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From the Editor in Chief

In August 2024, *Societas Ethica* invited scholars of theological, philosophical, and applied ethics to join its annual conference. This time the conference was held in Sigtuna—a small, rather idyllic town located between Stockholm and Uppsala, nearby the beautiful lake Mälaren. The theme of the conference was, however, anything but idyllic: *Societas Ethica* gathered to discuss critical perspectives on human rights.

The fact that we met in Sweden had an impact on the spirit of our event. Over a short period of time, Sweden has developed from being a country with a high level of social equality and trust into a country where economic and social inequalities are normalized. Human rights which used to be taken seriously by the legislator as well as by the administration are now openly questioned, especially when those rights are claimed by minorities and other unprivileged groups.

The final event during the conference in Sigtuna was a panel with representatives of non-governmental organizations of Muslim, Roma, and Sámi minorities. The panelists gave us their perspectives on how Swedish civil society uses human rights as instruments to strengthen minorities and individuals—from parallel reporting in the United Nations to democratic education. The panelists told us about the Swedish state's discriminatory actions against minorities, actions that in many cases are legitimized by the idea that the cultures of Muslim, Roma, and other minorities constitute a threat to European democracy and human rights.

What are human rights, then? Are they the democratic agency of people such as those represented by our Muslim, Roma, and Sámi panelists, or are they yet another instrument of state control? If they are both—and I believe they are—how can we differentiate legitimate and illegitimate conceptions and practices of human rights?

In fact, these questions were the main concerns of the scholars who initiated the meeting in Sigtuna. We invited our colleagues from Europe and other parts of the world to contribute to the discussion about whether it is possible to prevent human rights from being primarily an ideology of power.

The very fact that human rights are used ideologically, that is, as an instrument of power, should not surprise scholars and practitioners of human rights. Similar to other attractive moral and political visions, human rights are an arena for the struggle between those who use them as an instrument of liberation and those who see human rights as a tool to sustain existing power relations. Therefore, the challenge is not so much to recognize the ideological dimensions of human rights, but to find ways of uncovering particular forms of this ideologization and, most importantly, suggest counterstrategies.

Many ethicists and scholars of human rights joined Societas Ethica's three-day conference in Sigtuna to discuss these and related challenges. Our conversations continued after the conference, and this special issue of De Ethica is a way of contributing to the ongoing discussion of the current challenges to human rights. Thus, what we are now offering the reader are articles that develop further the 'Sigtuna dialogue.'

Three of the articles in this special issue are authored by researchers who were keynote speakers at the conference in Sigtuna.

The first article is written by professor Michael Goodhart, whose research on democracy and human rights is extensive and greatly appreciated by many. In the contribution "The Human Rights Project and the Limits of Cosmopolitan Rights," Goodhart offers a critique of cosmopolitan human rights—rights that assist the new liberal international order by providing most powerful global agents with a presumably apolitical and universal framework. This framework conditions the agency of other subjects—those who do not embrace cosmopolitan human rights as the only true human rights model. Goodhart argues that this conditionality, supported by "the transcendent moral authority of human rights," restricts the agency of those who legitimately question the neoliberal order established in the 1990s. Additionally, such conditionality contradicts the model of human rights expressed in the Universal Declaration of Human Rights. In that model, human rights are not perceived as the unquestionable moral truth, but understood as subjects of diplomacy, debate, and negotiation.

In his article, Goodhart demonstrates how cosmopolitan human rights have become normalized in the scientific discourse, and he argues that these rights have several fundamental limits. Most importantly, they are inefficient if our aim is to combat social and economic inequalities generated by neoliberal economic politics. In a clear contrast to the moral universalism of cosmopolitan human rights, Goodhart defends a genuinely pluralistic vision of human rights—a vision in which the arrogance of cosmopolitan elites is challenged by a plurality of political voices of those who demand social justice, thus reclaiming the human rights project as politics, diplomacy, and negotiation.

The second article in this issue is Lena Halldenius's essay entitled "What is the Point of Human Rights? Against Human Rights Minimalism." Halldenius's contribution is a philosophical analysis of the egalitarian potential of human rights, a potential that is reasonably questioned by many. With reference to Elizabeth S. Anderson's work on the point of equality, Halldenius defends the view that "human rights have a dual rationale: a negative one to end oppression, and a positive one to establish a political culture of democratic equality." Halldenius develops this understanding by means of a critique of human rights minimalism that fails to grasp the complexity of equality. Such a minimalism reduces human rights to either protection of some fundamental claims, or to such claims that we can reasonably expect to be satisfied by a corresponding duty holder. A minimalism of human rights can, of course, combine both forms.

Halldenius argues that minimalism of human rights is not egalitarian on two grounds. First, it stipulates equality as an abstract moral ideal, but offers no arguments against inequalities produced by concrete social conditions. Second, minimalism of human rights reduces those rights to claims corresponding to realistic interpretations of institutional duties. Such an approach transforms human rights into the domain of "the possible," that which is compatible with the social and political status quo.

In the final section of her article, Halldenius states that "equality cannot merely be a moral starting-point, but a requirement of political justice on the function and outcome of institutions and the practices we live by."

Both Goodhart and Halldenius offer highly relevant critique against moral approaches to human rights that they view as far too abstract and fundamentally distanced from concrete social positions and practices. I address this critique in the article "Defending and Disputing Human Rights."

My interpretation of the moral dimension of human rights, as well as my understanding of ethics as a critical analysis of moral conventions, differs from the abstract moralism of rights that is often misused for ideological reasons; or so I claim. In the article, I offer a model of human rights that endorses disagreements about rights as a democratic and emancipatory resource. However, a pluralistic model need not be a form of strong normative relativism—there are interpretations of human rights that should be rejected.

In my view, the principle of equal respect for human dignity, if understood as a pure normative and critical principle, is a good instrument to discriminate between legitimate and illegitimate disagreements. Such understanding incorporates social constructivism by viewing human rights as a product of concrete politics and legislation. Simultaneously, it offers a model of counteracting discrimination and inequality in particular contexts. Everyone is equally entitled to disagree about the content and priorities of human rights. However, any concept or practice of human rights that legitimizes discrimination fails the test of the equal respect for human dignity.

In her article "Whose Criticism of What? Ethical Reflection on Postcolonial and Decolonial Criticism of Human Rights," Michelle Becka interprets and discusses different forms of critique of human rights when they are understood and practiced within colonialist frameworks.

Becka reminds the reader of postcolonial and decolonial theory as two related but different paradigms of critical theory. She reconstructs three main objections to mainstream human rights theory and practice—restricting agency of people in Global North; human rights' incapacity to address the issue of inequality; and the individualism of human rights that counteracts democratic solidarity and political action.

Becka discusses this critique and argues that it should be taken seriously. In her view, postcolonial and decolonial critics should not be interpreted as refusing human rights altogether. Rather, they should be understood as questioning particular features of human rights theory and practice in order to sustain the democratic and emancipatory potential of the idea of equal human rights.

The last article in this issue is written jointly by Max Tretter and Analucia Löschcke Centeno. The authors challenge John Rawls's interpretation of civil disobedience and argue that radical climate protests should be viewed as a form of justified civil disobedience and "an expression of democracy." Tretter and Löschcke Centeno utilize the example of Last Generation actions in Germany and, most importantly, the debates provoked by the activism in order to discuss the tension between climate protection on one hand and democratic institutions on the other.

The authors argue that traditional ethical and legal approaches to radical climate activism are inappropriate because they sustain a false dichotomy between protest movements and democracy. Tretter and Löschcke Centeno defend the activism of Last Generation and they are critical of the democratic potential of international human rights law. However, I do not believe that this defense is incompatible with any reasonable interpretation of human rights.

I hope that our readers find this issue interesting enough to engage themselves in the discussion about human rights as they figure in academic discourses and social practices. To me, if human rights are to persist as instruments of justice and liberation, they should be understood and practiced democratically, that is, through discussions and disagreements.

Uppsala, May 2025
Elena Namli, Editor in Chief

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The Human Rights Project and the Limits of Cosmopolitan Rights

Michael Goodhart

This essay argues for a critical reconsideration of cosmopolitan human rights and of the post-Cold War Human Rights Project. It begins by contextualizing cosmopolitan rights in their historical and ideological context, showing that they are deeply complicit in a broader regime of neoliberal global governance, helping to justify and to depoliticize new modalities of coercive conditionality that characterize that regime. It shows how specific features of cosmopolitan rights contribute directly to this form of indirect rule and opines that present indifference or hostility toward human rights can and should be understood in part as a product of this complicity and of the wider failures of neoliberal global governance. The essay concludes with some reflections on the study of backlash against human rights amidst the real threat of rising ethno-nationalism and fascistic politics.

Introduction

Over the past 30 years, human rights discourse has become the normative *lingua franca* of global ethics and politics. New rights instruments have proliferated and rights NGOs have multiplied. International prosecutions for extreme human rights violations have become routine, and the doctrine of universal jurisdiction has become an accepted principle of international law. Humanitarianism has become a core modality of global politics and humanitarian intervention commonplace. International negotiations on nearly every topic are saturated with rights talk, and human rights condition aid, trade, development, and diplomacy. In short, the past decades have been what Mark Goodale, following Louis Henkin, has called an Age of Rights.[1]

Recently, however, many scholars and political commentators have become increasingly worried that human rights may have crossed their apogee—that the "rise and rise" of human rights[2] may finally have come to an end.[3] While this growing anxiety about

[1] Mark Goodale, *Reinventing Human Rights* (Stanford, CA: Stanford University Press, 2022), 51.
[2] The phrase belongs to Kirsten Sellars, *The Rise and Rise of Human Rights* (Gloucestershire, UK: Sutton, 2002).
[3] It's worth noting that "the end of human rights," much like the wolf in the fairytale, has often been previously announced – see, e.g., David Rieff, "The Precarious Triumph of Human Rights," *The New York Times Magazine*, August 8 1999; Stephen Hopgood, "Human Rights: Past Their Sell-by Date,"

a backlash against human rights has numerous sources, the threat is personified in the figure of the populist strongman spouting racist and nativist ideologies and hawking irresponsible economic populism. A central component of this alarmingly fascistic authoritarian nationalism is the rejection of "liberal internationalism," which I will roughly define as a cluster of related norms around multilateralism, human rights, liberal democracy, and economic integration.[4] As these strongmen quit treaties, crack down on civil society, denounce international conventions, practice election denialism and interference, propose withdrawal from multilateral military and economic arrangements, and promise to "put [country] first or make [country] great again," their actions seem to be hastening the liberal world order toward collapse.[5]

The understandable and unsurprising response is often a reflexive defense of existing norms, ideas, and practices of human rights and other elements of liberal internationalism. I shall argue that this reflex should be resisted. Hand-wringing about the end of liberal internationalism ignores that it was always mostly a myth[6] while at the same time perpetuating the myth by postponing any reckoning with the failures and contradictions of the neoliberal global governance regime—failures that are fueling the emergent fascism liberals profess to abhor.

In this essay,[7] I focus specifically on the idea and practice of human rights within that regime, arguing that these rights are much more problematic, practically and theoretically, than their proponents recognize. To show this requires locating contemporary human rights in their historical and ideological context.

The human rights project

The "human rights project" is a term of art that is used promiscuously to refer to a broad constellation of actors, ideas, institutions, and practices related to international human rights. I shall use it more precisely to name the singular political project around international human rights that has dominated the global intellectual and geopolitical landscapes since around 1990. For me, the Human Rights Project (HRP) specifies the global advancement of an international legal regime of human rights built on liberal economic, political, and philosophical foundations, anchored in UN and regional systems of treaties, councils, tribunals, and monitoring mechanisms, and backed by the militarized power of liberal democratic capitalist states and the soft power of those states and their corporate, philanthropic, and international NGO partners. The HRP is integral to a wider regime of global governance that promotes liberal democratization, "good" governance, and the "rule of law" against the backdrop of neoliberal economic globalization. This Project was hugely ambitious: it aspired to create a new global constitutional order centered on

Opendemocracy.net (2013); Eric Posner, *The Twilight of International Human Rights Law* (New York: Oxford University Press, 2014). It's also worth noting that the moral of that story is not that there was no wolf.

[4] See Hans Kundnani, "What Is the Liberal International Order?," in *Liberal International Order Project, no. 17 (April)*, Liberal International Order Project (Washington, DC: The German Marshall Fund of the United States, 2017).

[5] I shall use "liberal internationalism" and "liberal world order" interchangeably.

[6] https://theglobal.blog/2019/04/16/the-end-of-a-liberal-international-order-that-never-existed/

[7] This essay draws ideas and material from my book manuscript in progress, which is tentatively entitled *The Enigma of Human Rights*.

protecting rights-bearing individuals from violations.[8] It has also been hugely successful—at least until very recently.

Human rights have been configured as *cosmopolitan* rights in and through the HRP. This claim assumes that human rights can be differently configured and also that the familiar cosmopolitan configuration is specific to, and somehow a product of, their interpolation into the HRP. To see this requires locating that Project within its historical and ideological context as part of the larger political project of neoliberal global governance that emerged following the end of the Cold War. Human rights played an important part in a new agenda for global governance; they were, in fact, an important instrumentality of that agenda. Put differently, the HRP had its own logic and function within the evolving liberal international order that shaped both the idea and the practice of human rights.

This claim may seem to be in tension with recent revisionist historical scholarship identifying the international human rights movement of the 1970s as the engine of human rights ascendence in world politics. I can't properly engage with that scholarship here, but my argument need not contradict it. My focus is simply different. While Moyn, Hopgood, and others are primarily interested in the history of the movement itself, my concern is with the role that human rights came to play in global governance.[9] This is a story not of the 1970s but of the 1990s. That said, the international human rights movement's program dovetailed neatly with these developments and shaped them in important ways: NGO discourse and advocacy provided the HRP with crucial support and legitimacy. For the most part, the movement was willingly insinuated into the HRP and the wider project of global governance of which it is a part.

One quarrel I do have with the revisionists is that they treat the HRP as an outgrowth of the movement's advocacy efforts, both the product and the fulfilment of its dreams of a "transcendent moral authority" in world politics. Although human rights do constitute a transcendent moral authority within the neoliberal global governance regime, to depict the creation of this authority as the outgrowth or product of the international human rights movement misconstrues the political nature and function of the Project within the broader architecture and ideology of that regime. International human rights were *remade* in this conjuncture after the Cold War to do specific work, and this remaking profoundly shaped their conceptualization and operationalization.[10]

The 1990s was an era of indisputable American hegemony. The United States was the world's predominant military, economic, and cultural power, and that status engendered global ideological dominance.[11] A US-led coalition of liberal democratic

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[8] Stephen Hopgood, Jack Synder, and Leslie Vinjamuri, "Introduction: Human Rights Past, Present, and Future," in *Human Rights Futures*, ed. Stephen Hopgood, Jack Snyder, and Leslie Vinjamuri (Cambridge: Cambridge University Press, 2017), 8.

[9] The most influential revisionist accounts are Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap (Harvard), 2010). and Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca, NY: Cornell University Press, 2013).

[10] The focus on NGOs also leads to the neglect of grassroots and more radical human rights activity—especially around economic rights and justice and especially in the global South (see, e.g., Paul Nelson and Ellen Dorsey, "New Rights Advocacy in a Global Public Domain," *European Journal of International Relations* 13, no. 2 (2007); Jackie Smith, *Social Movements for Global Democracy* (Baltimore: Johns Hopkins University Press, 2008). This leads to problems for Moyn; see Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2018; cf. Michael Goodhart, "Not Enough: Human Rights in an Unequal World. By Samuel Moyn. Cambridge, Ma: Harvard University Press, 2018. 296p. $29.95 Cloth," *Perspectives on Politics* 16, no. 4 (2018).

[11] By ideology I simply mean a constellation of ideas, values, and beliefs that provides explanations and justifications for organized political action and an interpretive framework for making sense of the

capitalist states used this dominance to inaugurate a three-pronged agenda for global governance that would use norms, policies, and institutions to spread liberal democracy, expand membership and participation in the emergent liberal international system, and construct an "open and inclusive" global economy. This program was a self-conscious attempt to operationalize a cosmopolitan worldview and was informed by three specifically neo-Kantian theories: democratic peace, liberal institutionalism, and economic interdependence theory.[12] Once regarded as wildly utopian, these theories appeared newly plausible after 1989.[13]

Ideas shape institutions and orders most effectively when they are shared within strong epistemic communities and when they are introduced in the wake of exogenous shocks.[14] As Richard Rosecrance observes, there was an unusual degree of ideological alignment within the dominant coalition during this period.[15] The US shared a universalist vision with its allies; it was willing to use its power to promote that vision; and, it was unusually unconstrained in doing so.[16] The previous two decades had seen a revivification of Kantian ethics in the influential scholarship of Rawls and Habermas (to which I return later on). Liberal institutionalism was challenging the dominance of realism in International Relations. "Free market" liberalism was ascendent in politics, economics, and popular culture following the Thatcher and Reagan revolutions.

So, when the abrupt end of over four decades of superpower rivalry suddenly upended familiar ways of thinking, politicians and scholars were left grasping for new ideas to help them get hold of the changes remaking the world around them. Neo-Kantian liberalism, in the form of neoliberal cosmopolitanism, provided a handle—it was, in Milton Friedman's terms, an idea "lying around" waiting to be picked up by scholars, pundits, and policy-makers in urgent need of new ways of thinking.[17] With this opening, "philosophical arguments in favor of universalism… returned with a vengeance, bringing with them renewed advocacy of cosmopolitanism."[18] A cosmopolitan analytic framework

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world and helping to organize and direct political activity within it Michael Goodhart, *Injustice: Political Theory for the Real World.* (New York: Oxford University Press, 2018): 16.

[12] John J Mearsheimer, "Bound to Fail: The Rise and Fall of the Liberal International Order," *International security* 43, no. 4 (2019): 22-3.. Mearsheimer does not mention Kant in his discussion of these three theories; that insertion is mine. See Immanuel Kant, *Kant's Political Writings*, ed. Hans Reiss, trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1970).

[13] Joseph S Nye, "What New World Order?," *Foreign Affairs* 71, no. 2 (1992).

[14] Judith Goldstein and Robert O Keohane, "Ideas and Foreign Policy: An Analytical Framework," in *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca, NY: Cornell University Press, 2019), 14ff.

[15] Richard Rosecrance, "A New Concert of Powers," *Foreign Aff.* 71, no. 2 (1991).

[16] David C. Hendrickson, "The Renovation of American Foreign Policy," ibid.

[17] Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1982), ix. Friedman famously wrote that "Only a crisis—actual or perceived—produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around." See also Mark Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (Cambridge: Cambridge University Press, 2002). and Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (New York: Metropolitan Books (Henry Holt and Company), 2007) on the uptake of liberal ideas lying around at significant historical junctures.

[18] Robbins differentiates between an "older" neo-Kantian cosmopolitanism and new tendrils of that doctrine that germinated in the Cold War's rapid thaw. In describing these offshoots, nourished by the new (or newly salient) experiences of mobility, hybridity, uprootedness, and internationalism engendered by globalization, Malcomson coins the phrase "actually existing cosmopolitanism." I focus on the older neo-Kantian strain because it was the dominant ideology of global governance in the 1990s, the *actually existing cosmopolitanism* of the liberal international order. See Scott L. Malcomson,

provided a way to make sense of this new phase of globalization,[19] and politicians and scholars ran with it. This new-old idea provided a congenial worldview for an era of purported consensus and cooperation, one that often blurred the distinctions between explanatory and normative argument. Political and economic liberalization would encourage peace and prosperity; peace and prosperity would in turn create global conditions conducive to human rights and the pursuit of justice. International human rights guarantees and the rule of law would backstop liberal democracy and ensure the smooth functioning of an integrated global economy.

As Pheng Cheah has astutely observed, this revived neo-Kantian cosmopolitanism features an innovative upgrade: in the place of universal Reason, it substitutes an empirical account of "contemporary globalization and its effects" as the driving force of history and progress.[20] Globalizing processes, both past and present, are seen as objective embodiments of different forms of normative, non-ethnocentric cosmopolitanism because they rearticulate, radically transform, and even explode the boundaries of regional and national consciousness and local ethnic identities.[21] Globalization is thus said to engender a sort of "universal normative consciousness."[22]

As Cheah notes, this reformulation makes cosmopolitanism more palatable for a purportedly post-colonial world, seemingly refashioning it as a de-colonial force. The reformulation also renders globalization's material processes and outcomes impervious to critical scrutiny by making them definitional of cosmopolitanism itself. As one of the conditions of possibility of cosmopolitanism, neoliberal globalization cannot readily be subjected to critique within a cosmopolitan framework; it is effectively naturalized (hypostatized) in this new ideological formation. The ideological dominance of this reformulated cosmopolitanism helps to explain why mainstream left parties across the OECD accepted neoliberal economic orthodoxy and embraced "third way" programs that were difficult to differentiate from those of their rivals on the right.[23] "This shift and its consequences have been crucial to the rise of a nativist, populist right and to the broader problems facing democracy today in Western and Eastern Europe, as well as other parts of the world."[24] Thus were the seeds of today's backlash sown.

"The Varieties of Cosmopolitan Experience," in *Cosmopolitics: Thinking and Feeling Beyond the Nation*, ed. Pheng Cheah and Bruce Robbins (U of Minnesota Press, 1998).

[19] Pheng Cheah, "Given Culture: Rethinking Cosmopolitical Freedom in Transnationalism," ibid., 291.

[20] *Inhuman Conditions* (Harvard University Press, 2009), 18-9.

[21] Ibid., 18.

[22] Ibid.. Kant regards international commerce as a form of sociability among states that emerges thanks to the stability provided by a world federation of peace-loving republics. The objective historical tendency of international peace and commerce toward world federation produces universal values and cultural dispositions; the empirical processes of commerce and pacification generate a "cosmopolitical culture [that] is a universally normative ideal because it is an asymptotic historical approximation of the universal moral community, the noumenal realm of human freedom that is no longer bound by deterministic laws of nature." Cheah, "Given Culture," 290-1.

[23] See Stephanie L Mudge, *Leftism Reinvented: Western Parties from Socialism to Neoliberalism* (Cambridge, MA: Harvard University Press, 2018).

[24] Sheri Berman and Maria Snegovaya, "Populism and the Decline of Social Democracy," *Journal of Democracy* 30, no. 1 (2019): 6. I return to this point below.

Cosmopolitan human rights in neoliberal global governance

A new conception of human rights was formed through this emergent system of global governance and played a specific and quite important role in its justification. Any system of rule requires justification—some public, accessible, and persuasive account of its legitimacy.[25] Cosmopolitan human rights provided such an account for the new liberal international order in the form of what Samuel Moyn memorably called "a politics that [works] precisely by claiming to transcend politics."[26] From the creation of ad-hoc tribunals and the eventual establishment of the International Criminal Court (ICC) to the new conditionality of aid, trade, and development policy and the radical expansion of militarized interventions, human rights provided an "apolitical" rationale for intrusion in states' domestic affairs by the "international community."[27]

Rather than world government, this was rule through disciplinary regimes that reached deep into the economic, political, and social life of states. As Peter Gowan argues, "any form of liberal cosmopolitan project for a new world order requires the subordination of all states to some form of supra-state planetary authority."[28] The rebooted Kantian cosmopolitanism I'm describing facilitates this subordination by naturalizing both the material processes of globalization and the cosmopolitan ethic it purportedly produces, creating an ideology that suited the economic and political proclivities of the new hegemon.[29] The genius of neoliberal global governance was to create disciplinary regimes—international financial and military arrangements, aid and trade restrictions—that were justified in terms of human rights and that allowed the United States largely to avoid coercion and to rule indirectly.[30]

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[25] I mean empirically persuasive: the account must actually persuade. I don't mean "persuasive" in the way that scholars in some disciplines might use that term to refer to a rational, coherent, or well-argued account.

