

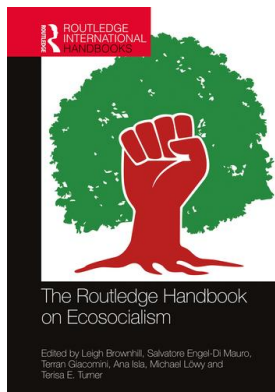
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ILLIBERALISM AND HUMAN RIGHTS

Marie-Luisa Frick

Introduction

There is a widespread worry among both human rights theorists and practitioners that the heyday of human rights is behind us. The increasing pluralization and culturalization of human rights raising questions over our shared understanding of what human rights are and should be; the robust opposition of authoritarian regimes to international human rights norms; the double standards of Western States turning a blind eye to human rights violations by “strategic partners;” and the rise of what is referred to as “populism,” “nationalism,” or “illiberalism,” sparking fears of a human rights backlash in Western democracies. These, and further developments, have eroded many of the hopes of the modern human rights project, which began with the proclamation of the *Universal Declaration of Human Rights* (“UDHR”) (UN 1948) and reached a peak in the 1970s.

This chapter first attempts to explore the relationship between illiberalism and human rights, and then clears the ground for informed discussions on a key issue of contemporary political theory. Are these concepts natural enemies because human rights and liberalism are essentially coupled? Or could human rights also exist in illiberal contexts and, if so, how would they look like or have to change? From a philosophical perspective, the relationship of illiberalism and human rights is primarily a question of how the two relate as theoretical concepts. I will thus begin by asking what human rights are and what (il)liberalism is. Given that there is no single or context-free understanding of either concept, I provide operational definitions that specifically enable us to analyze the relationship between illiberalism and human rights. Finally, in the third section, I explore the question of how much (or how little) flexibility human rights admit to accommodate illiberal viewpoints. Drawing on endeavours to restrict human rights with reference to morality, I propose relative universalism as a methodological approach to determine – or at least estimate – boundaries to illiberalism in human rights that are derived from the idea of human rights itself.

What is Illiberalism? What are Human Rights?

Concepts are the instruments with which we pierce through realities. The clearer they are in terms of content, the firmer their grip. We must, therefore, move beyond political jargon, i.e.

hollow talk of “illiberalism” (which hardly engages the question of what “liberalism” really is or should be) as well as vacuous pleas for “human rights” (which take them for granted as a uniform notion of moral progress) before we can ask, as a next step, where we see phenomena matching these concepts and subsequently evaluate them from a normative point of view.

Let us start with human rights. “Human rights” can refer to a corpus of international (quasi-) *legal* norms enshrined in treaties and charters and/or to *moral* rights human beings are entitled to simply because they are human. People who refer to human rights can have significantly divergent views as to which rights humans should have, and often disagree about the priority of certain rights. Since the emergence of *modern human rights* in the twentieth century – building on the early modern *Rights of Man/Droits de l’Homme* but also departing from them in significant ways – one can observe an increasing regionalization and diversification of human rights. Documents like the (*Banjul*) *African Charter of Human and Peoples’ Rights* issued by the African Union (“AU”) (1981), the (*Cairo*) *Declaration of Human Rights in Islam* (“CDHRI”) issued by the Organization of Islamic Cooperation (“OIC”) (1990), or the *ASEAN Human Rights Declaration* (2012) not only testify to the eagerness of non-Western peoples to contribute to the human rights project but also underscore deep disagreements about human rights.

One way to cut through this plurality of meanings is to differentiate between *human rights as catalogs* and *human rights as an idea* (Frick 2019). Given the different lists of rights and their different natures (whether such rights are legally binding/enforceable, or whether they carry moral/symbolic weight only), human rights can indeed have multiple manifestations. The content can likewise vary, as can their scope. When a State pledges to respect and secure them in a constitution or international treaties, human rights take the form of *fundamental rights* (as opposed to *rights of the citizen* restricted to members of the political community). The idea of human rights, however, is not yet concerned with the precise stipulation of specific rights or methods of their realization, but instead focuses on the core concept of human rights, i.e. what all human rights catalogs (should) convey: that every human being has a right to have human rights. The idea of human rights encompasses both an *equality dimension* and a *liberty dimension*. The former consists of everyone having the same right to principally equal rights. Their latter stems from human rights being *individual rights* and not group rights, albeit possibly collective rights, i.e. rights that can only be enjoyed in community with others. Individual rights can and often do clash with collective interests. The question of which communal goods could allow for the curtailing of certain people’s rights is the eternal debate between liberalism and its Others.

What are these Others? Let us first ask what set of ideas or ideals comprise the concept of liberalism. As a political concept, liberalism centres upon the autonomy of the individual. It is the individual’s interests and agency that matter most since the individual is the genuine proprietor of his own person and capacities. This “possessive individualism” is rooted in assigning moral worth to the individual’s claim “I am mine” (MacPherson [1962] 2011). The individual has a principal right to choose her own path and decide what to achieve in life, what to aspire to, and what to shun. Since such a moral claim to self-ownership/self-mastery gives rise to conflicts of interest, once it is universalized – i.e. granted to everyone – the *concept of liberalism* must confront questions of how to reconcile the freedom of the individual with the freedom of others in the form of specific *liberal theories*.

Despite their differences, liberal theories share the axiological premise of the moral worth of the individual person and his endeavour to master life according to his own preferences. Liberal theories, beginning in their early stages in seventeenth century Europe, have delved into questions of legitimate government and the purpose of the State. Liberal social contract theories envision the State as legitimate only insofar as the individual can approve of its end, i.e. the protection of individual freedoms against intrusions from other individuals. The State provides a

modus vivendi for individuals to live a happy life according to their own standards. Consequently, liberal theories share commitments to natural or pre-political rights and set boundaries to legislation in a liberal State via *liberal institutions* (e.g. constitutions, high/supreme courts).

