

DIMINISHING RESPECT OF HUMAN RIGHTS

In 2000, Michael Ignatieff could still correctly state that human rights had become nothing short of “the dominant language of the public good around the globe.”¹ A generation earlier, Michel Villey observed that “human rights have only friends.”² Today, this is considered a thing of the past, a not-so-noble lie. It is held against human rights that it dared to be the *dominant* language. To be dominant is a sin, because dominance is imperialistic. Human rights were and are the tool of ruling elites, and classic civil rights are the worthy tool of elite privilege.³

The old demagoguery roars again: it is increasingly common to label human rights defenders as criminals.⁴ Public opinion does not appear to be worried about it. Human rights discourse is redesigned and marginalized in Western societies; in the rest of the world, where human rights served as the mobilizing idea in revolts against tyranny, little enthusiasm likely remains after the failure of the Arab Spring.

A generation ago, a state that would have openly challenged universal human rights ran the risk of becoming a pariah. Today, disregarding human rights in international relations has become common,

¹ Ignatieff M., *The Rights Revolution*, House of Anansi Press, 2007, 176.

² Villey M., *Le Droit et les Droits de L’homme*, Presses Universitaires de France, 1983, 17 (my translation). Villey was very critical of the use of human rights in law.

³ This fits into the populist delegitimation of human rights (an imposition from a global conspiracy).

⁴ In 2018, Italian Vice-Prime Minister Salvini called the high sea rescuers of asylum seekers “criminals”. See: Giuffrida A., *Italian Government Approves Salvini Bill Targeting Migrants*, *The Guardian* (September 24, 2018), <www.theguardian.com/world/2018/sep/24/italian-government-approves-bill-anti-migrant-measures-matteo-salvini>.

even normal.⁵ Doing business with dictators goes without saying: human rights are not a precondition for economic ties with China. To the extent that domestic protection of human rights is a matter of international relations (which has formed part of the equation even in stable democracies – see the foreign policy sides of desegregation in the United States), the changes are discouraging. Post-1989, it seemed that democracies committed to human rights would push other countries towards greater respect for them, and the latter would have little choice but to accept the corresponding hegemonic language. (Of course, this was not a strong push, and even development aid was not tied to the human rights record of a recipient country.) Today, with new political and economic dependencies, this pressure is diminishing.

The international human rights protection system runs the risk of disintegration, even if some events point in the opposite direction.⁶ The UK openly refused to implement the ECtHR judgement on prisoner voting rights and threatened withdrawal from the European system.⁷ The Russian Constitutional Court followed suit, declaring that it has the constitutional duty to determine which judgments of the ECtHR are compatible with the Russian constitutional order.⁸ This position was endorsed by Russian legislation requiring the Constitutional Court to exercise the ultimate review of constitutionality. Country after country deserts the jurisdiction of the International Criminal Court, and the

⁵ The UK, which only twenty years ago copied the ECHR into its constitutional system to fill a major gap, now conducts a relentless war against this very Convention, which was the brainchild of Winston Churchill.

⁶ On the disregard for international judgments in illiberal democracies, see Chapter 8.

⁷ State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights, (1978), Advisory Opinion OC-24/17, IACtHR (ser. A) No. 24 (November 24, 2017).

⁸ See: Mälksoo L., Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No21-П/2015, European Constitutional Law Review, Vol.12, No.2, 2016, 377-395.

ECtHR is under increasing stress. Earlier in Latin America, after the IACtHR found that a dismissal of judges in Venezuela violated the Inter-American Convention,⁹ the Venezuelan TSJ held that the Convention and the rights protected by it, “under the pretext of universal legalities,” cannot be supreme compared to the Constitution, and thus refused to execute the judgment.¹⁰

While most of the backlash against human rights resembles erosion and decline, there has been progress for certain human rights and related claims, at least in many countries. Instead of a general backlash, we may be facing an important readjustment, a shift *within* human rights, a restructuring and re-evaluation of their priorities and content. Human rights are universal but not immutable, and certainly not exempt from social adjustment. Or perhaps they must be local. Perhaps classic civil and political rights are less important today compared to the age of bourgeois elite rule, and only traditionalists interpret their loss of importance as decay. After all, fundamental human rights have always been subject to change. Cultural shifts matter both for the meaning (interpretation) of human rights and their social acceptability. While liberal constitutionalism and early rights declarations centered on freedom, today this no longer holds the same importance for a majority that takes liberty for granted: it is not concerned with liberation from specific forms of despotic oppression. Liberty appears too burdensome for ordinary use. As Tocqueville had already noticed: “To live in freedom one must grow used to a life full of agitation, change and danger ... That is the price of freedom.”¹¹ Today, freedom

⁹ Apitz Barbera et al (“First Court of Administrative Disputes”) v. Venezuela, IACtHR, Judgment of 5 August 2008. See Chapter 7.

