

CRITICAL ESSAYS ON HUMAN RIGHTS CRITICISM

ANDRÁS SAJÓ AND RENÁTA UITZ (EDS.)

eleven

international publishing

2 NEITHER INVARIANT NOR SACROSANCT

Human Rights Critique and Deliberation Past and Present

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1 INTRODUCTION

It is anything but news that the widespread optimism about a global triumph of modern human rights during their formative period in the second half of the 20th century has evaporated at the same time as the belief in a happy “end of history.” Discussions with international lawyers these days lead to the standard diagnosis that the heyday of human rights is over. There is no single reason for this sort of consciousness and if we wish to make sense of what is happening in the world today and what is going on in people’s minds, we have to be ready to participate in a journey to complexities that are often barely reducible to digestible fragments and ambivalences that are sometimes difficult to endure.

The anxiety surrounding current developments in politics and society, in particular among human rights practitioners and scholars, may very well be indicative of a larger crisis. However, in order to understand what sort of crisis it actually might be – a crisis brought about by increasingly hostile social environments or one that is (also) self-inflicted, a crisis whose outcome will weaken human rights or strengthen them, and so on – we need to refrain from taking this apparent anxiety as a *prima facie* proof that human rights are in serious trouble.

The truth is that human rights have (almost) always been the source and object of fierce philosophical and political contestation:¹ They have been denigrated as dangerous fallacies and as heresy and are still opposed on these grounds until the day; they have been criticized from inside and from out to a degree that this very distinction has been dismantled; they were annihilated for centuries in totalitarian and even genocidal regimes and they were torn apart in the Cold War; and just when many had hoped for the waves to finally calm and for a new age of multilateral cooperation, international peace, and security to triumph, terror and the war on terror began to gnaw away their contours.

¹ Also M. Goodhart, ‘Human Rights and the Politics of Contestation’, in M. Goodale (ed.), *Human Rights at the Crossroads*, Oxford. 31–44. (2013).

In light of the continuous critique of 'human rights' or the 'rights of man' from various ideological directions,² the current *siège* mentality is indeed remarkable. In the turbulent and arduous history of human rights, why have those who support or sympathize with them not grown accustomed to human rights critique and the deliberation that has accompanied the idea of universal rights from the outset?

In this chapter, I attempt to take a step back (in time) to outline three major thrusts of human rights critique that I systematize as the charges of naïveté, bias, and betrayal. In order to contribute to a more self-assured handling of human rights critique and deliberation, after outlining these three types of human rights critique, I turn to questions of how to assess these criticisms. What, after all, makes them valid and under whose conditions? I discuss the candidates for a justified critique before turning to the question of what types of human rights criticism should concern us most at the present time.

2 THREE MAJOR THRUSTS OF HUMAN RIGHTS CRITIQUE

Before taking a closer look at three influential strands of human rights criticisms, we have to clarify what "critique" and "human rights" are supposed to mean in this context. Starting with the former: its etymological roots reveal that critique entails acts of discriminating and deciding. In what follows, I am concerned with critique as a contraposition or opposition to something that builds on distinctions and judgments. Critique and criticism, which I use synonymously, are not subjected to further qualification in this part since I am concerned with the *critique of human rights critique* in another part.

I have selected three thrusts of human rights criticism, past and present, without, however, claiming that these categories exhaust all phenomena in this regard or that other types of critique are not relevant. The reason for the selection described below is that these types of criticism are so powerful that no human rights-oriented person could actually refuse to reflect on them at least once without putting their commitment at risk of yielding to any random blow.

As far as the definition of human rights is concerned, it is impossible in this context to operate with an ahistorical, unchanging concept of human rights: after all rights did not just fall into our laps once and for all, and, notwithstanding their persistence, they embody a dynamic development over the course of roughly three hundred years. The modern rights of man were then not yet our contemporary human rights, and human rights critique and deliberation account for this fact to anything but a small extent. Yet there is an undeniable family resemblance between rights of man and human rights and we therefore

² See also J. Lacroix & J.-Y. Pranchère, *Human Rights on Trial: A Genealogy of the Critique of Human Rights*, Cambridge. (2018).

cannot cast aside as obsolete, for instance, the objections Jeremy Bentham lodged against the French *Declaration des Droits de l'Homme et du Citoyen* (1789).³ Thus, criticism of human rights is always directed at a specific version or manifestation of 'human rights', the clarification of which should be the first step in any analysis. The target of critique in the case of human rights are human rights *in the eyes of someone*, not human rights as such. What human rights are, properly understood, and how, if at all, they are affected by charges against them, cannot be decided without, first, passing through the wind tunnel of critique.

To give a brief example: Stephen Hopgood, portraying what he calls the "endtimes of human rights,"⁴ levels criticism against the "Human Rights Empire." The primary objects of his critique are bodies of international law, activists, and nongovernmental organizations, not human rights declarations or covenants per se. To the extent that representatives of international humanitarianism feel addressed because they build their work on a concept and commitment to human rights, such critique, however, is human rights critique – unless, of course, the author of the critique emphasizes a sharp distinction between human rights in the ideal sense and human rights in the hands of (wo)man. Hopgood sets "human rights" apart from "Human Rights," tentatively approving of the former and disapproving of the latter. What then are human rights *really*? Whether we side with Hopgood's critique (in the holistic meaning of the word) or refute it, in both cases we are serving with an answer.

2.1 *Naïveté: Aspiration and Reality*

Doubtlessly utopian from the onset and the 'last utopia' for the time being,⁵ human rights traditionally attract criticism from those who see them as overambitious, as neglecting the gap between aspiration and reality, and those who declare their preference for brute facts over wishful thinking.

A modern version of human rights critique as a naive ideology has been put forward, for example, by David Kennedy. Advocating a pragmatist stance, he argues that human rights is too narrow a concept to improve human life and is not able to live up to the expectations of people around the world.⁶ "We promise more than can be delivered," he says, "and come to believe our own promises. [...] Humanitarianism prompts us to hubris, to an idolatry about our intentions and routines, to the conviction that we know more

³ Cf. J. Bentham, *Anarchical Fallacies. Being an Examination of the Declaration of Rights Issued During the French Revolution*, in *The Works of Jeremy Bentham*, Vol. 2, Edinburgh. (1796/1843).

