a more relational rather than individualistic way, the question of how to deal with collective rights remains. Minority rights play a special role in this. Article 27 of the International Covenant on Civil and Political Rights provides the protection of minorities, explaining that persons belonging to minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."³⁷ Although other declarations and conventions supplement this article, minorities are still experiencing discrimination resulting in marginalization and exclusion. The problem exists in many countries around the world

The accusation of individualism also goes hand in hand with an accusation of anthropocentrism, but that would be a topic in its own right.

³⁴ Heiner Bielefeldt, *Sources of Solidarity: A Short Introduction to the Foundations of Human Rights* (Erlangen: FAU University Press, 2022), p. 46.

³⁵ An extreme case is in dealing with the deceased. People have a right to be buried in the area where they live, but no one can claim this right themselves, others do. Cf. German Commission for Justice and Peace, *How society cares for the dead – a matter of human dignity!* (Berlin, 2024), online at https://justitia-et-pax.de/jp/publikationen/pdf/guf_142e.pdf (accessed 2025-03-16).

³⁶ Hille Haker, *Towards a Critical Political Ethics: Catholic Ethics and Social Challenges* (Basel: Schwabe, 2020).

³⁷ UN General Assembly, International Covenant on Civil and Political Rights, adopted on December 19, 1966, Art 27.

and plays a role in international law. These issues are also very present at the level of the United Nations.³⁸ But despite all the agreements, minority rights seem to be particularly at risk again in 2025 (even in supposedly stable democracies). Solidarity is needed to defend these rights.

So, a first conclusion can be that a stronger emphasis on human rights as relational rights could alleviate not all, but some of the supposed contradictions, and that minority rights has to be defended.

b. Context and the question of equality

That human rights policy is sometimes linked to economic interests or that it ignores inequality too much is a huge problem because it makes human rights efforts untrustworthy. Post-colonial criticism repeatedly draws attention to existing asymmetries in power, in wealth and the associated well-being, in opportunities. In concrete terms, asymmetry means that a large proportion of the world's population lives in poverty and therefore in a situation of extreme deprivation - including in terms of opportunities.

According to Amartya Sen, freedom would mean having opportunities in life and being able to realize them. This is also what the concept of positive freedom demands.³⁹ Positive freedom takes account of the insight that the mere absence of external coercion (negative freedom) does not guarantee that existing potential can be developed. Being free to do something has many prerequisites, ranging from education and the opportunity to develop a personality to a certain material security. In fact, human rights should precisely be a way to demand more economic justice.

It is one of the basic normative assumptions of the Universal Declaration of Human Rights that human rights are indivisible just as freedom and equality cannot be separated. But the fact that the UDHR, due to the political situation at the time, led to two treaties instead of one gave the impression of a supposed separation between political/freedom rights on the one hand and economic/social/cultural rights on the other, massively damaged the reputation of human rights in the South. In addition, the impression of a separation is reinforced by different languages in the conventions and by the differing effectiveness of the conventions: "[W]hile the language of the International Covenant on Civil and Political Rights is clear, strong, and unambiguous, the International Covenant on Economic, Social, and Cultural Rights is couched in more hesitant terminology."⁴⁰ And the push for treaties with greater binding force, such as a tax convention, often is rejected by the economically strong countries.⁴¹ Additionally, the impression of a divisibility of rights

³⁸ "Achieving effective participation of minorities and ending their exclusion requires that we embrace diversity through the promotion and implementation of international human rights standards." OHCHR, *About minorities and human rights*, online at <https://www.ohchr.org/en/minorities/about-minorities-and-human-rights> (accessed 2025-03-16).

³⁹ Cf. Amartya Sen, *Ökonomie für den Menschen. Wege zu Gerechtigkeit und Solidarität in der Marktwirtschaft* (München: Hanser, 2000).

⁴⁰ Owen Brown, 'Rights from the Other Side of the Line: Postcolonial perspectives on human rights', *Politikon* 25 (2014), pp. 5-26, at p. 23. Beyond Brown I would comment, that the language corresponds to the character of the rights in this covenant on social, economic and cultural rights. They are all (at least also) positive rights: They formulate a claim to something. With these, it is more difficult than with non-interference rights to determine exactly when a legal claim is fulfilled, e.g. what exactly the right to education covers. (Of course, this does not mean that the Civil Pact only covers negative rights and the Social Pact only positive rights). In the general comments, the claims are specified more precisely, but a certain degree of uncertainty remains, what is interpreted as a weakness by some.

⁴¹ Even if it is positive that there are now discussions about minimum tax rates at OECD level, this body - unlike the UN - lacks the representation of the countries of the South.

is subsequently reinforced by the ratification and reception of the treaties: as is well known, not all states have ratified the ICESCR (the USA still has not). It can be stated, there is a dominance of the Civil Pact which pushed ESC rights into the background, and it is more firmly anchored in the general consciousness. This is also accompanied by a devaluation of collective rights, which in some cases are connected to economic, social and cultural rights (explicitly, of course, they are anchored in the third generation of human rights).

