

Are Human Rights Moralistic?

Guy Aitchison¹ 

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Abstract In this paper, I engage with the radical critique of human rights moralism. Radical critics argue that: (i) human rights are myopic (they overlook important dimensions of power); (ii) human rights are demobilising (they obscure political conflict); (iii) human rights are paternalistic (they undermine political agency); and (iv) human rights are monopolistic (they displace more radical, collectivist ideologies). I argue that critics offer important insights into the limits of human rights as a language of social justice. However, critics err insofar as they imply that human rights are irredeemably corrupted and they under-estimate the subversive potential of the moral ideas that underpin the discourse. Building on the idea of human rights as claims, I set out the politicising features of human rights as they are deployed in a practical context of disagreement, conflict, and imbalances of power. I illustrate this discussion with reference to the contemporary struggles of irregular migrants.

Keywords Human rights · Political theory · Critical theory · Marxism · Migration · Political realism

The triumphant spread of human rights discourse across the globe in recent decades has been treated as an ambivalent development by many on the left. A number of theorists point to the embrace of the language of human rights by governments, businesses, bureaucrats and military leaders as evidence that the idea not only fails to challenge the interests of the powerful in any fundamental sense but provides them with a potent language of legitimation with which to justify their nefarious activities. A wave of critical literature combines insights into the ideological biases that underlie the purported universalism of rights, first articulated by Karl Marx, with an analysis of power relations that draws on Foucault, painting a pessimistic picture of how human rights come to regulate social relations and ‘produce’ a certain type of compliant subject

✉ Guy Aitchison
guyaitchison@gmail.com

¹ University College Dublin, UCD School of Politics and International Relations, Dublin 4, Ireland

through a variety of discursive mechanisms that go beyond the law. The most theoretically sophisticated and penetrating of these critiques have been developed by Brown (1995, 2000, 2004) and Douzinas (2000, 2007, 2013) across a number of different works, with important criticisms also issuing from the likes of Slavoj Žižek (2005) and Susan Marks (2011). These sceptics seek to analyse the role of rights within contemporary strategies of power and draw attention to their limits as a language of liberation, raising challenging questions about the role the concept plays in fixing dominant categories of identity, strengthening state institutions and legitimating military intervention and the spread of neoliberal globalisation. They call attention to the ‘paradox’ of rights, as both a discourse of *struggle* that can empower dominated groups to challenge authorities and a discourse of *subordination* that bolsters the power of those same authorities by legitimising the status quo.¹

A common theme running through this critical literature is that human rights discourse and practice is objectionably moralistic in attempting to regulate the political realm without proper regard for the history of particular societies and the role of power and material interests in shaping political outcomes. These authors share the Marxist worry that the resort to universal moral categories has an ideological function in simplifying complex and controversial issues, removing them from political contestation while masking the powerful interests that invoke them. However, the charge of moralism does not appear in the same form it did for Marx and Engels for whom moral categories as such were invariably compromised by ruling class prejudices and therefore had a limited role to play in social transformation. Rather, the language of rights is linked to a depoliticising form of humanitarianism that naively attributes human suffering to the moral ignorance of political decision-makers, or else to blind misfortune, while simultaneously casting those who are needy or abused as passive objects of pity. Notably, the concerns these theorists raise have been echoed by scholars working in the more applied domain of human rights practice (in international law, social science and anthropology) and are often levelled internally by activists within movements for social justice (Baxi 2008; Rajagopal 2003; Hopgood 2013; Posner 2014; Perugini and Gordon 2015).

In contemporary political and philosophical discourse, human rights are commonly understood to be rights that are of fundamental importance and universal in the sense that they are possessed not by virtue of citizenship, or some other special status, but by virtue of being human. The primary focus of the theorists I examine in this paper, however, is not with the best interpretation of this idea on the basis of abstract reasoning in the manner of normative ‘ideal’ theory. Instead, they are concerned with human rights as a living discourse and set of practices in which lawyers, politicians, activists, NGOs and other actors, shape the meaning of the concept, using the vocabulary of human rights to legitimise certain social arrangements and ideological narratives and delegitimise others. This critical approach supposes that in order to properly evaluate a political idea, such as human rights, we cannot limit ourselves to abstract contemplation of its moral aspirations, but must pay attention to how it is deployed by political agents

¹ Brown (2000) and Douzinas (2013). Giorgio Agamben is another influential critic, though his critique is much more far-reaching amounting to a philosophical rejection of the idea of rights as such on the basis that it is irredeemably implicated in sovereign violence. See Agamben (1998), and for a thoughtful response, Patton (2007).

in real-world circumstances, giving due attention to how the concept shapes and constrains the political imagination and serves the interests of dominant groups and classes.

Faced with this critical challenge, a defender of human rights might be tempted to reply that the manipulative and hypocritical deployment of the discourse by the powerful to justify self-interested ‘humanitarian’ wars, and other sinister activities, does not count against the idea since it involves a straightforward misapplication of the concept of human rights disallowed under a correct interpretation. This response proves unsatisfactory, however, since it misses how the critique of moralism goes beyond the charge of manipulation and hypocrisy alone to show how the discursive logic of human rights is itself troubling. The concern is not merely that human rights have the potential to be misused by the powerful, but that the very framework is defective. According to critics, even those who invoke human rights in a well-motivated way risk inadvertently contributing to social and political processes that expand the coercive reach of the state and legitimise neoliberal policy-making.