⁴ St. Hopgood, *The Endtimes of Human Rights*, Ithaca. (2013).

⁵ Cf. S. Moyn, *The Last Utopia: Human Rights in History*, Cambridge, Mass. (2012).

⁶ D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, Princeton. (2004).

than we do about what justice can be.⁷ Kennedy's critique – which is similar to Richard Thompson Ford's call for "human rights down to earth"⁸ – is directed against a concept of human rights or its supporters and representatives whose mistake consists in the unchecked conviction that human rights are a simple solution to everything, that "all you need to do is adopt, implement and interpret these rights".⁹ Or, in the words of Michael Ignatieff:

Activists who suppose that the Universal Declaration of Human Rights is a comprehensive list of all the desirable ends of human life fail to understand that these ends – liberty and equality, freedom and security, private property and distributive justice – conflict, and, because they do, the rights that define them as entitlements are also in conflict.¹⁰

To be sure, critique, in terms of getting the relationship between aspiration and reality wrong, is not exclusively located in the conflict between realism and idealism. As Bentham's "*Anarchical Fallacies*" (1796) demonstrates, it can also manifest as language criticism, that is, as a critical assessment of the shaping and application of terms. What enraged Bentham was not least the – in his eyes – manipulative substitution of 'should' and 'ought' with 'can' and 'is' throughout the French *Declaration*. In contrast to its authors from the revolutionary National Convention, Bentham was not of the opinion that "all men are born free." He stressed:

Not a single man [...] that ever was or is, or will be. All men, on the contrary, are born in subjugation [...] – the subjugation of a helpless child to the parents on whom he depends every moment for his existence.¹¹

He also criticized the hollow rhetoric of equality in this first declaration of 'human rights' on European soil, which was inspired by the American declarations and bills of rights, above all the *Declaration of Independence* (1776). There is no factual equality between human beings, and general normative equality without further stipulations would, in Bentham's eyes, only result in chaos. What he saw as the careless phrasing of rights articles results from ignoring the real effects lofty entitlements can have, by means of which they

7 Kennedy, 2004, xviii.

8 R. T. Ford, *Universal Rights Down to Earth*, New York. (2011).

9 D. Kennedy, 'Reassessing International Humanitarianism: The Dark Sides', in A. Orford (ed.), *International Law and Its Others*, Cambridge. 134. (2006).

10 M. Ignatieff, *Human Rights as Politics and Idolatry*, Princeton. 20. (2003).

11 Bentham, 1796/1843, 498.

easily become a convenient tool for basically anybody to justify their actions. Bentham writes:

In a play or a novel, an improper word is but a word: and the impropriety, whether noticed or not, is attended with no consequences. In a body of laws – especially of laws given as constitutional and fundamental ones – an improper word may be a national calamity – and civil war may be the consequence of it. Out of one foolish word may start a thousand daggers [...].¹²

A particular tenet of his charge, according to which the drafters of the French *Declaration* are naive beyond the pale, is their reference to natural rights. Bentham's verdict is uncompromising: "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts."¹³ He goes on to explain:

Right [...] is the child of law: from *real* laws come *real* rights; but from *imaginary* laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come *imaginary* rights [...].¹⁴

This impetus Bentham shares with another prominent political philosopher. When, in 1951, Hannah Arendt published her study on *The Origins of Totalitarianism*,¹⁵ she had lived through two world wars – as a child and as an adult. The horrors she experienced, first and second hand, shaped her philosophy – in particular regarding the plight of the masses of stateless people: refugees from war, internally displaced people, denaturalized or exiled dissidents, and, of course, the victims of the Shoa, who were stripped of their most basic rights. It is from this perspective that Arendt begins her interrogation of the French rights of man and their complex tensions, which emphasize the shared humanity of all and assert themselves within a specific political people, that is, a nation. Since the French nation is not the equivalent of all the human inhabitants of the Earth, this leaves us with the question of how universal rights protection can be sensibly guaranteed.

For Arendt, the apparent contradiction between "man" and "citizen" does not simply point to flaws in the revolutionaries' specific attempts to establish the rights of man but to a much greater structural problem that fundamentally challenges *any* project of universal rights. How can rights be universal, that is, in this context, granted to everyone and

¹² Bentham, 1796/1843, 497.

¹³ Bentham, 1796/1843, 501.

¹⁴ Bentham, 1796/1843, 523.

¹⁵ H. Arendt, *The Origins of Totalitarianism*, New York. (1951).

effectively protected for everyone, if they remain the rights of particular citizens and produce obligations on the part of particular States. As Arendt observed,

[f]rom the beginning the paradox involved in the declaration of inalienable human rights was that it reckoned with an 'abstract' human being who seemed to exist nowhere [...].¹⁶

In the eyes of Arendt, the peculiar naivete of the French *Declaration's* authors consisted in their declaring rights for everyone and everywhere without further consideration of the legal-political architecture in which these rights originate and within which they are ultimately confined. Without membership in a political community, Arendt reasoned, no one would be able to enjoy access to the kingdom of rights. Expecting human rights to save the world without realizing their precondition, that is, "a right to have rights," is, in her view, pointless. In reality, people without such a principal entitlement are but "living corpses."¹⁷

The charge of entertaining blind spots and overlooking the grave challenges ahead escorts human rights into the present in many forms. Unable to provide a more comprehensive picture here, I would like, however, to mention Richard Rorty, who, in his widely discussed 1993 paper expresses his profound distrust of the ability of the human rights paradigm to make the world a better place – at least so long as it operates with a narrow rationalist approach.¹⁸ People who smash other people's skulls in the course of genocidal violence will never be convinced by something like the preamble of the *Universal Declaration of Human Rights* or enjoy the subtleties of a philosophical argument that aims to found the concept of universal rights:

[I]t is of no use whatever to say, with Kant: Notice that what you have in common, your humanity is more important than these trivial differences. For the people we are trying to convince will rejoin that they notice nothing of the sort. Such people are *morally* offended by the suggestion they should treat someone who is not kin as if he were a brother, or a nigger if he were a white, or a queer as if he were normal, or an infidel as if she were a believer."¹⁹ It is, Rorty argues, sentiments whose cultivation – or, in his words, "manipulation" – is decisive in overcoming in- and outgroup divides that are easily

16 Arendt, 1951, 288.

17 Arendt, 1951, 293.

18 R. Rorty, 'Human Rights, Rationality, and Sentimentality', in S. Shute & S. Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures*, New York. 112–134. (1993).