[26] Moyn, *The Last Utopia*, 137. Moyn has argued that the contemporary human rights movement originated in a kind of anti-politics. He attributes the moral, apolitical character of human rights discourse in the 1970s to the influence of Soviet dissidents, who sought a non-ideological basis for their critique of an oppressive regime during the Cold War, and of Latin American activists, who similarly hoped to win broader sympathy for their cause with appeals that emphasized the injustice of governmental repression. This moralistic tone, he notes, resonated with the Christian morality of Amnesty International, then under the leadership of Peter Benenson (ibid., 129-48). In other words, oppositional movements adopted human rights discourse and framing specifically because they offered an alternative to political channels of dissent, replacing the politics of the state with a morality for the globe (ibid., 43).

[27] The intervention-justifying character of human rights is central to several important theories of the nature and content of human rights—so-called "political" theories. See John Rawls, *The Law of Peoples; With 'The Idea of Public Reason Revisited'* (Cambridge, MA: Harvard University Press, 1999); Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009); Joseph Raz, "Human Rights without Foundations," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010).

[28] Peter S. Gowan, "Neoliberal Cosmopolitanism," *New Left Review* 11, no. September / October (2001): 83.

[29] Human rights had been similarly configured in the late 18th- and 19th-centuries, during the previous era of cosmopolitan ascendancy.

[30] Gowan, "Neoliberal Cosmopolitanism." As Michael Ignatieff vividly put it, "The United Nations lay dozing like a dog before the fire, happy to ignore Saddam [Hussein's invasion of Kuwait in 1990], until an American president seized it by the scruff of the neck and made it bark" (quoted in Amy Bartholomew and Jennifer Breakspear, "Human Rights as Swords of Empire?," *Socialist Register* 40 (2004): 127. Mixing the metaphor, Ignatieff continues: "Multilateral solutions to the world's problems are all very well, but they have no teeth unless America bares its fangs …. The 21st century imperium is a new invention in the annals of political science, an empire lite, a global hegemony whose grace

As embodiments of the new cosmopolitan ethos produced by inexorable material processes of globalization, human rights norms could be considered universal, neutral, and impartial and their enforcement consensual and apolitical, transmogrifying the politics of neoliberalism into a kind of benign managerialism. Indirect rule is crystallized in the seemingly anodyne discourse of "good governance,"[31] which creates new forms of coercive conditionality[32] that, as Gowan explains, subordinate sovereignty to robust international oversight and regulation.[33] Good governance notions like transparency, rule of law, free and fair elections, and anti-corruption were used to promote quite specific policy outcomes, including in the economic domain.[34]

Human rights had to be practically and ideologically *reconfigured* to do this justificatory work. The Universal Declaration of Human Rights (UDHR) and the UN Charter did not set up a system of coercive conditionality, nor did they establish the transcendent moral authority of human rights.[35] The UDHR eschewed philosophical grounding,[36] enumerating a list of rights that, while broadly liberal in orientation, were articulated independently of any philosophical foundation and were in some ways mildly challenged liberal orthodoxy.[37] The machinery of human rights was part of a larger UN system that enshrined state sovereignty, self-determination, and non-interference as pillars of the post-War order. Human rights worked through diplomacy—that is, they were subjects of debate and negotiation among UN member states.[38]

Within the HRP, human rights were shaped into a particular and distinctive political form. They are substantively *universal*: the same rights apply to everyone, everywhere, in broadly the same way. The 1993 Vienna Declaration proclaimed that the universality of human rights is "beyond question."[39] Cosmopolitan rights are also understood as *moral* rights; their normativity is categorical and provides everyone with valid and binding reasons for action and restraint. These reasons trump political or cultural

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notes are free markets, human rights and democracy, enforced by the most awesome military power the world has ever known" (quoted in ibid.).

[31] Gowan, "Neoliberal Cosmopolitanism," 80.

[32] Ved P. Nanda, "The "Good Governance" Concept Revisited," *The ANNALS of the American Academy of Political and Social Science* 603, no. 1 (2006).

[33] Gowan, "Neoliberal Cosmopolitanism," 79.

[34] Nanda, "The "Good Governance" Concept Revisited"; see also Thomas G Weiss, "Governance, Good Governance and Global Governance: Conceptual and Actual Challenges," *Third World Quarterly* 21, no. 5 (2000).

[35] This is to say nothing of the many other uses of human rights that predated the UDHR.

[36] Standard histories treat this as a pragmatic requirement of achieving consensus on the Declaration itself; see Jacques Maritain, *The Rights of Man and Natural Law* (London: Centenary Press (1944) for the source of this notion.

[37] Scholars continue to debate this originary moment of the UDHR, as if getting the story "right" might somehow resolve controversies about what human rights are, what they mean, and what they do *now*.

[38] For a good discussion of how this worked, often in surprising ways, see Steven L. B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge: Cambridge University Press, 2016).

[39] UN General Assembly, "Vienna Declaration and Programme of Action," (New York: The United Nations, 1993). Of course, the universality of rights was and remains in profound question; the Declaration did little to quiet the roiling "Asian values" debate at the time, and it's arguable that human rights became more imperialistic in the era of humanitarian intervention than they had been during the Cold War (see, e.g., Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (New York: Routledge-Cavendish, 2007). My point is about the role Vienna played in constructing the cosmopolitan ideology of human rights at the core of the HRP.

tradition. Universality and morality work hand in glove to construct a cosmopolitan international community whose authority supersedes politics. As Willy Moka-Mubelo describes this community, it is "based on the conviction that all human beings are members of a community of fate and they share common human values that transcend the limits of nation-states. These values cannot be limited by any political power."[40]

Ideologically, cosmopolitan rights are *liberal*: they are the rights of individuals conceived as autonomous rational agents. Civil, political, and security rights are core rights, negative "freedoms from" rather than "freedoms to." Social and economic rights are merely aspirational—with the inexplicable exception of property rights, which are expansive and sacrosanct. As aspirational rights, they are left for states to address through their own domestic political processes, so long as those processes don't interfere with the workings of the global economy. Cosmopolitan human rights have a *juridical* social form. They are articulated in treaties, enshrined in international and domestic law, monitored and enforced through quasi-judicial international mechanisms, and so on. Finally, cosmopolitan rights are *international* in scope; they are matters for states to address, although failure to respect civil and political rights in particular becomes a matter of "international concern" sometimes warranting militarized intervention.[41]

Human rights configured in this way are *cosmopolitan* in two tightly related senses. First, they closely approximate the international ideal articulated by Kant three centuries ago: a liberal framework for peaceful and prosperous interactions among sovereign states.[42] Second, they are cosmopolitan in that a reformulated version of that ideal animates liberal thinking about global governance (the democratic peace, liberal institutionalism, economic interdependence); cosmopolitan rights are rights configured to support and advance this governance project.[43] To elaborate: institutions of neoliberal global governance claim merely to protect and promote human rights. Understanding human rights as universal moral rights that transcend politics renders the new disciplinary structures of indirect rule rational and apolitical, requirements of a new era of material global interdependence—and its associated ethos. In this way, self-determination is reconciled with interventionism, and democracy with conditionality, by making respect for human rights and other practices of good governance the basis on which the international community grants the license of sovereignty.[44] Rights violations can trigger militarized intervention, while rights promotion justifies conditionality in aid and trade deals, political reform, development programs, and the like.

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[40] Willy Moka-Mubelo, "A Cosmopolitan Human Rights Regime," in *Reconciling Law and Morality in Human Rights Discourse* (Springer, 2017), 169; cf. Robert Fine, "Cosmopolitanism and Human Rights: Radicalism in a Global Age," *Metaphilosophy* 40, no. 1 (2009): 8.

[41] E.g., Beitz, *The Idea of Human Rights*; Joseph Raz, "Human Rights in the Emerging World Order," *Transnational Legal Theory* 1, no. 1 (2010); Andrea Sangiovanni, *Humanity without Dignity: Moral Equality, Respect, and Human Rights* (Cambridge, MA: Harvard University Press, 2017).

[42] Kant, *Kant's Political Writings*.

[43] So much so, I would argue, that cosmopolitanism and liberal internationalism have become nearly synonymous.

[44] This is a view shared by those who endorse and who criticize this conditionality: compare Gowan, "Neoliberal Cosmopolitanism," 80; Fernando R. Tesón, "The Liberal Case for Humanitarian Intervention," in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003); Rawls, *The Law of Peoples*.

The normalization of cosmopolitan rights

That cosmopolitan human rights are so deeply embedded in the ideology and practices of liberal internationalism from the 1990s onwards goes a long way to explain the reflexive defense of the liberal world order by human rights advocates in the face of mounting challenges to its authority and legitimacy. We can, however, go even further: over the past 30 years, cosmopolitan rights have been conflated with human rights, so that for many observers—proponents and critics alike—cosmopolitan rights are identical with, they define, human rights.

Jack Snyder recently observed that most human rights practice developed in the post-Cold War context, "where it was assumed that cosmopolitan liberalism had become the only game in town." Much the same thing can be said about human rights scholarship: academic interest in the topic only really took off in the mid to late 1990s, by which time the HRP was in full swing. Neo-Kantianism was in vogue, as we have seen, and neoliberalism was politically ascendent and virtually unchallenged in those early, euphoric days of the End of History.[45] So, when scholars turned our attention to human rights, the HRP was the obvious, and in many ways appropriate, object of study—especially in those empirically-oriented disciplines (law, political science, anthropology) that were first to engage the subject.

Theorists and philosophers likewise embraced the cosmopolitan conception of human rights as something like orthodoxy and did so, in a sense, without realizing it. What I mean is that in the particular historical and ideological moment when theorizing human rights suddenly became urgent, it is unsurprising—and again, perhaps, appropriate—that scholars would seek to theorize the dominant conception of rights at the center of contemporary political debate. In that moment, when the bandwagon effect for human rights was unusually powerful and the idea of cosmopolitan rights was embraced by politicians and public intellectuals of all ideological stripes, it was easy to treat the dominant conception of human rights as if it were *the idea* of human rights. All of this is rather unsurprising and just another way of naming neo-Kantian cosmopolitanism as the dominant idea animating the new hegemonic political formation of the era.[46]

It is therefore also unsurprising that leading historical and ethical treatments of human rights (whether penned by philosophers, theologians, political theorists, or whomever) both reflected and reproduced this notion. Historical accounts naturalized the contemporary idea and practice of human rights by recreating the past as its prologue, positioning the HRP as the culmination of a centuries- or even millennia-long struggle to

[45] The phrase belongs to Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992); the sarcasm is mine.

[46] I don't mean to suggest that the dominance was *complete*; hegemony is never total. Human rights have in fact been the object of intense, ongoing contestation within the United Nations itself (see Abigail B. Bakan and Tasmeen Abu-Laban, eds., *Human Rights and the United Nations: Paradox and Promise* (New York: Routledge, 2025)), in international law more generally (see Balakrishnan Rajagopal, *International Law from Below : Development, Social Movements and Third World Resistance* (Cambridge, U.K.: Cambridge University Press, 2003)), and by grassroots social movements around the world (see Upendra Baxi, *The Future of Human Rights*, 3 ed. (New Delhi: Oxford University Press, 2008); Jackie Smith et al., eds., *Social Movements and World-System Transformation* (New York: Routledge, 2017)). Part of my point is that much of this contestation is overlooked, ignored, or explained away by mainstream scholarship.

realize a prophetic vision of human freedom.[47] (Of course, the revisionists, Moyn in particular, have challenged these histories, but have done so in a way that cuts off human rights from any history other than that of the HRP, which has the same effect of reproducing its centrality.[48]) Ethical treatments normalize cosmopolitan rights in several ways: by conceiving of them as moral principles in need of ontological grounding and epistemological elucidation, which tends to hypostatize them; by adopting fidelity to existing human rights norms, culture, and practices as a key constraint on their moral theorizing, which makes them conservative (in a *status quo* sense); and by appealing to tradition for authorization of present practices,[49] which distorts past ideas in and ignores or erases alternative theories and practices of rights.[50]

This is not to say that scholars have been uniformly supportive or uncritical of cosmopolitan rights—just the opposite. Alongside the defenses and justifications there has been deep skepticism and scathing critique. My point is that even the doubters and critics generally take cosmopolitan rights as the target of their concern and criticism. Again, this is hardly surprising: many of them are critical of liberal internationalism, and much of their work is a direct rebuttal of the celebratory scholarship that has dominated the academy and the wider political conversation. The point, however, is that proponents and critics alike conflate cosmopolitan rights with human rights. As a result of that conflation, mainstream human rights scholarship disguises the particularity (the socially constructed, historically contingent character) of cosmopolitan rights as natural and universal; it distracts from the relations of power that uphold the HRP; and, it erases from view the subversive and disruptive politics that people make with human rights within, outside, and against the HRP.[51]

What's remarkable, though it's rarely remarked upon, is the extent to which conversations about human rights over the past three decades have been conversations about the HRP and its distinctive conception of cosmopolitan human rights—and not, therefore, about much else. Together, the geopolitical dominance of cosmopolitan rights and the related intellectual fixation on them have engendered a belief in the singularity of human rights. The naturalization and normalization of a conception of human rights—which is anyway said to be the product of objective material processes of globalization—foster the idea that human rights is (that is, must be) an analytically coherent concept and a politically coherent practice. This belief is difficult to square with what we actually

[47] See, e.g., Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley, CA: University of California Press, 2004); Paul Gordon Lauren, *The Evolution of International Human Rights:Visions Seen*, 3 ed. (Philadelphia: University of Pennsylvania Press, 2011).

[48] Moyn, *The Last Utopia*; *Human Rights and the Uses of History* (New York: Verso Books, 2014).

[49] Lena Halldenius, "On the Use and Abuse of History in Philosophy of Human Rights," in *Discursive Framings of Human Rights: Negotiating Agency and Victimhood*, ed. Karen-Margrethe Simonsen and Jonas Ross Kjærgård (Abingdon, UK: Birbeck Law Press (Taylor and Francis), 2017).

[50] Sumi Madhok, *Vernacular Rights Cultures: The Politics of Origins, Human Rights, and Gendered Struggles for Justice* (Cambridge: Cambridge University Press, 2021).

[51] Bhambra and Shilliam have written about silences created by the dominant human rights discourse. I emphasize erasure, rather than silences, because—as they and their contributors show—alternative and subaltern human rights discourses do exist. Erasure thus draws attention to the active repression of these discourses while insisting on their continuance. See Gurminder K. Bhambra and Robbie Shilliam, "Introduction: 'Silence' and Human Rights," in *Silencing Human Rights: Critical Engagements with a Contested Project*, ed. Gurminder K. Bhambra and Robbie Shilliam (Basingstoke, UK: Palgrave Macmillan, 2009); Robbie Shilliam and Gurminder K. Bhambra, "Conclusion: Human Rights in Contemporary Global Perspective" (ibid).

observe about human rights in the world: that they comprise a complex multiplicity of ideas and practices that makes it impossible to say what or how they *really are*.

If the singularity hypothesis is correct—as I believe it is—it provides a further explanation for why so many human rights advocates are anxious about threats and challenges to the liberal world order: if one has conflated cosmopolitan rights with human rights, or simply never thought much about the distinction, those threats seem like threats to human rights themselves. Put differently, the choice seems to be between defending cosmopolitan rights or abandoning human rights altogether.

The limits of cosmopolitan rights

One of the many ways in which the singularity thesis distorts our thinking about human rights is by creating false dichotomies like this one—which produces (among other problems) the defensive reflex I have been scrutinizing. This reflex functions as a kind of deflection, both diminishing problems with existing human rights theory and practice and absolving theorists from worrying too much about them. I want to focus here on a few important problems and limitations of cosmopolitan rights that the reflex to defend them obscures. These limitations relate to the role that these rights play in maintaining the increasingly wobbly system of neoliberal global governance and can help us understand why many people around the world seem to reject cosmopolitan human rights, or at least, remain indifferent to them.

The first limitation concerns the political inefficacy of cosmopolitan human rights in combating or even mitigating the rampant social and economic inequalities generated by neoliberal economic policies.[52] We have seen that the neo-Kantian consensus forged in the 1990s naturalizes globalization and its effects, making them part of the rationale for human rights and for neoliberal global governance more generally.[53] A tolerance for inequality is thus conceptually hard-wired into good governance discourse alongside cosmopolitan human rights, in the form of protections of neoliberal economic "rights" and "freedoms" such as low taxes, capital mobility, privatization, "deregulation," and the "right to work."[54] These rights-like notions, which are interwoven throughout the fabric of neoliberal global governance and intertwined with cosmopolitan human rights, make any serious critique of neoliberal capitalism impossible; their global enforcement—again, largely through coercive conditionality alongside a strong dose of "market discipline"—makes a transnational egalitarian politics unthinkable. Progressive socio-economic projects are relegated to the domestic politics of "sovereign" states, where they must contend with capital flight, tight fiscal and monetary policy, races to the bottom in tax and regulatory regimes, and other constraints imposed by a fully neoliberalized global economy.

Thus in the richer states, social and economic provisions are continuously pared back in the name of low taxes and austerity, policies allegedly dictated by irresistible market forces. In the poorer states, social and economic security are promises of "economic development" predicated on the adoption of so-called structural adjustment programs that impose, again, low taxes, limited regulation, and public austerity as supposedly temporary

[52] See Moyn, *Not Enough*. and the numerous responses it provoked.
[53] This discussion draws heavily on ideas previously discussed in Michael Goodhart, "The Future of Human Rights Is Local" in *Human Rights at the Intersections: Transformation through Local, Global, and Cosmopolitan Challenges*, ed. Anthony Tirado Chase, et al. (London: Bloomsbury/I.B. Tauris, 2023).
[54] On how such policies are defended in human rights terms, see Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso Books, 2019).

measures to stimulate investment and spur growth. The result everywhere is the massive enrichment of a tiny elite and stagnation or deterioration in the material circumstances of most people.[55] At the same time, growing and legitimate popular anger and frustration with these neoliberal economic policies—which again, have been promoted by all mainstream political parties since at least the 1990s—is readily channeled into racism, misogyny, queerphobia, and hostility to migrants, at first by fringe parties and figures, but increasingly by mainstream politicians cognizant of the need to respond to this widespread resentment but reluctant or unable to question neoliberal orthodoxy. If it was once true that antisemitism was the socialism of fools, today's ersatz socialism is more pluralistic in its hatreds.

I am not claiming that cosmopolitan human rights somehow *cause* ethno-nationalist authoritarianism; I am instead arguing that cosmopolitan human rights—which again, are implicated in the wider system of neoliberal global governance that creates these circumstances and constraints—are ineffective in theorizing or challenging contemporary social and economic injustices, which the new cosmopolitanism understands as resulting from the same objective material processes that constitute globalization and engender the cosmopolitan ethos in the first place. The liberal ideological character of cosmopolitan rights explains why: they are conceived in a way that accepts neoliberal globalization itself as natural and inevitable. So, as they—unsurprisingly—prove unhelpful in addressing people's real concerns, people look elsewhere for answers. This is in no way to justify or excuse the ugly and often violent politics of ethno-nationalism; it is rather an attempt to think about why cosmopolitan human rights are not a more effective or more appealing alternative in the eyes of many.

The imposition of good governance and structural adjustment program points to a second limitation of cosmopolitan rights: neocolonialism. For many people around the world, coercive conditionality has been an insidious continuation of past practices of European and American domination, and like those past practices, it is closely associated with a universal, moralized liberal conception of human rights. It is a mistake—one encouraged by the singularity thesis—to dismiss or downplay this concern or attribute it to malicious actors, the proverbial "bad apples." Part of the reason I have tried to contextualize cosmopolitan human rights as an integral part of neoliberal global governance is to show that their function in the liberal world order is precisely to license coercive conditionality, especially for poorer, weaker states (which are, in fact, mostly former colonies). The problem is not the apples, it's the barrel.

Reaction against neocolonialism is not limited to the economic domain. A major source of concern over backlash among many scholars and advocates is the trend of states opting out of the ICC and similar international human rights institutions or refusing to comply with their determinations.[56] I read the politics of these examples differently, as

[55] E.g., Thomas Piketty, *Capital in the 21st Century*, trans. Arthur Goldhammer (Cambridge, MA: Harvard University Press, 2013).

[56] E.g., Genevieve Bates, "Backlash and Beyond: Three Perspectives on the Politics of International Justice," (Oxford University Press UK, 2024); Laurence R Helfer and Anne E Showalter, "Opposing International Justice: Kenya's Integrated Backlash Strategy against the Icc," *International Criminal Law Review* 17, no. 1 (2017); Mikael Rask Madsen, "Two-Level Politics and the Backlash against International Courts: Evidence from the Politicisation of the European Court of Human Rights," *The British Journal of Politics and International Relations* 22, no. 4 (2020); Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts," *International Journal of Law in Context* 14, no. 2 (2018).{Oloka-Onyango, 2020 #5711)

instances of corrupt rulers and ambitious politicians taking action to avoid accountability, project strength, and maintain or increase their power—that is, as normal politics. This reading does not excuse unethical behavior, but it does remind us that withdrawals and repudiations can be self-serving political ploys *and* that the track record of these international mechanisms—which have almost exclusively targeted poor, mostly African, former colonies while ignoring similar infractions elsewhere—makes it easy for those rulers to frame their actions as defiance of neocolonialism.

A likely objection to my argument is that while the application of cosmopolitan human rights might be flawed, that fact does not impugn the rights themselves. No principle is immune from misuse, and it would be a terrible mistake to throw out or give up on human rights because of such abuses; what's needed is to reform and perfect them. Note that this and similar objections assume, and their persuasiveness depends upon, the singularity of human rights: our only choice is between rights are they are conceptualized and practiced through the HRP or impunity, relativism, and chaos. This incorrect assumption, which is a byproduct of the hegemonic reproduction of cosmopolitan human rights through the HRP and of the mainstream scholarship and advocacy within and around it, conveniently hides the way that the specific configuration of cosmopolitan rights—particularly their universality and their morality—explains why they are so easily instrumentalized for domination and imperialism. That is in effect what they were designed for.

This claim too will seem surprising and worrisome to many readers—even as many others find it straightforward. Universality and morality are widely regarded as definitional features of human rights, a core aspect of their political appeal and a crucial bulwark against relativism and discrimination. At the same time, claims about universal Reason, Nature, humanity, autonomy, or whatever are just as widely recognized as key instruments of domination, oppression, exploitation, and dehumanization. The belief in the singularity of human rights forces us to choose between these two interpretations, to accept or reject human rights altogether—a false choice that Kurasawa has described as "human rights blackmail."[57] If cosmopolitan human rights are flawed, we should look to other conceptions of human rights as possible alternatives.

Against universality

The exploration of such alternatives must await another forum. Here, I want to point out that while generality is a conceptual feature of human rights, universality is not.[58] Generality means that in principle, human rights refer, apply, and are available to everyone. Universality is a particular way of interpreting generality as *morally significant sameness*. Paradoxically, universality makes human rights exclusive by making them conditional on people being the same in the specified ways—on some substantive idea or trait of humanity like autonomy or vulnerability. In practice, the operative metric of universality has most often been "like or the same *as us*." This could not be clearer historically: when encountering people unfamiliar to them, Europeans almost invariably concluded that those people fell short of the "universal" standard: they were not civilized

[57] Fuyuki Kurasawa. *The Work of Global Justice: Human Rights as Practices*. New York: Cambridge University Press, 2007.