A second more sophisticated response appeals to a conception of human rights that does not rest its authority on abstract reflection on human beings, giving due space for the role of democratic contestation and innovation in shaping the regime of rights from below. A number of recent contributions in critical and democratic theory have proposed theories of human rights as a properly *political* notion not given to us by nature or human reason. This literature draws inspiration from Hannah Arendt’s understanding of the ‘right to have rights’, which is taken to express the critical importance of political action to the achievement and enjoyment of rights (Arendt 1958; Ingram 2008; Honig 2009; Schaap 2011; Hoover 2016). In contrast with classical liberal theories, which derive human rights from an ahistorical conception of human beings, these theorists call attention to the dynamic quality of human rights which supports their dialectical deployment against a legal and political order nominally committed to the universal values they express. This approach embraces the ‘uncertainty and ambiguity’ of the discourse as a source of productive pluralism that enables the dominated, excluded and dispossessed to mount fresh challenges to the status quo (Hoover and de Heredia 2011). In his reconstruction of human rights, for instance, Rainer Forst develops an argument for the fundamental importance of a ‘right to justification’ (2012). This right expresses the moral claim that individuals should not be subject to relations of power they have no say in influencing, reflecting the human capacity for political judgement, initiative and action. Here, human rights are political in the sense of being open, provisional, and subject to ongoing political challenge.²

These critical and agonistic readings address the sceptical concern that the idea of human rights draws on some pre-political moral notion that ‘trumps’ democratic decision-making in a top-down authoritarian way. However, this still leaves a number of important issues unaddressed. The objection to human rights moralism expressed by radical critics is not merely a worry about the depoliticised *grounds* of human rights found in classical liberal theory, but a concern with how human rights are *deployed* in

² An alternative ‘political’ approach aims to develop a conception of human rights based on their role in setting standards for limiting the sovereignty of states in the international arena, see, e.g. Beitz (2009) and for an overview Gilabert (2011). Although I do not explore this approach in this paper, I would note that in making our understanding of human rights depend upon the role assigned to them within an international order dominated by powerful states, these theories do little to alleviate many of the concerns I discuss.

real-world contests; how, for example, the minimalist logic of human rights might place implicit limits on more ambitious, collectivist projects for social justice. It is a concern not merely with what human rights *are*, but what they *do*. In this paper, I critically examine the sceptical concern with human rights moralism. In ‘Marx and the Critique of Moralism’, I discuss the relevance of Marx’s original analysis of moralism in his reflections on the French Declaration of the Rights of Man. In ‘[Human Rights Are Myopic](#)’, ‘[Human Rights Are Demobilising](#)’, ‘Human Rights Are Paternalistic’, and ‘[Human Rights Are Monopolistic](#)’, I set out the various elements that make up the contemporary critique of human rights moralism and formulate them as four distinct—though interrelated—theoretical objections: (i) that human rights are *myopic* (they overlook important dimensions of power); (ii) that human rights are *demobilising* (they obscure political conflict with a false consensus); (iii) that human rights are *paternalistic* (they cast people as passive objects of concern); and (iv) that human rights are *monopolistic* (they displace more radical, collectivist ideologies).

I contend that sceptics provide vital insights into the perils of a particular form of contemporary human rights discourse oriented to consensus and the top-down implementation of legal entitlements by states. Nonetheless, as I argue in ‘Taking Stock of the Critique’, sceptics also rhetorically over-reach in their criticisms where they appear to imply that human rights are irredeemably corrupted by the ideological and paternalistic role they play in official discourse. While sceptics warn of real dangers in human rights practice, their critiques risk leaving us with an unbalanced picture. In ‘[Human Rights as a Language of Contestation](#)’, I call attention to how key conceptual features of human rights support the mobilisation of collective democratic power beyond the limits set by formal institutions. Building on the idea of rights as political claims, I highlight the politicising features of the concept which supports their role in contesting dominant identities, mobilising against adversaries and challenging injustice through appeal to a politicised ideal of what it means to be human. In ‘[A Human Right to Free Movement](#)’, I discuss the contemporary struggles of ‘irregular migrants’ (sometimes termed ‘illegal’ or ‘undocumented’ immigrants). Their case is of special interest because it demonstrates the tension between a moralistic humanitarian discourse of rights implicated in the coercive policing of state borders and the more transformative political discourse which irregular migrants have deployed in calling for a universal right to freedom of movement. As one of the most vulnerable groups in contemporary politics, they have appropriated and radicalised liberal rights doctrine to contest the exclusions of the international state system in a way that challenges many of the assumptions of sceptics.

Marx and the Critique of Moralism

Marx’s pioneering analysis of rights remains an essential reference point for today’s critics. In this section, I show how Marx highlights the perils of ahistorical abstraction in the discourse of rights and the limits of moral motivation as a force for change, while other element of his critique are less applicable to the distinctively modern notion of human rights. Marx’s most systematic engagement with rights is found in ‘On the Jewish Question’. In this, one of his earlier works, Marx argues that the French Declaration of the Rights of Man’s list of formal civil and political freedoms, protecting

a private sphere of autonomy, corresponded to the rights of ‘egoistic’ man separated from the community as an ‘isolated monad’; an anti-social conception in line with the bourgeois view of civil society as an arena for the unbridled pursuit of individual self-interest (Marx 2000, p. 60).

The abstract nature of the Declaration’s formal rights, for Marx, served to mask the substantive social and economic inequalities of capitalist society and the unequal enjoyment of political rights in practice due to the differential levels of power that wealth provides. The Declaration formalised the bourgeois distinction between the public sphere of the state and the private sphere of social life by granting a measure of civil and political freedom in the former and implicitly placing off limits the lack of freedom and opportunities for workers in the latter. As I set out in the next section, the concern that abstract rights obscure the material reality of class rule has been broadened by recent critics to an analysis of how the discourse overlooks other important dimensions of power across the entire field of social relations. Notably, Marx was not the first to fault the French Declaration for its ahistorical abstraction with the first notable critique of this kind to be found in the conservative polemics of Edmund Burke (1999). Yet, while Burke was concerned with how the abstract formalism of rights would loosen the social bonds of deference and allegiance that preserve the institutions a society inherits from its past, Marx’s worry was in the precise opposite direction: he worried that moral abstraction conferred an air of permanence on those institutions that frustrated society’s progress towards a far more promising future.

These objections were accompanied by a general suspicion of moral ideas. Although Marx’s own views were more complex than the crude equation between rights and domination drawn by some of his followers (Lenin 1975), a dismissive attitude to rights was encouraged within classical Marxism thanks to a set of teleological commitments that removed the need to formulate a systematic moral critique of the social order. This was a conscious break from the ideas of earlier radicals, such as Thomas Paine and Charles Fourier, who had proposed social rights to work and a minimum income. Engels famously contrasted the ‘utopian’ moralism of these authors with his and Marx’s own ‘scientific’ method centred on a historical analysis of exploitation and the social relations of production (Engels 1999). Crucially, this method identified a specific political agent who is positioned to overthrow the capitalism system in the form of the increasingly immiserated proletariat. The proletariat was destined to play this role not because it possessed the ‘correct’ account of rights and justice but because its social position as the majority class of exploited producers gave it both a material interest in overthrowing capitalism and the strategic capacity to do so. Although Marxist critiques of capitalism involved at least implicit appeals to ideals of equality and dignity, then, there was little need to formulate these as a distinct set of moral and political principles to persuade others: the increasing exploitation of the proletariat and their growing numbers could be relied upon to bring about social transformation.