Liberalism is hardly a uniform movement, and its theories differ in both their proposals regarding the precise duties of the State and the manner in which they weigh the autonomy of one against that of others. They are further divided over the specific rights that should protect individual autonomy. While *libertarian liberalism* is reluctant to grant more than the classical triad of the rights to life, liberty, and property, other strands of *social liberalism* call for recognizing the contribution that certain social rights can make to individual autonomy. One tricky question concerns the restriction or withholding of individual rights with reference to autonomy as a common, and not merely an individual, good. As *perfectionist* (or paternalistic) *liberalism* argues, in many cases the autonomous individual is too optimistic an ideal, and cannot be reckoned with without enforcing certain liberating policies. “Gradual transformation” can thus be seen as a somehow non-liberal endeavour but remains a just liberal cause (Raz [1986] 2009).

In the history of ideas, political liberalism has always been developed and shaped in confrontation with rival notions of the end of human existence and the purpose of government. The idea that the individual is able to manoeuvre through life without the guidance of superior wisdom and that no higher authority is warranted unless the individual voluntarily submits to it is a revolutionary line of thought. Unsurprisingly, the rise of political liberalism in the course of the Enlightenment has attracted fierce criticism from anti-liberal philosophies (Holmes 1993). What, then, is anti-liberalism, or, for our purposes, non-liberalism/illiberalism? With few exceptions (Simpsons 2015), these terms are hardly ever used as self-descriptions (even Viktor Orbán, who famously invoked an “illiberal democracy,” prefers to speak of “Christian democracy”).¹ They are instead used pejoratively to criticize certain theories or policies from a liberal stance. It is, therefore, difficult for scholarly investigations to define illiberalism in neutral terms. One way to make use of illiberalism as an analytical category is to look more closely at the philosophical rival of liberalism: *communitarianism*.

Instead of taking the autonomous individual as an axiological starting point, communitarianism centres upon the community and communally defined (higher) goods: “justice,” “solidarity,” “perfection,” “salvation,” etc. From a communitarian perspective, the individual can only enjoy genuine freedom by taking anthropological needs of belonging (to an ethical community) seriously. Therein lies the heart of the conflict between liberalism and communitarianism: From a liberal theoretical perspective, communitarianism equals non-liberalism. From a communitarian perspective, liberalism is (dangerously) anti-social unless confined, rectified, or even repressed. As Patrick J. Deneen in his recent critique of liberalism puts it, “the underpinnings of our inherited civilized order – norms learned in families, in communities, through religion and a supporting culture – would inevitably erode under the influence of the liberal social and political state” (2018, xiii).

When it comes to individual rights, communitarianism does not ask “What rights should the individual have vis-à-vis the collective?”² but, according to its axiological premise, asks from the other direction, “Which rights are socially acceptable?”. This question is usually phrased as one of the duties the individual owes to the community, instead of rights the community is responsible to grant and protect to the individual. Depending on how the community in question is defined, and how higher social goals (beyond or alongside individual autonomy) are specified, communitarianism can come in the form of different theories.

Like liberalism, communitarianism/illiberalism exists on a spectrum. On one end of this spectrum, we can identify a form of balancing communitarianism. Despite prioritizing the communally defined good, this form of illiberalism still leaves room for individual rights where

they do not compromise the common good. This form of illiberalism amounts to “liberalism, but,” “liberalism as far as this and not further,” or “liberalism with an edge.”³ Insofar as illiberalism acknowledges the idea of individual autonomy or rights in principle, even if its primary concerns are communal, we can call it *moderated illiberalism*. This form of illiberalism does not aim to smash liberalism altogether, but instead strives for a correction of liberalism’s flaws, allegedly visible in liberal societies, or to “enrich” it. In particular, liberalism’s neutrality towards versions of the good beyond the maximal enjoyment of individual freedoms compatible with each other – in the words of Ryszard Legutko, its “thinness of anthropological, moral, and metaphysical assumptions” (2008, 8) – raises concerns.

Liberalism’s critics see the limits rights-based liberalism sets for pursuing public policies as disarming them of political agency. Rodrigo Duterte, when criticized for the infringements on human rights in the course of his war on drugs, hinted at this disempowering tendency of human rights by replying, “Your concern is human rights, mine is human lives” (2018). In particular, liberalism’s “view from nowhere” is criticized as overdemanding and overly burdensome when what are claimed to be vital interests are at stake, including the ability to live in a society not disrupted by deep diversity in ideological, religious, and cultural terms or the preservation of a specific national identity.⁴ Above all, the liberal State envisioned as a *modus vivendi* arrangement of individuals who need not share further characteristics in terms of origin or religious affiliation in order to be full citizens unsettles those who think that the lack of a common identity is detrimental to social cohesion and solidarity among a State’s people. Especially in light of concerns about demographic decline and immigration, some feel that the civic – i.e. non-confessional and non-ethnic – nature of the liberal State is too chilly in its impartiality. By not caring of whom it is composed, the liberal State is a source of grievance for those who take pride in the cultural/religious fabric of their society and deem it worth protecting.⁵

Proponents or sympathizers of moderated illiberalism hence often call for a “liberalism-light,” where respect for individual autonomy is accepted as a political goal but where this autonomy has to give way in cases where communal interests seem to require it. For example: people who have no general issue with freedom of religion, but still advocate the enforcement of religious duties such as keeping Shabbat or abstaining from slaughtering cattle in order to uphold the religious identity of their country; people who adhere to liberal principles in general, but nevertheless feel that in order to preserve European values one has to restrict the autonomy of immigrant members of society when it comes to the proliferation of their traditional values; people who believe in the freedom of speech, but still prefer that certain expressions that are hurtful to supposedly vulnerable groups should be outlawed in order to achieve social harmony; people who believe or at least accept a universal right to live according to one’s sexual orientation, yet still support legal restrictions on what they see as the public advertisement of “morally corrupted lifestyles;” or people who believe that individual autonomy should be limited when it manifests in the form of offering sexual gratification for money, which is incompatible with their interpretation of human dignity. In all these and further instances, illiberalism is not – from those who hold these respective views – a wholesale repudiation of liberalism as such, but instead an effort to carve out space for particular partialities within an overall liberal framework.