19 Rorty, 1993, 127.

underestimated on the grounds of the Enlightenment's anthropological optimism.²⁰

2.2 *Bias: Universality and Particularity*

Human rights comprise entitlements assigned to every human being. This characteristic of *beneficiary universalism* implies that everyone, primarily States, are under obligation to respect these entitlements – at least in the eyes of those who morally assign such rights to members of the human species. This universal obligation in principle raises the question of whether human rights compliance is burdensome for all to the same degree or whether the concept of human rights is inherently biased towards some groups of people and their respective ethical and political orientations. If that were the case, some critics of human rights argue, these rights could not be claimed or enforced without violating basic requirements of fairness. They hence dispute that human rights are “a common standard of achievement for all peoples and all nations,” as the preamble to the *Universal Declaration* states,²¹ unless their respective cultural or ideological outlooks are accommodated.

Human rights in particular have faced charges of bias since they arose on a global stage, starting with the negotiations on the drafting of the *Universal Declaration*. The postcolonial turn in Western political philosophy added to this dynamic, as have debates on Asian, African, Andean, or Islamic exceptionalism in the course of the last decades. These developments have sparked fierce debates about the universality and particularity of human rights in which descriptive assessments and normative evaluations are entangled in complex ways.²²

In terms of bias, the political and moral undergirding of human rights, which are commonly – and rightly – held to be of liberal and humanist origin, lie at the heart of human rights criticism. When the committee tasked with drafting the *Universal Declaration* under the auspices of the United Nations' Third Committee, and with Eleanor Roosevelt relentlessly balancing diverging interests in the wake of the emerging Cold War, charges of “Western bias” were raised, predominantly from two sides. Socialist states, above all the USSR, challenged the (traditional) priority given to political and civil rights and demanded a greater consideration of social, economic, and cultural rights.²³ These states also expressed concerns about unrestricted liberal rights, such as the right to freedom of speech, and they

²⁰ Rorty, 1993, 125.

²¹ UN, *Universal Declaration of Human Rights*, A/RES/3/217 (1948).

²² Cf., e.g., A. Sajó (ed.), *Human Rights with Modesty: The Problem of Universalism*, Dordrecht. (2004); J. Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca. (2003). See also Frick, 2019.

²³ On the history of the UDHR, see esp. J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, Philadelphia. (1999).

(unsuccessfully) called for restrictions on the dissemination of "fascist propaganda," for example.²⁴

Although the UDHR – unlike previous rights declarations – entails substantial social and economic entitlements, socialist States were not satisfied since, in their opinion, it "was not sufficient to proclaim basic rights, such as the right to work, the right to equal pay for equal work, and social rights; it was also vital to think of their practical application."²⁵ As is well known, the USSR abstained in the vote on the final version of the *Universal Declaration* in the UN General Assembly in 1948. The USSR felt that the *Declaration* was not 'progressive' enough and was biased against socialist political philosophy, which prioritizes community interests over individual ones where these happen to clash. This position echoed the critique of the rights of man already put forward by Karl Marx, who viewed the first rights declarations as benefiting merely "the selfish man, separated from others and from the community."²⁶ The claim that the classical human rights corpus – despite the *International Covenant on Economic, Social and Cultural Rights* complementing the *International Covenant on Civil and Political Rights* – remains biased toward liberalism has not disappeared with the collapse of the USSR and has recently been lamented by Samuel Moyn, who argues that human rights sanction "in particular the distributional victory of the rich."²⁷

In the course of the process of drafting the *Universal Declaration*, cultural and ideological criticism was also voiced by Islamic states. In particular, the rights of freedom of religion – in the case of apostates – and the right to family – in the case of Muslim women marrying non-Muslims – were challenged by Pakistan (at least initially), Egypt, and Saudi Arabia.²⁸ Up to the present, the extent to which human rights should take into consideration religion based reservations is one of the most controversial in human rights theory. With what authority, critics of human rights universalism ask, do liberal democratic states demand compliance with norms that are agreeable from a liberal democratic perspective but not from an orthodox religious one? Discomfort with such alleged Western bias has spurred alternative rights declarations, such as the Organization of Islamic Cooperation's (OIC's) 1990 *Cairo Declaration of Human Rights in Islam* (CDHRI), which features substantial deviations from the classical human rights corpus.²⁹

24 Cf. UN, *Meeting Record of the 183rd Plenary Meeting*, A/PV.183, 10.12.1948.

25 UN, *Meeting Record of the 182nd Plenary Meeting*, A/PV.182, 10.12.1948. 896.

26 K. Marx, 'Zur Judenfrage', in *Marx Engels Werke*, Vol. 1, Berlin. 363. (1844/1978).

27 S. Moyn, *Not Enough: Human Rights in an Unequal World*, Cambridge, Mass. xii. (2018).

28 UN, *Meeting Record of the 183rd Plenary Meeting*, A/PV.183, 10.12.1948. 912; Saudi Arabia Amendment to Article 10 of the Draft Declaration, A/C.3/247/Rev.1, 9.11.1948.

29 To get a vivid impression of the OIC activities and their Independent Human Rights Commission (IPHRC), openly rivaling the UN bodies, one just has to visit their website. Currently featuring on top, a call "for practical measures to protect and strengthen the institution of family and marriage during 'Symposium on ways to confront the UN Human Rights Council Resolution on Sexual Orientation and Gender Identity'".