¹⁰ In a similar situation, Peru took the same position earlier with respect to the Castillo Petrucci et al. case, IACtHR, judgment of 10 May 1999. In the end, Trinidad and Tobago and Venezuela (in 2012) denounced the Convention.

¹¹ de Tocqueville A., *Journeys to England and Ireland*, Edited by J.P. Mayer, Yale University Press, 1958, 116.

means: “no more politics. I’m in the land of the free!”¹² However, if confronted with authoritarian ideas, this might change.

The emerging indifference to civil and political rights reflects a shift towards identity concerns in the contemporary narcissistic Western culture. Narcissism and related consumerism have already altered the focus on freedom-oriented human rights.¹³ As Nina Power, author of *One Dimensional Woman*, has stated following Laing’s theory of (personal) liberation: to live freely means “to live as freely and honestly as possible, to coincide with oneself as much as possible, to not feel anxious or guilty, or ashamed, to not dwell in negative feelings.”¹⁴ Freedom has become a problem of identity and feeling good: it means the right to an authentic (narcissistic) identity. Hence a specific understanding of privacy that insists on combining exhibitionism with governmental protection from its negative consequences (e.g. the right to be forgotten). Privacy and the right to private life have become the shelter of personal weakness and vulnerability (see below), often impairing political rights and transparency, which are necessary for a robust democracy. Other fundamental rights – like the right to freely practice religion – become expressions of identity: a manifestation that is not protected as part of a collective belief but because a person claims that an idiosyncratic behavior that is important to her identity just happens to be religious.

¹² The quote comes from Mrs. Schoolland, who survived China’s many vicissitudes. See: Stossel J., China’s Tech Totalitarianism, Rasmussen Reports Political, April 15, 2020,

<www.rasmussenreports.com/public_content/political_commentary/commentary_by_john_stossel/china_s_tech_totalitarianism?utm_campaign=RR04152020DN&utm_source=criticalpmact&utm_medium=email>.

¹³ On the negative social consequences of the cult of identity see: Lilla M., *The Once and Future Liberal: After Identity Politics*, Harper Collins, 2017; Fukuyama F., *Identity: The Demand for Dignity and the Politics of Resentment*, Macmillan, 2018.

¹⁴ Power N., “Untitled”, Nina Power (blog), March 14, 2019, <www.ninapower.net/2019/03/14/248/>

The citizen is satisfied with his “cage-free” status. By industry standard, to be “cage free” means able to nest, perch, and dust-bathe, with a minimum average space (as in the case of prisoners, who should enjoy on average three to six square meters per person in a prison cell). This is freedom *in* the cage; the cage is mistaken for an essential protective device or even a necessity to maintain the community within it, which would otherwise disappear in competition with other hen cultures.

This new understanding harms not only classic civil, political, and even socioeconomic rights but the very idea underlying human rights as such: the possibility that there are inherent limits to state power.

How did we get here? The shift is partly generational. It is difficult to understand and feel the importance of fundamental freedom-enhancing rights without the experience of totalitarianism. Other, actual injustices – frustrations due to inequality – capture the imagination. The fate of endangered species in faraway lands may stir the democratic public more than a lack of freedom for apostates in Bangladesh. Dolphins look more fun than prisoners.

Survey results indicate that both in stable democracies and transitional countries increasing numbers of people identify themselves with values that are incompatible with human rights. Nationalism and fear of the “other” turn against human rights. People show little interest in rights that pertain to all and demonstrate increasing hostility to rights that seem to benefit specific groups for which they find little sympathy. Majorities are solely interested in rights from which they individually benefit, like freedom of conscience (but not freedom of religion for unusual and foreign groups), the right to certain elements of private life and privacy (related to freedom of consumption), and the collective rights of the majority. The resurgent idolatry of the sovereign nation state prevails (especially after the takeover of right-wing populism). The idolatry of sovereignty and the nationalist cult of provincial localism is antithetical to the international protection of human rights; it denies transnational human solidarity and refuses international human rights protection.

How was it possible that demagoguery could once again undermine the results and foundations of three centuries of civilization? The complacency of self-evident truths (proudly professed long ago in the US Constitution and the French Declaration of 1789) has backfired. The last great reaffirmation of the obvious necessity of human rights came from the experience of totalitarianism. The lesson that civilization may easily collapse seem to be on the road to oblivion.

The instrumentalism and reinterpretation of human rights reflects broader, worldwide changes that facilitate the demise noticeable in illiberal democracies. It is not Eastern European authoritarianism but various Western ideologies, and geopolitical Western cultural changes, that undermine respect for human rights. Many scholars, activists, and ordinary citizens in stable democracies do not mind this loss. For them, human rights are not part of the solution but part of the (social) problem. For many critics, human rights are supposedly apolitical and thus unable to solve social conflicts. (Never mind that this has never been the ambition or purpose of human rights.