On the other end of this communitarianism/illiberalism spectrum lies an uncompromising form of illiberalism. In this context, individual autonomy is not merely a subordinate value, but of no concern whatsoever. When asking the question of which individual rights are socially acceptable, this robust or full-fledged form of illiberalism comes up with a negative answer: none, either because only collective rights are ever socially acceptable, or because any conflict of interest between the individual and the community is denied from the outset. Since

this type of illiberalism goes beyond pointing to the alleged shortcomings of liberalism and instead takes a markedly anti-liberal stance, we can also speak of *radical illiberalism*. This form of illiberalism typically promotes notions of *collective positive liberty*, which necessarily obliterates *individual negative liberty*. As Isaiah Berlin points out:

That is the great perversion which the positive notion of liberty has been liable to: whether the tyranny issues from a Marxist leader, a king, a Fascist dictator, the masters of an authoritarian Church or class or State, it seeks for the imprisoned, “real” self within men, and “liberates” it, so that this self can attain to the level of those who give the orders.

[1969] 2017, 328

Radical illiberalism assigns individuals their place regardless of whether or not they like or dislike specific roles or duties. In such a *functionalist collectivism*, an individual’s preferences do no matter unless she contributes to the respective communal goals. Notions of individual rights have only marginal space in such an ideological environment, if any at all. It is, instead, collectives who have rights, while the individual has duties first and foremost. As a full-fledged repudiation of liberalism’s ideal of individual autonomy, radical illiberalism is liberalism’s perfect antagonist.

Having outlined communitarianism or illiberalism as a concept that centres upon the community (rather than the individual), I would like to conclude this section by further clarifying the concept of illiberalism and highlighting its relation to democracy – i.e. popular sovereignty – since in public debates charges of illiberalism often blur with charges of authoritarian rule or populism. As a concept concerned with the *right politics* – i.e. questions of what should be regulated as public affairs and how public affairs should be regulated – illiberalism does not yet provide an answer to the question of who is authorized to regulate public affairs. Put differently, illiberalism does not have a doctrine of who is sovereign. If it is the people at large who rule themselves, and who at times disregard the autonomy of certain individuals in the name of higher ends other than safeguarding the autonomy of all individuals, we can speak of an *illiberal democracy*. If, on the other hand, a single person or a small group is the locus of sovereign power and again illiberally disregards the autonomy of certain subjects, we have an *illiberal autocracy* or an *illiberal oligarchy*.

In light of this differentiation, the relationship between liberalism and democracy appears more complex than suggested by the standard equalization of the two concepts. If assigning sovereignty does not yet necessitate a particular use of this sovereignty for liberal, illiberal, or anti-liberal political ends, it follows that a liberal autocracy is not necessarily a contradiction. We could think, for example, of a sage-king with a Millian mindset. At the same time, illiberalism is not necessarily prevented by popular sovereignty, as one of liberalism’s eminent primogenitors, Benjamin Constant, stressed when setting apart the “political liberty of the ancients” from “our modern liberties” ([1814] 2010a, 102ff).⁶ Not only could a majority violate rights inextricably linked to the equal popular sovereignty of citizens – like democratic minority rights – it could also refrain from granting more far-reaching fundamental or human rights.

To understand that liberalism and democracy – despite their undeniable historical parallels and imbrications, above all their shared axiological roots in human autonomy – are concerned with two distinguishable questions (which politics vs. whose sovereignty), we must be careful not to conflate these questions when we criticize political decisions or political systems. For example, a government that, even though democratically elected, violates democratic minority rights – i.e. the right of a minority to try to become a majority by means of advertisement and propagation of their views – is not primarily illiberal but, instead, *anti-democratic*. On the other

hand, laws that enforce a certain public religious morality are – independently of who their legislators are – primarily *illiberal*.

Differentiating the concepts of illiberalism and democracy further implies that illiberalism and populism should not be conflated, since the latter refers to political groups or trends concerned with setting the “true people” against a putative immoral/traitorous/corrupt elite. In dividing the *demos* into its “good” and “bad” parts, populism is primarily a potential threat to democracy, or more specifically to its ideal of the co-equal sovereignty of citizens. Populism can, however, ally itself with illiberalism, and in fact often does, for example where the “true” *demos* is defined in ethnic/religious terms (*nationalistic populism*) and when, as a consequence, people who differ in those regards – citizens and non-citizens alike – face restrictions to their autonomy.

Human Rights and Liberalism: A Contingent or Essential Bond?

A promising starting point for any investigation into the relationship of illiberalism and human rights is the question of how liberalism and human rights are connected. It is easy to point to their historical interrelatedness: with the paradigm shift social contract theories brought about for governmental legitimacy, concepts of natural rights evolved alongside the accentuation of popular sovereignty. The *Rights of Man/Droits de l'Homme* – with few exceptions, including, for example, in the form of social rights granted in the French Constitution of 1793 – were negative rights. They established *duties of non-interference* (negative duties) as well as *duties to protect* (positive duties) on the part of the State. The logic of early modern rights was simple and conclusive: if human beings would be far worse off without State institutions, and erect such institutions freely by submitting themselves to a central power invested with a monopoly of force, they have a motive: to secure their natural rights which without State protection are precarious or non-existent (cf. Hobbes [1651] 1968).