Against this development the connectedness of the two treaties must be recalled again and again. And where the ICESCR is thwarted, criticism is necessary. Great economic inequality must be criticized - and overcome - in the name of human rights. After 1945 it was the Latin American Group, which has achieved the inclusion of economic rights in the UDHR.⁴² Post- and decolonial critiques provide important suggestions in this regard.⁴³

As a second conclusion, it should be remembered that freedom and equality are closely linked. Economic inequality must be eliminated in the name of human rights - including freedom rights.

c. Holders of human rights

The question of holders and agents of human rights - and the subjective impression of being such an agent - is both particularly difficult and significant. The credibility of human rights depends on people seeing them as their rights.

The influence of the Latin American group on the UDHR was mentioned above. Other representatives of countries of the South are known to have worked in the Drafting Committee and today hold important positions in the human rights bodies of the United Nations. And yet the impression persists (or has intensified)⁴⁴ that the South is not an agent of human rights.

Without the opportunity to explain the reasons for this in detail here, in my opinion, they lie both within and outside human rights policy. I would like to take a closer look at the internal reasons.

The initial picture here is quite positive: For example, a look at the human rights treaties shows that concerns from the countries of the South are increasingly being taken up. One example is the International Convention for the Protection of All Persons from Enforced Disappearance, which came into force in 2010, which has taken up many of the ideas from relatives' associations, particularly in Latin America, and contains very important statements and demands in their spirit. Another example is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which came into force in 2003 and aims to protect people throughout the entire migration process, regardless of their residence status. The convention emphasizes the indivisibility of human rights and places particular emphasis on family reunification, for

⁴² Cf. Börzel and Risse, 'Liberales Ordnungen jenseits des Nationalstaates – global und regional', p. 147; Glendon, 'The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea', pp. 29 f.

⁴³ For example, in the reference to greater consideration of needs, as with Rosillo Martínez (cf. Rosillo Martínez, 'Derechos humanos y lo común en perspectiva crítica desde la filosofía de la liberación', p. 181) or the demand for more autonomy for regional and local structures.

⁴⁴ This is partly because the form of liberalism that characterizes the post-Cold War international order is less open to states with different cultural, political and economic backgrounds than in the post-war period. A concept of liberalism has prevailed that is narrower and more presuppositional. Cf. Among others Boerzel and Risse, 'Liberales Ordnungen jenseits des Nationalstaates – global und regional'.

example. Human rights claims of people from the South are considered and incorporated into legal texts.

But this is also where the extent of the problem becomes apparent: not a single so called "industrialized country", no EU state, has signed the Migrant Workers convention. This means that the concerns from the Global South have been considered, but then most states do not recognize this norm as binding for themselves. This is one of the most important reasons why many people in the Global South do not experience themselves as subjects of human rights.

And the example of the Convention against Enforced Disappearances shows the problem of the inadequate implementation of human rights standards. To establish international law is important, but it is not enough. It needs to be transposed into national law - and then it needs to be implemented. This is where the UN's monitoring structures reach their limits. Compliance with international treaties is difficult to enforce, governments can't be forced. And additionally, important decisions are not made by the High Commissioner for Human Rights, but by the Security Council, the G9, the World Bank, at the level of the nation state etc. These might be reasons why the feeling of powerlessness persists and is also spreading to human rights discourse.

Human rights practice must change. Double standards, instrumentalization and non-recognition of contexts and subjects make human rights practice untrustworthy. Context sensitivity, genuine effort to learn from the other, time and patience are needed. Spivak herself speaks of the necessary "cultural interweaving"⁴⁵. Different positions and perspectives of actors must be taken into account. Decolonial approaches, such as those of Sousa Santos and Dussel, especially emphasize the role of social movements.⁴⁶

In conclusion we can state that there has been progress in the participation of "the Global South" in human rights agreements. But more needs to be invested in the work of negotiation and implementation of human rights and in dialogue.

Defending human rights?

Post-colonial human rights criticism is often less about criticism of human rights themselves, but rather of the overall network of colonial late effects, neo-colonial and other more recent mechanisms of injustice that characterize global interactions. Human rights are also part of this context. In this respect, post- and decolonial criticism is of high importance. It also reminds us that it is not enough to set them once in declarations and treaties. Human Rights require permanent practice - and it must be self-critical. This is particularly important because the attitude with which representatives from countries of the North meet those from countries of the South often is one of arrogance: The human rights violations of others are seen, while their own - for example in dealing with migrants - are ignored. Criticism of human rights therefore raises the question of credibility. This is of paramount importance. And it has been shown above that postcolonial criticism can not only be used to criticize grievances in human rights practice, but also to defend human rights claims against instrumentalization and violations.

⁴⁵ Spivak, *Righting Wrongs – Unrecht richten*, p. 56.

