

Back to the future: human rights protection beyond the rights approach

This essay recognizes human rights as something more profound than legal rights. In the context of the rise of global capitalism, being faithful to human rights' intrinsic counter-hegemonic nature requires contemplating a picture larger than rights litigation. This involves reassessing the efficacy of human rights instruments in order to address the structural causes impairing human rights.

Introduction

This essay critically assesses the assumption that a so-called 'rights-based' approach should be the primary way of pursuing justice through the law. While not sceptical about the fact that human rights have an emancipatory dimension, in this essay I argue that resorting to an approach exclusively or mostly based on legal rights is not likely to unfold it. Human rights make a meaningful contribution to emancipation whenever they recouple with their counter-hegemonic nature. The structural sources of exclusion, indignity and environmental damage – today's hegemony – are connected to one phenomenon: the rise of global capitalism. Hence, the question of whether human rights are tools at the service of human emancipation requires asking if human rights are meaningfully engaging in the enterprise of domesticating the global capitalist economy.

This short essay deals with that question. It does so on the one hand by taking the view that the rights approach fails to seriously confront the human rights encroachments deriving from global capitalism. On the other, the essay explores avenues that could restore human rights' counterhegemonic nature. This plan could be summarized in the following points. Due to space constraints I will deal only with the first two of them. a) At the conceptual level I

suggest restructuring the interplay between human rights and democracy, so that people reappropriate human rights. b) With respect to social rights, I propose reorienting both its normative content and redress mechanisms. These should shift back from their present individual-centred focus towards their truly social and more duty-oriented nature. c) Internationally, and in line with the opinion of the Independent Expert on the Promotion of a Democratic and Equitable Order (OHCHR 2015), 'the human rights regime', should more actively prevent the harmful effects derived from free trade agreements (such as the TRIPS Agreement, or the still in negotiation TPP and TTIP) from limiting or in any way conditioning international human rights law. d) Regionally – in a proposal directed primarily at the governments and human rights movements of the Global South – I suggest strengthening peoples' right to self-determination in the economic domain by supporting human rights grassroots organizations reclaiming concepts such as 'food sovereignty' (De Schutter 2015), notion that involves breaking up with fundamental aspects of the heterodoxy of global capitalism.

The rights approach

Why a vast majority of peoples are deprived of development dynamics in the 21st century has a number of reasons. Human rights' inability to influence the global economy is a crucial one. Linked to this phenomenon, the relative indifference that the human rights academia pays to this interaction should be noted. That sophisticated jurisprudential developments are more frequently discussed than the interplay between global capitalism and human rights is not due to a circumstantial predilection from legal agents. It obeys to a more fundamental canon: the idea that addressing those interactions would entail mixing law

and politics, thus going beyond the scope of what human rights are or what they do.

By a 'rights-based' or 'rights' approach, I mean something that has both substantive and procedural implications. Content-wise a rights approach is individualistic. So prevalent is this emphasis that even in the case of social rights the receptor of a legal case is either an individual or a group of individuals, but not the community as a whole. This is problematic because the core aspect of social rights does not consist in granting entitlements to those capable of articulating them in legally sound ways (Ferraz 2011: 1660). As I shall further explain, the distinctive element of social rights lies in its communitarian and democratic normative dimension. With respect to procedure, a rights approach is, as a matter of principle, alien to political contestation (Petrova 2004: 188; Waldron 1999: 12). The problem here is that disjointing human rights from democracy impedes people from modulating human rights in line with their reality. A shift in this respect could be significant in articulating a whole spectrum of alternatives capable of opposing capitalist practices impairing human rights.

Three other features characterize the rights approach: trivialization, technicality and elitism. Trivialization is linked to the point of departure of the rights approach – the correct premise that human rights are important. However, from such a premise often follows the less convincing assumption that whatever the issue at stake (health, mining activities, the Internet, climate change) it should be looked at primarily under the purview of legal rights. This over-abundance trivializes human rights' importance (Petrova 2004: 203).

Moreover, as rights emerge from a specific place and have their specific techniques, they involve a great deal of technicality and elitism. Technicality is connected to the necessary legal expertise required for rights problems, what normally leads to their bureaucratization. With regard to elitism, this problem relates both to its Western origins, and to the fact that rights have become the well-paid job of expert lawyers and international bureaucracies. These two phenomena have led to a dismissive attitude towards the

voice of indigenous communities, student organizations, workers unions, grassroots movements of farmers, and human rights activists gathered at the World Social Forum. In this context, the counter-hegemonic nature of human rights unsurprisingly fades away.