Over the last seventy years (and for far longer, as natural rights), human rights were unquestionable or even sacred. Human rights “stand as the last remnant of the Enlightenment to retain its universal character [...] Human rights thus function as a normative imperative that is beyond politics and law.”¹⁵ Today, when populist movements and governments base their power on denying Enlightenment and reason in the name of alternative facts, and where the possibility of community is denied through the claim that “everything is political,” the relevance of this attack is more obvious than ever and so are the stakes. A new wave of human rights revisionism is readjusting the field of liberty.¹⁶

Only a few years ago, Professor Moyn gained a certain celebrity status, which says little about his book’s scholarly value but much

¹⁵ Salecl R., *The Spoils of Freedom: Psychoanalysis and Feminism after the Fall of Socialism*, Routledge, 1994, 112.

¹⁶ The term originates from Alston P., *Does the Past Matter? On the Origins of Human Rights*, *Harvard Law Review*, Vol.126, 2013, 2043-2081.

about academia's state of mind in matters of human rights.¹⁷ According to Moyn's thesis, the international recognition of human rights was neither a universalistic claim of the last two or three hundred years, nor a specific reaction to the barbarity of totalitarianism and World War II; it was a Cold War in(ter)vention, an apolitical, "moral" tool developed to respond to communism and enable interference into the domestic affairs of communist and other states.¹⁸

This kind of human rights revisionism is propelled by American (French, etc.) self-hatred, or more properly, hatred, dislike, or suspicion of the establishment, inspired eminently by President George W. Bush's unsuccessful invasion of Iraq. Moyn's earlier scholarly "conversion" paper is quite telling in this respect:

The shift in political debate has been impossible to miss. Even those who retain an investment in human rights cannot treat them as an unquestionable good, mainly because the America that once seemed to many enthusiasts to be the prospective servant of universality abroad all too quickly became the America pursuing low-minded imperial ambitions in high-minded humanitarian tones.¹⁹

¹⁷ Moyn S., *The Last Utopia: Human Rights in History*, Harvard University Press, 2012; See further, following a more openly leftist-egalitarian agenda at the expense of "liberal" human rights: Moyn S., *Not Enough: Human Rights in an Unequal World*, Harvard University Press, 2018. For a general criticism of Moyn's attempt to destroy human rights and liberal democracy, see: Lacroix, Pranchère J.-Y., *Human Rights on Trial: A Genealogy of the Critique of Human Rights*, Cambridge University Press, 2018. For a historically and morally more accurate narrative on human rights see: Hunt L., *Inventing Human Rights: A History*, W. W. Norton & Company, 2007.

¹⁸ The thesis reflects the 1960s state-of-the-art Soviet position, and yet Professor Moyn is not alone. Some of these attacks (stirred by leftist dissatisfaction – see Alain Badiou below) confuse the occasional or even systemic disregard of human rights with their legitimacy. Posner E.A., *The Twilight of Human Rights Law*, Oxford University Press, 2014 and Hopgood S., *The End-times of Human Rights*, Cornell University Press, 2014, are part of what Langford calls an "eschatological trilogy". Langford M., *Critiques of Human Rights*, *Annual Review of Law and Social Science*, Vol.14, 2018, 69-89.

¹⁹ Moyn S., *On the Genealogy of Morals*, *The Nation* (April 16, 2007), <www.thenation.com/article/archive/genealogy-morals>.

The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism. Here one is reminded of a somewhat modified expression of Proudhon's: whoever invokes humanity wants to cheat.²⁰

In Moyn's imagination, human rights, which are allegedly apolitical or suprapolitical, serve unacceptable imperialist politics. This position of political dissatisfaction simply (but not always openly) echoes the criticism of an earlier generation of feminists who refused the abstractness of human rights: "Abstract rights will authorize the male experience of the world."²¹

A somewhat older criticism of human rights is anthropological in its origins. It denies the possibility of the universalism of human rights and argues that universalistic claims not only disregard local conditions and traditions but also impose a Western way of life on non-Western societies.²² For example, some argue that Western private property is alien to most places in Africa, where collective property prevails; private property would not only destroy these idyllic relationships but would generate oppression in these sublime communities, which naturally know no gender discrimination. (What is missing in these vitriolic

²⁰ Schmitt C., *The Concept of the Political*, The University of Chicago Press, 1996, 54.

²¹ MacKinnon C.A., *Feminism, Marxism, Method, and the State: An Agenda for Theory*, in: *Feminist Legal Theory: Readings in Law and Gender*, Edited by K.T. Bartlett and R. Kennedy, Westview Press, 1991, 195. Interestingly, Edmund Burke, a thinker antithetic to feminism, disliked human rights for their abstractness.