[58] I can't provide a conceptual definition and defense of human rights here, though I do so in forthcoming work.

or enlightened (not Christian or white), and therefore not in (full) possession of human rights. When exclusive sameness is moralized, it is activated politically, creating an enforceable pretext for invasion, conquest, occupation, and extraction. In these ways (and others), universality is an obstacle to emancipation.[59]

Unfortunately, many proponents of human rights confuse or conflate universality with universalism. A certain kind of critical universalism – what Elena Namli has called *open universalism* – is a powerful emancipatory idea.[60] As she explains, this concept is purely normative: instead of a substantive account of what it means to be human (an account of *sameness* or *universality*), open universalism is a commitment to the idea that no formulation of human rights can be sufficiently universal. This normative commitment precludes any attempt to claim universality for a specific formulation or interpretation of rights; it provides a critical tool for highlighting injustice and demanding redress.

For Namli, open universalism is best understood as an implication of the principle of equal respect for human dignity, which she understands as a "constitutional" principle in the Habermasian sense that "it allows for an ongoing and never finalized constitutive political practice." Human rights are an outgrowth of an ongoing process of democratic will formation and formalized processes of legalization, both a precondition and a product of those processes. When the principle of equal respect for human dignity is taken up critically, it focuses attention on those who experience modern liberal democratic societies as unjust; this focus makes injustice clearly visible and informs the ongoing critical revision of human rights through democratic politics. Since much of the injustice that minoritized populations experience is linked to their material conditions of existence, this same critical principle demands the expansion of democratic authority over the economy.

I am very sympathetic with Namli's twin aims of subordinating the economy to democratic control and of drawing attention to those injustices that are normalized by dominant accounts of justice. I also share the standpoint-theoretical normative and epistemological commitments that animate her exhortation to foreground the experiences of dominated, oppressed, exploited, and dehumanized people.[61] Nonetheless, I worry that tying these aims to a project of rational reconstruction like Habermas's is a mistake. *Rational reconstruction* is an inherently conservative project.[62] It seeks to provide new grounds for existing ideas and understandings, not to open them to serious critical interrogation. This reminds us that the rationality at work in Habermas's reconstructive project is the liberal rationality of neo-Kantian cosmopolitanism. Habermas's view – echoed in the arguments of his acolytes – is essentially that a Kantian ideal of human dignity and a set of human rights that concretizes and protects that ideal can be shown to be rationally correct and necessary for liberal democracy.[63] While this reconstruction is

[59] Antony Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities," *Third World Quarterly* 27, no. 5 (2006).; cf. Nelson Maldonado-Torres, "On the Coloniality of Human Rights," *Revista Crítica de Ciências Sociais*, no. 114 (2017); Walter D Mignolo, "Who Speaks for the "Human" in Human Rights?," *Cadernos de Estudos Culturais* 3, no. 5 (2011); Anthony Pagden, "Human Rights, Natural Rights, and Europe's Imperial Legacy," *Political Theory* 31, no. 2 (2003).

[60] See Namli (this volume) and Elena Namli, *Human Rights as Ethics, Politics, and Law*, Uppsala Studies in Social Ethics (Uppsala, Sweden: Uppsala University 2014).

[61] See Goodhart, *Injustice*, ch. 5.

[62] Namli recognizes this in her critique of Habermas for abandoning the possibility of social revolution and accepting capitalism as a natural and pre-social phenomenon; see Elena Namli, *Legal Positivism, Politics, and Critical Ethics*. New York: Bloomsbury, forthcoming, chs. 5&6).

[63] See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: MIT Press, 1996); Seyla Benhabib, "Another

supposedly ongoing and open-ended, it must perforce remain within the confines of the liberal democratic project, since equal dignity and cosmopolitan rights are the logical and communicative preconditions for democratic politics and thus the principles that democratic citizens would (must) accept as constitutional prerequisites of their own freedom. Thus to rationally reconstruct cosmopolitan human rights is simultaneously to endorse them and to frame other interpretations of rights as *irrational* and opposed to the modern liberal democratic project.

It seems to me that it is precisely through the rationality of neo-Kantian liberalism operative in this reconstructive project that universality is weaponized against minoritized populations like those Namli wants to prioritize. The claim to universality contradicts open universalism, makes it impossible, illogical. In addition, I am skeptical whether this rationality or the reconstructed cosmopolitan rights it produces can mount an effective critique of neoliberal political economy, for reasons already discussed. Further, reconstructive projects are always in part idealizations. Habermas and his followers don't claim that society actually works as they describe it; what they depict is instead an idealized version of how society ought to work if it were to be consistent with its purported foundational principles. Many people, however, evidently do not share the belief in equal human dignity that supposedly grounds human rights on this view; assuming that they do share it seems debilitating for a critical theory of injustice. Consider Namli's example of Muslim migrant populations in Europe against whom human rights are frequently deployed as an instrument of domination and exclusion. She is correct in thinking that focusing on their experience can provide critical theorists with insight into injustice, but I wonder how that insight is supposed to matter *politically* when the mechanism through which it is meant to operate, democratic will formation through idealized deliberation, is a fiction—which is of course why the injustice occurs in the first place.

The political question seems paramount to me. If one believes, as I do, that cosmopolitan rights and liberal democracy are part of the problem—that frustration with their failures is at least part of what drives growing anger, frustration, and resentment against elite politics and makes people susceptible to ethno-nationalist appeals—then finding better arguments or justifications for them is not a promising way forward. I remain unpersuaded that we need to—or can—get "underneath" our normative commitments.[64] We need a different conception of human rights to challenge capitalist economic power and to fight for genuine inclusion; such a conception will emerge, if it emerges, not through rational reconstruction but through political organization and social mobilization. As Richard Rorty "crudely" put it, "let your view of human dignity fall out from your politics; don't milk your politics out of such a view."[65]

Cosmopolitanism," in *Another Cosmopolitanism*, ed. Robert Post (Oxford: Oxford University Press, 2006); Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice*, trans. Jeffrey Flynn (New York: Columbia University Press, 2012)..

[64] Here I follow Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989); "The Priority of Democracy to Philosophy," in *The Virginia Statute for Religious Freedom*, ed. Merrill D. Peterson and Robert C. Vaughn (Cambridge: Cambridge University Press, 1988).

[65] The full quotation is "I do not see much point in saying that [all human beings] are now … all equal in dignity. This doubt is a result of my more general suspicion of arguments of the form "We ought to seek to establish a utopia of the following sort, because such-and-such is presently the truth about us." My attitude is: let's try to figure out what kind of utopia we want, and let the truths about us be whatever we have to believe in order to work together for its creation. To put it crudely, let your view of human dignity fall out from your politics; don't milk your politics out of such a view." Richard

Besides, efforts to ground or justify human rights, like efforts to identify their origins, are never merely philosophical endeavors; they are part of a larger struggle over who gets to define human rights today. The inadequacy of the cosmopolitan ideal can be traced back to the origin stories reproduced in those naturalizing histories to which I referred earlier. Sumi Madhok argues that these familiar stories are the symbolic continuation of a mythologized Western tradition into the present. They "invariably begin with an orientalist and racialist assumption that the conceptual, philosophical, and empirical experiences of rights across the globe owe their formulation to" the Glorious, the American, and the French revolutions.[66] Moreover, as Baxi argues, the "universal" rights declared by European revolutionaries were predicated on the rightlessness of women, servants, enslaved people, colonial subjects, and others. While universal rights did offer grounds on which this rightlessness could be contested,[67] the biases and hierarchies that produce rightlessness nonetheless taint the conceptual structure of rights in the Western tradition and their universality—as feminist critics noted at the time and have been arguing ever since.[68] This taint complicates and belies simplistic stories about the gradual universalization and perfectibility of Western human rights and puts reconstruction into question. What, exactly, are we doing when we seek to reconstruct cosmopolitan human rights? The entire exercise, as Baxi maintains, betrays a kind of "arrogance" that treats the "human rights imagination" as something inherently Western that others can only mimic.[69]

Insistence on the singularity of cosmopolitan human rights, which procedures of rational reconstruction presume, rules out the possibility of (recognizing) Third World contributions to authorship of the content or meaning of human rights, wherever they originate.[70] Such procedures deny epistemic authority to people who use human rights to mobilize against the HRP and cosmopolitan rights. Scholars do study what are often called—from the dominant perspective—alternative or subaltern practices of human rights, but these practices are often treated as local variants of the hegemonic practice or else as alternatives to or wholesale rejections of human rights. (The universality of cosmopolitan human rights helps to explain contemporary cosmopolitans' skepticism of and hostility toward local human rights activism and resistance, which necessarily appear as particularistic, relativistic, and atavistic in comparison with the universal morality of cosmopolitan rights.[71] The very idea of local(ized) human rights politics jeopardizes the

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Rorty, "Response to Appiah." In *Globalizing Rights: The Oxford Amnesty Lectures 1999*, ed. Matthew J. Gibney. Oxford: Oxford University Press, 2003, 233.

[66] Madhok, *Vernacular Rights Cultures*, 36.

[67] Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 1999); Sankar Muthu, *Enlightenment against Empire* (Princeton: Princeton University Press, 2003).

[68] Olympe de Gouges, "The Rights of Woman," (https://olympedegouges.eu/1791); Mary Wollstonecraft, *A Vindication of the Rights of of Men and a Vindication of the Rights of Woman*, ed. Sylvana Tomaselli (Cambridge: Cambridge University Press, 1995).; cf. V. Spike Peterson and Laura Parisi, "Are Women Human? It's Not an Academic Question," in *Human Rights Fifty Years On: A Reappraisal*, ed. Tony Evans (Manchester, UK: Mancehster University Press, 1998)., among many.

[69] Baxi, *The Future of Human Rights*, 214; cf. Michael Goodhart, "Liberal Pragmatism and Liberal Fantasy in the Era of Backlash Politics." *Political Science Quarterly* 138, no. 4 (2023): 549-62.

[70] The reason for this slightly awkward formulation is that the Third World is a conceptual rather than geographical space; it exists everywhere, including within the "liberal democratic" states.

[71] See Goodhart, "The Future of Human Rights Is Local"; "Forget Cosmopolitanism! The Future of Human Rights Is Global," *OpenGlobalRights* (2020), https://www.openglobalrights.org/forget-cosmopolitanism-the-future-of-human-rights-is-local/.

legitimacy of the coercive conditionality on which neoliberal global governance depends.). Both interpretations deny the originary power of *located rights practices* as meaning-making strategies, placing the local (Southern or Third World) in a position of permanent epistemic and political subordination to the global (Western).[72]

So it is not enough, as Baxi recommends, to localize and particularize moments like 1789 as a way to open up space for consideration of other narratives—though it would be a welcome step. The proliferation of local stories (alone) won't solve the problem. Exclusion and erasure cannot be remedied simply by inclusion. Likewise, reconstruction can't rehabilitate the cosmopolitan conception of rights. As Gurminder Bhambra and Robbie Shilliam argue, it is necessary actually to dismantle and refashion the originary paradigms that produced the exclusions and erasures.[73] An emancipatory human rights program is one of deconstruction rather than reconstruction.

Conclusion and beginnings

It is important to resist reflexive defenses of cosmopolitan rights and the liberal international order because this deconstructive project is, for reasons that I hope I have made clear, essential in countering rising ethno-nationalist and fascistic politics.[74] If, as I have argued, this order actively facilitates neocolonialism, austerity, and the upward redistribution of wealth, popular frustration with it—taking different forms in different parts of the world and among different populations—is both unsurprising and appropriate. Retrenchment, doubling-down on neoliberal cosmopolitanism, will allow existing injustices to fester and spread and is likely to further alienate people whose rejection of the system that produces those injustice is treated by cosmopolitan elites as ignorant, irrational, or malicious.

This conclusion suggests two beginnings. First, scholars need to rethink how we conceptualize and study backlash. To continue to treat it as an atavistic or reactionary response to neoliberal cosmopolitanism will commit us to continually misapprehending people's anger, fear, and frustration with the status quo. Letting go of a belief the singularity of human rights can be a huge help in this regard: once the choice is no longer between the status quo and the abyss, it becomes easier to identify the limits of dominant conceptions of human rights and of the Human Rights Project and easier to begin imagining alternatives.

Second, and following directly from the previous point, we need a new approach to the study of human rights. Despite the grave problems with cosmopolitan rights and the wider regime of global governance in which they are enmeshed, human rights remain a popular form of discourse among minoritized populations and social justice advocates around the world—key, as Baxi maintains, to subaltern struggles of all kinds. Instead of reading the popularity of human rights as an endorsement of the dominant conception of them, scholars might seek to learn from how people engaged in struggles against injustice use human rights in making emancipatory politics. This kind of approach would move us

[72] Madhok, *Vernacular Rights Cultures*, 13. ;34

[73] Bhambra and Shilliam, "Introduction: 'Silence' and Human Rights," 2.; cf. Fine, "Cosmopolitanism and Human Rights: Radicalism in a Global Age," 13.

[74] I use the term fascistic because, following Alberto Toscano, *Late Fascism: Race, Capitalism and the Politics of Crisis* (London: Verso Books, 2023). and Jason Stanley, *How Fascism Works: The Politics of Us and Them* (New York: Random House Trade Paperbacks, 2020)., I think it's better to understand fascism in terms of processes and strategies rather than as an ideology.

away from the modes of reflection and reasoning with which ethicists—theorists, philosophers, theologians—are most comfortable and toward more engagement with located rights practices as sources of ideas and inspiration. This requires not the defense or reconstruction of liberal democracy and cosmopolitan rights but rather the embrace of a genuinely pluralistic politics that cannot be defined or contained by exhausted Enlightenment universals.

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What is the point of human rights? Against human rights minimalism

Lena Halldenius

This article offers a moral and logical critique of human rights minimalism, by which is meant an account that restricts human rights to a level of sufficiency above or beyond which inequalities have no moral relevance, and which makes duties prior to rights, such that rights are dependent on assumed or actual institutional capacities. The argument is that human rights minimalism fails by its own standards – to represent moral equality – on two counts. First, it is predicated on a principle of moral equality of human beings, yet can produce no arguments against even the starkest inequalities of living conditions. Second, by making rights a dependent variable to the reasonableness of duties, what rights people have will in effect be the product of contingent institutional capacities. For a truly egalitarian commitment to human rights, minimalism is the wrong philosophy. A point made is that inequality is politically constructed, and institutional capacities will partly be a function of such constructed inequalities. Any reasonable account of human rights needs to have resources within itself to criticise those constructed inequalities that negatively affect institutional capacities to protect and promote rights. With inspiration from Anderson's analysis of the point of equality, it is argued here that human rights have a dual rationale: a negative one to end oppression, and a positive one to establish a political culture of democratic equality.

Introduction

In this paper I will provide an analytical framework for thinking about human rights in a politically challenging and egalitarian direction. I regard human rights as a contested yet potentially fruitful political value concept and as an analytical tool for conceptualising and giving structure to ideas of freedom and political justice. I am worried by certain stubborn features of human rights philosophy: a focus on satisfying basic interests or the most urgent causes of concern rather than promoting distributive and relational justice. If the role of human rights in political philosophy is to level down our ambitions for justice in that way, then what is the point of them?

Samuel Moyn has shown, from a historical perspective, how the human rights movement and human rights philosophy came to disregard matters of economic

inequality.[1] From the 1970s onwards, human rights became a "subsistence ethic for an unequal world."[2] This is the minimalism that I will try and disentangle here. Moyn sees no way out of the subsistence trap for human rights philosophy, but I do.

The question that I will be mainly concerned with here is this: If you are an egalitarian, what does that imply for what theory or approach to human rights you have reason to develop and endorse? A possible reaction to this question is that the answer to it is trivial: the very notion of human rights is predicated on moral egalitarianism, so anyone who endorses human rights is an egalitarian; it is part of the concept of human rights that they hold equally for all. This reaction refers implicitly to what can be called "the human rights formula", which says that the impetus to thinking in terms of human rights at all lies in a prior moral commitment to regarding all human beings as equal in some operational sense, like equally entitled to concern.[3]

The puzzle that I will articulate and then try and undo is that many of the most influential human rights philosophies proceed from a principle of moral equality, to a theory of what human rights are and what human rights require that justify even stark political and economic inequalities, thus undoing in practice the moral equality that was meant to provide the urgency for the whole project. This is what I refer to as human rights minimalism and my purpose here is to show why we should reject it for philosophical reasons.

Human rights minimalism

In this first section, I will work my way towards the puzzle that I have in mind: the equality puzzle. Most philosophical as well as practical accounts of human rights insist that it makes good sense to keep the meaning and scope of human rights restrictive, for two interconnected reasons. The first reason is a kind of practical intuition that the language of human rights should be reserved for protections of whatever is regarded as particularly important. In order to retain urgency and the commanding nature of human rights claims, we should guard against human rights inflation.[4] What counts as particularly important and protection worthy – in other words, what human rights should protect or promote – is of course an open question and provides a lot of the stuff of debate in human rights philosophy.

The second and related reason is logical. The classic argument is that rights are distinguished by having the form of claims or entitlements, and claims necessarily correlate with duties: they need an addressee, some identifiable agent on whom the obligation falls.[5] And since no agent can have a duty to do what it is impossible for them to do or – the moral version – what it is unreasonable to expect them to do, the outer limits of what rights there can be and what those rights require, will be set by whatever it is

[1] Samuel Moyn, *Not Enough. Human Rights in an Unequal World*. Cambridge, Mass.: The Belknap Press of Harvard University Press, 2018.
[2] Ibid. p.147.
[3] Ronald Dworkin, *Sovereign Virtue. The Theory and Practice of Equality*. Cambridge, Mass.: Harvard University Press, 2000, p.6.
[4] Dominique Clément, "Human rights or social justice? The problem of rights inflation." *The International Journal of Human Rights*, *22*(2), 2017, pp. 155–169. https://doi.org/10.1080/13642987.2017.1349245
[5] Wesley Newcomb Hohfeld. Fundamental Legal Conceptions as Applied in Judicial Reasoning. *The Yale Law Journal*, 26:8, 1917, pp. 710-770.

possible or reasonable to expect the corresponding duty holder to deliver ("ought implies can").[6]

These two things together prompt what I will refer to as human rights minimalism (I will expand on this as we go along). One seminal example of human rights minimalism is Henry Shue's definition of human rights as "protections of vital human interests against standard threats", where vital human interests translate as "a minimally decent human life" and standard threats as threats that are "predictable and remediable."[7] Shue stresses that rights must not be extended beyond the capacities of duty bearing individuals and institutions.[8] We find a similar account in Charles Beitz, who sees human rights as protections of "urgent individual interests" against "certain predictable dangers."[9]

It is not difficult to appreciate the point of this kind of reasoning. If human rights are restricted in this way, it is nearly impossible to forge a reasonable argument against them. They will – at least in theory – be sharp tools against the worst kinds of deprivations, and what they protect will undoubtedly be universal human needs. Whatever contested and conflicting things people want, we all need food, physical security, and basic human contact or we will wither and die. Hence the Shue/Beitz position: human rights as a red line that may not be crossed under any (normal) circumstance.

The structure of human rights minimalism is compatible with a more inclusive account of what a decent human life requires and consequently what it is that rights protect, but the more expansive the range, the more contestable the account will be. A well-known example is Martha Nussbaum's capability approach to human rights. Nussbaum's list of ten central human capabilities (including bodily health, emotions, practical reason, and affiliation)[10] is designed to capture the ethical components of a flourishing human life. A life that is good in a distinctly human way – not only minimally acceptable – is constituted of these capabilities instantiated as real freedoms, by which is meant that they are actually – not only nominally – available for each person to choose and pursue. Nussbaum's is basically an ethical theory of what a good human life looks like, but she regards it also as an account of human rights.

It needs to be noted that in Nussbaum's version, the capabilities approach does two things: it identifies a set list of components of a good human life, and it makes a distinction between the actual enjoyment or exercise of these good things (functionings) and real opportunities for enjoying or exercising them, should one so wish (capabilities). Whether or not a person exercises freedom of speech or enjoys community with others should be a matter of their own choice and nothing else – the right to it is the right to the capability to use it or not – so Nussbaum's account makes human rights into a pure opportunity concept.[11]

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[6] Chris Fox & Guglielmo Feis, "'Ought Implies Can' and the Law." *Inquiry*, *61*(4), 2917, pp. 370–393. https://doi.org/10.1080/0020174X.2017.1371873

[7] Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 40th Anniversary Edition. Princeton: Princeton University Press, 2020.

[8] Henry Shue, "Interlocking Rights, Layered Protections. Varieties of Justifications for Social Rights", in: *Being Social: The Philosophy of Social Human Rights*. K. Brownlee, D. Jenkins, and A. Neal (eds.). Oxford: Oxford University Press, 2022, pp. 18-30.

[9] Charles R. Beitz, *The Idea of Human Rights*. Oxford: Oxford University Press, 2009, p.109

[10] Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach*. Cambridge, Mass.: The Belknap Press of Harvard University Press, 2011, p.33f.

[11] Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach*. Cambridge, Mass.: The Belknap Press of Harvard University Press, 2011, p.25. See Amartya Sen's critique of Nussbaum's conflation of capabilities and rights in Amartya Sen, "Human Rights and Capabilities". *Journal of Human Development*, *6*(2), 2005, pp. 151–166. https://doi.org/10.1080/14649880500120491

Framing her capabilities approach as an account of human rights, Nussbaum introduces a feature that is familiar from the minimalist theories of human rights that we have just looked at, but which seems odd in the context of an aspirational theory of the morally good life: a threshold level of sufficient capabilities.[12] The right to human capabilities (or maybe rights *as* human capabilities; she describes her account as a "species" of a human rights approach)[13] is, we are given to understand, not an opportunity right to a flourishing life, but an opportunity right to a sufficient capacity to choose a flourishing life. What that might mean is left unspecified and it is not immediately obvious what the condition for it would be. What is a sufficient level of capacity to choose to live a good life? The question just barely makes sense, and the approach cannot produce a criterion from within itself to settle it. The one criterion one could think of is the one offered by the logics of the rights-duties correlation and the ethical restriction that duties need to be reasonable and actionable. Consequently, the only non-arbitrary criterion I can think of for settling the level or range of capabilities that people can claim as their human rights is the capacities of the duty holders – governments and their institutions – to deliver, which means that people's human right – conceived as real opportunities – to choose to live a good life is determined by the contingent condition of whether they live in a poor or rich society. Surely this cannot be good enough, particularly not if the moral imperative from which we are supposed to start is the inherent equality of all human beings.

The traditional minimalist theories, exemplified by Shue and Beitz, are explicit about the fact that they do not aspire to capture anything resembling a good life. They restrict the function of human rights to bare necessities with the intention of making them actionable, politically unobjectionable, and universal in a practical sense. The more complicated minimalism of Nussbaum's capabilities approach introduces a morally arbitrary cut-off point into an allegedly universal theory of the good human life, leaving the question of what it means to have sufficient opportunities to choose to live a good life to the logic of reasonable duties, which are politically contingent.