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Human rights criticism is not absent from Christianity either. Although the Catholic Church, for instance, renounced its opposition to the concept of human rights in the course of the Second Vatican Council, reservations remain regarding the rights paradigm's alleged uncurbed individualism in particular. In his address to the European Parliament in 2014, Pope Francis expressively requested the development of "a culture of human rights which wisely links the individual, or better, the personal aspect, to that of the common good."³⁰ Russian Orthodox Christianity is particularly vocal about such concerns and is vigilant against what are perceived as noxious Western influences.³¹ The liberal desire to grant substantial freedoms to individuals without restricting them in terms of religious doctrine is described as a deviation from "both the traditional morality and historical religions."³² As the World Russian People's Council, headed by the Patriarch of Moscow and all Rus' states: "[T]he freedom of choice leads to self-destruction and loss of human dignity when the choice is evil."³³

Not only States and institutions that have coupled their legitimacy to religion have positioned themselves within a global human rights discourse that aims at "truly universal" rights beyond the Western model.³⁴ Among others to have done so are those of the Andean region that call for a more comprehensive concept of rights that make allowances for group rights, in particular the rights of "Mother Nature." Underlining the tenet "that in very crucial aspects human rights politics is a cultural politics,"³⁵ Boaventura de Sousa Santos warns against human rights becoming a "globalized localism"³⁶ that perpetuates Western liberal hegemony at the expense of true universality.

In their *African Charter on Human and Peoples' Rights* (known as the Banjul Charter), member states of the African Union (AU) stressed their communitarian orientation, with a special emphasis on human duties, signaling that previous human rights declarations and treaties had not entirely served their social and cultural needs.³⁷ Such claims of exceptionalism or Western bias also shaped the so-called 'Asian values' debate in the

OIC, Press release. (2018). Available at https://www.oic-iphrc.org/en/press_details.php?id=MTIwOTIwMThPSUNfQCMhQA==.

30 Pope Francis. 'Address of Pope Francis to the European Parliament', 25 November 2014. Available at https://w2.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco_20141125_strasburgo-parlamento-europeo.html.

31 K. Stoeckl, *The Russian Orthodox Church and Human Rights*, London. (2014).

32 World Russian People's Council, *Declaration on Human Rights and Dignity*. (2006). Available at <https://mospat.ru/archive/en/2006/04/30728/>.

33 World Russian People's Council, 2006.

34 Cf. also M.-L. Frick, 'Universal Claim and Postcolonial Realities. The Deep Unease over Western-Centred Human Rights Standards in the Global South', in S. S. Bagchi & A. Das (eds.), *Human Rights and the Third World: Issues and Discourses*, Lanham. 17-13. (2012).

35 B. de Sousa Santos, 'Human Rights as an Emancipatory Script? Cultural and Political Conditions', in B. de Sousa Santos (ed.), *Another Knowledge is Possible: Beyond Northern Epistemologies*, London. 6. (2012).

36 de Sousa Santos, 2012, 8.

37 AU, ACHPR. (1981). Available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

1990s.³⁸ Again, the mainstream Western liberal orientation was confronted with charges of being biased against traditional values. As Lee Kuan Yew argued:

We must not allow our values and our philosophy of what is good government to be overwhelmed by the standards and norms of the contemporary West, regardless of their relevance to our social, economic and political conditions, simply because, for the time being the West have the material abundance and technological superiority.³⁹

Pointing out the particularity of human rights, postcolonial and critical feminist theorists apply the charge of cultural or ideological bias on a regular basis. From the *Statement on Human Rights*, issued by the American Anthropological Association (1947)⁴⁰ to the scholar Makau Mutua, to name just one prominent contemporary voice, cultural critique continues to represent a powerful headwind to the concept of universal rights. According to Mutua, "[h]uman rights are part of the cultural package of the West [...]"⁴¹ and are ultimately a civilizing mission that disregards non-Western, in particular African, communitarian values. This view is shared by, among others, Ratna Kapur, who argues that without considering experiences from the postcolonial world fairly, the human rights project remains one-sided and does not serve human beings as such, but only the 'liberal subject'.⁴²

A marked feminist human rights skepticism is sometimes infused in such criticism.⁴³ While charges of male bias date back to the French *Declaration*,⁴⁴ contemporary feminist critics of human rights are less concerned with actual forms of the exclusion of women from the enjoyment of certain rights (which remains a reality for millions of women worldwide) than with symbolic modes of exclusion and the philosophical underpinnings of the human rights project. In accentuating the autonomous individual (instead of the interdependency of human relationships), and in maintaining the public-private dichotomy

- 38 Cf. L. Avonius & D. Kingsbury (eds.), *Human Rights in Asia: A Reassessment of the Asian Values Debate*, New York. (2008); Donnelly, 2003; ASEAN. *ASEAN Human Rights Declaration*. (2012). Available at http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf.
- 39 K. Y. Lee, *The Wit and Wisdom of Lee Kuan Yew*, Singapore. 137. (2013).
- 40 American Anthropological Association, 'Statement on Human Rights', 49 *American Anthropologist*. 539. (1947).
- 41 M. Mutua, *Human Rights: A Political and Cultural Critique*. Philadelphia, 34. (2002). See also M. Mutua, *Human Rights Standards. Hegemony, Law, and Politics*, Albany. (2016).
- 42 R. Kapur, 'Human Rights in the Twenty-First Century: Take a Walk on the Dark Side', 28 *Sydney Law Review*. 665. (2006).
- 43 L. Parisi, 'Feminist Perspectives on Human Rights', 20 *Oxford Research Encyclopedia of International Studies*. 2157. (2010).
- 44 Esp. M. O. de Gouges, *Déclaration des droits de la femme et de la citoyenne*, Paris. (1791). Available at <http://gallica.bnf.fr/ark:/12148/bpt6k64848397>.

(instead of being attentive to women's social predicaments), human rights would overlook specific female experiences and suffer from a structural androcentric bias.