The critical tenor of this essay does not seek to demerit the valuable contributions of the rights approach with respect to, for example, governmental accountability. However, as today's human rights challenges are located far beyond those infringements, the scope of that accountability should be re-examined.

Adapting the approach of P. Jha (2006: 15), I think that the emancipatory goal of human rights I mentioned must be carried out with deliberate intent. This does not mean getting rid of the rights approach but it requires supplementing it with a reappropriation of human rights by human rights movements. This reappropriation requires, firstly, the recoupling of human rights to democracy. Secondly, to shift towards a truly social – and not merely a legal rights oriented – definition of social rights. Naomi Klein's (2007: 119) criticism of Amnesty International illustrates the first point. Klein criticized Amnesty's aseptic approach in relation to the human rights violations that occurred in Chile during the dictatorship. She stated that the violations were only quantified, devoid of any analysis of "why" they had occurred. No mention was made of the fact that the junta was remaking the country "along radically capitalist lines". The omission produces the effect of presenting the violations as "random" violence. Nonetheless, it is only by examining the junta's "revolutionary economic project" that one can make sense of why, how and against whom such extreme repression was used.

While the accountability aim of the rights approach should be welcomed, I do not think that the context should have been underemphasized. Moreover, it is incorrect to exclusively identify human rights with combatting impunity. Crucially, human rights have also to do with the very content of the struggles of those attempting to build alternatives to capitalism.

Yet, the question remains: can human rights law embrace this perspective?

The forgotten radical mandate of human rights

I shall begin with the critical book by Stephen Hopgood, *The endtimes of human rights* (2013), and the publication that the Dutch section of Amnesty International devoted to the discussion of Hopgood's contribution: *Debating The endtimes of human rights* (Lettinga & Van Troost 2014). In this latter publication, Frank Johansson (2014: 53) stated: "[T]he big issues of social and economic justice cannot be solved through the human rights paradigm, as it doesn't confront economic power." Although I think that the challenges faced by human rights are not limited to distributive justice, I agree with Johansson's statement. Actually, I think Hopgood's critique fails capturing these challenges. I believe that what should really create concern about 'the human rights regime' is how ill-equipped it is to contribute to domesticating the capitalism that impairs human rights. About that, Hopgood does not say much.

Today, global capitalism challenges all human rights dimensions including the very conditions of life on the planet, at least the way we know it. At the same time, in its fast economic makeover of the world, capitalism impacted both the political structure of the nation state (Jha 2006: 82) as well as human rights' substantive meaning and redress mechanisms. Worse, as I will show later on, legal rights have in some cases become instrumental to legitimizing and guaranteeing capitalist expansion. Furthermore, 'the human rights regime' lacks the capacity to hold to account the transnational compound of political and economic elites steering these negative shifts.

Climate change impacts the Earth's limited and fragile macrosystem. Scientists speak of "defaunation" in order to signify the acute loss of biodiversity as a result of human behaviour (Dirzo et al. 2014: 401). While our ecosystem has already been reacting to the rise of CO₂ emissions, estimates of the rise in temperature by 2100 are around 4 degrees Celsius. The consequential rise in sea levels that would follow threatens with inundating "many coastal

areas from Ecuador and Brazil to the Netherlands to much of California and the northeastern United States, as well as huge swaths of South and Southeast Asia" (Klein 2014: 13). A threat against life at this level leaves the conceptualization of the right to life falling short. This is an example of why human rights advocates should not only think of human rights violations; they should also reflect on the ability of human rights instruments to target the structural causes of those problems.

Slavoj Žižek (2011: 363), in a predicament that we could describe as *apocalyptically pragmatic*, states that "the true utopia is the belief that the existing global system can reproduce itself indefinitely". Are human rights embedded in the utopia Žižek reproaches? Interestingly, both the UN Charter and the Universal Declaration of Human Rights (UDHR), core instruments of our discipline, did not. What lay at their core was a radical and comprehensive view to which both great powers and small countries committed themselves after World War Two. Both instruments legitimized themselves because after Hiroshima and the sobering realization of the possibility of the extinction of humankind in a nuclear holocaust, the victorious central powers accepted that the world could simply not do without a platform for international dialogue in the fields of security, cooperation, and human rights.

Moreover, the central powers' attitude with respect to the UN Charter and the UDHR was shared by non-industrialized nations. These smaller countries believed that peaceful dialogue and cooperation would give them an opportunity to attain social and economic development. Later on, great powers would often instrumentalize human rights by scornfully addressing small countries' claims of respect for their sovereignty and self-determination. Yet, small countries never understood human rights as a top-down, externally imposed process. The relentless claims from organizations such as the Non-Aligned Movement exemplifies this (Prashad 2014: 26-27).