One thing that these accounts have in common is that they are designed so as to not have applicability to inequalities above or beyond a certain cut-off point and so cannot provide arguments for why such inequalities might be wrong. I say "above or beyond" for a specific reason: the cut-off point can be horizontal or vertical. (I do not mean to load the terms horizontal and vertical with too much significance; they are mainly heuristics to illustrate a point.) By a horizontal cut-off point, I mean a *sufficiency* restriction such that the right to some good (say education or food) is satisfied in full by a sufficient (by some standard) provision of that good.[14] Say that the right to education is spelled out as a right to literacy and numeracy. In that case, the right to education is satisfied *in full* by making sure that everyone can read, write, and do arithmetic. The fact that a few do not get any education beyond that, while some get vocational training and others study poetry or quantum physics at university, would then be neither here nor there for the *human right* to education, conceived as a right to literacy and numeracy. The horizontal cut-off point can be higher or lower depending on the range of interests one takes human rights to protect; it would be higher for Nussbaum than for Shue.

[12] Nussbaum, *Creating Capabilities*, p.45, 76.
[13] Ibid. p.62.
[14] Lena Halldenius, "Human Rights and Republicanism", in *The Oxford Handbook of Republicanism*. Frank Lovett and Mortimer Sellers (eds.). Oxford: Oxford University Press (online edn), 2024, https://doi.org/10.1093/oxfordhb/9780197754115.013.36

By a vertical cut-off point, I mean a *relevance* restriction such that the protection or promotion of some interests do not qualify as human rights at all because they are not seen as vital enough, or are of the wrong kind, or cannot be satisfied on any level without unacceptable costs to others. What qualifies as a human right at all will vary depending on your theoretical commitments. The most well-worn example is the notion that socioeconomic interests do not qualify as human rights, either because they are of the wrong kind (they are seen as aspirational goals for societies, not claims that individuals can make against those societies) or too costly to qualify as duties. The relevance restriction disregards the interdependence of various determinants for even basic rights satisfaction. We know, for example, that the single most important factor for a child's capacity to benefit from education is not the quality of teaching, but their family's socioeconomic position.[15]

Theorists who employ these restrictions might still believe that inequalities above or beyond them are or could be wrong but, if so, they are wrong for other reasons than rights, since their human rights theory does not apply to them.

The equality puzzle

With human rights minimalism in mind, here is the puzzle. It has two components: first, highly influential theories of human rights such as the ones I have discussed are predicated on a commitment to the moral equality of human beings, yet are designed to be inapplicable to even stark inequalities in living conditions and opportunities, thus implicitly justifying such inequalities. In order to appear commanding, politically unobjectionable, or actionable, they exclude inequalities that would count as unjust from the point of view of distributive or relational justice – both morally and logically – from their range of concerns. The presumed moral equality of persons does not even function as a side-constraint for what real-life inequalities that can be acceptable. It is worth bearing in mind that wherever the cut-off point is, only the relatively disadvantaged are affected by it; the privileges of the rich and powerful are not impacted at all.

The second component of the equality puzzle is to do with the rights-duties correlativity. On this logic, what rights people have and what those rights require function as a dependent variable, whereas the duties of whoever is the duty-bearer (normally the state and its institutions) is the independent variable. It is not independent in the sense of being changeable, but rather in the sense that it does not depend on anything other than itself; it sets its own conditions.

Shue maintains that "society must not multiply rights beyond necessity or beyond the capacities of individuals to bear the duties inherent in the institutions protecting the rights."[16] It would be "excessively burdensome" to try and protect "unlimited numbers of interests", as if there is no middle ground between unlimited interest satisfaction and a "minimally decent life". But more to the point here: what we can note with some consternation is that the capacities of the institutions feature merely as observable facts to which the range of claimable rights must defer.[17]

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[15] Karl Alexander, Doris Entwisle & Linda Olson, *The Long Shadow: Family Background, Disadvantaged Urban Youth, and the Transition to Adulthood*. New York: Russell Sage Foundation., 2014

[16] Shue, "Interlocking Rights, Layered Protections." p.20.

[17] For critique of this position, see John Tasioulas, "The Moral Reality of Human Rights", in: *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?*. Thomas Pogge (ed.). Oxford: Oxford University Press, 2007.

This means that as long as the actual or assumed limitations of institutions' capabilities restrain what rights people have in relation to them, there cannot be a claim to more or better institutional capacities. But what if the capacities of the institutions are what they are for reasons that are unfair or suboptimal? Say that the capacities of the institutions to satisfy human needs and interests would be vastly improved if the rich were taxed more. Well, if we have already decided that the concept of rights is constructed in such a way that rights have a cut-off point above or beyond which rights-reasoning has no applicability, that the cut-off point is set in terms of what is "sufficient" for a human life to be acceptable by some standard, and the outer limit of that standard is set in terms of actual or assumed limits to institutional capacities, then the range of claimable rights necessarily defers to institutional *status quo* and cannot function as demands for institutional change towards stronger rights supporting capacities.

Compare the approach of a vaguely Rawlsian account of justice, where the overarching question is something like "how do the institutions of society need to be (re)organised in order for the outcome or their workings to be fair for all?" or "how do the institutions of society need to be (re)organised in order for the worst off to be as well off as possible?" On human rights minimalism, the overarching question instead seems to be "what subsistence level can the worst off reasonably expect to have to settle for, given that the institutions that control their circumstances are (assumed to be) what they are?" For anyone who is concerned with distributive justice for egalitarian reasons, this should be the wrong question to ask.

If we are seriously committed to the moral equality of human beings, and the function of human rights in political philosophy is to promote some morally arbitrary threshold above which inequalities are unobjectionable however big they are, then maybe one should abandon human rights thinking and go for distributive justice or relative egalitarianism directly. But that is not what I will suggest. I will instead go on to suggest that we explore the potential of thinking of equality and human rights in a different and more challenging way.

For a moral commitment to equality of persons to have any bearing on those persons' real-life circumstances, then equality cannot merely be an honestly felt yet practically inert moral starting-point, but a requirement of political justice on the *function and outcome* of institutions and the practices we live by.[18] This requires that we address both components of the equality puzzle: the idea and logic of a cut-off point and rights as a dependent variable. The first thing we need to do in order to get there is to address this question: what is the point of human rights?

The rationale: what is the point of human rights?

What is the overarching aim or point of human rights? What do we want human rights to represent and do in the world? For what purposes should we reason in these terms at all? In this section, I take inspiration from Elisabeth Anderson's analysis of "the point of

[18] There are affinities between my discussion of the equality puzzle – the political inertness of this moral principle in combination with minimalism – and Michael Goodhart's critique of "dignity" as the foundation of human rights. Making dignity the moral foundation of human rights disregards how power shapes dignity in practice. Instead, he argues, human rights should have an emancipatory function that constitutes dignity in practice. Michael Goodhart, "Constructing dignity: Human rights as a praxis of egalitarian freedom". *Journal of Human Rights*, *17*(4), 2018, pp. 403–417. https://doi.org/10.1080/14754835.2018.1450738

equality."[19] Anderson argues that whichever criteria one suggests for what equality requires or does not require, or whatever critique one puts forward concerning what equality requires or does not require, will reveal what one takes the main aim or point of equality to be. So why are we concerned with equality?

The main target of Anderson's critical analysis is "luck egalitarianism", the highly influential idea in philosophy that "the fundamental aim of equality is to compensate people for undeserved bad luck."[20] This principle has undoubted intuitive appeal. It seems reasonable that people whose circumstances are worse off than others through no fault of their own should be compensated for that. Think of people who are born into poor or dysfunctional families, or with a genetic disease, and who live a life of relative poverty or ill-health because of it. It seems obvious that their relative disadvantage is unjust and should be rectified as far as reasonably possible. But is it really the fact that their poverty or ill-health is caused by bad luck that make their situation unjust? And if it is, what does that require? Should they be compensated up to a counterfactual point of what their situation might have been if they had not been unlucky? And what is that? The average?

Anderson notes that if we take compensation for bad luck to be the main aim of equality, we will find ourselves preoccupied with the wrong kinds of questions, and philosophers have indeed devoted a good deal of effort to questions that frankly seem beside the point, such as: if there is an equal right to family life yet I am unattractive to potential partners, should I get the opportunity to bid for one in a pool of eligible single people? If I am born with a tendency to envy and therefore suffer terribly knowing that other people have more than I do, should some of their resources be redistributed to me so that this undeserved character trait is not allowed to lower my quality of life?

If compensation for bad luck is the point of equality, then we will also be locked in practical riddles like: if I am poor partly because of inherited poverty and partly because of some ill-advised decisions that I took, should I then be partly compensated and, if so, compared to what? How much does it matter if my ill-advised decisions are also a matter of bad luck (say that my parents worked long hours on minimum wage and were too tired to teach me practical reasoning).

The fact that luck egalitarianism prompts these kinds of questions as serious matters of concern shows that it has lost touch with why equality matters, and particularly why and how it matters politically. It assumes that every morally relevant aspect of a person's life situation is in principle traceable to a cause in that person's history, and that looking for such a cause is a morally and politically meaningful endeavour. It individualizes responsibility in a condescending way, blames people for their misfortunes, and focuses narrowly on privately enjoyed goods, as if inequality is sorted out one person at a time. As Anderson points out, this kind of egalitarian thought is oblivious to the political aims of egalitarianism and the concerns of actual egalitarian movements, but also, I would add, to political explanations of inequalities and why they persist.

Anderson contrasts luck egalitarianism to her favoured political account of why equality matters for justice: democratic equality. Democratic equality has two interconnected aims: the negative aim to end oppression and the positive aim "to create a community in which people stand in relations of equality to others."[21] Historically, what egalitarian movements have opposed are social orders based on hierarchies, where people are ranked as superior or inferior and the disadvantaged need to present themselves as

[19] Elizabeth S. Anderson, "What is the Point of Equality?" *Ethics*, Vol. 109, No. 2, 1999, pp. 287-337.
[20] Ibid. p.288.
[21] Ibid. 288f.

pitiable or deserving in order to qualify for a hand-out. The primary egalitarian concern here is equality of status: to be socially and politically included and not vulnerable to contempt, exploitation, and domination.[22] Luck egalitarianism, she claims, does not conceptualise the basic egalitarian principle to treat everyone with equal concern and respect; it violates it, by ranking people's worth according to their conditions, talents and personal histories, willing to leave people to their fate if general opinion is that they should have made smarter choices.

I agree with Anderson on the point of equality. Her explication of the negative and positive aims of what she calls democratic equality also fits perfectly with the republican account of political freedom as non-domination, which I am on record for having defended.[23] Securing non-domination, such that no one lives precariously under arbitrary or unaccountable powers, be it in social life, the workplace, or the public domain, is a matter of institutional arrangement, distribution of resources, and a culture of respectful deliberative practice.

This is the point of equality, but we can put it in a different way in order to show that it should also be the point of human rights: if we really are committed to the moral equality of all, such that everyone is equally a rights holder, then a society characterized by what Anderson calls democratic equality is the society to prefer, for reasons of human rights.

I will soon expand on this. For the moment, let me note that human rights minimalism is similar to luck egalitarianism in these two regards: first, having lost sight of the political point of their respective projects, they apply conditions for equal treatment or rights satisfaction in discrete situations that leave them with nothing to say about inequality overall. Second, they disregard the import of institutional design. We will take a quick look at the logic of luck egalitarianism in relation to these problems, and then move over to how this relates to human rights minimalism. Luck egalitarianism, as we will see, breaks down the moment we zoom out from distinct cases and look at the political picture. And so, I will suggest, does human rights minimalism.

Here is an example: say that I already live on a relatively low income when a change in tax policy leaves me even worse off than before, both in absolute and relative terms. It so happens that the income-bracket I am in is hit hardest by the new rules, while top-earners get a tax relief. I now need to get by on less, while the gap between me and the rich has increased. The policy change is prompted by a wealthy elite with the power to influence politics to their advantage by threatening to move their assets off-shore. Is this outcome a matter of bad luck for me? It seems obvious that it is, even more obviously so if I did not even vote for whoever is now in office. I am made worse off through no fault of my own and so have a luck-egalitarian reason to be compensated. It is not my relative poverty that grounds the compensation claim, but the fact that I did not bring it upon myself.

By the same logic, comparatively privileged people should also be compensated if, say, they are made worse off than before as a consequence of a new wealth tax that redistributes resources to the poor. Say that they now suffer terrible anxiety because they

[22] Ibid. p.312.

[23] Lena Halldenius, "Freedom Fit for a Feminist? On the Feminist Potential of Quentin Skinner's Conception of Republican Freedom." *Redescriptions: Politcal Thought, Conceptual History and Feminist Theory*, 17:1, 2014, pp. 86-103. Lena Halldenius, "Neo-Roman Liberty in the Philosophy of Human Rights". In: *Rethinking Liberty Before Liberalism*. Hannah Dawson & Annelien de Dijn (eds), Cambridge: Cambridge University Press, 2022.

had to give up their much treasured summer house and are no longer as admired for their lifestyle as they once were. This is a matter of bad luck for them: the new law is not their doing and it is not their fault that they have grown up in a society that makes people addicted to wealth.

From the point of view of luck egalitarianism, this implies that anyone who is relatively disfavoured by a political decision they cannot control, no matter what the decision is, should *pro tanto* be compensated for its effects on them. Consequently, any political or policy decision that has a relative negative impact on some individuals or groups could generate a compensation claim based on bad luck. Any such decision would need to unravel its own effects, making luck egalitarianism practically useless on the level of politics and policy.

A point I wish to make is that luck egalitarianism might have intuitive appeal in everyday interactions and discrete cases, but by refocusing our attention to structure and policy, we can see that its logic makes it politically self-defeating. I suggest that human rights minimalism suffers from a similar problem: it may be predicated on a principle of moral equality, but it sees the point of human rights to be the satisfaction of basic human interests against certain threats, not to end oppression and promote a culture of democratic equality. The outer limits of those claimable interests are set by whatever duties the requisite institutions can reasonably take upon themselves. These are the two components of the equality puzzle: why would an egalitarian subsume human rights under the idea and logic of a cut-off point and make rights into a dependent variable? Let us now do what we did with luck egalitarianism: by zooming out to the level of institutional structure, we will see human rights minimalism defeating itself.

Incapacity by design

What makes institutional capacities to be what they are? If institutional capacities determine reasonable duties, which in their turn determine what rights can be claimed, then this seems to be a question of crucial importance. A point that I will try to make in this section is that institutional capacity is partly shaped by prevailing inequalities in the priority of interests, and that this goes some way in showing that we have reason to reject human rights minimalism if we care about moral equality. Let's start with an example.

Economic inequalities in Sweden have increased rapidly since the 1990s,[24] and the reasons are not mysterious. Some of the drivers are the marketization of public services and access to housing, which have increased segregation and keep people in poverty, while tax-reliefs on wealth, inheritance, and top earnings have accelerated capital income and wealth-concentration. Sweden is a rich country, but things like public-service spending, level of tax progressivity, and labour rights are indicators of economic inequality in all economies.[25] What this shows is something we already know: inequality does not just happen. It is not a circumstance to be observed and maybe compensate for after the fact. Inequalities are constructed and to a large extent a function of political decisions and institutional design. Inequalities by design can be deliberate – like tax relief for the rich –,

[24] Swedish Fiscal Policy Council, *Economic inequality in Sweden. An overview of facts and future Challenges*. Särskilda studier från Finanspolitiska rådet, 2024/1, 2024. Lars Calmfors and Jesper Roine, "Increasing Income Inequality in the Nordics" *Nordic Economic Policy Review*, 2018.
[25] Jo Walker, Matthew Martin, Emma Seery, Nabil Abdo, Anthony Kamande & Max Lawson, *The Commitment to Reducing Inequality Index 2022*. Development Finance International, Oxfam, 2022. DOI 10.21201/2022.9325, pp. 8-14.

they can be unintended but foreseen side-effects – like increased health inequalities after cost-saving cuts to medical benefits –, and they can conceivably also be unforeseen side-effects, if the links are sufficiently indirect or uncertain.

Still, the personal-history approach to justified inequality that luck egalitarianism exemplifies is widely present in social perceptions about inequality. It informs the stubborn norm of meritocracy, which depends for its reasonableness on it being true that people's opportunities are wholly under their own control and that the rich and powerful are so because of talent and graft, while the poor are poor because of bad choices.[26] Inequality is, it seems, easily normalised into what people take for granted. The acceptance of inequality as normal is piggybacking both on the intuitive appeal of meritocratic principles and a wide belief that they actually work, and that existing inequalities reflect choices that people have made. It has been shown in empirical studies that increases in inequality do not prompt as much critique as one might expect because people's attitudes adapt and become more accepting of inequalities the more unequal their society is or the more unequal they believe it to be. People's perceptions of legitimacy favour existing circumstances.[27] In unequal societies, people are also more prone to attribute inequalities – however incorrectly – to meritocratic factors (like the rich being rich because they work harder) rather than to structural factors, like discrimination, fiscal policies that favour the rich, labour exploitation, and inherited poverty.[28] In its latest report on poverty and economic inequality, Oxfam notes that billionaire wealth is rising sharply and wields immense oligarchic power. Their calculation is that "60% of billionaire wealth comes from either inheritance, cronyism and corruption or monopoly power."[29]

The capacities of various institutions depend, of course, on general resource levels, but like inequalities also on structure and design. This fact is disregarded if you make the scope and level of rights defer to institutional capacities as if they are just *there*, like a stable reference point. So, first, institutions do not just *have* certain capacities. Institutional capacity is a matter of funding priorities, staffing, and budget allocation, which are practical matters but also ideological ones. This is part of what I mean by institutional design. Second, there is a feed-back loop between whatever inequalities, hardships, and disadvantages that exist in a society and the capacities of relevant institutions. Capacities are relative to the size and difficulty of the task. If budget and staffing resources of a social service institution remain stable, while the social problems the institution is meant to deal with increase, then the institutional capacity decreases. When Swedish public housing companies were marketized, homelessness increased. Homelessness is a constructed problem, a function of the commodification of housing, which then lands as a task for

[26] Michael Young, *The Rise of the Meritocracy*. London: Thames & Hudson. Sandel, Michael J. (2020) *The Tyranny of Merit. What's Become of the Public Good?* New York: Farrar, Straus and Giroux, 1958.

[27] Kris-Stella Trump, "Income Inequality Influences Perceptions of Legitimate Income Differences", *British Journal of Political Science*, 48, 2017, pp. 929–952. doi:10.1017/S0007123416000326

[28] Jonathan J. B. Mijs, "The paradox of inequality: income inequality and belief in meritocracy go hand in hand". *Socio-Economic Review*, Vol. 19, No. 1, 2021, pp. 7–35, doi: 10.1093/ser/mwy051. See also my egalitarian arguments against threshold thinking in Lena Halldenius, "Why Limitarianism Fails on its Own Premises – an Egalitarian Critique." *Ethical Theory and Moral Practice,* 25, 2022a, pp. 777–791. https://doi.org/10.1007/s10677-022-10337-1.

[29] Anjela Taneja, Anthony Kamande, Chandreyi Guharay Gomez, Dana Abed, Max Lawson and Neelanjana Mukhia. *Takers, not Makers. The unjust poverty and unearned wealth of colonialism*. Oxfam International, 2025. DOI: 10.21201/2024.000050

under-resourced social services. What, then, is the institutional capacity to deliver on the duty to protect the right to housing, and where is that duty located?

When Shue says that "society must not multiply rights beyond necessity or beyond the capacities of individuals to bear the duties inherent in the institutions protecting the rights," [30] it is worth bearing in mind the complication that the hardships or disadvantages that a right is meant to address – like homelessness – can itself be an institutional construct. What institutional capacities there are will reflect the priority of the problem. There are no "duties inherent in the institutions". Which institutions protect which rights against what threats will depend on the analysis of what kind of problem the right is about. What right can be inferred from the fact of homelessness? A right to temporary shelter? A right to a permanent and safe home if you do not have one? Institutional security against the risk of losing your home if you do have one? The best ways to secure people against the risk of losing their homes might be to regulate the tenants' market (which in itself does not cost the public institutions anything) or – since unemployment is a main cause of homelessness – to protect people against the risk of losing their jobs through employment security and the right to unionize.

The point is that there is no set of duties inherent in an institution that can settle any of these questions, partly for the reason that different institutions are involved and different capacities required depending on what the right is supposed to be about.

Another complication that sufficiency levels in human rights minimalism ignore is that inequalities (regardless of whether they are under or above some cut-off point) negatively affect things that unequivocally are basic human interests or standardly accepted as human rights. Economic inequalities – not just poverty – have social costs[31] as well as psychological ones: wealth inequalities prompt hierarchical thinking, cause stress, and lower wellbeing.[32] We know from before that economic inequalities have detrimental consequences for public health, and not only for the deprived but throughout the economy.[33] This means that inequalities lower the capacities of health care services, since capacities are relative to needs.

Another crucial factor for human rights is that wealth concentration enables the rich to nudge politicians into favouring their interests, thus negatively affecting the political rights of the relatively poor.[34] Inequalities – also above sufficiency levels, wherever such levels are set – threaten institutional capacities to protect and promote also basic human interests, like health and political liberties.

There is no way to escape the fact that the primary question is not what institutions can do – because what institutions can do and which institutions that are involved, etc., are contingent matters in the way I have shown – but the normative one of what institutions need to be able to do, given what we take the point of human rights to be. Only then will

[30] Shue, "Interlocking Rights, Layered Protections." p.20.
[31] Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future*. New York: W. W. Norton & Company, 2012. Danny Dorling, *Injustice. Why Social Inequality Still Persists*. Bristol: Policy Press, 2015. Thomas Piketty, *The Economics of Inequality*. Translated by Arthur Goldhammer. Cambridge, Mass.: The Belknap Press of Harvard University Press, 2015. Ruth Lister, *Poverty*. Cambridge: Polity Press, 2021.
[32] Richard Wilkinson and Kate Pickett, *The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone's Well-being*. London: Penguin Books, 2019.
[33]Richard Wilkinson and Kate Pickett, *The Spirit Level: Why Equality is Better for Everyone*. New Edition. London: Penguin Books, 2010.
[34] Olivier De Schutter, *Eradicating poverty beyond growth. Report of the Special Rapporteur on extreme poverty and human rights*. United Nations, Human Rights Council, A/HRC/56/61, 2024.

accounts of human rights be accounts of political justice, rather than of institutional convenience.

To reiterate: by human rights minimalism I mean an account that restricts human rights to a level of sufficiency above or beyond which inequalities have no moral relevance, and which makes duties prior to rights, such that rights are dependent on assumed or actual institutional capacities. I have argued that human rights minimalism fails by its own standards on two counts. It is predicated on a principle of moral equality of human beings, yet can produce no arguments against even the starkest inequalities of living conditions, thus showing the arbitrariness of the notion of a sufficiency line. And by making rights a dependent variable to the reasonableness of duties, what rights people have will in effect not be the "sturdy objects to 'stand upon,'"[35] that human rights minimalists want them to be, but the product of contingent institutional arrangements.

Towards human rights as levers for equality

My critique of human rights minimalism importantly includes critique of the human rights logic according to which rights function like a dependent variable under allegedly stable institutional duties that restrict what can be claimed as rights. A possible inference could be that I favour moving away from rights language and the rights-duty correlation towards principles of distributive justice that do not incorporate any notion of claiming. But given the point of human rights that I have just defended – the point of human rights is to end oppression and promote a political culture of democratic equality – there are important values to appreciate in the notion of claiming and the status position that claiming entails.