2.3 *Betrayal: The People versus The Establishment*

Although feminist critiques of human rights in the tradition of critical theory are mainstream among academic elites, these have not yet expanded beyond that domain, and have even met with considerable resistance among larger populations in Western societies where in recent decades substantial resentment towards 'human rights' has mounted and even appears to be growing. The 'populist threat' to human rights, as many today label it, is of course too simplistic a diagnosis for the current state of affairs, yet a profound crisis of the plausibility of human rights can be substantiated with high-ranking politicians openly slamming 'human rights' or norms associated with them. Populist⁴⁵ criticism takes the form of two connected lines of reasoning: First, it is assumed that the human rights 'establishment,' that is, scholars, activists, practitioners, and high courts, have been allocated more *de facto* power than have the popular majority. As if this were not problematic enough from a democratic point of view, these elites, it is claimed, also use their greater power to work against 'the people's' will. And the reason they do so is the 'globalist' human rights ideology. The charge that political leaders raise in such narratives is ultimately the charge of betrayal: The human rights-inspired establishment betrays the interests of the good ordinary people who suffer because of the de-politicization the moral discourse of rights and equality carries with it. This is indeed a novel challenge for human rights supporters and one many find so frightening that rational thinking gives way to a polemics of panic.⁴⁶

Let us look at some most recent examples of such sentiments that have echoes in developed countries as well as in the global South. Upon taking office in 2018 as president of Brazil, Jair Bolsonaro's reputation as a proud despiser of human rights principles – the ban on torture, the human dignity of women and gay people, indigenous rights, and the like – was already well established.⁴⁷ *Inter alia*, he is reported to have said:

⁴⁵ As for the term 'populism', I apply it in a narrow, and, if you will, scientific understanding that departs from the popularized meaning of populism in some ways. Populists are actors who claim to represent a uniformed will of the 'true' people against supercilious or even corrupt elite. Depending on how "the people" is defined – in terms of a mere civic unity, in terms of blood, culture, or religion etc. –, these actors can be also nationalists, but not necessarily. Cf. also Frick, 2019; J.-W. Müller, *What is Populism?*, Philadelphia, (2016).

⁴⁶ Cf., e.g., S. Khan, 'UN's Human Rights Chief Compares 'Demagogues' Donald Trump, Nigel Farage and Geert Wilders to ISIS', *The Independent*, 6 September 2016. Available at <https://www.independent.co.uk/news/world/politics/un-s-human-rights-chief-compares-donald-trump-nigel-farage-and-geert-wilders-to-isis-a7227486.html>.

⁴⁷ Cf. S. Simões, 'Brazil's Polarizing New President, Jair Bolsonaro, in His Own Words', *The New York Times*, 6 September 2018. Available at <https://www.nytimes.com/2018/10/28/world/americas/brazil-president->

Are we obliged to give these bastards [criminals] a good life? They spend their whole lives fucking us and those of us who work have to give them a good life in prison. They should fuck themselves, full stop. That's it, dammit!⁴⁸

Rodrigo Duterte, president of the Philippines since 2016, would not reproach Bolsonaro for such a position. In the fight against drugs, he has called for as little restriction as possible in order to protect the population and to "uphold the greatest good, for the greatest number."⁴⁹ He makes it clear that human rights (advocates) better not get in his way: "And when illegal drug operations turn nasty and bloody, advocates of human rights lash at – and pillory – our law enforcers and this administration to no end. Sadly, I have yet to really hear howls of protest from the human rights advocates and church leaders against drug-lordism, drug dealing and drug pushing as forceful and vociferous as the ones directed against the alleged errant [law] enforcers in the fight against this social scourge." He adds: "Your concern is human rights, mine is human lives."⁵⁰

A symbolic figure in populism's ascendancy in Europe, Hungarian Prime Minister Viktor Orbán has in a similar manner promised to protect the Hungarian people from social threats, above all, imposed migration from the global South. The inability of the European Union to deliver on promises made before, in the course of, and after the so-called migration crisis of 2015-16 has strengthened Orbán's position. With populism going mainstream, Orbán no longer is an outsider to the European family. His core credo is that the protection of the Hungarian – and, ultimately, European – people from the ills of contemporary migration is a fateful challenge and that he is the one who is able to face it⁵¹ – not least because he is not intoxicated by 'globalist (read: human rights) ideals', but faithful to the true sovereign, the people. In his own words:

[I]f we permit mass migration to take place, this [...] will transform the character of countries and transform the quality of our lives. [...] I believe that decisions must not be made without asking the people. The problem in Europe

jair-bolsonaro-quotes.html; 'Who is Jair Bolsonaro? Brazil's Far Right President in His Own Words, *The Guardian*, 29 October 2018. Available at <https://www.theguardian.com/world/2018/sep/06/jair-bolsonaro-brazil-tropical-trump-who-hankers-for-days-of-dictatorship>.

48 *The Guardian*, 2018.

49 R. Duterte, 'Speech Delivered at the Session Hall of the House of Representatives', 23 July 2018. Available at <https://www.philstar.com/headlines/2018/07/23/1836195/full-text-dutertes-2018-sona-speech>.

50 Duterte, 2018.

51 V. Orbán, 'Christmas Conversation with Prime Minister Viktor Orbán', 25 December 2018. Available at <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/hungary-has-set-out-on-an-upward-path>.

...? They spend their
...ve them a good life
...dammit!⁴⁸

I do not reproach Bolsonaro
...little restriction as possible
...est good, for the greatest
...er not get in his way: "And
...of human rights lash at –
...d. Sadly, I have yet to really
...id church leaders against
...iferous as the ones directed
...is social scourge." He adds:

Hungarian Prime Minister
...he Hungarian people from
...South. The inability of the
...rse of, and after the so-called
...ion. With populism going
...amily. His core credo is that
...in – people from the ills of
...ne one who is able to face it⁵¹
...: human rights) ideals', but

...] will transform the
...lives. [...] I believe that
...The problem in Europe

ht President in His Own Words, *The*
m/world/2018/sep/06/jair-bolsonaro-

representatives', 23 July 2018. Available
t-dutertes-2018-sona-speech.

bán', 25 December 2018. Available at
r-s-speeches/hungary-has-set-out-on-

today arises from the fact that people are unable to express their opinions – or
if they do express them, they are ignored by their leaders.⁵²

3 TO CONCEDE OR NOT CONCEDE?

Reconstructing why human rights – or certain of their aspects – deserve criticism in the
view of some is the precondition for evaluating such criticism or, if you will, for arriving
at a *critique of critique*. At this metalevel, we have to distinguish two questions: (a) which
criticisms are valid? and (b) which criticisms should concern us (most)? It would be a
mistake to be concerned only about valid critique since false assumptions and accusations
can also be very powerful in particular in democratic contexts. At the same time, some
criticisms may be justified, and yet their relevance may be limited (e.g., predominantly to
scholars).