All the previous shows that the UDHR is incorrectly interpreted under the narrative of the rights approach advocated by organizations such as the International

Commission of Jurists where, apparently, all it takes for the splendid realization of human rights consists in improving access to justice and rights protection in court (ICJ 2008). If, as I believe, the challenges faced by human rights today are taking place at a more structural scale, the bad news is that the greatest challenge to human rights lies not in becoming more effective, but exactly its opposite – the human rights movement must become self-aware of the inefficacy of its mechanisms (human rights litigation in the first place) as a pre-requisite to its reinvention. The encouraging news is that if in 1948 the world accepted that business-as-usual would not do the job in the international arena, we may well accept that once again.

In the coming sections I will do the following: Firstly I shall illustrate a normative shift derived from the rights approach in the field of social rights. Second, I shall get back to the point of recoupling human rights with democracy.

Capitalism's erosion of social rights

Processes of privatization, marketization and liberalization contracted the extension and quality of social services. This has happened because of another, more important shift. Capitalism has changed *our understanding* of what rights are and of how to guarantee them. When William Henry Beveridge (1870-1963) in 1942 delivered the report that served to establish the National Health Service (NHS) in the United Kingdom, he did so on the understanding that social rights consisted in granting access to health care to everyone irrespective of their ability to pay. That understanding is reflected in the NHS' founding principles of comprehensiveness, universality and equity (Pollock 2005: 83). Some of us still think that it is this perspective of social citizenship that informs social rights such as the right of access to health.

But it was when capitalism in its perpetual hunt for niche markets (Crouch 2004: 83) expanded to health care that our understanding of social citizenship - which in the words of T.H. Marshall (1950: 28) had to be directed "towards a fuller measure of equality" - found itself in need of adjustment. From a focus on affordability we shifted towards choice protection (Lister 2013: 31). Choices in

health care attract consumerist sympathy, but in doing so they legitimized the appropriation of health care by business and with that, the loss of the ideas of citizenship and solidarity informing social rights.

This change of paradigm had an institutional parallel. From single-tiered health care systems we moved towards the complex structure of insurance companies, regulators, private, and semi-private providers. So strong has been the pressure to extend capitalist appropriation in the profitable domain of health care (health-related needs are both perpetual and urgent) that not even ideological consistency has been respected – allegedly neoliberal principles such as efficiency have been ignored.

Take Canada, as an example. In spite of the fact that "in terms of ratio of productivity to administrative costs" the Canadian single-tiered health care system was regarded by a series of legislative reports "as one of the most efficient [...] in the world",¹ Canada began a path towards the gradual commercialization of its health care. Interestingly, the decisive blow to Quebec's noble egalitarian tradition came not from the political arena but from human rights' alleged allies – rights and courts. The 2005 *Chaoulli* ruling (ibid 2005: 860), struck down acts of parliament impeding health care commercialization under a reasoning based on the rights to life, liberty and security. As a perceptive analysis has revealed (Hirschl 2007: 60-65, 77, 83, 92), court activism, far from the elevated reasons often pled in its favour, contributes decisively to the entrenchment of a legal and institutional setting favourable to the perpetuation of capitalism.

In the developing world, excessive emphasis on a legal rights approach has brought health care systems not only not to focus on the most vulnerable (Mchangama: 2014), but also to be run in an economically unsustainable way (Gouvêa 2013: 466). In the case of Brazil for example, since middle and upper classes are more likely to have their voice heard in court, their more exclusive and expensive

¹ The Supreme Court of Canada (2005) *Chaoulli v. Quebec* (AG), SCC 35, Ruling of 9 June.

health care needs have been prioritized to the detriment of the vast majority of impoverished people in one of the most unequal countries in the world (Gouvêa 2013: 463; Ferraz 2011: 1660; Wang & Ferraz 2013: 165). And focusing scarce resources on less cost-effective interventions is an approach that has been advised against by the World Health Organization (2014: xi).

Purposeful action in line with the 1978 Alma-Ata Declaration needs to be adopted. This would allow to emphasize the importance of health planning, comprehensiveness, affordability, and universality, in line with the World Health Organization's goal of "health for all" (WHO 1978: paras. 6, 7.8, 8). Critically, it is this approach too that would have been vital in addressing contemporary crises, such as the Ebola crisis (Brown 2014; Kiény 2014; Zinzombe 2014).