The theoretical commitments of classical Marxists further entailed that they gave little thought to the principles of right that would animate a liberated society post-revolution: technological developments in the productive process could be relied upon to generate a society of abundance, ending social and political inequalities, and the conflicts they engender, and with it the need for regulative moral principles. With the strict teleological narrative of classical Marxism now largely discredited, it is difficult to imagine today’s critics offering the same generalised dismissal of moral ideas. As we

shall see, however, they retain a certain degree of caution about idealistic proclamation of rights divorced from any empirical account of the social collectives that can achieve and enforce those rights in practice. Marx's historical assumptions about the dynamics of capitalist development and the nature of communist society account for some of the more polemical denunciations of rights we find in his writings on the Gotha Programme in which he contrasts his own 'scientific' and 'realistic' outlook with the 'ideological nonsense about right and other trash so common among the democrats and French socialists' (Marx 1978, p. 388).

Yet while undoubtedly critical, there are strong reasons to think that Marx's own attitude towards rights was always more sympathetic and nuanced than a straight-forward equation between rights and domination. In 'On the Jewish Question', he notes that the French Declaration, representing the dissolution of the old feudal hierarchies of rank and privilege, was far from worthless. It was, he argued, a necessary though incomplete form of 'political' emancipation, which is a 'great progress' and the final form of emancipation within the framework of the prevailing social order prior (Marx 2000, pp. 50–54). It was the bourgeois application of rights, which naturalised a historically specific configuration of social power, to which Marx objected. In certain of his writings, Marx himself recognised the role of rights in political struggle. He urged communists to win the 'battle of democracy' and regarded movements by workers for the 10-h day and other social rights as an important form of progress (Marx and Engels 1998, p. 60). In his analysis of the 1848 revolutions, he criticised the popular slogan of 'the right to work' as an 'absurdity, a miserable pious wish', but noted that 'behind the right to work stands the power over capital; behind the power over capital, the appropriation of the means of production, their subjection to the associated working class, and therefore the abolition of wage labour, of capital, and of their mutual relations' (Marx 1960, p. 102).

In this way, while Marx was not always clear about the moral basis of his own critique of capitalism, he nonetheless saw a role for rights in confronting injustice and valued the way rights were used by workers to demand better treatment, allowing for the possibility that more radical articulations of rights could challenge the prerogatives of capitalist power. The fundamental insight of Marx's historicist analysis of rights is that we should be cautious about the universalism of rights as it features in official discourse and be alert to the particular historical interests that lie behind its dominant mode of articulation. The Marxist critique of moralism reflected a justified scepticism about the motivational power of moral appeals alone when it comes to confronting entrenched material interests.

However, critics sometimes assume an easy translation of Marx's analysis to the contemporary context in a way that overlooks relevant differences. Arguably, the critique of moralism applies in a different way to the Enlightenment idea of natural rights current in Marx's time than it does to the modern idea of human rights to be found in the international legal and political regime that emerged after World War Two. Importantly, the modern idea of human rights does not rest its authority on claims about what individuals are entitled to in an ahistorical 'state of nature' and points towards a more social ontology of the individual than that found in the classic eighteenth century declarations. The Universal Declaration of Human Rights, for example refers to the rights individuals enjoy as part of the human 'family' and lists a number of rights to social and economic goods that can only conceivably be enjoyed in the context of a political community. Many of these rights, such as the right to education, were rights

that Marx himself fought for during his lifetime—often in the face of staunch opposition from those styled ‘liberal’ in his day (Ishay 2008). The modern subject of human rights, then, is not easily assimilated to the mythological self-reliant figure of bourgeois natural rights theory and Marx’s own views on rights are more nuanced than has often been assumed.

Nonetheless, the Marxist analysis demonstrates how the moral abstraction of rights can detract from the powerful interests positioned to benefit from the denial of freedom to others, while smoothing over sources of social and political conflict. This has informed contemporary critiques of the myopic, demobilising and paternalistic logic of human rights (discussed in ‘[Human Rights Are Myopic](#)’, ‘[Human Rights Are Demobilising](#)’, and ‘[Human Rights Are Paternalistic](#)’). Other elements of recent critiques however—most notably the charge of monopolism, discussed in ‘[Human Rights Are Monopolistic](#)’—have been developed in light of the distinctive history and character of modern human rights practice. In the next section, I begin my reconstruction of contemporary critiques of moralism with the concern that the statist focus of human rights makes them blind to other important dimensions of power.

Human Rights Are Myopic

Human rights define a set of entitlements that individuals are said to hold against states as a result of some fundamental need, interest or vulnerability common to all human beings. In an oft-cited formulation, states have obligations to *respect* individuals in the enjoyment of their rights, *protect* them from abuses and *provide* them with the content of their rights through positive action. The difficulty for sceptics is that this abstract state-centric approach can bring with it a narrowing of political focus. In particular, it does not address *how* human rights are to be implemented and *why* they are being denied in the first place. This raises three interrelated worries. First, by empowering state institutions, human rights create a relationship of dependency with the very agent that most threatens us. With its recognition of human rights, the state assumes the position of interpreter and enforcer of moral claims. It is placed in the role of disinterested, impartial overseer with the effect of obscuring its own role in sustaining exploitative, unjust structures.

The indeterminate nature of human rights, as they appear in law, hands experts significant discretionary power to adjudicate the claims of different social groups and classes. While the law claims an aura of impartiality, judges and other state officials may act in biased or self-serving ways.³ This worry goes beyond a concern with the misbehaviour of state officials, however, to a deeper concern with the surrender of sovereignty. As Brown (2004, p. 455) writes, rights discourse ‘may trade one form of subjection for another’ in the form of ‘an external agent or set of institutions that promises to protect individuals from abusive state power in part by replacing that power’. The proliferation of human rights in law leads to increased decision-making powers for state institutions over ever more domains of social life through government

³ A number of empirical studies lend support to this thesis in documenting the judicial preference for rights to private property over rights to collective bargaining and material resources that would involve redistribution of wealth and power. See Hirschl (2009) and Nicol (2010).

bureaucracies, policing, surveillance and militarism. This paternalistic oversight encourages a stance of passivity and inertia among rights-bearers who alienate their capacities to safeguard their interests to state institutions with a consequential decline in autonomous political organisation.