The purpose of the State thus determines the limits of legitimate government. In this specific tradition, rights and liberalism are indeed inseparable. That there is an indisputable bond between the two in the history of ideas and political thought does not necessarily make the case, however, that human rights are essentially tied to liberalism. For our purpose, it is instructive to note that the *Rights of Man/Droits de l'Homme* were advocated for not only on classical liberal grounds but also from a communitarian perspective. In Rousseau’s philosophy, for instance, the rights of every human being include a positive right to equality that he not only stresses in economic terms but also on a far more fundamental level. To be truly equal citizens, he argues, everyone must possess the identical basic public creed. The State must enforce such a “civil religion,” featuring articles of faith ranging from the belief in God and an afterlife to the profession of the holy nature of (social) contracts, since otherwise confessional diversity would always risk splitting the citizenry. So important is this public creed to Rousseau that he famously forbids renouncing it under penalty of death ([1762] 1968).

This illiberal tendency of Rousseau’s ideal political community adds to his non-democratic ideology (it is not the actual people who govern, but the metaphysical general will), but is conceptually independent from it. Comparing this approach with the restrictions, Thomas Hobbes, for example, sets for the freedom of religion for citizens in his ideal State – people are allowed to believe basically anything as long as expressions of this belief do not disturb the peace ([1651] 1968) –, shows that Rousseau’s model is illiberal only from the perspective of a robust liberal stance in which rights are primarily negative rights (i.e. the right not to be killed or injured, not to be robbed of one’s property, not to be forced to confess what one does not freely believe, etc.). Rousseau ranks rights differently than other theorists.

Actions that other theorists consider violations of people's freedom of conscience, Rousseau considers indispensable. Given that, in his view, equality is a central right that comes with duties on part of the State to actively realize it, his civil religion does not infringe upon rights but guarantees them.

A similar conflict exists between different understandings or prioritizations of rights within modern human rights. Modern human rights differ from the *Rights of Man/Droits de l'Homme* not only in their global orientation, but also by taking human dignity as their foundational principle and enlarging the corpus of rights by stipulating economic, social, and cultural rights alongside traditional civil-political rights. That this conjunction was all but an easy endeavour is evident from the resistance of liberal (Anglo-American) States to these second-generation rights, which has resulted in what can be described as different human rights cultures. The respective ideological differences already surfaced in the process of establishing the UDHR. Despite the compromise the declaration ultimately represents – a compromise that did not outlive the Cold War, which picked up pace in the mid-twentieth century – as a project, the UDHR was marked by conflicts between rival ideological outlooks.

While Western liberal States opposed the “statism” of socialist States, socialist and Latin-American States advocated for the recognition of State duties beyond mere non-interference in people's lives. The right to social security (Art. 22), to an adequate standard of living (Art. 25), or to education (Art. 26) require – if enshrined in national legislation – that the State provides services and/or sets up additional institutions to do so (UN 1948). From a classical liberal perspective, this cannot be aligned with the “original” purpose of the State without complications, not least because the right to (individual) property comes under pressure when taxes are collected for such social advancements. Western States also feared that any emphasis on social and economic rights would come at the expense of civil and political rights since socialist States, before ultimately abstaining from the vote on the UDHR in the UN General Assembly, also advocated curtailing first-generation rights, such as the right to freedom of expression. According to the logic of the socialist States, political freedoms are superfluous when an allegedly perfect political order already guarantees human flourishing. On the contrary, individual liberties could, when unchecked by collective interests, undermine the very order that individual well-being ultimately relies on.

Seventy-three years after the UDHR was established, this illiberal argument in favour of prioritizing economic and social rights is still very much alive. For many Western observers rooted in the liberal tradition, it is astonishing how the People's Republic of China, for instance, prides itself of its human rights records, as in, for example, *Seeking Happiness for People: 70 Years of Progress on Human Rights in China* (2019). Acknowledging that “[l]iving a happy life is the primary human right,” the Chinese government declares the right to subsistence and the right to development to be primary human rights. In its “people-centred approach,” China argues for respect for different regional/national concepts of human rights: “There is no universally applicable model, and human rights can only advance in the context of national conditions and people's needs.” In line with socialist doctrine, any rivalry between individual interests or liberties and collective interests is denied: “There is no collective development without individual development; individuals can only enjoy well-rounded development in a collective environment” (Seeking Happiness 2019).

From this perspective, China has succeeded in improving the lives of (hundreds of) millions by lifting them out of poverty, liberating them from feudalism and harmful traditions, creating a harmonious multicultural society, and so on. From its critics' perspective, however, China's social improvements and economic progress are significant, but without substantial political and civil rights, they crucially disregard the autonomy of the human person. Again, from the

Chinese government's perspective, this emphasis on liberal autonomy remains a mere prejudice: how autonomous is a starving person or a person without real purpose?

It is important to understand that modern human rights have been shaped by diverging political ideologies and religious or philosophical ideas. Even the people who drafted the UDHR held quite diverse worldviews, and were not all liberals, at least not without some ambiguities. John Peters Humphrey, for instance, the UDHR's most important drafter, emphatically sought to reconcile liberal and socialist ideas. Another example of this ambiguity is Jacques Maritain. This French Catholic philosopher praises the "mystery of the human person," man's (individual) soul and freedom, and, of course, his natural rights ([1942] 2011, 65f.). He simultaneously stresses, however, the common good of an organic social whole that exists independently of the good of its parts. He makes this moderated illiberal stance clear when he writes:

Let us not say that the aim of society is the individual good or the mere aggregate of the individual good of each of the persons who constitute it. Such a formula would dissolve society as such for the benefit of its parts and would lead to "anarchy of atoms."

Maritain 2011, 69

We should, therefore, be less than surprised to find that the combination of political and civil rights with social, economic, and cultural rights is not the only compromise between liberalism and communitarianism in the UDHR. Drawing inspiration from the earlier proposal for a human rights charter put forward by the Ninth International Conference of American States in Bogotá, the *American Declaration of the Rights and Duties of Man* (1948), which features a list of duties one owes to the community, the UDHR states in its famous Art. 29: "[e]veryone has duties to the community in which alone the free and full development of his personality is possible." Furthermore, it stipulates boundaries for individual rights in the form of "the just requirements of morality, public order and the general welfare in a democratic society" (UN 1948, Art. 29).⁷ Also, in the binding *International Covenant of Civil and Political Rights* (ICCPR), ratifying States can find considerable communitarian spirit in the form of permitted restrictions on certain human rights for aims such as the protection of "public safety," "(public) order," "health," and "morals" (UN 1966, Art. 12; 3; 18; 19; 21).