²² An-Na'im A.A., *Decolonizing Human Rights: An Urgent Plea for Rebuttal*, Lecture at Oxford University. YouTube (July 20, 2017), <www.youtube.com/watch?v=yveTevoQpIM>.

While most drafters of the Universal Declaration were committed to Western values, the Declaration did not take a position on the source(s) of human rights (except in the desire to avoid the barbarism of the immediate past). Maritain J., Introduction, in: *Human Rights: Comments and Interpretations; A Symposium*, UNESCO, 1948; Maritain J., *Man and the State*, University of Chicago Press, 1951, 77.

fables is that, contrary to what some short-sighted World Bank bureaucrats once claimed, the constitutional guarantee of private property does not require the privatization of collective property; famously, constitutional protection does not entail *access* to property.)

Authoritarian rulers and nationalist leaders happily echo these arguments. Without universalism, the local is king, and circumstances can justify an array of oppressive policies for the greater future good in the name of consent.²³ Once again, we arrive at popular endorsements advocated by populist and authoritarian leaders and a growing number of their citizens.

Furthermore, public acceptance of human rights in the past decades (especially where personal experience of oppression and barbarity had faded or did not exist) was bolstered by the economic performance of regimes claiming to respect human rights: as fundamental constitutional rights formed part of the political arrangement in successful democracies, they were embraced as part of an effective and attractive political system. This was a performance-based legitimacy, a legitimacy by association. The mantra asserted that Western-type rights-respecting regimes would bring welfare: liberation and wellbeing go hand in hand. This was certainly the hope in Eastern Europe in 1989. However, the lack of satisfactory economic results following the transition to a market economy in many new democracies explains how this disappointment extended to a belief that rights were seemingly useless. Once the socioeconomic performance of the state becomes unconvincing, especially in terms of individual benefits, respect for human rights shares the consequences of this disappointment. Beyond the negative experiences contradicting the utilitarian, development-based assumption, an even stronger intellectual challenge has arisen with the success of China. Here, even economic liberties remain limited, while others do not even exist, and yet the country has

²³ Le N., Are Human Rights Universal or Culturally Relative?, Peace Review, Vol.28, No.2, 2016, 203-211.

seen mass-scale improvement of living conditions without freedom and democracy.

The catalog of fundamental and human rights has grown longer since 1789,²⁴ with socioeconomic rights being the great addition of the last century. The expanding list and scope of rights resulted in rights inflation. Quite often, the new “rights” do not represent individual entitlements and reflect new expectations vis-à-vis the state. This changed conceptual basis contributes to the intellectual delegitimation of human rights.

The UN Universal Declaration of Human Rights was silent on the foundations of human rights, but it was expressly concerned about past brutality. With time, constitutional courts increasingly concluded that fundamental rights are based on the equal dignity of all human beings. Critics labelled this individualist-liberal, but accepted it as a foundation, even in the Vienna Declaration and Programme of Action (1993), which at the same time codified a new approach to human rights. Centring human rights in dignity is a catch-all concept. A more substantive understanding of dignity has also justified socioeconomic rights: people living below a certain standard cannot have a dignified life, and dignified life becomes the standard for government services. Dignity seemed attractive as a common foundation because it conformed with Western values (see Christian and Kantian traditions). Unfortunately, this has not been the case with all other cultures, which do not know the term. The reference to dignity has not been particularly problematic as long as that obscure notion entitled all human beings to be worthy of equal respect by the state.

With the emergence of the substantive concept of dignity, human rights gradually morphed into social justice issues. The grammar of rights changed. The new, social rights-inspired aspirations expected the state to perform and provide services in line with the dictates of

²⁴ In 1787, more than fifty rights could be found in American state constitutions. Many were not incorporated into the Bill of Rights and were deleted from state constitutions.

rights, as if state power was always decent, responsive, and non-oppressive. Rights were expected to do the work of democratic decision-making. Human rights here serve as a justification and battle cry for social movements. Rights mean obligations and policies to provide state services. The traditional approach, which was concerned with the rights of the *autonomous individual*, became neglected, as if it were irrelevant. In the last decades a shift towards vulnerability related security occurred. This carries practical consequences, as vulnerability dictates very different choices compared to classic human rights. From the demands of enlightenment to the Universal Declaration, human rights have enabled personal individual autonomy. They serve autonomous beings. The classic rights were necessary against nearly unlimited government power. Where government power is unlimited, society without rights may descend into barbarism and slavery. This consideration is now replaced by a positive program of social justice that seeks to counter vulnerability. Hence individual rights become irrelevant; they can be granted for instrumental purposes, namely, to force the state to fulfil its mission to counter vulnerability.