This analysis explains why under the rights approach social rights have been inhibited to reconnect with its genuinely social origins. It is imperative to shift back towards the historical and teleological routes of social rights. Namely, to re-emphasize the importance of the duties necessary to guaranteeing them. Paraphrasing García Manrique (2013: 34) social rights denote the democratic standards a community gives to itself in order to specify the distribution of wealth and opportunities necessary to satisfy everyone's needs of assistance, education and labour. Hence, as much as the challenge for the right to vote demanded the political defeat of census suffrage, we must come to terms with the idea that what social rights primarily demand is the de-commodification of key areas such as the provision of healthcare, education and other essential social services. Also – as some human rights NGOs have started to acknowledge – tax systems must be restructured with a view of redistribution (CESR 2015). It is this trend, and not the privatization of social rights' legal nature, what truly reflects commitment towards the challenge posed by the 1993 Human Rights Vienna Conference (OHCHR, 1993: para. 5). It is in the acceptance of a plural legal response that *the goal (not the means)* of universality, indivisibility, interdependency and interrelatedness of all human rights will be attained.

Recoupling human rights and democracy

Shifting back towards new visions of human rights such as the abovementioned, as well as others promoted by human rights grassroots organizations such as the claim for 'food sovereignty', demands a different interrelation between law and politics. One, that opens the door to see in human rights something more than legal rights, along with re-emphasizing the importance of duties and collective instruments such as the right to development.² This would upscale human rights from a friendly conscious reminder, into an irritating stone in the shoes of capitalism.

These issues involve a number of practical shifts. Yet, this transformation also requires a review of the theoretical framework of human rights. Reappropriating human rights requires altering the predominant understanding of the relation between constitutionalism and democracy. Against Dworkin, who thought that if the majority and not judges set the standard of restraint with respect to individual rights "the majority [would be] judge in its own cause" (1977: 142), it must be highlighted how such a mistrust for self-government is based on a naive thought: the idea that "the minority is no longer synonymous with the oppressor" (Rosanvallon 2008: 116). To be sure, democracy is precisely about making the majority a judge in its own cause (Atria 2006: 85; Waldron 1999: 265, 297) and, unless we shift towards a government of enlightened despots, human rights advancements should be mainly conceived as advancements that a majority supports.³ This does not mean that I consider law and politics the same thing. On the contrary, following Fernando Atria (2004: 150), I believe that legal reasoning should be able to claim a position of *relative* autonomy with respect to the political. Judicializing

2 This is in spite of some influential Northern countries' attempt of disjoining the right from its collective dimension and reduce it to another individual legal right (Bunn 2012: 109). Bunn, I. (2012) *The Right to Development and International Economic Law. Legal and Moral Dimensions*, Oxford: Hart

3 This is without prejudice of admitting the intrinsic fallibility and precariousness of democratic arrangements, as Chantal Mouffe has theorized (Mouffe 2009: 11).

politics in contrast, not only denies any legal autonomy, it also threatens de-legitimizing the legal expertise of the judiciary, arguably, one of its mayor social capitals.

Moreover, tactically speaking, I think that well-inspired-left-wing-legal-scholars have overestimated the counter-hegemonic potential of judicializing politics (Langford 2008: 42; Uprimny & García Villegas 2005: 255). Can pro-bono or NGO litigation be equated to the power of corporate law firms expending their immense resources in articulating every possible legal avenue to defending the interests of capital against state's social budget (Eberhardt & Olivet 2012)?

The points raised so far are not to deny the soundness of many judicial rulings. But even good rulings can be counterproductive if their effect is to persuade us of the idea that human rights are the stuff of expert lawyers and that ordinary citizens should not have much of a say in that process. Pushed forward by global capitalism, the great enterprise of human rights has entered a critical stage. One where what is at stake is nothing less than the extinction of human rights. Not because an authoritarian leader will ban them – sooner or later human rights find their way through that. The real challenge lies in seriously addressing the structural sources of human rights degradation by carefully evaluating the effectiveness of our legal response. In this

sense, as Jeremy Waldron (1999: 304) critically reminds us, we must overcome our fear of shaping the architecture of human rights, purely on the basis of the contempt towards legislative politics.

Conclusion

In this essay, I have argued against the arrogance toward politics and the business-as-usual-attitude of many human rights advocates who, in contrast to the founders of the UN system, believe that human rights are not more than individual legal rights. I believe that we require both a sense of urgency, and an acknowledgment of the limitations of our legal instruments in confronting the challenges posed by global capitalism. Moving beyond the rights approach does not mean leaving legal rights behind. The accountability aim is still valuable albeit too limited in scope for coping with transnational dimensions and conceptual paradigm shifts catalysed by global capitalism. Moving beyond the rights approach entails asking what human rights could do to influence the global economy, especially how to address the structural causes of abuse and injustice derived from it. In doing so, I have suggested a strategy that requires peoples to reappropriate human rights through democracy, while restoring a truly social comprehension of social rights.