States that prefer a more communitarian human rights ethos have emphasized such restrictions on human rights in recent years. "Requirements of morality" are particularly important to actors in international human rights law and discourse who fear that liberal human rights threaten their "traditional" or "family" values. The Russian Federation's initiatives aiming to upgrade the right to family – but also to counter views that consider the family a meaningful concept beyond traditional heterosexual constellations⁸ – testify to an increasing communitarian/illiberal desire that is shared across borders and sometimes leads to astonishing alliances (Petkoff 2015; Stoeckl and Medvedeva 2018). Similar tendencies can be observed with regard to ambitions to proliferate interpretations of human rights that shield religions – in particular Islam – from critique. In its endeavour to propagate "defamation of religion" as a human rights cause, the OIC has contributed to illiberal understandings of freedom of speech and respective policies (Langer 2013; Petkoff 2015).

Communitarian concessions in existing international human rights law have not prevented States that have not traditionally shared the Western liberal outlook from resorting to their own human rights charters. In complementing the rights declared therein with duties and stipulating individual rights alongside peoples' rights, the previously mentioned *Banjul Charter* represents a particular "African communitarianism" (AU 1981). Affirming that "[t]he rights and freedoms

of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest” (ibid., Art. 27), the *Banjul Charter* also lays out specific duties, including the duty to “preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need” (ibid., Art. 29, 1) and to “contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity” (ibid., Art. 29, 8). In its “Islamic communitarianism,” the CDHRI goes much further, limiting the scope and interpretation of the rights enshrined therein with reference to Shari’ah law (OIC 1990). The Islamic nation – i.e. the *Ummah*, as God’s favoured community – sets clear communitarian/illiberal boundaries to the enjoyment of individual rights when they are attributed the tendency to conflict with the higher good of the “true religion.”

Returning to the initial question of the relationship between human rights and liberalism, we can draw the following preliminary conclusion: there is an essential and not a merely contingent bond between liberalism and negative – i.e. classical political and civil – rights. Since, however, what claims human rights (should) entail and how they relate to each other is and remains contested, there is no essential relationship between liberalism and human rights in general. As many examples tell, paying tribute to human rights obviously does not necessarily require a conversion to liberalism. Moreover, few appear to be convinced that such an unreversed conversion or rapprochement is a good idea after all – not only due to what some see as a decline of Western civilization, but also because they presume that what Chris Brown argued more than 20 years ago is true: that liberal societies owe their previous success less to their rights-based individualism than to their construction in a more communitarian vein (Brown 1997, 51).⁹

Today, the communitarian criticism of *liberal* human rights is so widespread in both political discourse and academia that the question of what human rights are and who “owns them” – or, less drastically, who guards and speaks for them – is an open one. Furthermore, the grand universal aspirations of human rights hardly allow for restricting their dissemination beyond immaculate liberal political commonwealths, if such a thing exists. This leaves us with a weighty and ever more pressing question: how can human rights survive in a world that is not exclusively liberal, but is instead shaped by various forms of liberalism alongside various forms of communitarianism/illiberalism?

How Much Illiberalism Can Human Rights Stomach? The Case of (Religious) Moral Perfectionism

The question of how to deal with the diversification of human rights (cultures) and especially the strategic embrace of human rights rhetoric by those who despise them is a cause of worry for liberal human rights theorists (Charvet and Kaczynska-Nay 2008). What are human rights and what can they not be? To what extent should liberal understandings of human rights allow for deviances from (hitherto established) human rights standards?

A well-known approach was put forward by the late John Rawls (Rawls 1999). It was the time, when political leaders like Singapore’s Lee Kuan Yew and Malaysia’s Mahathir bin Mohamad sparked a global debate about the merits of “Asian” communitarian values which deepened the divide between “universalist” and “particularist”/“relativist” human rights scholars (Avonius and Kingsbury 2008).¹⁰ Working from the assumption that assigning legitimacy only to perfectly liberal States would leave these States isolated, and accepting that cooperation in a globalized world requires at least some compromise of one’s values, Rawls maps out three categories of States or peoples: those that adhere to principles of liberal justice including extensive

and robust rights; those that are non-liberal but decent enough to deserve liberal tolerance; and those whose oppressive, inegalitarian spirit is so extreme that it is intolerable. Rawls uses human rights terms to set the latter group apart from the sufficiently decent States or peoples, and specifies these absolutely essential rights as the rights to life, liberty, property, and formal equality (Rawls 1999, 65).¹¹

Rawls' proposal of a compromise between ideal justice and the real world is, like all theories of toleration, embedded in a threshold of pain. How far, Rawls asks, can we assign decency to other political regimes without being unfaithful to that which we hold dear for what we consider compelling reasons? There is nothing wrong with theories of toleration. As outdated as they might seem, they are vital in our increasingly heterogeneous world, populated by eight billion people who have habits and particularities that we must sometimes endure rather than celebrate. Human rights-minded people understand this bitter truth particularly well. In the following, however, I would like to highlight a different point of departure. Unlike approaches such as Rawls' that aim at shielding particular important rights, the relative universalist approach I propose tries to take seriously the boundaries *within* the concept of human rights for the interpretation or restriction of rights with reference to higher social goals (Frick 2019).

At the heart of any relative universalist approach lies the idea that human rights should be enjoyed and respected by all individuals across the globe. Given the world's plurality of values and philosophical/ideological conflicts, a global consensus on human rights can only be a "thin" one. In the words of John Gray:

Human rights can be respected in a variety of regimes, liberal and otherwise. Universal human rights are not an ideal constitution for a single regime throughout the world, but a set of minimum standards for peaceful coexistence among regimes that will always remain different.