3.1 What Is Valid Critique?

Valid or justified criticism is criticism equipped with reasons. How these should look in
order to be acceptable is, however, often contested – not only because people may differ
in terms of what they accept as (good) reasons but also because they may not even see such
reasons if they, for instance, do not sufficiently scrutinize certain types of critique.

A popular criterion used to set apart justified from unjustified criticism is
constructiveness, which is described as the motivation to improve instead of damaging
the object of critique. In this argument, human rights critique is valid if it aims at an overall
strengthening or stabilizing of human rights. This standard of valid criticism, however,
may be problematic in at least two ways. The first challenge can be met more easily. This
involves clarification of the exact nature of human rights, without which there is no
guarantee that critics and 'defenders' of human rights are referring to the same
phenomenon. If they were not, 'constructive' would then soon become a fighting word
rather than serving as an arbiter.

This is why, on the metalevel of human rights critique, the question of what human
rights *are supposed to denote* needs to be addressed. I propose a minimal definition, not
only because I believe that it encapsulates the "core" of human rights, but also, for
methodological reasons, in order to work with a least partial definition at this point.

52 V. Orbán, 'Prime Minister Viktor Orbán's Statement Following his Meeting with Prime Minister of the Czech Republic Andrej Babiš', 1 December 2018. Available at <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-statement-following-his-meeting-with-prime-minister-of-the-czech-republic-andrej-babi>.

Understood in this manner, human rights are claims of special importance to human life that every human being should be entitled to and that imply duties on the part of others and, in particular, on the part of states.

Another problem with validating criticism in terms of standards of constructiveness involves the hidden premise according to which human rights are quasi-perfect already and are in need, at most, of minor revisions rather than significant deconstruction. But what if some tenets, even roots, of human rights need to be destroyed in order to safeguard the prosperous future of human rights themselves? This is exactly what *radical* human rights critique from feminist or postcolonial perspectives implies: Human rights need to be stripped from their 'male,' 'white,' 'liberal,' 'secular,' and other biases. Perhaps in this case too, the grand aspiration is that, by leveling such criticism and proceeding in 'progressive' policy directions, 'true' human rights can be established. Again, some (more traditional) advocates of 'human rights' might not recognize such human rights, allegedly purified from bias, as human rights at all.

For these reasons, constructiveness is too vague a criterion to be used to separate justified from unjustified criticism: The criterion of genuine motivation (as distinguished from alleging criticism as a pretense) will not take us very far either – not only because charging someone with acting on the basis of pretense can itself become a pretense for not engaging with criticism. Referring to Lee Kuan Yew and the Asian values debate, Andrew Fagan expresses his view that "attempted rationalisations of political oppression should [not] be accorded much intellectual weight."⁵³ Were Lee's critical views of "Western human rights" ultimately nothing more than a convenient excuse for a despot? How is it then that so many saw him not primarily as the oppressor but (also) as a prototype of the well-meaning, devoted ruler according to the Confucian ideal?

Lee thought deeply about political questions and in many cases adjusted his views according to what he came to experience and believe, not least through friendships with other statesmen such as former German Chancellor Helmut Schmidt. It is evident from his writings that Lee did not despise the Western model but rather tried to draw selective lessons from it and to avoid what he believed to be its flaws. He did not criticize human rights as a pretext for not being held accountable for deviations from classical human rights law (e.g., in the context of criminal law), but in fact advocated these deviations as the best solutions to the problems that he, as the founding father of a nation, was responsible for tackling.⁵⁴

53 A. Fagan, *Human Rights: Confronting Myths and Misunderstandings*, Cheltenham. 59. (2009).

54 In Lee's words: "It is Asian values that have enabled Singapore to contain its drug problem. To protect the community, we have passed laws which entitle police [...] to have [...] any person who behaves in a suspicious way tested for drugs. If the result is positive, treatment is compulsory. Such a law in the United States will be unconstitutional, because it will be an invasion of privacy of the individual." (Lee, 2013, 155.).

One may argue that Lee still did not criticize human rights from within but rather as an outsider to their nature and logic.⁵⁵ This shows that differentiations between criticism from *within* and from *outside* are challenging, too. After all, what is inside and what is not? More importantly, why should critique from opponents of human rights never be justified at all? A telling example in this regard is Edmund Burke's critique of the revolutionary rights of man in France.⁵⁶ Commonly taken as the author of "the manifesto of the Counter Revolution",⁵⁷ Burke nevertheless shared some of the ideas of his rivals, for example, that absolute monarchy was to be rejected and that there are (some) moral or 'natural' rights that precede government, though he did not task government with the duty of their realization.⁵⁸ What Burke strongly objected to, however, were revolutionary means for bringing about an age of rights – at least in cases where governmental tyranny was not excessive.⁵⁹ Does this make him a critic from inside or from outside 'human rights'? And again, why would this matter for the question of whether his critique was justified?

Critique is valid to the extent it is based on *true claims*.

The truth of empirical claims can be assessed (in principle) by checking whether what is claimed is actually the case. Take, for instance, the critique of the effectiveness of human rights (law). If one maintains "that human rights law has failed to accomplish its objectives,"⁶⁰ others could draw on inquiries into facts that point in the other direction.⁶¹ Still, the evaluation of facts makes quite diverse outcomes possible – does, for example, the ratification of human rights treaties by regimes hostile to human rights speak of success or failure? – yet at least the standard of empirical truth frames an overseeable arena in which claims can be (con)tested. As meager as this might seem to some, empirical validity – although difficult to establish – is an eminent benchmark since almost all arguments involve factual claims at some point, (counter)critique of human rights being no exception. The critique of human rights as being inherently biased towards 'white males', for example, relies heavily on historical claims whose accuracy is sometimes doubtful. Whoever is

55 One could, however, also suggest the contrary by pointing to quotes like these: "My idea of a good society is one where everybody has enough to eat, a home, good health, good education for their children and a good future for them. To do that, we must have a strong, clean government, which is fair, which is honest, which works to provide people with equal opportunities, regardless of their race, religion and sex." (Lee, 2013, 140.)