⁴⁶ Cf. Dussel, Enrique. 20 Thesen zu Politik. Berlin: LIT Verlag, 2013.163

However, I think it is problematic if the human rights claim itself is rejected. Instead, it should be protected - and universalism should be strengthened rather than weakened.⁴⁷

For this I refer to Omri Boehm, who has strongly advocated this thesis in recent years and caused some provocation: "The form of postmodernism that is currently being re-imported to Europe in the form of critical race theory and postcolonial or decolonial theory takes the dreams of Martin Luther King just as little seriously as the dream of the America into which Du Bois was born. Such dreams are considered illusions by right and left alike."⁴⁸

More strongly than he does I would like to emphasize: post-and decolonial theories, Critical Race Theory and others have necessarily pointed to the potential for violence in forms of universalism, they have pointed to the problem of representation and the importance of experience - especially experiences of disregard. Boehm starts at the point where the (as I would say) necessary consideration of experience becomes problematic, where "things tilt", namely when one's own experience or a certain identity characteristic becomes the sole criterion for legitimizing and defending claims. He criticizes identity politics and the like - from the right, but also from the left.⁴⁹ That is a provocation, because the left stood for the defense of the universal claim.⁵⁰

Boehm is criticizing a political left, which equates reason with interests, and for which enlightened universalism is a contradiction. And he defends precisely this enlightened universalism, which I would call critical universalism. He refers to historical examples to make it clear that group interests should not be set against each other. Following Martin Luther King, he states that if injustice happens anywhere, justice is in danger everywhere.⁵¹ It follows from this that we should demand justice and fight for it even if it is not ourselves or our own group that is affected. His most important example is slavery, but today many examples can be found, too.

This strong plea for enlightened - critical - universalism is of highest importance and I want to strengthen it. At the same time, Boehm's approach has weaknesses. His concept of justice remains abstract, and he ignores the importance of political deliberations and struggles. He speaks quite impartially of absolute and true justice and of right law and wrong law - which one must or must not abide by. This brings with it considerable problems, theoretical as well as political.

Boehm lacks an appreciation of positive law and there is a certain irony that in his defense of a strong universalism he touches on the decolonial criticism, which is

⁴⁷ Opinions on this differ widely among post- and decolonial critics. In Latin American decolonial critique in particular, there are many who defend universal claims and often associate these with human dignity rather than human rights, because this leaves room for maneuver in the design (Dussel, Sousa Santos, Rosillo Martínez etch.). On the postcolonial side, there is greater skepticism, even if the fundamental rejection is partially broken through by Spivak and Chakrabarty, for example.

⁴⁸ Omri Boehm, *Radikaler Universalismus* (3rd Edition. Berlin: Propyläen, 2023 [2022]), at p. 12.

⁴⁹ The fact that right-wing thinkers and policies have a problem with recognizing universalist claims is nothing new - it is practically part of their core. One's own group or nation is set against or above others. That Boehm criticizes this is hardly surprising. But even the current liberal left - his point is somewhat abbreviated - is falling into the identity trap. Here it is not the nation, but other groups, often characterized by a particular experience of discrimination that make a particular claim and reject universal normative claims.

⁵⁰ Of course, there is a huge discourse how "left politics" can be understood and how identity claims and universal claims relate to each other. This can't be discussed here. Cf. Musa Al-Gharbi, *We Have Never Been Woke: The Cultural Contradictions of a New Elite* (Princeton: Princeton University Press, 2024).

⁵¹ Boehm, *Radikaler Universalismus*, p. 63.

characterized by a very strong skepticism towards institutions (law system included). From a socio-ethical perspective, however, legal institutions are important because, when properly functioning, they prevent arbitrariness. But there is a responsibility to build them in such a way that they are just and facilitate good and decent life with others. Boehm also lacks an appreciation of the political: The necessity of struggle, of negotiation, of permanent reassurance about normative foundations. Universal norms cannot be defended without explication, negotiation processes, interaction with concrete needs, experiences and dialogue. So, if we defend human rights, then it is always also about the political level, about negotiation processes and dialogue, and also about sensitivity to difference and about respect.

Conclusion

In the end, this brings us close to the intention of many post- and especially decolonial critics. Many of them do not reject the idea of human rights in general. They have what Rosillo-Martinez might call a "visión liberadora de los derechos humanos" - a liberating vision of human rights. We need such a critical theory and practice of human rights. It brings the - universal - emancipatory claim of human rights back into focus. Post- and decolonial criticism points out that this emancipatory claim of human rights is repeatedly betrayed - in the definition, recognition and practice of human rights. Tensions and ambivalences in human rights policy and discourse cannot be resolved and are often augmented by criticism. However, this is not an argument against taking criticism into account, but rather in favor of further developing human rights and practicing a liberating human rights policy.

Human rights have been fought for in the struggles of ordinary people. This is the emancipatory claim that links them to the decolonial project. Post- and decolonial critique can strengthen this claim today, as Shetty Salil expresses:

"Firstly, the essence of human rights and decolonisation are basically the same thing: the struggle for freedom against the abuse of power. The modern human rights framework as we know it was born in the crucible of decolonisation. It is a historical context we would do well to remember. Secondly, human rights themselves have always been subject to efforts at colonisation: misappropriation and being manipulated for political ends. We need to recognise this for what it is, and in this sense the fight to decolonise human rights is a permanent one.

And thirdly, to be true to the character of human rights, we need to reconnect again with the struggles of ordinary people against abusive power."⁵²

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⁵² Salil, Shetty. Decolonizing Human Rights, without page.

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