Gray 2000, 21

Universality without uniformity is thus the motto of approaches that call for greater human rights flexibility. The reasons for such a generous position are not merely born out of the realization that Western human rights standards face considerable resistance across the globe (Frick 2012; 2020). If the idea of human rights centres on a conception of the human being as free and equal, human rights can therefore not be dictated, nor can their corresponding duties be imposed. It is only consistent to claim that rights-holders should have a say in what human rights are and do for them. As Hurst Hannum puts it: "Ignoring the flexibility inherent in interpreting rights or attempting to define rights primarily through the lens of liberal western Europeans misrepresents the goals that human rights have set for themselves" (Hannum 2019, 117).

UN members at the World Conference in Vienna 1993 took a similarly flexible stance. The *Vienna Declaration and Programme of Action* emphasized that although "[a]ll human rights are universal, indivisible and interdependent," nevertheless "the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind" (UN General Assembly [UN] 1993., para. 5). Although this approach has merits and attractions, even its proponents are concerned about the risk of watering down human rights standards and allowing "particularities" entry to the global human rights dialogue without qualification. Can human rights allow for pluralism and still be saved from hostile acquisitions? I would like to discuss this question by turning to a major "zone of conflict" between liberal and illiberal/communitarian human rights understandings and sentiments: the boundaries human rights set for enforcing moral norms and achieving (communal) moral perfection.

A standard criticism of liberalism, as explained above, points to its doctrinal jealousies regarding comprehensive versions of the good. If people are free to choose for themselves where and how to attain happiness, the only good liberalism aims to achieve is the coexistence of different notions of the good. Liberalism might not be amoral – i.e. devoid of substantial claims about the good (life), as liberal theorists in the Rawlsian tradition mistakenly claim when setting apart “the good” from “the right” – but its thin *super-morality* allows many varied moral orientations and convictions to flourish under its auspices. Liberalism is uncomfortable, therefore, with any view according to which the law shall (inter alia) “impose and inoculate moral virtue” (Simpson 2015, 59). For its critics, however, by failing to differentiate between good and bad other than in terms of “capable of coexistence or not,” liberalism aids and, in the end, promotes evil.¹²

Particularly for those committed to religious ideals, the liberal premise is neither plausible – why should the liberal version of the good be superior to other versions? – nor acceptable in all circumstances. This becomes strikingly clear when considering, for instance, the (still emergent) human rights doctrine of the Russian Orthodox Church (Pollis 1993; Stoeckel 2014). In its *Basic Teaching on Human Dignity, Freedom and Rights* (Russian Orthodox Church 2008), the Russian patriarchy professes a principally egalitarian view and, by alluding to the creation of man in God’s image, affirms the notion of human dignity. Still, by qualifying – not yet denying – dignity according to religious-moral terms, the question of sin and how to define and avoid it is “injected” into the heart of human rights. If “[a] life in sin is unworthy of the human person as it destroys him and inflicts damage on others and the world around him,” then sin becomes a human rights issue. In this context, sin injures human dignity, which is the basis of human rights. Sin in this view is never a personal matter, but also affects others. An unrestricted “right to sin” – i.e. a generous right to liberty – religious illiberalism claims, cannot, therefore, be approved, not even on liberal terms. In particular, (religiously informed) views pertaining to sexuality and family are traditionally at the forefront of a communitarian critique of liberal notions of individual rights. To name several well-known examples: protests and legal repressions in many countries against the visibility of non-conformist – lesbian, bisexual, gay, transgender – sexual orientations and lifestyles; adoption/assisted reproduction for non-heterosexual couples; resistance to school curricula devoted to (early) sexual education; prostitution; and, of course, abortion (Dworkin [1977] 2013).

The discussion illiberal and liberal perspectives must, at this point, have concerns the definition of “harm.” Once both parties agree that the liberal harm principle matters – perhaps because illiberal actors are eager to fashion their campaigns in the language of human rights, given that it carries legitimacy and therefore allows them to enter liberal discursive terrain – the question of justified restrictions of personal liberty is reduced to the following: what constitutes harm and whose harm is to be acknowledged (first)? From a liberal perspective, it is difficult to empathically see the “harm” many religious people obviously experience as a result of a forced confrontation with *and* toleration of behaviour they think is inherently wrong. To return to the Russian Orthodox Church’s teachings on human rights, their declaration explicitly mentions “absolutely vicious things” including the “destruction of the family” and “perversion” (Russian Orthodox Church 2008). The grievances of religious people who despise certain human actions so much that they cannot perceive them as merely self-regarding are difficult to understand from a liberal perspective. Perhaps easier to grasp is the idea that morality is never the business of the individual. In human history, norms of moral right and wrong have instead evolved as a collective endeavour. The modern notion of personal affairs or privacy would have been entirely novel to premodern societies in which moral ideas first began growing roots. The widespread idea that God is inclined to punish a whole people for the wrongdoings of one;

the emphasis on communal ritual purity; the common, yet fragile path to salvation in need of protection: religious morality very often features existential concerns that outgrow any liberal distinction of self- and other-regarding behaviour. One telling example is the way in which one of Jerusalem's chief rabbis recently defended his anti-LGBT position: "With their bodies," Shlomo Amar stated, "they sin against the Jewish people" (on quote in Winer 2019).

With their thick moralities pressured in modern liberal societies, religious believers often resort to freedom of conscience. "Human rights," says the Russian Orthodox doctrine, in agreement with probably all other normative (and not merely spiritual) religions, "cannot be a reason for coercing Christians into violation of God's commandments" (ibid.). How, against the background of what some describe as "culture wars," can liberal and (religious) illiberal perspectives enter into an earnest dialogue? From a relative universalist perspective, the first hurdle religious positions must overcome if they want to be treated as equals in a discussion – here on human rights – is to demonstrate a truly inclusive humanism in principle. Referring back to the question of a sinner's human dignity, it is not enough to acknowledge the dignity of all but the "morally wrecked" specimen of humankind. That is not to say, however, that religious perspectives must be committed to treat the "sinner" and the "pious" individual identically within their institutions or believe in their equality beyond their basic dignity. Since this dignity is the foundation of modern human rights, such rights cannot accommodate religious views that deny a person's right to have rights.