56 E. Burke, 'Reflections on the Revolution in France and on the Proceedings in Certain Societies in London Relative to that Event. In a Letter', in *The Works of the Right Honorable Edmund Burke*, Boston. (1790/1894).

57 J. Mackintosh, *Vindiciae Gallicae: Defence of the French Revolution and its English Admirers against the Accusations of the Right Hon. Edmund Burke*, London. xi. (1791).

58 "Government is not made in virtue of natural rights which may and do exist in total independence of it, – and exist in much greater clearness, and in a much greater degree of abstract perfection [...]" (Burke, 1790/1894, 310).

59 "Governments must be abused and deranged indeed, before it can be thought of; and the prospect of the future must be as bad as the experience of the past" (Burke, 1790/1894, 271).

60 E. A. Posner, *The Twilight of Human Rights Law*. Oxford. 7. (2014).

61 Cf., e.g., K. Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century*, Princeton. (2017).

convinced by the claim that "the moment when Europe was in the midst of a struggle for liberty, equality and freedom, Europe's 'Others' continued to be subjugated under the weight of colonialism and slavery,"⁶² should be able to answer on how, for example, the mass movement for the abolition of the slave trade in the British Empire fits into that all too somber narrative.⁶³

Other types of claims, in particular axiological and normative ones, do not allow for such a straightforward approach since they cannot be collated with the physical world – they are not truth-apt. What should the truthmaker be of sentences such as: "All human beings [...] should act towards one another in a spirit of brotherhood;"⁶⁴ or: "Proper human rights ought to assume that all cultures are equal?"⁶⁵ In such cases, we have to manage without an in-principle shared reality and are left to struggle with different, often fundamentally opposing orientations towards what is held to be valuable and good. We can, however, even with such a noncognitivist stance, assess claims in terms of logical flaws (for example, why should a normative sentence be derived from a descriptive one?) and inconsistencies (how can A and non-A be asserted at the same time?) or general concepts of fairness (for example, why focus on this aspect so vehemently and not on others?). If such shortcomings are dealt with, human rights critique relying on well-established facts should be conceded *prima facie* validity. Thus, it should not be cast away arrogantly but rather given the chance to – if not convince us – then at least to be reflected in our judgments.

3.2 *Should All Critiques Concern Us Equally?*

To be sure, once criticism of human rights is found to be valid, it always – as a matter of principle – deserves fair attention. However, there is, I argue, criticism that independently from its validity deserves consideration because it is (a) directed against the fundamentals of human rights and/or (b) particularly influential or widespread.

Among these types of critique, a candidate for (a) is Arendt's observation that without a universal "right to rights," human rights are nonsensical. Striving for human rights without working for the establishment of such a principal entitlement that precedes any given rights charter⁶⁶ is a dewy-eyed endeavor. As has become clear over the course of the

62 Kapur, 2006, 673.

63 E.g., S. Drescher, *Abolition: A History of Slavery and Antislavery*, Cambridge. (2009).

64 *Universal Declaration*, Art. 1.

65 Mutua, 2016, 109.

66 As Arendt emphasizes in the German version of *Origins of Totalitarianism*: "The deprivation of human rights not only takes place when this or that right [...] is lost, but only if man loses his place in the world due to which he alone actually can have rights [...]" (*Elemente und Ursprünge totaler Herrschaft*, Munich. 613. 1955/2005.). Translation by the author.

recent years, Arendt's critique is relevant beyond the historical context. Statelessness, migration, and political persecution put the promises of human rights and their moral pathos into perspective. It is hence no surprise that Arendt's reflections on human rights and the implications of her critique for the contemporary international order are debated intensively nowadays.⁶⁷ While she herself did not hint at any concrete solution to the "aporia of human rights,"⁶⁸ those inspired by her thoughts turn to different panaceas, ranging from the universal protection of human rights by means of a world polity (about which Arendt was profoundly skeptical), to the protection of these rights by individual, yet effective and cooperative states, or even the substitution of any legal human rights domain with moral cosmopolitanism.

Up to the present day, we have faced the dilemma that human rights are either protected by states and are thus always exclusive to some degree or they are not protected at all. So long as so many states are failing or have failed, human rights in the form of basic rights (*Grundrechte*) are all we can reasonably aim at – for the time being. Arendt's critique is of fundamental importance for the concept of human rights as it forces human rights advocates to think more thoroughly about the structural dimension of human rights in a politico-legal vein rather than being swept away by the moral grandeur of rights so easily promised and yet so arduously implemented.

A rather different sort of human rights critique is one suggesting a betrayal of a *demos*, that is, a sovereign people, by human rights or its 'elitist' advocates. Its popularity among electorates in so many countries worldwide undoubtedly makes this criticism a candidate for urgent and earnest engagement. Human rights are indeed in trouble once they are challenged on the grounds of their sister concept, democracy. However, this challenge cannot be approached if one remains petrified and capable only of moralizing mantras. Some might feel unease at this statement. Is it not evident that populists who condemn human rights merely exploit base sentiments and set up scapegoats? Is not all we can expect from them "demagoguery, fueling prejudice and unfounded fear"?⁶⁹ Is not the best way to address the problem such political actors constitute for the human rights project to shame their voters and instill in them that human rights are not to be touched, and to brand everyone who thinks otherwise as an enemy of civilization?

To be sure, populist politics rests on premises fraught with problems, above all the *idée fixe* of the one, true will of the people (whereas, in fact, only a plurality of individual wills exist that are equally sovereign as citizens, regardless of whether they happen to be in the

67 Cf., e.g., S. DeGooyer, A. Hunt, L. Maxwell & S. Moyn, *The Right to Have Rights*, London. (2018).

68 Arendt, 1951.

69 A. Sajó & R. Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism*. Oxford. 383. (2017).

majority or in the minority).⁷⁰ Furthermore, the form that some (nationalist) populist politics take when contrasting the 'true' people, on the one hand, and the citizen 'traitors' or alien 'parasites,' on the other, has dehumanizing potential and thus poses a fundamental challenge to the equality dimension of human rights (which does not ask us to treat everyone *equally* in all circumstances but nevertheless demands that everyone is treated *as an equal*,⁷¹ as a human being with a right to rights).