The second concern relates not to the empowerment of the state, but to the way in which a focus on state remedies obscures the role of broader economic and social processes in producing abuses and deprivation. As Susan Marks (2011) puts it, a human rights framework can detract from the ‘root’ causes of injustice. Human rights organisations tend to address their work to governments and ask what they ought to do in conditions in which basic the organisation of the capitalist economy and state sovereignty are not in question. The use of child labour in India, for instance, is discussed as a failure of government policy with little attention to the competitive imperatives of global production chains or the potential role for unionised labour as a counter-weight to employers (Gordon et al. 2000). The professional advocates of the international human rights movement have traditionally addressed the material basis of individual powerlessness with talk of the ‘interdependence’ of different human rights, reflecting how the effective exercise of the right to vote, say, depends on access to education and a home to live in. However, it is difficult to see this as a replacement for a more structural analysis of the causes of repression and material deprivation based on the balance of power between different groups.

A third worry is that the apparatus of human rights lacks any resources with which to challenge more diffuse, pervasive forms of power which shape our very being as subjects in the world. The contemporary critics of human rights add to the classical Marxist view a more comprehensive understanding of the institutional and social relations of power within which a right is embedded that draws on two central insights from Foucault. The first is that power reaches beyond the ‘juridical’ seat of sovereignty in the state into the countless mechanisms of ‘disciplinary’ power that organise human behaviour through various forms of technical, scientific knowledge and institutional regimes.⁴ Second, Foucault proposed that rights-bearers cannot be understood according to the classical liberal ontology as intentional political agents who confront power as an external repressive force. Instead, rights-bearers are produced by power which shapes the habits, desires and even the inner-most thought processes of individuals (Foucault 1982).

For Brown, then, human rights ‘are not simply rules and defenses against power, but can themselves be tactics and vehicles of governance and domination.’⁵ Beneath the purportedly universal human subject of human rights is a conception of persons—as consumers, workers, masculine, straight, white, European etc.—congruent with existing forms of rule. Even moral notions that appear to promise liberation—such as human ‘dignity’ and ‘freedom’—bring with them various forms of disciplinary self-regulation. The concept of freedom within official human rights, for example, is said to institutionalise an understanding of individuals as self-reliant economic agents equipped with a minimal set of ‘negative’ rights to market participation. In this way,

⁴ See Foucault (2012) and for an illuminating overview of Foucault’s thinking on rights, see Golder (2015).

⁵ Brown (2004, p. 459). This critique builds on Brown’s (1995) earlier writings in which she argued against the push for specific identity-based legal rights for women and racial minorities, which she said risked encoding subordinate identities in the law in such a way as to reproduce existing relations of power and exclusion.

the diffusion of human rights internationally smooths the social terrain for the expansion of market-friendly subjectivities (Douzinas 2013, p. 65). Even the achievement of ‘new’ rights—such as the right to same-sex marriage—can reinforce conservative social norms by legitimating certain identities against others. By focusing on human rights as protections from the state, then, sceptics make a persuasive case that we risk overlooking other potentially more fundamental mechanisms of power and failing to notice how rights themselves are implicated in the constitution of a certain type of submissive subject. The myopia of human rights in the face of modern forms of power would be troubling enough, but sceptics also allege that the discourse obscures political conflicts and division thanks to its universalising, consensual character, as I now discuss.

Human Rights Are Demobilising

Human rights address themselves on behalf a unified vision of ‘humanity’, emphasizing shared values and a common ethical project. The Universal Declaration of Human Rights was drawn up in the aftermath of a major conflict following World War Two and the human rights movement today draws much of its legitimacy from the notion that it offers a moral vision outside politics that transcends whatever ideological and partisan attachments we might have. As Douzinas (2007, p. 107) puts it, ‘rights belong to the consensual domain of politics’. This is a problem because the emphasis on consensus tends to airbrush historical relations of power, while occluding the democratic value of conflict and antagonism in challenging them. Within the analytical framework of human rights, it can seem as though conscious forms of oppression and deprivation are the result of poor policy choices or official negligence, rather than being the predictable result of a system that enhances the privilege of some at the expense of others.

This concern is tied to a broader critique of law as a means to resolve conflict. Thus, for Douzinas:

Right claims reinforce rather than challenge established arrangements. The claimant accepts the established power and distribution orders and transforms the political claim into a demand for admission to the law. The role of law is to transform social and political tensions into a set of solvable problems regulated by rules and hand them over to rule experts (2013, 60).

A powerful example offered by feminist theorists in this context is the right to abortion in the USA. Following the victory of *Roe v. Wade* in 1973, the women’s rights movement to a large extent demobilised, failing to sustain its earlier momentum. This invited a conservative political backlash against abortion led by religious groups who succeeded in undoing many of the gains made by removing public support for medical abortion clinics (Glendon 2008, p. 65). The moment of ostensible ‘victory’—when a right is legally recognised—can mislead us into thinking the right has been depoliticised in line with a broader social consensus, undermining the conditions for effective activism.

The sceptical concern with the depoliticisation of conflict extends to international affairs where the doctrine of ‘humanitarian intervention’ trades off the deceptive notion of an impartial international community capable of benign, dispassionate action (Douzinas 2007). This obscures the fact that it is powerful states who will be doing the intervening and that they will nearly always act to further their interests. In a recent work, Nicola Perugini and Neve Gordon (2015) mount a powerful critique of western human rights organisations for evaluating US drone strikes and other forms of state violence according to narrow principles of ‘non-discrimination’ and ‘necessary precautions’ with little regard for the legitimacy of the wider military conflicts in which they are used. The danger here is not so much the familiar one of military powers duplicitously invoking human rights to further their own self-interest, but that the very groups who should be opposing militarist violence are instead content with shallow ameliorative reforms within the logic of state procedures.