Attempts, for example, in Uganda several years ago to (re-)introduce the death penalty for male homosexuals, which was also driven by the support of US-American Evangelicals (cf. Frick 2012), could never pass even a relative universalist test. That is not so much because the death penalty is a human rights violation – according to international human rights law it is not *per se* – but because such legislative proposals express the desire to cleanse the world of sub-humans, unworthy of mere existence. In human rights, there is no room whatsoever for such ultimately genocidal mindset. Lesser forms of repression, like the "homosexual propaganda" ban introduced in 2013 in the Russian Federation, however, must also be considered (Johnson 2015). The case of laws intending to "protect" children from the "advertisement" of ways of life that contradict "traditional family values," is far more complex. It resonates with unsuspecting notions of protecting vulnerable groups and suggests that an individual's interests (to express one's sexual orientation in public) might pose a risk to the interests of others (to raise their children without being exposed to homosexuality), and that a liberal balancing of rights is, therefore, warranted.¹³

A liberal perspective would no doubt question the harm that would be done, and in what circumstances, if children were not "protected" (from what, exactly?). There is nothing wrong with having this discussion and in challenging illiberal notions of child protection on such terms, but the decisive question from a human rights point of view is a different one. It is primarily the question of what right of the child is concerned after all. Could one seriously claim a "right to be brought up in the traditional values of one's community," regardless of what the values of that community may be? Moreover, if one were to claim a parent's human right to child rearing according to one's moral values, would religious believers be ready to endorse such a right in case of areligious parents as well? Would religious people then accept the possibility – a reality in bigger cities – that non-conformist communities bring up their children according to their respective values? Or would they still advocate a right of the child to be brought up in the "true faith"?

Only when communitarian social visions are *translated* into the concept of rights can one begin to evaluate their (in-)compatibility with the idea of human rights. Generally speaking, religious individuals cannot claim that it is a "human" right that they be allowed to exclusively or

hegemonically proliferate their values, traditional or not. In the sphere of universal rights, illiberal perspectives that strive for the enforcement of religious moral norms face a dilemma: every protection religious individuals demand for their interests, they cannot deny to others. The debate over rights then becomes a zero-sum game. The question, then, is not whether human rights stomach such illiberal infringements on non-conformist rights, but whether religious illiberalism can admit their universalization (e.g. legitimizing an agnostic community protecting their children from non-acceptable values defined in their own terms)? How, for instance, would a “right to live in a clean environment, away from vice and moral corruption” (CDHRI, Art. 17) suit orthodox Muslims in practice if the definition of what is morally corrupt lies not exclusively in their hands?

There is, no doubt, room for earnest debate when it comes to the negative right to freedom of conscience for religious believers (e.g. do human rights really need to be interpreted in such a manner as to compel individuals to provide even bakery services to “sinners”? (Corvino, Anderson, and Girgis 2017)). Nor should one reject out of hand questions raised by religious believers regarding the consistency of liberal abortion regimes within a human rights framework (e.g. aren’t the unborn worthy of at least the right to take into consideration some protection vis-à-vis the pregnant women’s autonomy?). There is also room to manoeuvre when collective ideals of social/multi-religious harmony limit individual rights relating to public (speech) actions (e.g. “defamation of religion”), as long as (non-)religious traditions are treated equally and one keeps alive the question of less restrictive means.¹⁴

However, the idea of human rights represents limits to concessions to moral perfectionism that should not be overlooked or belittled. Regarding even moderated illiberal attempts to enforce public morality, human rights advocates should affirm the liberty dimension of human rights, truthful to the liberal credo according to which “[h]e is the person most interested in his own well-being: the interest which any other person can have in it, is trifling, compared with that which he himself has” (Mill [1859] 2015, 74). Likewise, liberal human rights advocates should learn from the strategies of their illiberal adversaries, not least to avoid their imitation. If trying to enforce a particular morality is fraught with justificatory problems within a human rights framework, one should be careful not to turn “human rights” into a compulsory ideology. The tendency to restrict individual rights with reference to human rights *values*, in particular human dignity and civility, today exists in various forms ranging from speech codes/laws¹⁵ to prohibitions on the purchase of sexual services (Weitzer 2006). It is, therefore, important to bear in mind that human rights do not aim at human perfection but equal liberty. And that no matter how fine this line may be in concrete terms, it is one decisive demarcation between liberalism and its Others.

Conclusion

Illiberalism can challenge, even undermine or damage, human rights in manifold ways. In order to understand why this is so and what these challenges or threats are, we have to take a close look at the concepts of human rights and liberalism. Sharing the same axiological fundament, i.e. the appreciation of human autonomy, individual rights and liberal theories are inherently related. Modern human rights, however, declaring negative rights alongside positive rights as well as offering opportunities to restrict rights with reference to certain communal goals, have much looser ties to liberalism as the earlier *Rights of Man/Droits de l’Homme*. Globally, “liberal human rights” today encounter numerous rivaling human rights doctrines or even human rights cultures that prioritize communal goods and collective interests over individual rights.