Human rights are not just another name for things that we value. Human rights also have a deontic feature: they mark a commanding relation of claims and obligations. Violating someone's right is not merely wrongdoing, it is doing wrong to somebody who is recognized as having morally significant standing in relation to other members of the community and to society's institutions. Seeing people as claimants is to see them as agents and not as passive beneficiaries. This means that satisfaction of interests can be rights affirming or not depending on the conditions and circumstances. A good – be it education, housing, religious freedom, or something else that we accept as the proper object of a right – can be enjoyed *as a right* or as a matter of chance or charity. Being subordinated to unaccountable powers is domination and nullifies the point of human rights, even if those powers happen to satisfy basic interests like food and shelter. Human rights can therefore not simply be a list of things that people should be able to enjoy; human rights importantly have a certain *modality*.[36] The goods on the lists need to be enjoyed securely as claims within a rights supporting democratic culture. Rights do not merely protect people from the worst forms of hardship; they invest them with powers to act and recognized status positions as claimants to such powers to act.

Consequently, rights should protect against subjection to powerful interests and artificial interference, but restricting rights to *claims* alone gives them a too restricted conceptual space: claiming is predicated on status positions, and the point of claiming is to secure powers to act freely.

Here is an example. One thing that I wish to emphasize with it is that things that we are used to thinking about as *one* right is in fact made up of a bundle of status positions,

[35] Joel Feinberg, "The Nature and Value of Rights", *Journal of Value Inquiry*, vol. 4, 2970, pp. 245-257.
[36] Halldenius, "Neo-Roman Liberty in the Philosophy of Human Rights."

claims and powers to act; and have a variety of social determinants. I will use health as an example.

Onora O'Neill has famously argued that the right to health, as it is formulated in article 12 of ICESCR as a "right to the highest attainable standard of health", does not make sense as a right because it cannot be anybody's duty to secure it. It is too vague, complex, and excessively demanding.[37] O'Neill insists that for rights to be claimable, duties need to be well specified and clearly allocated, like the duty of a physician to provide appropriate healthcare. This is classic human rights minimalism.

It is certainly true that health is a complex and demanding phenomenon, but that does not mean that the interpretation and achievement of it is mysterious or cannot be analysed in terms of a program of action.[38] The determinants of health are susceptible to social analysis and indicative of something of crucial importance and wider application, beyond matters of health: people suffer ill-health as a consequence of circumstances that have nothing to do with access to healthcare, but with other things like anxiety from poverty, or loneliness.[39]

But if, even for the sake of argument, we were to restrict the right to health to a right to healthcare, we would need to reckon with the fact that within a healthcare institution I can claim care only if I am credited with the status position of a patient to whom care is due, which (as I point out in "Neo-Roman Liberty in the Philosophy of Human Rights")[40] I might not be if I am an undocumented migrant or too poor to have health insurance. The institutionally relevant status position is logically prior to the capacity to claim anything at all. So, the entry ticket to the institution – say a public healthcare system – might have very little to do with the specifics of what that institution does – provide healthcare – or with my interest in being treated for an illness. My status position in relation to the healthcare system will be predicated on other things, like migration laws, income security, or risk pooling in social insurance.

Importantly, the implication is not that a recognised status position needs to be established first in order for anything that follows to count as rights. Again, the point of human rights is to end oppression and establish a democratic culture, with the space for protest and contestation that democracy mandates, and we need to recognize how activism and resistance work: by acting out powers that you do not have or making claims you know will not be recognised, as a kind of performance of status positions you are denied.[41]

Now, if we were to acknowledge that the right we have in mind when talking about health is not merely a right to healthcare but a right to actually live a life which is as healthy as possible, then the analysis of what the protection and promotion of such a right require will be an analysis of those circumstances of life that are usually referred to as the social determinants of health.[42] Since we know that health is inhibited by poverty,

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[37] Onora O'Neill, "The Dark Side of Human Rights", *International Affairs*, 81, 2, 2005, pp. 427-439, p.429. For a critical discussion, see J. Wolff, "The Demands of the Human Right to Health". *Proceedings of the Aristotelian Society, Supplementary Volumes*, *86*, 2012, pp. 217–237.

[38] World Health Organization, *Operational framework for monitoring social determinants of health equity*. Geneva, 2024. Licence: CC BY-NC-SA 3.0 IGO.

[39] Lister, *Poverty*. Liao, S. Matthew, "Do Older People Have a Right to Be Loved?", in: *Being Social: The Philosophy of Social Human Rights*. Kimberley Brownlee, David Jenkins, and Adam Neal (eds). Oxford: Oxford University Press, 2022, pp. 110-126.

[40] Halldenius, "Neo-Roman Liberty in the Philosophy of Human Rights."

[41] Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law*. Oxford: Oxford University Press, 2012, p.118f.

[42] WHO, *Operational framework for monitoring social determinants of health equity*.

homelessness, and insecure working conditions, the right to health will have to include protection from poverty, homelessness, and insecure working conditions.

There is nothing weird about this conclusion, in fact it is logically mandated. If you want X, then you are logically committed to want the necessary means to X. If you do not, your commitment to X is spurious, or nominal at best.

The language of social determinants to refer to those lived circumstances that are known to be necessary, or empirically reliable securities for a desired end, is well established in the case of health. But in fact, all goods that we talk about in terms of rights have social determinants. Given that the point of human rights is to do away with oppression, exploitation and precarity (negative aims) and establish equal standing in a democratic culture (positive aims), then social determinants of rights will also be both negative, that is, removing hindrances, and positive, that is to secure real capacities, all the while remembering the modality of rights: a good can be enjoyed or practised *as a right*, with the security that entails, or it can be held contingently, under precarious conditions, as a matter of chance or charity.

Let me use a familiar example in order to show how the interpretation of something as a right, what that means, and why it is important are affected by thinking of the point of human rights in the way that I have suggested, while acknowledging rights modality. One of the articles in the Universal Declaration of Human Rights which is most routinely criticised as not the proper object of human rights is article 24: 'Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay'. The reasons for dismissal of this provision have been that it is not basic or urgent enough to qualify as a proper human rights concern or that it is of the wrong kind entirely; these are classic minimalist arguments.[43] In fact, predictable time off from work is crucial for life quality. And, crucially given the rationale of human rights that I am defending – this is a matter of countering vulnerability to arbitrary power on the labour market. Elizabeth Anderson has pointed out how partial we tend to be in our concerns regarding power relations.[44] As democrats, we are committed to guarding the rights of citizens against the dominating power of the state, while accepting as normal that paid work – which for most people is necessary for survival – takes place in de facto dictatorships. Regulating the labour market and the conditions of paid employment along the lines of article 24 is thus not primarily a matter of making sure that workers get holidays, but to rectify the unaccountable powers that employers have on an unregulated labour market and to equalize relations between employers and employees. That is why a right like Article 24 should be regarded not only as fully justified labour right, but as a fundamental political right to the capacity to assert oneself in vital relations that shape one's circumstances of life. Without provisions like article 24, all people who depend on paid employment – and that is most of us – would be dependent on employers' good will and subject to their arbitrary power.[45] So, Article 24 does not only express a claim to regulation of working hours and paid holidays but, more fundamentally, a status-position

[43] For a discussion of arguments for and against labour rights as human rights, see Mathias Risse, "A Right to Work? A Right to Leisure? Labor Rights as Human Rights", Law & Ethics of Human Rights. Vol. 3, issue 1, 2009.

[44] Elizabeth Anderson, *Private Government. How Employers Rule Our Lives (and Why We Don't Talk about It)*. Princeton and Oxford: Princeton University Press, 2017, p.48ff.

[45] For a radical view of labour rights as human rights using a similar argument, see Alex Gourevitch, "The Right to Strike: A Radical View." *American Political Science Review*. 112:4, 2018, pp. 905-917. doi:10.1017/S0003055418000321

in relation to employers. Remember that I said that rights typically are a bundle of status positions and claims, supporting powers to act. Before you can claim, you need to be credited as a claimant: a free person to whom others are accountable. For this rationale, the sufficiency and relevance criteria of human rights minimalism are neither here nor there. They are, if nothing else, not designed to say anything about the conditions in which I stand to others, nor to acknowledge the impact of relative economic power, be it on the labour market, housing market, or any other sector of life.

The primary function of human rights must be to support the equalisation of power, institutionally securing status positions requisite to claiming. In formulating the equality puzzle, I emphasized that equality cannot merely be a moral starting-point, but a requirement of political justice on the function and outcome of institutions and the practices we live by. Human rights should work as levers for equality, by which I mean that what rights are and what they require need to be interpreted such that they support and set relations on a path towards equality. Human rights minimalism instead disregards inequalities above levels of alleged sufficiency, thus institutionalising inequalities that keep people dependent and subordinate to unaccountable powers.

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Defending and Disputing Human Rights

Elena Namli

This article demonstrates how ethics, understood as the theoretical analysis of morality, contribute to the discussion of disagreements over human rights. It starts with an elaboration on the disagreements between proponents of human rights and proceeds to disagreements between human rights proponents and sceptics. It is argued that there are strong reasons to endorse pluralism of human rights. This endorsement includes both ideational disagreements and material conflicts. However, it does not prevent us from defending human rights as a powerful emancipatory project. Open normative universalism, which views moral as well as legal human rights as socially constructed, is presented as an ethical position that secures the democratic dimension of human rights.

Introduction

Those of us who agree that human rights matter disagree about how and why. Most importantly, we disagree about the moral justification of human rights. While there are those who believe that human rights protect individuals from severe power abuse on behalf of states, others claim that human rights are a matter of justice, nationally or internationally. Understandably, the meaning of justice is contested among proponents of human rights.

Human rights sceptics offer different types of critique of the project. Many political realists argue that human rights are used by states only when it suits them, that is, as an ideological instrument for wielding power.[1] Marxian perspectives regard human rights as a historically progressive but limited instrument of human emancipation. Additionally, there are important post-colonial voices which claim that human rights, though an attractive political morality in many regards, are deeply inflected by the cultural and political imperialisms of the Global North.[2] How should we approach these disagreements?

Just a decade ago most scholars of human rights contended that if we agree that human rights matter, our disagreements about why they matter are irrelevant for politics

[1] For a nuanced account of realism on rights see for example William E. Scheuerman, "Reconsidering Realism on Rights". In Claudio Corradetti (ed.), *Philosophical Dimensions of Human Rights. Some Contemporary Views* (Dordrecht Heidelberg London New York: Springer, 2012), pp. 45-60.
[2] Balakrishnan Rajagopal, *International Law from Below. Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003), pp. 163-232.

and law. Accordingly, the correct response to those who question the importance of human rights should be a firm endorsement of international human rights law as law, that is, as authoritatively binding regardless of disagreements.[3]

The situation today is different, in my view. Disagreements about human rights – both among proponents and between proponents and sceptics – are seen as significant. For example, differing justifications of human rights on behalf of those who endorse such rights lead to differing interpretations of rights as well as to different priorities between recognized rights.[4] Differing explanations of ideological usage of human rights imply differing evaluations of responses to human rights as ideology.

Disagreements are not a purely theoretical enterprise, therefore, but both reflect and impact political developments.

How then should we approach these differences? Scholars of law and politics have discussed this question as an issue of the future of human rights. How much disagreement is compatible with functional human rights regimes? Do disagreements among proponents of human rights present a threat to the universality claim of human rights? How serious is the sceptics' critique, and how should we react?

I believe that ethics, understood as the theoretical analysis of morality, can contribute to the discussion of disagreements over human rights. In what follows I demonstrate how this can be done. I start with a short elaboration on the first type of disagreements, those between proponents of human rights. I then proceed to disagreements between human rights proponents and sceptics. In the final sections, I present a view of human rights that I believe is theoretically plausible and politically potent. This view combines an understanding of human rights as socially constructed with open normative universalism. Social constructivism allows for the recognition of reasonable disagreements about human rights, while open normative universalism sustains human rights' claim to universality.

Justifications of human rights

Human rights are legitimate claims to which all humans are entitled with regard to power and, above all state power. Many people would add "without discrimination" and argue that the universalism of human rights cannot be secured without strong anti-discrimination laws. However, there is a significant variety of perspectives on human rights among those who agree that "human rights law concerns the relationship between the individual and the state, which constrains the state in what it can do and how it should use its resources."[5]

Proponents of human rights disagree about which claims should be regarded as human rights and how human rights should be prioritized. There are liberal perspectives on human rights that emphasize the importance of individuals' freedom from coersion. For example, Michael Ignatieff and David Miller believe that human rights should be an instrument to protect individuals from the most severe abuses of power by states. The list of human rights should be kept short so that the international community can act when those rights are violated. In their view, human rights protect a very basic level of individual

[3] Jack Donnelly, *International Human Rights*. Third edition (Boulder: Westview Press, 2007), p. 24.
[4] Elena Namli, *Human Rights as Ethics, Politics, and Law* (Uppsala: Acta Universitatis Upsaliensis, 2014).
[5] Mark Klamberg, *Power and Law in International Society. International Relations as the Sociology of International Law* (London: Routledge, 2015), p. 89.

agency.[6] Other liberals, such as John Rawls and Ronald Dworkin, disagree and instead claim that human rights cannot be reduced to a short list of negative rights. They take the view that the function of human rights is to realize the constitutional principle of equal respect and concern. Through human rights legislation the state recognizes its duty to treat all citizens with equal respect and concern.[7]

Liberal perspectives – egalitarian as well as non-egalitarian – are challenged by those who endorse human rights but envision them differently. One such challenge originates from the minority movement, which has succeeded in incorporating the collective rights of some minorities into the human rights law. In turn, minority rights are a source of frequent disagreement, not least because they affect our view of what kind of democratic model is compatible with human rights protection. Some commentators argue that the human rights of minorities do not include collective self-determination; others hold that self-determination should be recognized as a human right for minorities.[8]

Related to but not identical with the "minority challenge" is the relationship between universal human rights – understood in this particular context as rights recognized in the international law – and various other traditions. A frequent disagreement among proponents of human rights arises between those who believe that human rights can and should be articulated and implemented uniformly, and those who believe that contextual differences justify significant variations in how human rights are interpreted and prioritized. Contextual variations naturally take different forms: some are related to material positions, some to cultures, and some to both.

For example, many Christian and Muslim defenders of human rights claim that international human rights law should be implemented as uniformly as possible, a view which implies that Christian and Islamic theology should be adjusted to human rights norms.[9] Others argue that Christian and Islamic theology offer unique and democratically potent resources for human rights, something that justifies a significant plurality of human rights regimes. Ali Shariati, a famous Muslim liberation theologian, has defended such a view on the grounds that the principle of *tawhid* prohibits humans from demanding the subjugation of other humans. According to Shariati, the moral dimension of Islamic monotheism is the belief that God alone is justified in demanding the subjugation of human beings. Whenever humans dominate other humans, they are therefore violating the core Islamic norm, namely monotheism.[10] An instance of this interpretation of monotheism is offered by the Cairo Declaration's prohibition of corruption as a form of human rights violation.[11]

These and other approaches offer different understandings of the substance of human rights and priorities between rights. Miller and Ignatieff argue in favor of a short list of negative rights. Egalitarian liberals defend a long list on the principle of equal respect and concern. And the defenders of collective rights argue that minorities' rights cannot be

[6] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001); David Miller, "The Responsibility to Protect Human Rights". Working Paper Series, Center for the Study of Social Justice SJ006 May 2007.
[7] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), p. 273.
[8] See for example Fernando R. Teson, (ed.): *The Theory of Self-Determination* (Cambridge: Cambridge University Press, 2016).
[9] See for example Abdullahi Ahmed An-Na'im, *Islam and the Secular State. Negotiating the Future of Sharia* (Cambridge, Mass.: Harvard University Press, 2008).
[10] Teresa Callewaert, *Theologies Speak of Justice. A Study of Islamic and Christian Social Ethics* (Uppsala: Acta Universitatis Upsaliensis, 2017), pp. 163-204.
[11] *Cairo Declaration on Human Rights in Islam,* art. 11 and art. 23.

protected within a pure liberal paradigm. Most importantly, these disagreements over the substance and prioritization of rights are related to the fundamental disagreement between human rights proponents, that is, disagreement over the issue of justification. As L. W. Sumner has demonstrated in his seminal work *The Moral Foundation of Rights*,[12] any coherent concept of right that recognizes the possibility of conflicting rights implies a clearly articulated moral justification. Put simply, any list of substantial rights needs to include a model for justification as an instrument to prioritize between these rights when they conflict.

As is well known, Sumner defends a utilitarian justification of human rights, which, he believes, allows for a transparent account of strength of rights, that is, their ability to resist "rival considerations (whether rights or other factors)."[13] Herbert L. A. Hart takes a similar approach to rights in claiming that utilitarianism has been and remains the most democratic approach to legitimate claims, i.e. the subjective rights of citizens. Hart repeats and develops Bentham's critique of moral rights in favor of political rights as derivative of utilitarian justification, for instance by balancing the actual interests of people. According to Hart, traditional deontological theory is false in that it regards human rights as morally fundamental and therefore *pre-political*. While in practice morality is conventional, those who hold more power tend to present their morality as natural and therefore above democratic critique. In Hart's critique of deontological theory, every catalogue of "natural rights" risks excluding some conventional norms from social critique. The utilitarian approach rejects the very existence of natural rights, offering instead a justification based upon a transparent analysis of people's actual interests.[14]

The utilitarian critique of the naturalistic deontology of moral rights, as being a notoriously anti-democratic project, is reasonable. Yet utilitarian approaches to human rights are limited by their inability to explain how human rights can be constructed in a way that restricts the power of majorities. I therefore believe that we should look for a justification of human rights that is neither naturalistic nor utilitarian. It should recognize the sociality of rights while simultaneously offering resources for the critique of moral and legal conventions. In other words, we are looking for a model that connects human rights to democracy more substantially than the mere rhetorical proclamation of a unity between them.

The most fully elaborated candidate for such a model is Jürgen Habermas's understanding of human rights and democracy as a dialectic of private liberties and civic autonomy. Habermas makes a crucial revision of Kant in order to address human rights as an issue of social status:

> In Kant, too, human rights derive their moral content, which they spell out in the language of positive laws, from a universalistic and individualistic conception of human dignity. However, the latter is assimilated to an intelligible freedom beyond time and space, and loses precisely those connotations of status that qualify it as the conceptual link between morality and human rights. Thus the point of the *legal character* of human rights gets lost, namely, that they protect a human dignity that

[12] L. W Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987).
[13] Op. cit., p. 12.
[14] Herbert L. A. Hart, "The Demystification of the Law". In Hart, *Essays on Bentham. Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), pp. 25-26.

> derives its connotations of self-respect and social recognition from a status in space and time – that of democratic citizenship.[15]

In Habermas's view, Kant becomes political if one redefines the moral principle of universalization from being a philosophical enterprise to a practical discourse, one in which actual agents justify norms and relate to others' justifications. Habermas does not interpret human rights as a pre-given natural morality that should be incorporated in law. In his view, rights are both the product and the precondition of democratic deliberation. As Habermas frames it, popular sovereignty and human rights are mutually constitutive. For example, basic political rights (which in turn entail social rights) "to equal opportunities to participate in processes of opinion- and will-formation" create citizens as the subject of law and are simultaneously the products of democratic practices.[16] Private liberty is secured by human rights, but in order to exist this liberty requires that civic autonomy constructs rights in political terms.

In this article, I argue in favor of this Habermasian view of human rights precisely because it accounts for reasonable disagreements about human rights. Rational discussion of human rights is possible since it is possible to dismiss some perspectives on human rights. However, there is no particular justification of human rights that can be described as exclusively valid.

This endorsement of a pluralism of human rights that includes both disagreements and conflicts does not prevent us from defending human rights as a powerful moral and political project. On the contrary, different approaches to human rights and, above all, to the moral justification of human rights make possible the political account of human rights that is necessary if the human rights project is to have a future. Such an account represents an appropriate response to the critique of human rights as an ideology of power, something that I believe should be taken very seriously. Let me now summarize the most important forms of this critique.

Human rights and power

Human rights, if understood as an instrument to frame power exercise, is a revolutionary political and legal project. Whereas historically dominant models of social organization ascribe duties to people, thereby reserving social dignity (freedoms and rights) to particular positions within society, human rights aspire to guarantee rights to people by prescribing *duties* to states.

This explains why those who yearn for unrestricted power over other people tend to question human rights or intentionally reinterpret them as an ideology of power. A recent example of this interpretation is the way in which human rights are used by ideologists of ethno-nationalism. In many European countries, human rights are used in order to present migrants and minorities, most frequently Muslim minorities and migrants from Muslim countries, as a threat to human rights and democracy.[17] Instead of implementing human rights as the constitutional rules for exercising power on behalf of

[15] Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights". In Corradetti, *Philosophical Dimensions of Human Rights*, p. 73.
[16] Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996), p. 123.
[17] Kaius Tuori and Iida Karjalainen, "The European far right and human rights language," *The International Journal of Human Rights* 29, no. 1, 2025, pp. 1-21.

states, European nationalists present human rights as personal moral values by which citizens – particularly minorities – are bound. Accordingly, the state is viewed as a guardian of such values. For example, in the rhetoric of Sweden Democrats human rights become an instrument for controlling individuals and groups rather than for framing the exercise of state power. Sweden Democrats argue that Muslims, who they presume do not endorse human rights, can be legitimately excluded from the protections offered by political and social rights.

Such a revision of human rights should be rejected. However, there are other forms of critique of human rights that deserve serious attention and adequate response. Unlike ethno-nationalist revisions of the meaning of human rights, these critiques point to potential limitations of human rights as a political project of social emancipation. The Marxian critique of the liberal form of human rights is a good example. In the Marxian account, liberal human rights are progressive to the extent that capitalist society is progressive in comparison to feudal social structures. As some contemporary Marxists have argued, Marx endorsed human rights as progressive because they unquestionably secured a significant level of human emancipation. In his most illuminative analysis of the Marxian critique of liberalism, Igor Shoikhedbrod writes:

> Marx saw liberal rights as the historical achievements of the seventeenth and especially eighteenth-century bourgeois revolutions, and he took the American and French revolutions as historical exemplars. Such liberal rights included the right to life, liberty, and security of the person, the right to own property, equality before the law, universal (male) suffrage, freedom of conscience, expression, and movement, due process, as well as rights against seizure of property and goods. […] The decisive difference between feudalism and capitalism, for Marx, is that whereas the former was based on a hierarchy of privilege and on direct domination, the latter is characterized by legal equality and formal freedom.[18]

The Marxian critique of human rights is therefore not an anti-liberal rejection of political rights. What Marx instead offers is a materialist conception of rights that states that "different modes of production give rise to different legal relations."[19] This conception of rights as legal relations that correspond to how society is structured was articulated in "On the Jewish Question" and further nuanced in both the *Grundrisse* and the *Critique of the Gotha Program.* Here, Marx is critical of the abstract "rights of man" and turns to historical analysis in order to demonstrate that the emancipation achieved by bourgeois revolutions is conditioned by material relations of power, above all economic production. Liberal rights are progressive but limited. To attain a higher level of human emancipation, it is necessary to recognize *how* the emancipatory potential of historically progressive subjective rights are limited by capitalist property relations. Moreover, any particular set of rights can serve an ideological function if it is presented as the highest level of human freedom.

The Marxian materialist concept of rights as conditioned by economic structures is associated with a particular view of humanity. Unlike most contemporary political realists, Marx believes that although social progress is conditioned by material factors, it remains possible to establish just social relations. These relations will truly emancipate humanity, which has hitherto been deformed by social relations that alienate human beings from each

[18] Igor Shoikhedbrod, *Revisiting Marx's Critique of Liberalism. Rethinking Justice, Legality and Rights* (London: Palgrave Macmillan 2019), pp. 56-57.
[19] Op. cit., p. 85.

other. Most importantly, he believes that we can emancipate ourselves from the selfishness of capitalist market society and achieve a truly free sociality.