Reflecting on the invasion of Iraq by western forces, Žižek (2005) notes that it would be too crude to say that the politicians overseeing the occupation of the country simply used human rights as a mask for the Western economic interests that oversaw the privatisation of much of the country’s resources. Rather, they drew support from a particular liberal-capitalist understanding of development and freedom that favoured Western corporate interests. The abstract universalism of human rights thus detracts from the historical complexity of specific situations, justifying coercive interference from external agents without regard for the needs and interests of local populations. This can lead to a paternalistic form of top-down politics, as I now discuss.

Human Rights Are Paternalistic

The concern here is that the vocabulary of human rights constructs those whose rights are at stake with a moralised identity that downgrades their political voice and participation. They are identified as passive, suffering bodies in need of outside help. Brown and Žižek note this logic at work in Michael Ignatieff’s call for a ‘minimalist’ doctrine of human rights. The role of human rights activism here is stopping ‘beatings, killings, rape, and assault and to improve, as best we can, the security of ordinary people’ (Ignatieff 2001, p. 173). Here, the ‘human rights activism’ is something ‘we’ do in order to prevent the suffering of the vulnerable ‘victims’. This generates a depoliticising form of humanitarian paternalism. Makau W. Mutua summarises a powerful post-colonial critique in arguing that the human rights movement is implicated in a simplistic, neo-colonial narrative that casts the west as ‘saviours’ and the third world masses as needy ‘victims’.⁶

Again, this is not simply a problem of misappropriation. The argument reaches beyond the more overt neo-colonial deployment of humanitarian discourse by powerful states to the way in which groups such as trafficked sex workers, refugees and the poor are treated by those at the ‘softer’ end of human rights practice. The institutional dynamics of this practice typically require that rights-bearers appear in legal and political forums as weak and powerless in order to gain support. As the anthropologist

⁶ Mutua (2001). In a more recent work, Mutua’s (2016) critique is more narrowly focused on the biased and exclusionary process of norm definition in the official human rights system.

Sally Merry Engle notes of the depiction of refugees of political violence in international forums:

They are represented visually far more than in voice, typically through images that are anonymous and focused on dead, starving or homeless bodies. The predominance of women and children in these depictions emphasises their helplessness and neediness. They need protection and someone to speak for them, in this rendition, not the opportunity to tell their stories (Engle, 2003, p. 196).

The role of representing those deprived of their human rights in high-level forums and conferences in which international laws and norms are drafted is then assumed by a cadre of NGOs, lawyers and other human rights professionals from the wealthier nations (Baxi 2008; Rajagopal 2003). However well-intentioned these actors may be, there are unavoidable problems of accountability when they decide on matters without being responsive to the relevant constituencies of interests.

The reality of life for those suffering from oppression, persecution and deprivation is far removed from the day-to-day experience and concerns of the human rights NGOs concerned with pleasing their donors and maintaining access to elite decision-makers. The problem is accentuated by certain institutional incentives of the professionalised human rights system. In their concerns to broaden their funding appeals, NGOs may even erase salient contextual facts about military conflicts and political-economic restructuring, to make their work as ideologically undemanding as possible (Pruce 2014). Those whose essential interests are under threat thus risk being treated as passive objects of concern rather than political subjects with some say over their fate. In the next section, I consider the claim that human rights displace more radical, collectivist ideologies. This fourth and final objection to moralism was not articulated by Marx, reflecting as it does the specific historical origins and character of modern human rights.

Human Rights Are Monopolistic

Human rights are commonly understood to protect individuals from only the most serious and urgent threats to their dignity and well-being in the modern world. They do not offer a rich, ambitious vision of the good life, but—in the words of one of the most prominent philosophers of human rights—the ‘morality of the depths’ (Shue 1996, p. 18). This substantive minimalism is tied to the backward-looking, reactive character of human rights practice as a response to cruelty, abuse and deprivation. In order to make themselves credible to authorities, social movements are expected to frame their demands in the terms of a list of individual rights that the system can accommodate, rather than seeking a more radical transformation of the status quo. In their official form, human rights operate within the terms of hegemonic discourse, asking the powerful to live up to values that they claim to believe in. Douzinas (2000) draws a strong contrast here between the revolutionary, Enlightenment idea of the Rights of Man, which took aim at the entire feudal system of rank and privilege, and the modern idea of human rights which has become a language of state power and legitimation.

As I have noted, the modern regime of human rights has expanded significantly from the minimalist libertarian ideology of natural rights that Marx criticised and now includes a range of social and economic rights that can only be conceivably enjoyed in the context of an interventionist, redistributive state. However, sceptics note that these rights lack the prestige of the classical liberal freedoms and are accorded lesser priority in international treaties and in the activities of the major human rights NGOs. For sceptics, this is no mere accident of politics but a structural feature of human rights with its orientation to formal matters of procedure over more substantive matters of redistribution. The inequalities of the economy, it is said, are placed off-limits by the state-focused framework of human rights with those political projects that address these inequalities framed by comparison with human rights as too ideological and insufficiently neutral.

The apparent silence of human rights on matters of economic redistribution is one of the chief criticisms levelled by the historian Samuel Moyn. In contrast with Brown and Douzinas, Moyn (2014) does not hold human rights complicit in the spread of market-led globalisation, instead arguing that human rights have provided a weak and ineffectual set of tools with which to contest the inequalities it has brought about. Certainly, the over-arching thrust of the distributive claims in international treaties suggests a language of sufficiency, prescribing a threshold of material well-being which no human being should fall below. There is little explicit in international human rights law that precludes the vast levels of economic inequality documented today and the concentration of oligarchic power in the hands of the '1%'.

The minimalistic character of human rights would be less troubling, for sceptics were it not for the monopolistic hold the discourse enjoys over the political imagination. In presenting themselves as post-ideological—as a very *framework* within which political disagreement takes place—human rights are said to displace other more ambitious collectivist visions. In Moyn's (2010) terms, human rights are a 'last utopia' that came to be embraced by activists and intellectuals almost by default in the latter decades of the twentieth century after the ebbing of earlier anti-colonial struggles and the discrediting of a revolutionary communist alternative with the decline of the Soviet Union. While Moyn departs from Marxist and post-structuralist influenced critics who see human rights as an important component of neoliberal governance, he presents his revisionist history of the idea in similar terms as an attempt to loosen the grip human rights have on the political imagination of progressive movements, to make way for a more ambitious economic agenda.