As I have shown, in the human rights context, illiberalism takes the shape of communitarianism. In that regard, it is important to differentiate between a moderated illiberalism and a radical illiberalism. In the case of moderated illiberalism, the tension between collective interests and individual autonomy is not denied although the latter has to give way to the former as a matter of principle. In the case of radical illiberalism, by contrast, this very tension is obliterated altogether: either by arguing that what is good for the community is always already best for the individual or by affirming a “natural” or “eternal” chain of being as a source of duties towards the communal good. Based on this differentiation, we can see where human rights – understood as a flexible, yet no way arbitrary concept – could enter into an earnest dialogue with its critics or even adversaries. A reflected relative universalism confident in its own standards acknowledges that, like liberalism, illiberalism exists on a spectrum. Whereas human rights cannot accommodate radical illiberalism and should not yield to it, some forms of moderated illiberalism can be tested as to their translatability into a human rights framework. Taking (religious) moral perfectionism as an example, I tried to show why such translation efforts are particularly intricate. They ultimately point to a divide between worldviews that is exceedingly difficult to bridge, i.e. between those presupposing a final destination of human existence (and extracting from it purpose and duties) and those acknowledging a plurality of such destinations (and hence allowing for people to judge for themselves what to aspire). In this sense, interrogating the relationship of illiberalism and human rights can help us to better understand what liberalism is and how it differs from its Others – and what difference it makes for human rights if one takes these Others either too seriously (i.e. as enemies where in fact they are adversaries) or not seriously enough (i.e. as fellows where in fact they are impostors).

Notes

- 1 As Orbán declared at the congress of the Fidesz party: “We have created a Christian democratic state [...]. Today the Hungarian state rests on the foundations not of liberal democracy, but of Christian democracy. Democracy yes, liberalism no. This is our programme” (2019a).
- 2 In the original Millian version, this question reads: what are “the rightful limits of the sovereignty of the individual over himself?” ([1859] 2015, 73).
- 3 The “illiberal counter-revolution” in societies in Eastern Europe following the end of the Cold War appears to have been predominantly driven by such sentiments. After embracing new freedoms and imitating their role models, many gradually departed from what they came to believe was liberalism, disillusioned, and sour (Krstev and Holmes 2019). In 1997, when the “end of history” seemed near, Fareed Zakaria predictively stated: “Western liberal democracy might prove to be not the final destination on the democratic road, but just one of many possible exits” (24). For a critical assessment of broken liberal dreams on the global scale, see also Mearsheimer 2018.
- 4 As Douglas Murray laments: “An entire political class have failed to appreciate that many of us who live in Europe love the Europe that was ours” (2017, 320). Or, as expressed by Roger Scruton: “For, while multiculturalism has done nothing to reconcile immigrant communities to their new surroundings, it has destroyed the frail remnants of national culture that survived the Second World War” (2011, 45).
- 5 In the words of Viktor Orbán: “The starting-point for Hungarian policy is that we Christians have the right to defend our culture and the way of life that has grown from it [...]. Demographic forecasts also indicate that in the not-too-distant future there will be European countries undergoing rapid change in the religious and cultural composition of their populations. Everything that has happened in Syria and Iraq – or what is happening in Nigeria today – is much closer to us than many people think” (2019b). For Hungary as a “laboratory of illiberal governance,” see Krekó and Enyedi 2018.
- 6 Constant stressed: “The sovereignty of the people is not unlimited; it is, on the contrary, circumscribed within the limits traced by justice and by the rights of individuals” ([1814] 2010b, 182).
- 7 Art. 29 of the *American Declaration of the Rights and Duties of Man*: “It is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality.”

- 8 Attempting to upgrade the status of “traditional values” in the UN human rights arena, in 2009 the Russian Federation has put forward the resolution *Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind* (A/HRC/RES/12/21). Requesting “a workshop for an exchange of views on how a better understanding of traditional values of humankind underpinning international human rights norms and standards can contribute to the promotion and protection of human rights,” the resolution was adopted by the Human Rights Council with the votes of 26 States.
- 9 A similar argument can be found earlier by Joseph Raz: “Many rights were advocated and fought for in the name of individual freedom. But this was done against a social background which secured collective goods without which those individual rights would not have served their avowed purpose” (2009, 251).
- 10 For Singapore’s “authoritarian rule by law,” see Rajah 2012.
- 11 Arguing in line of his theory of an overlapping consensus that these rights “do not depend on any particular comprehensive religious doctrine or philosophical doctrine of human nature,” Rawls concludes: “Human rights, as thus understood, cannot be rejected as peculiarly liberal or special to the Western tradition” (1999, 65). Albeit human rights can be grounded in different worldviews and do not depend on a single comprehensive doctrine, human rights cannot be grounded in a free-standing manner, as envisioned by Rawls (Frick 2019). We would not be able to understand the different conceptualizations of such general rights as to life or liberty in different religious/cultural/philosophical traditions if we neglected the nexus between *foundational* ideas (e.g. human dignity in a secular or religious fashion) and rights *content*.
- 12 Vladimir Putin expressed this unease in his 2013 Presidential Address to the Federal Assembly: “Society is now required not only to recognize everyone’s right to the freedom of conscience, political views and privacy, but also to accept without question the equality of good and evil, strange as it seems, concepts that are opposite in meaning” (2013).
- 13 John Stuart Mill: “As soon as any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion” ([1859] 2015, 73).
- 14 These conditions are not met when laws restrict speech accused of disparaging religious convictions. Not only does such a provision protect group rights and not individual human rights; what is more, it protects some groups – i.e. religious ones – and not all systems of belief equally. When the European Court of Human Rights (ECtHR) recently refused to overrule the verdict of an Austrian court that had previously convicted a woman for slandering Islam’s final prophet (*E. S. v. Austria*, Application no. 38450/12 judgement of 25 October 2018), it did so by resorting to the margin of appreciation doctrine. Arguing that “preventing disorder by safeguarding religious peace” was a legitimate aim, the Court in effect tied the enjoyment of individual autonomy to the condition that (religious) others are not displeased with this autonomy to such a degree that they resort to violence. Where such logic takes roots, liberal human rights are forced to retreat.
- 15 In enforcing civility, hate speech laws can quickly become illiberal once they are “inflated in a way that dangerously curbs liberty” (Garton Ash 2016, 211).

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