To what extent does the Marxian concept of rights offer a relevant critique of contemporary versions of human rights? In my view, proponents of human rights can utilize the Marxian critique if they admit that any particular regime of human rights is related to existing social structures and types of social agency. Jürgen Habermas's republican account of human rights, which I mentioned in the previous section, is inspired by the Marxian critique of the liberal "rights of man." Human rights in their legal form – that is, norms posited as valid law – are the products of democratic agency and, in turn, are the instruments of that agency. When Habermas calls human rights "constitutional," he is usually implying that they are a crucial element of the basic and legally regulated *structure of the society*.

Furthermore, human rights are revolutionary (and here Habermas allies himself with Ernst Bloch) because they potentially offer a legal form for a radically new *constitution* of the society. Historically, human rights have transformed the relations of power by assigning duties to states and legitimate claims to people. Hopefully they still contain this transformative potential.[20] In this particular understanding of politics and democracy, what is "constitutional" lies very far from that which is "secret and unchangeable." On the contrary, human rights can constitute a new form of social organization by means of revolutionary changes in the structure of power.

Habermas endorses the Marxian historical view of human rights, arguing that human rights, precisely because they have legal form, should be related to the moral principle of human dignity. Later in this essay, we will consider different interpretations of this principle. For now, it is crucial to recognize that, for Habermas, human rights are *legal* relations and therefore human-made and changeable.

Classical political realists such as Hans Morgenthau and Reinhold Niebuhr have been influenced by some elements of the Marxian critique of idealism on rights. However, whereas the Marxian analysis of liberal rights that I have presented here is focused on revolutionary changes of social structures, political realism focuses on modern states as the main agents of international politics. Moreover, it does not share Marx's optimistic view of humans and sees selfishness as unavoidable. This implies that, for most forms of political realism, human rights politics – like any other politics – should be understood as a means for states to promote their particular interests, ultimately by maintaining and extending their power.

Although Reinhold Niebuhr concedes that human beings as individuals are able to endorse "the highest ideal" of unselfishness, social morality is another matter entirely. Collective egoism cannot be eliminated and social justice must be envisioned realistically, that is, by recognizing that states and other collective agents always seek power for its own sake.[21]

How should we respond to political realism? In his recent monograph *Critical Political Ethics*, Swedish ethicist Carl-Henric Grenholm suggests that we should discriminate between, on the one hand, a descriptive realism that regards the possession and extension of power as the driving force for any political agency and, on the other hand, a normative realism which claims that political collectives (typically states) are morally

[20] Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights," p. 73.
[21] For a most nuanced analysis of Niebuhr's political realism and his view of political and personal morality see Carl-Henric Grenholm, *Kritisk politisk etik. Om moralens betydelse inom politiken* (Uppsala: Acta Universitatis Upsaliensis, 2024), pp. 151-184.

justified in seeking power and prioritizing their own interests.[22] This means that endorsement of descriptive realism does not necessarily imply an endorsement of normative realism. Additionally, Grenholm believes that we should discriminate between the political cynicism that claims that moral considerations have no importance for politics, and the political realism that recognizes at least some moral considerations as political factors.[23] Classical political realists, for example, endorse the category of justice as relevant for politics.

In my view, Grenholm's investigation represents the most nuanced approach to the challenge of political realism. Proponents of human rights can and should recognize power, not least as it figures in international relations, as the main driving force behind human rights politics. However, this does not prevent us from defending the thesis that moral considerations should be relevant when political decisions are made and/or evaluated. Domestically as well as internationally, critical morality should be used to resist unjust politics. Yet doing so requires a clear vision of how to discriminate between purely instrumental uses of human rights and morally legitimate discourses on human rights.

I do not believe that there exists only one correct form of such a distinction. Rather, we should be prepared to argue, transparently but tentatively, over the issue. Ethicists can make significant contributions to the quality of such debates. Different forms of justification for human rights become crucial in this particular context. We can never be sure whether those who offer their own specific justification of human rights are motivated by a desire for justice or a desire to use human rights instrumentally, that is, as a way of legitimizing their actions. Even so, we can uncover many forms of ideological legitimization of power that present themselves as moral justifications.

Additionally, if we do not expect any particular moral justification to be final or definitive, we can reasonably endorse a variety of contextual justifications and thereby prevent human rights morality from becoming an anti-democratic enterprise.

Human rights as ethics, politics, and law

In the remainder of this article, I present an understanding of human rights that a) explains the persistence of reasonable disagreements among proponents of human rights; b) offers a plausible response to several forms of human rights' skepticism; and c) endorses human rights universalism. Such an understanding incorporates the insight that human rights, as both law and political morality, do not transcend social, economic, and political power.

I endorse a view of human rights that is a combination of social constructivism and open normative universalism. It stipulates that human rights, both as posited law and as conventional morality, are products of collective agency and material power relations in concrete historical and cultural contexts. To admit this is not to reject human rights as a potentially emancipatory practice. Human rights can be and often are used by progressive political agents in order to reconstruct social relations and make them more just. In such practices, moral universalism on behalf of human rights is transformed from an instrument of legitimization of power into an instrument of critique of power.

I therefore believe that there is a democratically potent form of human rights universalism. In this form, the principle of equal respect for human dignity is central to the justification of particular human rights projects. Although there exists no universal

[22] Op. cit., p. 118.
[23] Op. cit., pp. 33-35.

morality (as for example "cosmopolitan rights", which Michael Goodhart has rightly criticized)[24] that follows on from the principle, the principle can assist us in making a critique of any particular moral and political project of human rights.

Importantly, the principle of equal respect for human dignity as a principle of critical ethics does not allow for apolitical generalist approaches to interpretation and prioritizing between human rights. Nor can it eliminate ideological disagreements between proponents of human rights. Rather, it allows for the critical scrutiny of any individual interpretation and prioritization of human rights.

The principle of equal respect for human dignity stipulates that a justified exercise of power respects the humanity of each and every person equally. The principle is moral and does not describe how power *is* exercised. Moreover, it does not say what constitutes a violation of humanity but depends rather upon the experiences of those whose humanity is violated. The very universalism of the principle lies in its being an abstract form awaiting interpretation in a particular social context. This insight is indeed already present in the classical human rights instruments, above all the UDHR and the main UN conventions on human rights. Although these documents stipulate the basic rights that all states should secure, they neither define them trans-contextually nor offer a universally valid ranking.

The principle of human dignity in the form I am defending here is constitutional and democratic. It is constitutional, primarily not because it is inscribed in written constitutions but because it potentially allows for the emergence of democratic developments that can result in more progressive, albeit never final, law. Let me explain this difference by considering two famous interpretations of the principle, one egalitarian-liberal and the other republican-critical.

The principle of equal respect for human dignity has been interpreted as a form of egalitarian liberalism. John Rawls and Ronald Dworkin offer such a liberal interpretation in their attempts to politicize Kant. Both Rawls and Dworkin believe that the moral principle of equal respect and concern is the most plausible understanding of the Kantian principle of equal respect for human dignity. Moreover, in their view, the principle of equal respect and concern informs the United States Constitution and should guide legal and political practice under its aegis. Dworkin has demonstrated how the constitutional principle of equal respect and concern is used in legal practice as a way to strengthen human rights. To take human rights seriously, he famously argued, is to frame the exercise of state power in terms of the principle of equal respect and concern. In his later writings Dworkin developed an interpretative theory of adjudication and argued that legal norms should be interpreted by judges in light of the principle of equal respect and concern.[25]

A clear advantage of Dworkin's suggestion for how the political morality of human rights should be interpreted and adjudicated is the power analysis that Dworkin includes in his liberal version of egalitarianism. Let us recall how Dworkin argues in favor of affirmative action.[26] Affirmative action is justified (and this justification is similar to the justification in the United Nations Convention on the Elimination of All Forms of Racial Discrimination, CERD) if it contributes to a society with a higher level of equality. This means that in order to find out whether any particular group is qualified for affirmative action we must investigate whether formal equal treatment actually constitutes the treatment of people as equals. Significant levels of racial discrimination in American

[24] See Goodhart's article in this issue.
[25] Ronald Dworkin, *Justice in Robes* (Cambridge, Mass.: The Belknap Press of Harvard University, 2006).
[26] Ronald Dworkin, "Reverse Discrimination." In Dworkin: *Taking rights seriously*, pp. 221-239.

society, for example, explain why discrimination of African-Americans continues even when applicants to highly desirable educational programs are treated equally. Affirmative action is a way to promote social equality, which demands treatment as equals and not just equal treatment.

For both Rawls and Dworkin, then, human rights are a legal instrument whose main function is to enact the fundamental moral principle of equal respect and concern. Kant's pure moral principle becomes a principle of social and political morality.

Nonetheless, I do not believe that Rawls and Dworkin offer "the most we can hope for" if we are looking for a critical moral principle that is sensitive to concrete political and economic structures. Like other liberals, they reduce human rights to legal instruments that states should use in their treatment of people. Such a reduction weakens the democratic potential of human rights. States are bound, or should be bound, by human rights obligations. But human rights agency is here reduced to that of state officials. Citizens – individuals as well as groups – are the objects of state policies that should ideally comply with human rights law.

Although legal practice is crucial for all human rights regimes, democratic agency on behalf of the unprivileged is needed in order to create and re-create a human rights regime. Human rights in liberal interpretations protect people against power but they also reduce people to the status of subjects of law. We therefore need an interpretation of human rights that does not downplay people's status as the legitimate authors of law.

I believe that Habermas's view of human rights as a dialectics of private freedom and civic autonomy offers a more cogent understanding of how the principle of equal respect for human dignity should be interpreted. According to Habermas, this principle is constitutional because it allows for an ongoing and never finalized constitutive *political practice*. A democratic society constitutes itself through ongoing democratic will-formation and a formalized process of legislation. Human rights, if they function properly, are always the product of this constitutional practice, not just the legal implementation of pre-existing international norms. People who *experience* as unjust a society that endorses equal respect for human dignity in its constitution are the most important democratic agents of human rights. This conclusion is a major insight of Habermas's interpretation of human dignity and human rights. Let me illustrate this point by means of the example of contemporary Islamophobia.

We expect human rights to protect people from racism. In contemporary Europe, however, human rights are frequently used in order to legitimize the discrimination of Muslims. Muslim cultures are presumed to be undemocratic and incompatible with human rights, a view which serves to legitimize regulations that weaken the rights of Muslims. From the egalitarian-liberal point of view, such a deformed legal and political usage of human rights must be counteracted by state officials and by international law: states are expected to enforce human rights law and protect minorities from discrimination. While I agree with this view, I believe that we will be unable to effectively counteract racism if Muslims themselves (and those who show solidarity with them) lack democratic agency. The more such groups are treated as a threat to human rights and democracy, the more the legitimacy of their political agency is questioned. In Sweden, for example, Muslim organizations, including human rights organizations, are subjected to far stricter administrative control than other organizations of civil society. Instead of promoting the bottom-up democratic consolidation of Muslims, the Swedish state has

introduced policies of assimilation that present human rights as a particular set of personal values which Muslims should endorse in order to become included in society.[27]

From a Habermasian perspective, the constitutional principle of equal respect for human dignity requires institutions that make Muslims into the agents of democratic will-formation, not merely the objects of official state concern. Dissatisfaction with the current situation among Muslim minorities represents a democratic resource, not a threat to democracy. Their experiences reveal contemporary forms of injustice and they are motivated to democratically work for a change. Such a change might include a questioning of established policies of human rights.

To sum up, human rights, if interpreted in light of the principle of equal respect for human dignity, should not be reduced to positive legal and political norms for state officials to enforce but should also function as a critical morality.[28] To achieve this, unprivileged persons and groups must be recognized as agents of human rights. This thesis differs from the idea that human rights are subjective rights. Subjective rights are claimable rights, that is, rights with corresponding state obligations. Democratic human rights are claimable rights that we are the *authors of*. And it is here that the capacity to see unjust social institutions becomes fundamental. From the perspective of unprivileged persons and groups, injustice *appears* as an injustice that prompts the (re)adoption of the democratic struggle for reforms of social and legal institutions.

Human rights bind states by virtue of their legal forms, that is, authoritatively. As a moral and political project human rights are fundamentally open, they are and should be constituted and re-constituted through democratic processes in which disagreements related to different social positions play a central role.

Universalism without closure

Let us return to my initial question about the contribution that critical ethics can make to progressive political agency with regard to human rights. Most importantly, we must firmly reject the idea of a uniform natural morality that is waiting to be implemented in politics and law. Instead of proposing new versions of naturalistic theories of "cosmopolitan rights," we should look for models of critique. How should we develop an ethics of human rights that is to be an instrument for the critique of different moral and legal conventions on human rights?

Classical utilitarianism offers a critical model of "natural rights" by counting every person's actual interests and/or preferences. Islamic liberation theology claims that any subjugation of humans by other humans is an offence against God and must be rejected on moral grounds. The normative principle of equal respect for human dignity promotes a democratic human rights culture by claiming that discrimination is incompatible with genuine practices of human rights. While human rights are constructed contextually, humans in any context are all entitled to the same level of protection by human rights.

In my view, human rights interpreted in the light of the principle of equal respect for human dignity do not presuppose a belief in any particular substance of humanity; we

[27] Muslims are not the only group subjected to discriminatory practices. Roma organizations in Sweden testify about similar experiences. In fact, several minority organizations work together to reach out to the UN with parallel human rights reports.

[28] For a more elaborated account of my view of human rights as politics, law, and morality see Namli, *Human Rights as Ethics, Politics, and Law*.

can construct legitimate human rights regimes even while disagreeing about what exactly it means to treat humanity with respect.

What the principle of equal respect for human dignity does presuppose is the purely normative demand that the exercise of power must be justified in such a way that a morally valid judgment can be regarded as valid in every identical situation. We can disagree on what particular human right should be regarded as the strongest. But if we reason in favor of one particular meaning or the priority of one particular human right, we cannot legitimately argue that some groups (for example, because of their presumed or actual culture) can be restricted in claiming such a right. If we agree that humans are entitled to freely choose their way of life and personal values, we are committing ourselves to securing this right for everyone. Human rights can be limited, of course, but such limitations must be justified and applied in a non-discriminatory manner.

Somewhat unexpectedly, perhaps, I also believe that we can utilize Richard Hare's universalizability principle as a way to combine normative universalism with a constructivist approach to human rights, that is, an understanding of human rights as socially constructed in particular contexts. As Hare writes:

> Universalizability can be explained in various equivalent ways; it comes to this, that if we make different moral judgements about situations which we admit to be identical in their universal descriptive properties, we contradict ourselves.[29]

This version of universalization, as a criterion of valid moral judgements, is sensitive to the particularity of human conditions. Universalizable moral judgments are always judgements in particular contexts, which means that universalizable judgement is not the same as general judgment.

Although Hare has himself endorsed utilitarianism as the best normative theory, his metaethical principle of universalizability is coherent with a critical morality of human rights. Human rights are constructed by different agents in concrete social settings, but these constructions are not legitimately different if they allow for different normative judgements in identical situations.

The universalizability of moral judgements as a justificatory demand does not explain *how* we recognize situations as either identical or non-identical in their descriptive properties. Hare himself is mostly concerned about the coherency of professional philosophical moral judgments. My own view is that finding out whether situations are identical in their descriptive properties demands democratic practical reasoning, i.e. actual involvement in deliberation with others. Situations that seem identical can be significantly different when viewed from other social perspectives.

Let us consider a situation where two women apply for a position as a nurse at a hospital somewhere in Europe. One woman belongs to the majority population and, having previously been part of a particular religious culture of the region, is now secular. Another woman is a Muslim who has been born and educated in Europe. Many of us believe that the situation of these women seeking the position is identical. Such might indeed be the case, but in order to make such a judgment we need to include the perspectives of European Muslim women, their actual experiences of being evaluated in comparison with "European" women.

Open universalism is the term I have given to the kind of universalism of human rights that I am proposing. This kind of universalism is best achieved if human rights are

[29] R.M Hare, *Moral Thinking. Its Levels, Method and Point* (Oxford: Clarendon Press, 1981), p. 21.

interpreted in light of the principle of equal respect for human dignity. Open universalism of human rights is purely normative insofar as it does not offer a description of what constitutes humanity in any specific time and space. Instead, it states that all humans should be treated as equally human, thereby opening up a space for specific people in specific places to demonstrate how they are treated inhumanly and argue for what should be done in order to reform institutions, including human rights.

As noted already, the open universalism of human rights enables a critical morality that is political. Already classical utilitarian philosophers have questioned the possibility of moral and legal conventions being meaningfully scrutinized by super-philosophers who elevate themselves above particular human conditions. Ethicists ought, rather, to involve themselves in the critical analysis of human rights. And this means that we need to act in solidarity with those for whom injustice is the consequence of their material social conditions.

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

Michelle Becka

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 Bhaba[10] 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 problem[17]

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[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 reafirmed 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.

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[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. Therefor 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]

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[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

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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

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[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, 'Liberale 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, 'Liberale 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

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[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 aumented 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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Fight for your (climate) rights! Ethical, legal, and human rights perspectives on democracy and protest

Max Tretter & Analucia Löschcke Centeno

The climate protests of Last Generation have not only garnered widespread attention but also sparked significant criticism. A key argument against their actions is that they undermine democratic processes and therefore pose a threat to democracy. Such critiques frame the group's environmental concerns as being in opposition to their critics' concerns for democracy. In this paper, we explore how this perceived tension between climate protection and democracy can be addressed. Drawing on ethical, legal, and human rights perspectives, we argue that this conflict cannot be resolved by simply prioritizing one side over the other. Instead, each of these perspectives affirms that both climate protection and democracy are fundamental values, state objectives, and legal principles. Consequently, we argue that the best way to address this tension is to fundamentally reframe the debate itself. Instead of asking whether "democracy or climate protection" should take priority, we should emphasize their interdependence and synergies – shifting toward a "democracy and climate protection" framework. To support this argument, we draw on Robin Celikates' concept of radical democratic civil disobedience, which allows us to perceive Last Generation's protest actions as a struggle for both climate justice and democracy.

Introduction

What we are witnessing today, according to German protest researcher Tareq Sydiq in his latest work, is the rise of a *new culture of protest*.[1] Yet, what makes this culture "new", according to Sydiq, is not so much the issues at stake—what people are protesting for or against—nor the forms of protest themselves, even though new technologies have introduced fresh dynamics.[2] Rather, what defines this *new culture of protest* is a renewed

[1] Tareq Sydiq. Die neue Protestkultur. Besetzen, kleben, streiken. Der Kampf um die Zukunft. München: Hanserblau, 2025.
[2] Zeynep Tufekci. Twitter and Tear Gas. The Power and Fragility of Networked Protest. New Haven, London: Yale University Press, 2017; Athina Karatzogianni et al. (ed.), Protest Technologies and Media Revolutions. The Longue Durée. Bingley: Emerald Publishing, 2018; Nils B. Weidmann & Espen Gellmuyden Rød. The Internet and Political Protest in Autocracies. New York: Oxford University Press, 2020.

growing global awareness of protest as a powerful tool of political expression and participation—one that is increasingly recognized as essential in the "struggle for the future."[3] Sydiq sees this shift reflected in movements such as the so-called *headscarf protests* in Iran, the political demonstrations in Hong Kong, the revolution(s) and counterrevolution(s) in Sudan, as well as resistance against right-wing shifts across Europe and the United States. Not least among these movements are the global climate and environmental protests, with Sydiq paying particular attention to the actions of *Last Generation.*

Sydiq's focus on the protests of *Last Generation* can be explained by two key factors. First, their actions have garnered massive media attention and sparked intense public controversy—particularly in Germany—due to their "disruptive"[4] nature. Second, the debates surrounding *Last Generation's* protests provide a particularly revealing case for analyzing the relationship between protest and democracy in general. Across media, public discourse, and academic debates, *Last Generation's* protests are frequently portrayed as a *threat to democracy*—or even as fundamentally anti-democratic. Critics from different fields argue that the movement's methods undermine democratic processes and, in doing so, endanger democracy itself. This framing constructs a deeper tension between protesters, their supporters, and their dual commitment to climate protection and democracy—echoing similar accusations leveled against other protest movements.

It is precisely this framing—one that positions protest as a threat to democracy—that this paper seeks to interrogate, using Last Generation and the discourse surrounding their protests as a case study. At its core, this analysis asks: How can this supposed tension between protests and their goals—in this case: climate protection—and democracy, which these protests are said to endanger, be negotiated? To address this question, we will first examine Last Generation's protests, the controversies they have ignited, and the broader tension framed between climate action and democracy. From there, we will analyze this supposed conflict through three different lenses: first, an ethical perspective; second, a legal perspective; and finally, a human rights perspective. However, as we will see, none of these perspectives offer a clear resolution in favor of one side over the other. From ethical, legal, and human rights standpoints alike, *both* climate protection *and* democracy emerge as essential values, legal interests, and rights. Ultimately, this analysis will suggest that the oftentimes proposed conflict between protests and their goals and democracy is itself a misleading construct. Rather than treating the two as opposing forces, we should recognize that democracy and climate protection in particular as well as democracy and protest in general *can* and maybe even *must* go hand in hand—calling for a fundamental reframing of the debate itself. This argument is ultimately reinforced by reflections from political theory on the concept of civil disobedience.