The monopolistic quality of human rights is linked by some commentators to the historical origins of the modern human rights system as a moral response to the evils of totalitarianism and the Holocaust. By comparison with the post-ideological promise of human rights, radical collectivist visions are seen to carry an imprint of authoritarianism. Human rights, it is said, enjoy the totalizing character of a religious narrative, offering redemption for humanity after the 'Fall' and defining a global battle between the forces of good and evil (Meister 2011). The argument of sceptics is that this both impoverishes the political imagination and imposes substantive constraints on any reconstructive project for social justice. In the next section, I consider the implications of these various critiques of moralism, before setting out an account of human rights that calls attention to the politicising and mobilising features of the discourse and its potential for contesting relations of domination.

Taking Stock of the Critique

At a time when multiple and diverse political demands are being translated into the legitimating – but nonetheless constraining – apparatus of human right discourse, sceptics offer a vital reminder that human rights are not a comprehensive language of social justice and that additional collectivist programmes will be necessary to confront entrenched inequalities of wealth and power. In their orientation to state-based remedies, human rights have the potential to modify and dilute the ambitions of political movements and detract from the underlying social, economic and cultural structures that reproduce injustice. These are important considerations as progressive movements struggle to articulate an effective egalitarian response to the rise of authoritarian populist parties and movements in Europe and the USA who draw much of their support from social constituencies ‘left behind’ by globalisation. While a rights-based discourse has the potential to mitigate some of the worst harms of market societies, it is not a substitute for a class-based analysis of inequality and an energising vision of the common good.

We should also be cautious of talk of human rights ‘victims’ that comes at the expense of other more political identities that express the broader relationships of power intimately tied to the violation of rights. This means linking human rights, where appropriate, to structural discourses—such as race—which bring into view the source of an injustice and the social groups who are positioned to benefit from existing arrangements. It also means applying social descriptions that express the fundamental power dynamics at work—such as repression, exploitation and dispossession—rather than viewing human rights ‘violations’ in abstract isolation (Marks 2011).

Nonetheless, the sceptical concern with delegitimation sometimes loses the flexibility of human rights as they are used in the bottom-up practices of social movements that do not constrain their demands to existing institutional formulations. In their more polemical moments, it can seem as though sceptics’ concern with human rights moralism is a concern with moral ideas as such, as though the animating ideals of individual freedom and dignity were irredeemably tainted through their association with existing forms of power. The more relevant concern with moralism, I suggest, is with the deployment of moral ideas in a way that would seem to pre-empt or over-ride concrete processes of political contestation and relevant contextual considerations that remove from the specificity of the situation and what actions needs to be taken. We can distinguish here between moral appeal as *charity*, which casts rights-bearers as passive objects of concern, and moral appeal as *critique* which extends forms of solidarity to rights-bearers as political subjects.

Without some principled basis, it is not clear what critical capacity human rights can have for those seeking to challenge power (Aitchison 2017). As mentioned, recent contributions to critical and democratic theory have elaborated the fundamental importance of a right to politics in defining a critical moral standpoint against the social order. While this basic right finds expression in domestic and international legal texts in the form of rights to free speech, association and electoral participation, it can be understood in a more encompassing sense as a universal moral right to critically interrogate and challenge the relations of social and political power one is subject to. The right to politics plays a fundamental role not only because the achievement and defence of other rights depend on it, but because it is crucial to identifying and articulating what ought to

count as a right in the first place as individuals highlight previously misunderstood or neglected forms of injustice in concert with others.

For Forst, this is understood as a basic ‘right to justification’ which is implicit in all historical struggles for justice. It is not the case that all other human rights are ‘derived’ from this one right in the manner of classical liberal theories, rather it designates the ‘concrete standpoint of those who demand reasons and rights in particular social situations’ (Forst 2012, p. 209). As he puts it, through the very act of protesting individuals demonstrate that they ‘believe that there is at least *one* fundamental moral demand that no culture or society may reject: the unconditional claim to be respected as someone who deserves to be given justifying reasons for their actions, rules, structures, to which he or she is subject’ (Forst 2012, p. 212).

Human rights may not be universalistic in a fixed and timeless sense, but they are intrinsically *universalisable* in the sense of being open to being claimed by any purposive agent.⁷ The claiming of rights open up ‘a contest over the significance of humanity as an identity’ without assuming that a fixed and final determination of human rights (Hoover 2013, p. 218). Moral universalism does not simply mask inequalities and exclusions, under this view, but affords a basis for continual contestation as political subjects bring to attention the gap between the ideal of individuals as self-determining agents and their own lived experience of inequality and unfreedom. Here, the very ambiguity of human rights discourse, which risks allowing elites to advance their own particular interests in the name of all, also sanctions subversive and unpredictable challenges to the regime of rights from below by groups exercising their basic right to political contestation. Although sceptics may not disagree with this emphasis on the normative value of political participation, their preoccupation with official regimes of economic liberties at times seems to foreclose the possibility of more democratic, transformative articulations. In the next section, I develop this idea of human rights as an emancipatory political concept by identifying their more practical role in contesting power relations.

Human Rights as a Language of Contestation

A useful route into thinking about this contestatory role can be found in philosophical writings that present rights as a form of speech act based on an analysis of their role as ‘claims’. Significantly, there are certain features of rights that are more readily expressed in the language of ‘claims’ and ‘claiming’ since claims are familiar not only as *nouns*, but as *verbs* that allow us to do things (Flathman 1976; Feinberg 1980). The focus on claims orientates us to the performative character of rights and the dynamic processes through which they are created, defined and enforced in politics in contrast to a more static focus on rights as a form of moral property that individuals enjoy independently of political activity.

The performative claiming of human rights can open up a space for contestation, supporting forms of democratic collective action that politicise social relations,

⁷ As Christian Reus-Smit (2011, p. 1217) puts it, ‘what makes individual/human rights particularly compelling moral principles is their universalisability: the fact that they cannot, coherently, be claimed by one but denied to another’.

constitute new identities and challenge existing forms of power. Consider first that a human right is a relational concept that is claimed *against* a specific other who bears the corresponding obligation. While it is common to think of a right as a two-part relationship in terms of ‘X has a right to Y’, it is more appropriate to think of it as a three-part relationship involving some further agent ‘Z’ who bears the obligation to secure X in the enjoyment of Y. This is paradigmatically states but potentially includes corporations, international institutions and other non-state entities. In this way, human rights function to define a political target and a relationship of accountability. Although human rights involve a certain amount of moral abstraction, they are not abstract in the impersonal sense of other moral ideas (such as ‘equality’ or ‘justice’) since they refer us to the status and actions of specific agents and places them in a political relationship with one another.