It would, however, be overly hasty to reject populist human rights criticism wholesale, as illegitimate from the outset. If there exist – and the evidence is quite suggestive – conflicts between standards of contemporary human rights (law) and popular opinion in some circumstances, human rights cannot simply be lifted above the arena of politics unless democratic legitimacy is deemed an irrelevance. As Jeremy Waldron recently emphasized, now is the time to ask "whether there is anything to be learned from the populist critique of human rights."⁷²

This would suggest an understanding of human rights that does not amount to dogma but rather conceives of them as a work-in-progress, as (necessarily) imperfect and open to revision and new accentuations ('living instruments'). Any given human rights catalog will inevitably produce conflicts between the respective entitlements as well as between people arriving at (sometimes) different interpretations of these entitlements. As Michael Ignatieff puts it:

Human rights is nothing other than a politics, one that must reconcile moral ends to concrete situations and must be prepared to make painful compromises not only between means and ends, but between ends themselves.⁷³

Against the background of populist politics, one way to protect human rights from blanket criticism is to listen carefully to critique expressed about specific issues, such as the alleged impossibility of effectively curbing crime or tackling irregular migration with both entry and exit regimes within a human rights framework. If too many people have acquired the impression that human rights are rights for some particular clientele but not for everyone, or that they tie their hands in resolving pressing social issues, persuading them of the opposite will not suffice. Instead, they need to actually experience the benefits of human rights or at least feel confident that their concerns can also be expressed in human rights language.

70 Cf. A. Weale, *The Will of the People: A Modern Myth*, Cambridge. (2018). See also M.-L. Frick, *Zivilisiert streiten: Zur Ethik der politischen Gegnerschaft*, Stuttgart. (2017).

71 On this distinction, see R. Dworkin, *Taking Rights Seriously*, London. 327. (1977/2003). Also Frick, 2019.

72 J. Waldron, 'Human Rights in a Time of Populism', Harvard Law School, 24 March 2018. Available at: <https://www.youtube.com/watch?v=QBbhzNaqEH4>.

73 Ignatieff, 2003, 21.

Political self-determination, the right to security, the right to freedom of speech, and many more: In some instances, populist actors do frame their ambitions in human rights terms.⁷⁴ Instead of assuming that every time they do so they are merely playing the human rights card based on sinister motives, it may prove rewarding to lend one ear to their arguments, keeping in mind that they represent a large number of people whose hearts and minds need not be closed indefinitely to counterarguments. As a matter of fact, the way we respond to human rights criticism has an impact on how that criticism further evolves. If dialogue is suspended or even frowned upon, it can turn the charge of betrayal of a people by its globalist elite into a charge of *tyranny*. However, it also can assist people to see the good of the argument on either side – if human rights are not turned into a church with a special class of high priests banning the unorthodox from entry. If human rights advocates choose the latter, they would attract exactly the sort of criticism Bentham has already levelled against natural law ‘despots’: “In us is the perfection of virtue and wisdom [...]. Our will shall consequently reign without controul [sic], and for ever [...].”⁷⁵

At the same time, human rights cannot be compromised for appeasement’s sake at any price. In times in which ever more different understandings and interpretations of human rights exist, it is crucial that we come to an understanding of where the “red lines” lie.⁷⁶ We should be prepared to find them transgressed even when no aggressive political rhetoric indicates human rights critique or even hostility. As Leslie Vinjamuri reminds us:

When leaders openly denigrate the rights of individuals based on gender, religion, or race, there is good reason to protest. But strategies that pay some heed to existing norms and institutional frameworks can be equally or even more subversive and may be harder to block in part because they do not always garner the same public outrage.⁷⁷

⁷⁴ Sometimes, they even pledge commitment to ‘human rights’, leaving us with the question as to their sincerity but also with a self-imposed standard to judge their political work. As Rodrigo Duterte stated: “Human rights to me means giving Filipinos, especially those at the society’s fringes, a decent and dignified future through the social and physical infrastructures necessary to better their lives” (2018). Even the model of a ‘Christian democracy’, pursued by Viktor Orbán, is envisioned by him to “guarante[e] human dignity, freedom and security, protect[t] equality between men and women and the traditional family model, suppress[es] anti-Semitism, defend[er] our Christian culture and offer[er] our nation the chance of survival and growth.” V. Orbán, ‘Prime Minister Viktor Orbán’s Address after Swearing the Prime-ministerial Oath of Office’, 10 May 2018. Available at <https://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-address-after-swearing-the-prime-ministerial-oath-of-office>.

⁷⁵ Bentham, 1796/1843, 501.

⁷⁶ Cf. Frick, 2019.

⁷⁷ L. Vinjamuri, ‘Human Rights Backlash’, in St. Hopgood, J. Snyder & L. Vinjamuri (eds.), *Human Rights Futures*, Cambridge, 114, 133. (2017).

4 CONCLUSION

In this chapter, I have illustrated three major thrusts of human rights critique, past and present, and offered a general outline for a critique of critique. Today, the impression or feeling that resistance to human rights law and thought is on the rise in various parts of the world is widely shared among those in the global "human rights camp." Being mindful of the long-standing tradition of criticizing "human rights" could alleviate (some of) the anxieties surrounding the current state of human rights affairs. The specific moral of human rights' (recent) history I would like to extract is, however, not simple encouragement in the sense of "If you hail the banner of human rights, be prepared to come under fire because that is exactly what distinguishes the enlightened from the brute." Rather, it consists in the advice to embrace any invitation to earnestly reflect on what human rights are or should be – even if this invitation is provoked by voices we (initially) disagree with, sometimes deeply.

Critique, from a critical rationalist perspective, is never futile, neither if we learn from it directly, nor if we learn from it indirectly, that is, when we should find it unfounded. In order to decide which is the case, criticism has to be reconstructed and itself assessed using instruments of critique. This requires relinquishing prejudices we might have grown fond of because they protect us from asking the same questions over and over again. Human rights, I would argue, belong exactly to this category of problems. Emanations of modern political thought, they are neither sacrosanct nor invariant. We cannot but think them anew and defend them time and again.