Climate protests in Germany and the controversies they spark

Last Generation has drawn widespread attention both in Germany and internationally through a series of disruptive protests, many of which have sparked intense public controversy. Some of their most high-profile actions in Germany include throwing mashed

[3] Sydiq, Die neue Protestkultur.
[4] Last Generation themselves actively employ the term "disruptive" to describe their protests. This characterization has since been widely adopted in media reporting and public debate. See Letzte Generation. Strategy for 2024, online at https://letztegeneration.org/en/strategie/ (accessed 2025-02-06).

potatoes at Claude Monet's *Grainstacks* in Potsdam's *Barberini Museum*,[5] spraying Berlin's *Brandenburg Gate* with orange paint,[6] and blocking major roads, intersections, and even airport runways.[7] The latter blockades typically involve groups of predominantly young activists—often wearing high-visibility vests—gluing their hands to the ground to obstruct traffic or air travel. The rationale behind these actions is to use highly symbolic acts that attract national and international media attention to raise urgent awareness of the "climate crisis"[8] and increase pressure on political decision-makers to accelerate the transition to sustainable energy and other climate-friendly policies.[9] The protesters take care to minimize harm: in paint attacks, they use washable paint and target well-protected or easy-to-clean objects, while in road blockades, they ensure openings for emergency vehicles.[10] In short, they strive to make their actions as nonviolent as possible. Additionally, both individual activists and *Last Generation* as a movement have repeatedly stressed that they view their protests as *a last resort*, given what they see as the failure of established democratic processes to achieve meaningful progress in climate policy.[11]

Reactions to *Last Generation's* protests have been sharply divided—both in the media and in the public, as well as in academic and political discourse. While some applaud the activists' commitment, others have strongly condemned their methods. Olaf Scholz, who served as Germany's Chancellor from 2021 to 2025, during the height of *Last Generation's* protests, dismissed the group as "totally crazy" (*"völlig bekloppt"*).[12] Meanwhile, leading members of the *Christian Democratic Union* (Germany's most popular

[5] Sam Jones. 'Climate activists throw mashed potatoes at Monet work in Germany'. The Guardian (2022-10-23), online at https://www.theguardian.com/environment/2022/oct/23/climate-activists-mashed-potato-monet-potsdam-germany (accessed 2025-02-07).
[6] The Associated Press. Climate activists spray Berlin's Brandenburg Gate with orange paint (2023-09-17), online at https://apnews.com/article/climate-protest-last-generation-brandenburg-gate-paint-9518c67e688628c89e65e106e346b900 (accessed 2025-02-07).
[7] Deutsche Welle. German climate protesters glue themselves to Berlin streets (2023-04-24), online at https://www.dw.com/en/germany-climate-activists-glue-themselves-to-berlin-streets/a-65416427 (accessed 2025-02-07); Reuters. Climate activists breach security at four German airports (2024-08-15), online at https://www.reuters.com/world/europe/two-german-airports-temporarily-suspend-flights-over-climate-activists-2024-08-15/ (accessed 2025-02-07).
[8] The use of the term "climate crisis" is not without controversy with some critics arguing that it introduces introduces normatively charged or even suggestive language into what they believe should remain a "neutral" description of climatic developments. While we acknowledge this debate, we deliberately choose to use "climate crisis" in this article. This choice reflects not only the urgency attributed to the issue by a growing number of scholars, activists, and political leaders, but also the increasingly evident and devastating consequences of climate change—already observable today and disproportionately affecting vulnerable populations. That's why, in our opinion, the term "climate crisis" is not only ethically, politically, and empirically justified, but perhaps even the more appropriate term to describe the current situation—precisely because so-called "neutral" descriptions are never truly neutral, and can risk downplaying the severity of the challenges we face.
[9] Last Generation. Hand on Heart—Democracy Needs Honesty, online at https://letztegeneration.org/en/erklaerung/ (accessed 2025-02-07).
[10] Last Generation. Values & Protest Consensus, online at https://letztegeneration.org/en/mitmachen/werte-protestkonsens/ (accessed 2025-02-07).
[11] Letzte Generation. Wer wir sind - Letzte Generation, online at https://letztegeneration.org/wer-wir-sind/ (accessed 2025-01-29).
[12] Der Spiegel. Letzte Generation: Scholz findet Klebe-Aktionen »völlig bekloppt« (2023-05-22), online at https://www.spiegel.de/politik/olaf-scholz-zu-letzte-generation-kanzler-bezeichnet-klebe-aktionen-als-voellig-bekloppt-a-8c459d08-5530-46be-91e4-4108da36fceb (accessed 2025-01-29).

political party), including the candidate widely expected to become the next Chancellor, have likened the group to criminals, hooligans, and even terrorists.[13]

This rhetoric is mirrored in legal actions, as many climate activists have indeed been implicated in incidents involving collateral damage,[14] with some even facing criminal charges, including coercion.[15] Further legal actions have included charges of resisting law enforcement officers and, more recently, allegations of forming a criminal organization under §129 of the German Penal Code (*Strafgesetzbuch*)[16] – a statute originally designed to target organized crime.[17] The outcome of this case, still pending, could have significant implications. A court ruling classifying *Last Generation* as a criminal organization would not only impact its members but could set a precedent that exposes the logistical, legal, media, and political apparatus supporting the group to scrutiny for its alleged promotion of a criminal organization. Such a precedent could have far-reaching implications for other climate activism groups in Germany as well.

Beyond the legal sphere, critics from various disciplines have challenged *Last Generation* from a democratic theory perspective. Some theologians, for instance, contend that the movement's methods bypass democratic processes, allowing a vocal minority to impose its political position without seeking broader societal consensus.[18] Similar concerns surface in media and public debates, where *Last Generation* is repeatedly accused of undermining democracy and making a "mockery of democracy and the rule of law"[19] – or, at the very least, where the compatibility of their protests with democratic principles is

[13] Frankfurter Allgemeine Zeitung. Merz nennt Klimaaktivisten "kriminelle Straftäter" (2022), online at https://www.faz.net/aktuell/politik/inland/merz-nennt-klimaaktivisten-kriminelle-straftaeter-18490178.html (accessed 2025-01-29); Ferdinand Otto. 'Alexander Dobrindt: "Die Entstehung einer Klima-RAF muss verhindert werden"'. Zeit Online (2022-11-06), online at https://www.zeit.de/politik/deutschland/2022-11/alexander-dobrindt-klimaaktivisten-strafen-raf (accessed 2025-02-13).

[14] One of the most high-profile cases in which protesters from Last Generation were accused of causing significant collateral damage occurred in November 2022. That month, a cyclist died following a traffic accident near a Last Generation protest in Berlin. While early reports suggested that an emergency vehicle had been delayed due to the protest, prosecutors later concluded that the group could not be held liable for assault or homicide. See rbb. Staatsanwaltschaft: Klima-Aktivisten nicht für Tod von Radfahrerin verantwortlich (2024-04-13), online at https://www.rbb24.de/panorama/beitrag/2023/04/berlin-radfahrerin-tod-klima-aktivisten-rettungseinsatz-keine-verantwortung.html (accessed 2025-01-29); Dieter Rucht. 'Die Letzte Generation: Eine kritische Zwischenbilanz'. Forschungsjournal Soziale Bewegungen 36:2 (June 2, 2023): 186–204.

[15] Lena Herbers. 'Ziviler Ungehorsam. Straftat oder legitimer Protest?'. Forschungsjournal Soziale Bewegungen 36:2 (2023), 314–327.

[16] German Criminal Code (2021-11-22), translated by Michael Bohlander, online at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (accessed 2025-02-06).

[17] Katrin Höffler. 'Ziviler Ungehorsam. Testfall für den demokratischen Rechtsstaat'. Verfassungsblog (2023-05-25), online at https://verfassungsblog.de/ziviler-ungehorsam-testfall-fur-den-demokratischen-rechtsstaat/ (accessed 2025-02-13).

[18] Ulrich Körtner. 'Die letzte Generation?' Zeitzeichen (2022-12-28), online at https://zeitzeichen.net/node/10214 (accessed 2025-01-29); Hans-Richard Reuter, 'Klimaprotest als ziviler Ungehorsam. Liberal oder radikal?' Zeitschrift für evangelische Ethik 67:3 (2023): 165–70; Thomas Martin Schneider. Kirche ohne Mitte? Perspektiven in Zeiten des Traditionsabbruchs. Leipzig: Evangelische Verlagsanstalt, 2023.

[19] Reinhard Müller. 'Die Verhöhnung von Demokratie und Rechtsstaat'. FAZ (2022-11-03), online at https://www.faz.net/aktuell/politik/inland/letzte-generation-und-klimaaktivismus-die-groesste-gefahr-18432010.html (accessed 2025-02-07).

repeatedly questioned, often in a critical or suggestive manner.[20] Alongside the claim that *Last Generation* circumvents established political processes, critics often argue that by fostering public skepticism and deepening societal polarization, the movement threatens the very foundations of social and democratic cohesion.

Viewed from a broader perspective, these criticisms illustrate how *Last Generation's* climate protests are framed as being in direct opposition to democracy.[21] This framing constructs a dichotomy with climate protection being pitted against democracy, and with *Last Generation* positioned as advocates for the climate but portrayed as a threat to democratic order.[22] Meanwhile, their critics position themselves as defenders of democracy. This constructed opposition has increasingly shaped both public and media discourse surrounding *Last Generation's* protests. As a result, activists are forced to prove that their actions do not threaten democracy, while the broader public is pressured to take sides in this supposed conflict between climate protection and democracy.[23] But what is

[20] See, for example, Tom Mannewitz. 'Zur Nötigung genötigt? Die "Letzte Generation" zwischen Extremismusvorwurf und zivilem Ungehorsam'. Konrad Adenauer Stiftung (2023-02-16), online at https://www.kas.de/de/web/die-politische-meinung/artikel/detail/-/content/zur-noetigung-genoetigt (accessed 2025-02-07); Christoph Schäfer. 'Radikaler Aktivismus. Wie viel Klimaprotest verträgt Demokratie?' Deutschlandfunk (2023-05-31), online at https://www.deutschlandfunk.de/radikaler-aktivismus-wie-viel-klima-protest-vertraegt-demokratie-dlf-7b8f2bce-100.html (accessed 2025-02-07); Sebastian Thomas. 'Letzte Generation: Schadet die Protestform der Demokratie?' Vorwärts (2024-04-28), online at https://vorwaerts.de/inland/letzte-generation-schadet-die-protestform-der-demokratie (accessed 2025-02-07).

[21] One factor that very likely contributes to the strong criticism—and at times harsh rhetoric—directed at Last Generation and their protests, and perhaps also to the construction of the dichotomy between climate protection and democracy, is the fact that Germany has already adopted a number of progressive climate protection measures and laws, especially in comparison to other European and international contexts. These include, among others, the Renewable Energy Sources Act (Erneuerbare-Energien-Gesetz), the Coal Phase-out Act (Kohleausstiegsgesetz), and the Climate Protection Act (Bundes-Klimaschutzgesetz), which will be adressed in more detail later. Against this backdrop, the actions of Last Generation might be viewed as devaluing these democratically achieved milestones and as potentially undermining democratic processes more broadly.

[22] The dichotomy between "climate protection" and "democracy" identified above—frequently encountered in public and political discourse surrounding Last Generation—is, of course, a simplification that overlooks the broad spectrum of positions within each. Public support for climate action in Germany remains relatively high, but often varies in intensity—with many people endorsing moderate activism, while tending to be more skeptical of disruptive or radical forms of activism. Similarly, conceptions of democracy differ significantly, ranging from proceduralist and liberal models to more participatory or agonistic understandings. While a more comprehensive analysis would need to take this plurality into account, for the sake of analytical clarity in this contribution we focus on the "simplified" dichotomy as it is most commonly represented in public and political discourse. For more detailed discussion that considers the varieties of climate activism and their democratic implications, see our forthcoming articles in Cursor_ (2025): Analucia Löschcke Centeno and Max Tretter. 'Of Climate Protests, Symbolic Acts, and joder: Theological Reflections on Annoying Forms of Activism' Cursur_ (2025) and Max Tretter. 'Radical Activism, Abolitionism, and Proportionality: Lessons for (Theological) Ethics' Cursor_ (2025).

[23] Framing climate activism as being in conflict with democracy not only places activists in a defensive position—forcing them to justify the democratic legitimacy of their actions—but also risks undermining the broader cause they represent: climate protection. When protests by Last Generation are portrayed as illegitimate or as a threat to democratic order, public trust may be weakened not only in the group itself, but in climate activism more broadly, including the perceived urgency and legitimacy of ambitious climate action. In this way, the discourse surrounding Last Generation affects more than just the activists—it may erode public support for climate policy as such. Given that, according to the most recent Ipsos study from April 2025, a clear majority in Germany still supports climate protection in principle, but the share of those who feel responsible to act has dropped from 69% to 53% since the previous survey from 2021, this risk of further delegitimization becomes all the

the "right" decision in the face of this dichotomy? The following sections will explore this question from multiple perspectives.

Climate protection *or* democracy? Ethical perspectives

As discussed in the previous section, the debate over *Last Generation's* protests is framed as a binary opposition: one side is portrayed as advocating for climate action but accused of endangering democracy, while the other side is positioned as defending democracy. Within this framework, both sides can appeal to significant ethical principles to support their positions. On one hand, there is the urgent need to combat climate change to prevent severe long-term harm—especially in regions of the Global South.[24] On the other, there is the fundamental obligation to protect democracy and uphold democratic core principles such as freedom, equality, and political participation.

Attempting to resolve this opposition through ethical reasoning quickly runs into difficulties, as neither principle can be clearly and un-disputably prioritized over the other. While some argue that safeguarding the climate is a prerequisite for democracy to exist, making climate protection a fundamental priority,[25] others assert that democracy provides the essential framework for achieving meaningful climate action, warning against any measures that might undermine democratic principles in the name of climate protection. Similarly, while some stress that climate protection is the more urgent issue—since climate change will ultimately affect everyone[26]—others argue that its most severe consequences will unfold gradually, allowing time for (technical) solutions to emerge. In contrast, they contend that democracy faces immediate crises,[27] making its preservation the more pressing concern.

Given these arguments, single individuals may gravitate toward the side that aligns more closely with their personal convictions, supporting either the climate protesters or their critics. However, from a more "objective" perspective, it must be acknowledged that both sides present compelling arguments, making it difficult—if not impossible—to determine whether climate protection or democracy should be considered the more *fundamental* or *urgent* priority. This leads to a crucial question: If neither climate protection nor democracy can be *ethically* prioritized over the other, how can this conflict be meaningfully addressed?

Legal perspectives

One possible approach to resolving this issue is to shift the debate from an ethical framework to a legal one, examining which of the two concerns—climate protection or

more serious. See: Ipsos. People and Climate Change. Public attitudes to the Climate Crisis and the transition to Net Zero (2025-04), https://resources.ipsos.com/rs/297-CXJ-795/images/People%26ClimateChange2025.pdf?version=0 (accessed 2025-04-22).

[24] Peter Singer. Practical Ethics, third edition. Cambridge: Cambridge University Press 2011 (1979), pp. 216-237; Humberto Basilio. 'Extreme heat will kill millions of people in Europe without rapid action'. Nature 638:8049 (2025), pp. 17-18, https://doi.org/10.1038/d41586-025-00239-4.
[25] Friederike Otto. Klimaungerechtigkeit: Warum die Klimakatastrophe mit Kapitalismus, Rassismus und Sexismus zu tun hat, second edition. Berlin: Ullstein, 2024 (2023).
[26] Singer, Practical Ethics; Basilio, Extreme Heat; Otto, Klimaungerechtigkeit.
[27] Craig Calhoun, Dilip Parameshwar Gaonkar and Charles Taylor. Degenerations of Democracy. Cambridge: Harvard University Press, 2022.

democracy—takes precedence from a legal perspective. Various legal frameworks could be relevant here: individual nqations have their own laws, and in some countries, such as Germany or the United States, federal laws apply nationwide, while state laws govern at the regional level. Furthermore, supranational legal frameworks, such as those of the European Union, also come into play. At all these levels, laws exist that address both the protection of democracy and climate action. A thorough legal analysis would need to account for these laws, their hierarchies, and their interactions.

To avoid overextending our expertise and because a narrower focus is sufficient for the conclusion we aim to reach, we will simplify this complexity and concentrate solely on federal law in Germany, setting aside state-specific differences and European legislation, as our case study is based there. In Germany, numerous laws are designed to safeguard democracy and address climate protection. In recent years, targeted legislation—such as the Renewable Energy Sources Act (*Erneuerbare-Energien-Gesetz*),[28] the Coal Phase-out Act (*Kohleausstiegsgesetz*),[29] and the Climate Protection Act (*Bundes-Klimaschutzgesetz*)[30]– has been introduced to advance climate goals. However, the most fundamental legal framework is the German constitution, known as the Basic Law (*Grundgesetz*), which defines the objectives of the Federal Republic of Germany and provides the foundation for all legal texts and policies.

If we draw on this Basic Law to gain a new perspective on the above conflict, two observations can be made. First, Article 20 of the Basic Law explicitly defines Germany as a democratic state: "(1) The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people [...]." This article assigns democracy a uniquely elevated status, granting it the highest level of legal protection. Under no circumstances may the democratic order be endangered. This protection is so robust that Article 20, Paragraph 4, even provides citizens with the right—some scholars might even call it a duty—to resist any attempt to abolish the democratic constitutional order: "(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available."31

Democracy, as affirmed by this article of the Basic Law and supported by its legal interpretations,32 is a fundamental value that must be rigorously protected. However, this does not imply that democracy is inherently more important than other fundamental values like, for instance, climate protection. Accordingly, Article 20 cannot and should not be interpreted as necessarily mandating alignment with those who oppose climate protests in the name of defending democracy. Particularly regarding climate protection, Article 20a provides a critical clarification. Introduced into the Basic Law after Article 20 on October 27, 1994, and effective as of November 15, 1994[33]—more than 45 years after the Basic Law

[28] Erneuerbare-Energien-Gesetz (2023-05-27), online at https://www.gesetze-im-internet.de/eeg_2014/ (accessed 2025-02-07).
[29] Kohleausstiegsgesetz (2022-12-19), online at https://www.gesetze-im-internet.de/kohleausg/index.html (accessed 2025-02-07).
[30] Bundes-Klimaschutzgesetz (2023-07-17), online at https://www.gesetze-im-internet.de/ksg/index.html (accessed 2025-02-07).
[31] Basic Law for the Federal Republic of Germany (2022-12-19), translated by Christian Tomuschat, David P. Currie, Donald P. Kommers, and Raymond Kerr, online at https://www.gesetze-im-internet.de/englisch_gg/ (accessed 2025-01-17).
[32] Christian Bumke and Andreas Voßkuhle. German Constitutional Law. Introduction, Cases, and Principles. Oxford: Oxford University Press, 2019, pp. 321–332.
[33] Jan-Louis Wiedmann. 'Umweltschutz, Art. 20a GG', in Staatsorganisationsrecht: Klausur- und Examenswissen, edited by Valentina Chiofalo, Louisa Linke and Jaschar Kohal. Berlin: Walter de Gruyter, 2022, pp. 246–247.

was first enacted[34]—Article 20a designates the protection of the "natural foundations of life"[35]—and since its amendment in 2002, the protection of animals[36]—as a state objective grounded in the "responsibility towards future generations."[37]

"Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."[38]

For many years, the interpretation of Article 20a remained ambiguous, prompting extensive debate. However, in 2021, the Federal Constitutional Court (*Bundesverfassungsgericht*)—the highest authority in Germany for constitutional interpretation—delivered a "landmark ruling"[39] that established a clear precedent for understanding Article 20a. In its Order of 24 March 2021, the Federal Constitutional Court determined that, under Article 2, Paragraph 2, Sentence 1 of the Basic Law, which guarantees every individual the "right to life and physical integrity",[40] people must also be protected from the impacts of environmental pollution, as these impacts pose a significant threat to their constitutionally guaranteed physical integrity.[41]

"The protection of life and physical integrity under Art. 2(2) first sentence of the Basic Law encompasses protection against impairments of constitutionally guaranteed interests caused by environmental pollution, regardless of who or what circumstances are the cause. The state's duty of protection arising from Art. 2(2) first sentence of the Basic Law also encompasses the duty to protect life and health against the risks posed by climate change. It can furthermore give rise to an objective duty to protect future generations."[42]

Building on this landmark ruling—that the state is obligated to protect individuals from the consequences of environmental pollution (which explicitly includes the effects of climate change, as it stems directly from such pollution)—the Federal Constitutional Court

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[34] Christoph Möllers. Das Grundgesetz: Geschichte und Inhalt. München: C.H. Beck, 2009.

[35] Basic Law for the Federal Republic of Germany. The German Basic Law refers to the "natural foundations of life", a term that encompasses broad environmental concerns—including ecosystems, biodiversity, and natural resources—beyond climate protection in the narrower sense. While we acknowledge this broader scope, our discussion explicitly focuses on climate protection, reflecting the specific context of the protests and legal cases analyzed in this article. This understanding aligns with the interpretation of the Federal Constitutional Court, which we will present in more detail later in this section.

[36] Andreas Buser. 'Tierschutz, Art. 20a GG', in Staatsorganisationsrecht: Klausur- und Examenswissen, edited by Valentina Chiofalo, Louisa Linke and Jaschar Kohal. Berlin: Walter de Gruyter, 2022, pp. 248–252; Wie Umwelt- und Tierschutz ins Grundgesetz kamen (2013-12-02), online at https://www.bundestag.de/webarchiv/textarchiv/2013/47447610_kw49_grundgesetz_20a-213840 (accessed 2025-01-17).

[37] Basic Law for the Federal Republic of Germany. For more information on the topic of responsibility towards future generations and sustainability within German legal contexts, see Michael Kleiber. Der grundrechtliche Schutz künftiger Generationen. Tübingen: Mohr Siebeck, 2014; Andreas Glaser. Nachhaltige Entwicklung und Demokratie. Tübingen: Mohr Siebeck, 2006.

[38] Basic Law for the Federal Republic of Germany.

[39] Deutscher Bundestag. Wissenschaftliche Dienste. Umweltschutz nach Verfassungsrecht und Beteiligungsrecht gemäß Aargus-Konvention (2024-08-19), online at https://www.bundestag.de/resource/blob/1021388/24e2347301180edef4acd847475661a7/WD-5-118-24-pdf.pdf (accessed 2025-01-17).

[40] Basic Law for the Federal Republic of Germany.

[41] Federal Constitutional Court, Order of 24 March 2021 (2021-03-24), online at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html (accessed 2025-01-17).

[42] Federal Constitutional Court, Order of 24 March 2021.

outlines in Paragraphs 2 through 5 the implications of this Order for the interpretation of Article 20a of the Basic Law and the resulting obligations for the state. Without delving deeply into the legal debates, the court concludes that Germany's constitutional duty to safeguard against the effects of climate change obligates the state to strengthen its climate protection measures—while also ruling that existing measures have been insufficient.[43] At the same time, the court emphasizes that this constitutional mandate for climate protection must not be pursued at the expense of other interests, particularly those rights and principles equally enshrined in the Basic Law. Instead, as explicitly stated in Section 2a of the Federal Constitutional Court's Order, in cases of conflict, a careful balancing of constitutional interests and principles is required:

"Art. 20a of the Basic Law does not take absolute precedence over other interests. In cases of conflict, it must be balanced against other constitutional interests and principles. Within the balancing process, the obligation to take climate action is accorded increasing weight as climate change intensifies."[44]

With this clarification, the Federal Constitutional Court affirms that the constitutional right to climate protection cannot and should not be used to override other constitutional rights—meaning that democracy or other fundamental rights may not be "sacrificed" in the name of climate protection. At the same time, this Order elevates climate protection to the status of a state objective and a fundamental right. Thus, we find ourselves back at the beginning: grappling with a conflict between climate protection and the preservation of democracy. The key difference, however, is that these are no longer framed "only" as "ethical goods" but also as "fundamental rights" and "state objectives", both safeguarded by German law at the highest level. In summary, while shifting from an ethical to a legal framework has indeed brought some new aspects to light, it has not resolved the core challenge. This prompts the question: How do we move forward? Is there yet another way to resolve the initial question?

[43] Federal Constitutional Court, Order of 24 March 2021. The Constitutional Court's call for the Federal Republic of Germany to strengthen its climate protection measures has also been met with criticism. Some argue that the German state—like any single state—has only limited agency when it comes to addressing global climate change. Since climate change is driven by transnational and cumulative emissions, even the most ambitious national climate policies are said to be insufficient unless matched by comparable efforts elsewhere. From this perspective, and following the ethical principle that "ought implies can," critics suggest that Germany cannot be held responsible for solving a problem it cannot solve alone. This line of reasoning has become so prominent that the Federal Constitutional Court addressed and explicitly rejected it in Paragraph 2c of its 2021 climate ruling: "The fact that no state can resolve the problems of climate change on its own due to the global nature of the climate and global warming does not invalidate the national obligation to take climate action. Under this obligation, the state is compelled to engage in internationally oriented activities to tackle climate change at the global level and is required to promote climate action within the international framework. The state cannot evade its responsibility by pointing to greenhouse gas emissions in other states." Rather than deriving the incapacity of individual states from global interdependencies—and thus rejecting any attribution of responsibility—the Court explicitly emphasizes that every state remains obligated to contribute to solving global problems within the scope of its capabilities. By doing so, a state may inspire others and help initiate broader international efforts. A similar line of argument is regularly advanced by scholars and policymakers, who underscore Germany's frequently invoked leading role in climate policy, stressing that Germany's actions can serve as precedents, helping to shape international norms, and influencing the political will of other states and political actors.

[44] Federal Constitutional Court, Order of 24 March 2021.

International human rights perspectives

One possible approach would be to shift the framework once again. Up to now, we have focused exclusively on national legal perspectives from Germany, while leaving out supranational legal considerations. However, climate change is a global issue, and climate protection cannot be effectively addressed within national borders alone. It therefore seems reasonable to broaden the legal perspective and integrate international human rights considerations into the analysis.