This quality plays a role in sanctioning protest by individuals to improve their condition. The denial of a human right is not wrong in some abstract impersonal sense that we say that some state of affairs is unjust. Instead, it is a wrong done *to* the rights-bearer, giving them the personal normative standing to protest, press and demand what they are owed. This brings into focus the anti-paternalist thrust of the discourse that sits in tension with the criticism that they are merely a language of passive victimhood. The understanding of oneself as a rights-bearer—as a ‘maker of claims’—is associated with a certain degree of confidence and assertiveness as someone with an entitlement to be heard. As claims addressed towards others, rights are a form of speech that others are required to respond to.

Within the discourse of rights, there is a presumption that individuals have oversight over the exercise and enforcement of their own rights where they are mentally competent and have the capacity to do so.⁸ This is in keeping with the assumption that individuals are often the most appropriate judge of their own well-being in line with the familiar liberal presumption about individuals as moral persons. However, it also expresses a certain kind of strategic assessment that rights-bearers are the ones best placed to defend themselves from the threats to their rights or else to judge how others might support them in cases where they require assistance, recalling Marx’s introductory words of the ‘Rules of the International’, that ‘The emancipation of the working class must be the act of the workers themselves’.

Moreover, while human rights may rest their legitimacy in international treaties and bills of rights in an appeal to an abstract consensus, in practical politics they are typically called upon in situations of conflict and disagreement. There is a certain agonistic—even antagonistic—quality to human rights as a political practice since they are paradigmatically called upon in situations in which the relationship between two parties has broken down. They are frequently *claimed* in the face of a duty-bearer who stands to benefit from the denial of the right and is therefore hostile to its recognition, whether it be the government which suppresses free speech, the employer who blacklists workers or the patriarchal husband. If the duty-bearer continues to deny a right after it has been claimed, then the claiming of a right frames them as a *rights-*

⁸ In cases of children and adult incompetents, where the rights-bearer is not the best judge of their interests, it may be required that a third-party agent assumes de facto authorisation to claim rights on their behalf until the time they have the requisite autonomy to do so themselves. The same may also be required for those cases - such as a political prisoner - where the rights-bearer is incapable of defending themselves against incursions or of alerting others to help.

violator. In the terms of social movement scholars, this constitutes an ‘injustice frame’ that involves the ‘attribution of responsibility to a concrete target’ (della Porta 2015, p. 83). A rights-violator is framed as not merely careless or morally ignorant, but as actively unjust in refusing to act upon authoritative moral demands.

In addition, there are features of human rights claiming which encourage the politicisation of distinct categories of social interests, qualifying the idea that universalism is demobilising. This is because for one person to claim a human right for themselves is logically to claim that right on behalf of all human beings who are similarly socially positioned on account of social class, gender, race, religion, political belief, disability or some other socially salient feature. In this way, the universalist logic of human rights is not merely a source of apolitical abstraction, but confers a collective character to claim-making. To claim a human right, is to claim that right on behalf of all others who are similarly socially positioned. It is to assert not only that ‘I should not be treated this way’, but that ‘no one in my position should be treated this way’, distinguishing rights from more self-regarding terms such as ‘needs’ or ‘interests’. This collective quality of human rights can be obscured through a focus on the legal rights of individuals before the courts, but it is what gives human rights the potential to radically challenge institutions and structures.

A human right claim will also function as an appeal to third parties for political support where there is a conflict with the rights-violator. In claiming rights within formal institutions, the third party is typically a judge who has formal institutional obligations to enforce recognised legal rights. When a rights claim is made autonomously of legal institutions, however, third parties include political allies in the form of allies in domestic and international politics, extending to NGOs, political parties, trade unions and activists. These may be called upon to carry out any number of political actions in support of the rights-bearer, including voting and other forms of institutional politics, but also protests, petitions, strikes, sit-ins, marches, meetings, boycotts, and—in the case of foreign governments—possible action in the international arena. The ongoing claiming of a right in politics can thus function as a form of communicative power that builds support in institutional and social contexts of various kinds by persuading others. It is often the case that demands for rights initially ridiculed or ignored come to be accepted thanks to ongoing practices of critique and activism that build political support with third parties over time.⁹

The framework of speech acts also points to the distinctive proleptic quality to the language of human rights that helps explain some of their discursive force. The phrase ‘I have a right to X’ is typically uttered in a situation where some good X is being denied in the *present* as a means to urge the provision of X in the *future*. This reflects a further paradox and productive tension at the heart of human rights discourse. Assertions of new human rights may present themselves as conventional, upholding some prior order, but this masks the fact that they may be radically challenging that order according to new understandings. These claim-making practices beyond the terrain of formal institutions have the potential to contest dominant categories of identity and existing designations of what it means to be a human being.

In the next section, I turn to examine one contemporary human rights claim made by movements of refugees and irregular migrants: the right to freedom of movement. I

⁹ Same sex marriage is one right in the latter stages of this process, see Zivi (2014).

focus on their case because it illustrates the limits and potential of human rights discourse that I have thus far been discussing in abstract terms. A moralistic discourse of human rights—as propagated by states—presents the disenfranchised figure of the irregular migrant as a passive suffering victim, while overlooking the broader historical and structural forces that condition their fate. Contrary to the expectations of sceptics, however, human rights discourse also provides the moral resources for independent mobilisation by irregular migrants who have challenged the exclusions of the international state system with the transformative demand for universal freedom of movement.

A Human Right to Free Movement

The situation of irregular migrants is paradigmatic of a class of excluded persons. This group has a serious and urgent set of interests to defend in light of their vulnerability to abuse, exploitation and repression, and yet they lack the formal rights of political participation to advance those interests possessed by those with citizenship of the state or the secure public standing to make claims enjoyed by legally resident non-citizens. In Arendt's (1958, p. 297) terms, they exhibit 'the abstract nakedness of being nothing but human'; proof that while human rights are proclaimed to be universal and unconditional they depend for their enjoyment on the status and powers that come with membership of a particular state.