The *Universal Declaration of Human Rights* (UDHR) serves as the cornerstone document for human rights, outlining the "equal and inalienable rights" that "all members of the human family" are entitled to by virtue of birth. These rights, as articulated in the preamble, are regarded as "the foundation of freedom, justice and peace in the world."[45] Yet, a closer examination of the UDHR reveals that it contains no references to climate, climate change, or climate protection. This absence can be attributed to the historical context of its drafting—when the UDHR was adopted in 1948, these issues were not as prominent as they are today, to say the least. However, this absence should not be seen as an indication that climate protection or addressing the impacts of climate change are unrelated to human rights. On the contrary: the official website of the Office of the High Commissioner for Human Rights (OHCHR), the primary United Nations body for human rights, explicitly emphasizes:

"Climate change threatens the effective enjoyment of a range of human rights including those to life, water and sanitation, food, health, housing, self-determination, culture and development. States have a human rights obligation to prevent the foreseeable adverse effects of climate change and ensure that those affected by it, particularly those in vulnerable situations, have access to effective remedies and means of adaptation to enjoy lives of human dignity."[46]

So, even if climate change is not explicitly mentioned in the UDHR, the OHCHR highlights its profound implications for a wide range of human rights. Climate change poses threats to, or even directly violates, rights explicitly guaranteed to every individual under the UDHR. These include the rights to life and self-determination (Art. 3), access to water, sanitation, food, health, and housing (Art. 25), as well as development and culture (Art. 27). Moreover, additional fundamental rights not mentioned above are also jeopardized or negatively impacted by climate change and its effects, such as the right to freedom of movement and residence (Art. 13), social security (Art. 22), and education (Art. 26).[47]

If it is evident, as emphasized by the OHCHR and numerous other institutions and scholars,[48] that climate change not only threatens but also actively restricts human rights, this strongly suggests that combating climate change could—or indeed should—be understood as a fight against human rights violations; or, to put it in more positive terms,

[45] United Nations. Universal Declaration of Human Rights, online at: https://www.un.org/en/about-us/universal-declaration-of-human-rights (accessed 2025-01-25).
[46] United Nations. Human Rights. Office of the High Commander. OHCHR and climate change, online at https://www.ohchr.org/en/climate-change (accessed 2025-01-23).
[47] United Nations. Universal Declaration of Human Rights.
[48] Sumudu Atapattu. Human Rights Approaches to Climate Change. Challenges and Opportunities. London: Routledge. 2015; Bridget Lewis. Environmental Human Rights and Climate Change. Current Status and Future Prospects. Singapore: Springer Nature, 2018; Margaretha Wewerinke-Singh. State Responsibility, Climate Chance and Human Rights under International Law. Oxford, London: Hart, 2019.

as a fight for human rights. This interpretation is also advocated by Amnesty International, one of the largest human rights organizations globally, they assert on their official German website:

"Those who want to protect the human rights of all people worldwide must work to stop climate change. Global warming is already having devastating impacts on human rights. Millions of people are losing their homes due to floods, going hungry because droughts are destroying their crops, lacking access to clean drinking water, or being injured or killed by hurricanes."[49]

As this statement highlights, Amnesty International not only frames the fight against climate change as a substantive commitment to human rights. They also make it clear that this fight cannot be limited to addressing human rights violations already caused by climate change and providing compensation for them—it must actively include efforts to prevent future violations. By doing so, Amnesty International highlights the proactive and comprehensive nature of this interpretation.

What makes this interpretation of the relationship between human rights and climate change particularly significant is that it is not merely a theoretical argument confined to the domain of ethicists and human rights scholars. Instead, there are some legal precedents that embody a similar rationale. A landmark example is the April 2024 ruling by the European Court of Human Rights (ECHR) in favor of "Verein KlimaSeniorinnen Schweiz" (*Climate Seniors Switzerland*).[50] This group filed a lawsuit against Switzerland, alleging that the government's insufficient action against climate change and failure to adequately address its consequences constituted a violation of their human rights, especially the protection of their lives (Art. 2) and the respect for private and family life and the home (Art. 8).[51] Their claim was grounded in the argument that older women, in particular, are disproportionately vulnerable to the effects of climate change, especially extreme heat. In its decision, the ECHR determined that the plaintiffs' rights—as guaranteed by the European Convention on Human Rights (ECHR) and the UDHR—would indeed be violated if European states, in this specific case: Switzerland, failed to intensify efforts to combat climate change. Despite facing significant opposition afterward,[52] this decision achieved two major outcomes: first, it legally established the connection between human rights and climate protection; and second, it granted

[49] Amnesty International. Klimakrise und Menschenrechte, online at https://www.amnesty.de/informieren/themen/klimakrise-und-menschenrechte (accessed 2025-01-23), translated by MT.

[50] European Court of Human Rights. Legal Summary. Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC] - 53600/20. Judgment 9.4.2024 [GC] (2024-04-09), online at: https://hudoc.echr.coe.int/eng/?i=002-14304 (accessed 2025-01-27).

[51] European Court of Human Rights. Information Note on the Court's case-law 261. Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (relinquishment) - 53600/20 (2022-04), online at: https://hudoc.echr.coe.int/eng?i=002-13649 (accessed 2025-01-23).

[52] The ECHR's ruling has faced repeated criticism from various quarters, with opponents arguing that it is undemocratic, interferes with national sovereignty, and unjustifiably expands the scope of the European Convention on Human Rights. Charlotte Blattner provides a thorough account of these criticisms, along with a critical analysis, in which she defends both the Court's approach and its decision. Her commentary can be found on the largest German-language blog dedicated to constitutional law topics. See Charlotte Blattner. ‚Warum das KlimaSeniorinnen-Urteil nicht undemokratisch ist. Anmerkungen zu einer Schweizer Debatte'. Verfassungsblog (2024-06-26), online at https://verfassungsblog.de/egmr-klimaseniorinnen-gewaltenteilung/ (accessed 2025-01-23).

organizations the right to sue on behalf of those affected by climate change, such as the climate seniors representing older women in Switzerland.[53]

What insights can we draw from this argument, along with the supporting ruling that recognizes climate protection as a human rights issue, regarding the debate over climate protests in Germany? Is invoking human rights the "silver bullet" that resolves the conflict in favor of the protesters, who, by actively advocating for climate protection, are defending human rights? The answer is not so straightforward. Even though "democracy" is explicitly mentioned only once in the UDHR—in Article 29, which outlines the individual's duties to the community and states that individual rights may only be exercised within the limitations set by law and the rights and freedoms of others—there is a similarly close connection between democracy and human rights as there is between climate protection and human rights. As the OHCHR states on its website: "Democracy, development, rule of law and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing." This is further explained with the assertion that: "Democracy as a form of government is a universal benchmark for human rights protection; it provides an environment for the protection and effective realization of human rights."[54] This positive rationale—that democracy forms the foundation for human rights and creates the conditions in which they can thrive—can be further reinforced by a negative perspective. One could, for instance, point out that authoritarian or totalitarian states are often characterized by significant human rights violations. Democracy, therefore, stands not only as the strongest bulwark against such regimes but also as a safeguard against the human rights abuses that frequently accompany them.[55]

If the defense of democracy can also be interpreted as a *fight against human rights violations*—and therefore as a *fight for human rights*—then we find ourselves once again in

[53] It is essential to highlight that there are strict limitations regarding the admissibility of such representative lawsuits. This is demonstrated by two other cases brought before the ECHR, both of which were dismissed. The first case involved six Portuguese youths who sued more than 30 European states, alleging that these states, through inaction or insufficient climate protection measures, were accepting human rights threats or violations. The second case was filed by a French citizen who made a similar complaint against the French state. The ECHR dismissed the first case, arguing that it was too far-reaching and that states cannot be held accountable for actions occurring outside their borders. The second case was rejected on the grounds that the plaintiff lacked the so-called "victim status"—meaning he was not significantly affected by the consequences of climate change in a way that infringed upon his human rights. See European Court of Human Rights. Case of Duarte Agostinho and Others against Portugal and 32 Others (Application no. 39371/20). Decision (2024-04-09), online at https://hudoc.echr.coe.int/eng?i=001-233261 (accessed 2025-01-27); Tagesschau, Erste Klimaklage in Straßburg erfolgreich (2024-04-09), online at https://www.tagesschau.de/ausland/europa/klimaklagen-schweiz-100.html (accessed 2025-01-23).

[54] United Nations. Human Rights. Office of the High Commander. About Democracy and Human Rights, online at https://www.ohchr.org/en/about-democracy-and-human-rights (accessed 2025-01-23).

[55] Hannah Arendt. The Origins of Totalitarianism. San Diego: Harcourt Brace Jovanovich, 1979 (1951); John Dewey. The Public and its Problems. An Essay in Political Inquiry, edited by Melvin L. Rogers. Athens: Swallow Press, 2016 (1929); Richard Rorty. Pragmatism as Anti-Authoritarianism, edited by Eduardo Mendieta. Cambridge: The Belknap Press, 2021. Especially considering this close connection between democracy and human rights, as well as totalitarianism and human rights violations, the current global trend of "democratic backsliding" (Prainsack) and the rise of post-democratic, populist, or outright totalitarian regimes must be viewed with even greater concern. See Barbara Prainsack, Welche Sicherheit? Vertrauen zur Zeit des Democratic Backsliding, in Grenzen von Vermittlung—Vermittlung von Grenzen. Ethische, theologische, gesellschaftswissenschaftliche Erkundungen, edited by Peter Dabrock, Max Tretter, Michael Hahn and Tabea Ott. Stuttgart: W. Kohlhammer, 2025; Calhoun et al. Degenerations of Democracy.

a situation similar to where we began. From a human rights perspective, if both climate protection efforts and efforts to uphold democracy are fundamentally about safeguarding human rights, then both climate activists and those defending democracy can legitimately claim to be fighting for human rights. Therefore, while shifting the framework another time has once again uncovered new dimensions of this conflict, it has not provided a solution to the original question. The issue of who is "right" remains unresolved.

Political theory perspectives

In his reflections in *Philosophy and the Mirror of Nature*[56] as well as in *Contingency, Irony, and Solidarity*,[57] Richard Rorty develops the idea that when a question appears unanswerable, it is most often because the question itself has been framed incorrectly. Consequently, the solution is not necessarily to persist in answering it, but to reconsider its phrasing and framing—or even abandon it altogether. Of course, we cannot, nor do we wish to, abandon the question of whether climate activists or the supposed defenders of democracy are "right" in their priorities. What we *can* do, however, is critically examine the existing framework and rephrase it in a way that allows for deeper insight. In this case, that could mean shifting the framework once again—but in a more fundamental way—by questioning whether the real issue lies not in climate protection or democracy themselves, but in the oppositional framing that pits the two against each other.

One could even argue that this is exactly the approach taken by Last Generation themselves—as well as many advocates of climate protests—when they frame their actions as a form of civil disobedience. Civil disobedience is widely recognized by political theorists as a fundamentally democratic expression—and is even explicitly acknowledged as such in some constitutions. If Last Generation's protests can be understood as civil disobedience, the supposed conflict between climate protection and democracy therefore dissolves. Even more so, under a civil-disobedience-framing, their activism is not merely not a threat to democracy—it is an expression of democracy itself: a struggle not just for climate action, but for democracy as well. This shifts the central question that needs to be answered from "Are climate protesters or the supposed defenders of democracy in the right?" to "Do Last Generation's protests constitute a form of civil disobedience?"

However, whether Last Generation's actions truly qualify as civil disobedience ultimately depends on how the concept is defined. One of the most influential and widely recognized theories of civil disobedience comes from John Rawls. In his seminal work A Theory of Justice he defines civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government. By acting in this way one addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principles of social cooperation among free and equal men are not being respected. A preliminary gloss on this definition is that it does not require that the civilly disobedient act breach the same law that is being protested"[58] While Rawls sees the "natural duty" in upholding the institutions of a nearly just society, which can include following unjust laws, as long as they stabilize a nearly just society,[59] Rawls emphasizes that civil disobedience

[56] Richard Rorty. Philosophy and the Mirror of Nature, Oxford: Blackwell, 1996 (1979).
[57] Richard Rorty. Contingency, Irony, and Solidarity, Cambridge: Cambridge University Press, 1993 (1989).
[58] John Rawls. A Theory of Justice. Cambridge: Harvard University Press, 1971, p. 364.
[59] Ibid, pp. 334, 354.

can be justified in a nearly just democratic society when it is 1) used as a last resort[60] to 2) correct serious injustices.[61] He argues that such acts should be carefully calibrated so that they 3) respect and thus uphold the framework of the legal system,[62] 4) aiming to bring about change through moral persuasion rather than coercion.[63]

From this perspective, the question of whether Last Generation's protests constitute civil disobedience remains somewhat controversial—particularly in terms of respecting the framework of the legal system and the aspect of moral persuasion. While protesters and supporters argue that their actions should be understood as a last resort, carefully measured to remain proportional and as nonviolent as possible, critics counter that their actions can hardly be classified as a last resort, as numerous alternative avenues existed for advancing their cause within the democratic process. Similarly, while advocates maintain that Last Generation's protests foster public discourse and promote their goals through moral persuasion, critics argue that their actions are more coercive than persuasive—especially when they cause major disruptions to public life and potentially endanger individuals. As evidence, they point to widespread public opposition to Last Generation's protests, suggesting that their communication strategy has failed to garner broad support.[64] As a result, John Rawls' theory of civil disobedience does not provide a definitive answer as to whether Last Generation's actions should be considered civil disobedience—leaving the question of their compatibility with democracy equally unresolved.

There are, however, alternative conceptions of civil disobedience, e.g., "radical democratic approaches,"[65] that offer another foundation for addressing this question as, for instance, Robin Celikates' understanding of civil disobedience.[66] Methodologically, Celikates does not adopt an ideal-theoretical approach, like Rawls, which is inherently

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[60] Ibid, p.373.
[61] Ibid, pp.372, 375.
[62] Ibid., pp. 334, 354
[63] Ibid, pp. 352, 366, 376. For a more in-depth contextualization of Rawls's concept within broader debates on civil disobedience, see: Max Tretter. Hip-Hop bei Black Lives Matter-Protesten. Eine theologisch-ethische Auseinandersetzung mit ästhetischen Artikulationsformen in der Öffentlichkeit. Tübingen: Mohr Siebeck, 2025, pp. 17–21.
[64] Rucht, Letzte Generation, 2023.
[65] Following, e.g., Henning Hahn, Lena Herbers, and Hans-Richard Reuter, other approaches including Hannah Arendt's conception of civil disobedience in Crisis of the Republic and Étienne Balibar's interpretation in Equaliberty can be considered radical democratic approaches. Arendt's conception is open to changing democratic institutions and policies if necessary, even when these are supported by a majority (Arendt 1973, pp. 56, 75ff.). Balibar builds on Arendt's work and explicitly refers to her when developing his own conception of civil disobedience (Balibar 2013, pp. 165-186). With regard to civil disobedience, Balibar concludes that "Democratic citizenship is therefore conflictual or it does not exist" (Balibar 2013, p.284). See: Henning Hahn. 'Kampf um politische Handlungsfähigkeit. Grundriss einer normativen Theorie globalen zivilen Ungehorsams'. Zeitschrift für Politische Theorie 10:1 (2019), pp. 49–65; Lena Herbers. 'Ziviler Ungehorsam als Demokratie'. Verfassungsblog (2023-07-28), online at: https://verfassungsblog.de/ziviler-ungehorsam-als-demokratie/ (accessed 2025-04-23); Hans-Richard Reuter. 'Klimaprotest als ziviler Ungehorsam. Liberal oder radikal?' Zeitschrift für evangelische Ethik 67:3 (2023), pp. 165-170; Hannah Arendt. Crises of the Republic. San Diego: Harcourt, Brace & Co, 1973; Étienne Balibar. Equaliberty. Political Essays, translated by James Ingram. Durham: Duke University Press, 2013.
[66] Robin Celikates. 'Civil Disobedience as a Practice of Civic Freedom', in On Global Citizenship. James Tully in Dialogue, edited by James Tully. London: Bloomsbury, 2014, pp. 207–228; Robin Celikates. 'Rethinking Civil Disobedience as a Practice of Contestation—Beyond the Liberal Paradigm'. Constellations 23:1 (2016), pp. 37–45, p. 41; Robin Celikates. 'Democratizing Civil Disobedience'. Philosophy & Social Criticism 42:10 (2016), pp. 982-994.

unable to capture the complexities of non-ideal political situations. Instead, he begins by observing political practice,[67] a perspective that broadens the scope for recognizing the actions of *Last Generation* as forms of civil disobedience. Beyond this methodological consideration, Celikates also raises substantive critiques of Rawls' definition. In this context, the issue of nonviolence is particularly significant. Rawls emphasizes that civil disobedience *must* be nonviolent. However, while *Last Generation* claims to act nonviolently, the lack of a clear definition of "violence" in Rawls' framework leaves it ambiguous whether the actions of *Last Generation* can truly be classified as nonviolent. As mentioned above, court rulings have charged activists of *Last Generation* with coercion precisely on these grounds.

In this regard, Celikates highlights the problem inherent in the demand for nonviolence without a clear definition of what constitutes violence.[68] For example, although road blockades are a well-established method of civil disobedience, the German Federal Court of Justice (*Bundesgerichtshof*) ruled in its famous 1969 "second-row case" law that such protests could be classified as coercive—and are therefore violent. According to this ruling, blocking a single car does not constitute coercion, but if a second car is physically prevented from proceeding, the action is deemed coercive. Such legal rulings prompt Celikates to critique the unclear and inconsistent application of nonviolence as an insufficient standard for defining civil disobedience.[69]

Celikates is also critical of Rawls' assertion that civil disobedience must appeal to the sense of justice of the majority. Historically, civil disobedience has not always appealed to the majority's sense of justice, nor is this always its primary goal. At times, the aim of civil disobedience is to increase the political and economic costs of inaction, thereby pressuring decision-makers to implement the desired measures. In the case of *Last Generation*, the focus is also on achieving specific policy measures. While they aim to persuade the public, this effort is directly tied to their concrete demands. Once again, Celikates broadens the perspective, enabling a more inclusive understanding of the actions of *Last Generation* as forms of civil disobedience.

Beyond the deficits in the definition of civil disobedience that Celikates identifies, it is essential to address the specific role that civil resistance is attributed within a democratic framework. In Rawls's ideal-theoretical view, civil disobedience stabilizes the institutions of the nearly just society by acting as a warning signal to them when equal liberty is threatened.[70] The goal, then, is essentially to maintain the status quo—since democracies are, at least the ones Rawls is having in mind, "nearly just" and thus its institutions need to be upheld.[71] Based on practical experience, however, Celikates analyzes that activists often experience their democracy as deficient and see themselves as limited in their participation in it, i.e., not as nearly just.[72] This can be due, for example, to rigid or slow institutions, the influence of lobbying, or a restriction on participation in democracy due to lack of citizenship. Furthermore, although there are some progressive proposals on how to achieve a political voice for the environment,[73] the environment is

[67] Celikates, Civil Disobedience, p. 215.
[68] Ibid., p. 213-214.
[69] Celikates, Rethinking Civil Disobedience, pp. 41-42.
[70] Rawls, Theory of Justice, pp. 372-374.
[71] Ibid, p.82.
[72] Celikates, Democratizing Civil Disobedience, pp. 989-991.
[73] Bruno Latour. Politics of Nature. How to Bring the Sciences into Democracy. Cambridge: Harvard University Press, 2004; Jane Bennett. Vibrant Matter. A Political Ecology of Things. Durham: Duke

systematically excluded from political participation due to the prevailing political system. *Last Generation's* protest could be understood as an attempt to compensate for this deficit. According to Celikates, it is where civil disobedience intervenes as a collective, civil and transformative means of democratization. Civil disobedience does not have to maintain the status quo but can have a transformative effect on the deficits of democracy.[74] In this view, civil disobedience is also seen as an essential component of a functioning democracy.

From Celikates' radically democratic perspective, civil disobedience does not need to appeal to the majority's sense of justice, nor should it be constrained by the ambiguous demand for nonviolence of Rawls liberal approach. Within this framework, the actions of *Last Generation* clearly qualify as civil disobedience. The commonly perceived dichotomy between climate protest and democracy as debated in public discourse and unresolvable when weighed in ethical goods or rights, dissolves when viewed through Celikates' political theory. Rather than opposing democracy, *Last Generation* actively enacts it. Their acts of civil disobedience amplify voices where democratic institutions, operating within societies that fall short of Rawls' notion of a *nearly just society*, structurally have difficulties to uphold their own democratic ideals. In this light, their protest is not merely about climate justice but also a struggle for democracy itself.

Conclusion

Starting from the observation that *Last Generation's* climate protests have not only attracted enormous attention but also sparked debates on multiple levels—and that in these debates, the group's active commitment to climate protection has often been labeled as a "threat to democracy", framing their environmental concerns in opposition to the democracy-preserving concerns of their critics—this paper has explored how the supposed tension between *Last Generation's* protest, its goals, and democracy can be negotiated. Through an examination of ethical, legal, and human rights frameworks, it became clear that this tension cannot be resolved by simply declaring one side more urgent or more fundamental than the other. Instead, following Richard Rorty's insights, this paper proposed that the best way to resolve the tension is to fundamentally *change the framing itself*. Rather than asking whether "democracy *or* climate protection" ought to be prioritized, we should emphasize their interdependence and synergies—shifting toward a "democracy *and* climate protection"-framework. In the specific case of *Last Generation's* protests, this connection has been established through the concept of civil disobedience. Following Robin Celikates' radical democratic approach, civil disobedience is not merely a tool for advancing protest goals but also a mechanism for strengthening the foundations of democracy itself. For *Last Generation*, this means that by engaging in civil disobedience to fight for climate protection, they are simultaneously fighting for democracy—and, in doing so, inherently defending fundamental legal and human rights.

Reframing *Last Generation's* protests by challenging the "climate protection *or* democracy" dichotomy offers a fresh perspective—one that allows us to recognize their actions not only as a fight for climate protection but also as a way of strengthening democracy. More broadly, these conclusions shed light on the relationship between protest and democracy in general. Many protests—not only those of *Last Generation*—are often

University Press, 2010; Bruno Latour. Facing Gaia. Eight Lectures on the New Climatic Regime. Cambridge: Polity, 2017.

[74] Celikates, Civil Disobedience, pp. 223-224.

framed in opposition to democracy and dismissed as threats to democratic order. While there are indeed cases where protests may take on anti-democratic or democracy-destabilizing tendencies, the "protest *or* democracy" framing frequently seems—especially in light of the arguments outlined above—less like a genuine dilemma and more like a lingering remnant of *divide-et-impera*-thinking, serving to contain the transformative potential of protest. To be clear, we do not want to suggest that those critics who adopt such framings do so with ill intent—quite the opposite. We are convinced that they act out of a sincere and justified concern for democracy, which is more than warranted in the present moment. Rather than framing it as an accusation, we aim to present this insight as a guiding principle for the new protest culture described by Sydiq: *Stay vigilant* against the trap of accepting oppositional framings too readily—wasting energy on proving your democratic legitimacy or even opposing those who share your core concerns. Instead, inspired by Chantal Mouffe and Ernesto Laclau,[75] focus on building chains of equivalence, forging alliances, and harnessing synergies—while also recognizing the true adversaries: those people, parties, and companies who oppose both democracy and the transformative potential of protests.

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