Sceptics tend to cite the figure of the undocumented migrant as an example of the emptiness at the heart of human rights discourse. As Douzinas puts it, they are 'legally abandoned, bare life, the *homines sacri* of the new world order'.¹⁰ The border regime itself exemplifies many of the issues critics identify in human rights. Through the coercive, violent enforcement of national borders states produce the very suffering and trauma that they then claim to alleviate. The EU's border enforcement agency Frontex, for example, presents its operations in policing the Mediterranean as a form of harm prevention and 'humanitarianism' (Anna Triandafyllidou and Angeliki Dimitriadi 2014). The human suffering and death at the borders is then attributed to the individual actions of 'smugglers' and 'traffickers', rather than—to use Susan Marks's (2011) phrase—the 'root causes' of violent immigration controls and the global inequalities they uphold.

The notion of migrants as 'bare life', however, is misleading insofar as it suggests an omnipresent and all-encompassing view of state power. It overlooks the agency of migrants themselves who have appropriated and redeployed the idea of human rights for their own ends. A striking feature of recent migrant movements to Europe, the USA and other affluent parts of the world has been the level of political activity by irregular migrants themselves who have used hunger-strikes, sabotage, occupations, illegal border crossings, evasion and other forms of disobedience and protest to advance their aims. Far from abandoning human rights discourse as empty rhetoric, they combine rights claims that can be accommodated within the liberal framework of nation states—such as rights to work, residency and regularisation—with a radical call for freedom of movement as a human right that exceeds the limits of the existing institutional order.

¹⁰ Douzinas (2013, p. 56), see also Agamben (1998).

In a trans-national protest in 2014, around 400 refugees and irregular migrants, along with their supporters, staged a ‘March for Freedom’ from Strasbourg to Brussels where they held a week-long protest camp outside the EU’s headquarters (Nigg 2015). The group’s political demands focused on basic human rights to liberty and humane treatment against a brutal regime of policing, detention and deportation by European states. In addition, the group asserted the more utopian human right to ‘Freedom of Movement’ between states (Freedomnotfrontex 2014). Notably, this right is not to be found in international law. While the UDHR contains a right to free movement *within* states, there is no equivalent right to move *between* states. And while human rights law grants individuals a right to leave their own state of origin, there is no corresponding obligation for any particular state to take them in, with refugee law imposing only a minimal set of obligations on how states treat those groups who have made their way into the territory.

Seen from this perspective, it can seem as though human rights are complicit in upholding the inequities of the current global order. Yet, the significance of the political claim to free movement asserted outside the formal human rights system lies in calling attention to the tensions, contradictions and asymmetries of that system, highlighting the arbitrary way in which it distributes freedom and opportunity. The group’s public, symbolic transgression of state borders in their march to Brussels embodied the radical ethos of direct action in which individuals do not wait upon the state to grant their claims, but act ‘as if’ the world they wish to bring about existed already. In this way, they performed the right to free movement that was legally denied to them.

The group’s slogan that ‘No border crossing is illegal!’ framed a transformative challenge to the existing border regime as legitimate on the basis of its upholding a more fundamental and independent moral order. The March to Freedom aimed to mobilise those in the same social position as the protesters in the form of the hundreds of thousands of irregular migrants in Europe who have fled Africa and the Middle East due to conflict, poverty, persecution and the effects of climate change. They also hoped to reach sympathetic third party allies among the European citizenry in the form of politicians, political parties and social movements (Nigg 2015). The movement’s appeal to a universal ideal of human freedom aimed to overcome the moral distance implicit in their status as ‘outsiders’ by appealing to the fundamental interest individuals have in a modern, interconnected world in being able to choose where to live, love, work, study and settle.

As it stands, of course, the right to freedom of movement is rejected by liberal states and the overwhelming majority of their citizens who see unrestricted immigration as a threat to prosperity, security and cultural integrity. In recent years, we have seen the rise of nativist political movements in Europe and the USA, demanding the closure of borders to outsiders. This resurgence of racism and xenophobia in the West is one among a number of ominous trends for human rights worldwide along with the forward march of authoritarianism and the regression of democratic representative governments. These developments have extinguished the remaining liberal certainties of the post-Cold War era, with the recent ‘Brexit’ vote and the election of Donald Trump the most dramatic and potentially far-reaching exemplars of this trend. Faced with the US President’s brazen attacks on human rights norms—including repeated defences of torture—it can no longer be claimed with any plausibility that human rights are the object of a secure international moral consensus or (at the other extreme) that they are a mere tool for US imperial interests.

Instead, human rights have been radically repoliticised in public discourse and a fight is now on to defend established legal norms and due process, while resisting the mistreatment of non-citizens and other vulnerable groups. The favoured technique of the official human rights movement of ‘shaming’ states for their abuses is unlikely to be effective in a political climate of open contempt for liberal norms. Yet, moral pressure is far from being the only means of wielding influence. These illiberal trends instead point to the importance of broad-based coalitions and grass-roots activism to mobilise against power. While human rights may not be a panacea for the social and economic problems that fuel the rise of authoritarian populists, they nonetheless have an important role to play in these struggles, offering moral authority and the potential for international concern and solidarity.

Conclusion

Human rights sceptics call attention to the tensions and risks of a world in which the language of human rights is ideologically pre-eminent. They provide an important warning against an overly moralised human rights discourse that can simplify and distort political choices and even marginalise the voices of the already disenfranchised. It is important to remind ourselves that human rights are just one weapon among many in the arsenal of social justice activism. A more comprehensive political programme for open borders, for example might also highlight the exploitative structures of the global labour market and leverage the strategic position migrant labourers have within these structures to bring about change. Yet, while sceptics are right to caution against the dangers of an unreflective mobilisation of human rights, a preoccupation with delegitimation, which treats rights in exclusively ideological terms, risks losing the flexibility of the discourse and its transformative potential. Human rights are not, by their very nature, static and depoliticising. In politics, they also have a dynamic role to play as claims, a form of speech act which enables political mobilisation and contestation. In their vigorous campaigns for a human right to move, contemporary movements of undocumented migrants exemplify the productive side of the human rights paradox, acting upon the very citizenship rights they seek to acquire.

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