

The Limitation of Human Rights Discourse in Ushering Transformative Change

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ABSTRACT: Within the context of this paper I will explore Human Rights discourse and the ways it attempts to usher in transformative change more rightly their lack of change. Because human rights are social and cultural constructed relying on institutions and state actors to enforce and uphold their practice, Human Rights as a practice can often fail to uphold the protection of human dignity. The purpose of this paper is not to say that human rights dont have a place within society as defenders of human dignity rather to recognize its limitations in addressing the cultural, political and economic challenges faced by people and cultural groups.

KEYWORDS: Human Rights, Transformative Change, Individual Rights, Institutions, Social Constructivism

In examining the concept of Human Rights, one might contend that their emergence in global discourse stems from the massive human rights violations of World War II and the institutional responses that followed them, such as the UN Commission on Human Rights signed in 1946. However, as depicted by Samuel Moyn in *The Last Utopia: Human Rights in History* (2012) the history of human rights is not as clear as our modern understanding of them lends us to believe. Human Rights ultimately emerged in modern vernacular as a substitute for other utopias of 'collective entitlement and self-determination', ie; socialism and anticolonialism, as a sort of consolation prize for those who needed them the most (Moyn 2012, 45). A historical examination of the other utopias provides insight into the emergence of human rights as a manifestation of the heartfelt desire for making the world a better place (Moyn 2012, 225). At the surface, it is easy to regard human rights as just this, and in some ways one can easily point to human rights as a meaningful ideological protection for human dignity. However, this view is ultimately limiting, and establishes fixed notions/ understandings of human rights that are resistant to challenges and criticisms. Human rights are not a discourse of significant change because their utopian assertion of universality often fails, and their existence relies on specific social institutions to establish, enforce, and protect them. Additionally, their codification leads to ideological conflicts on national and international scales when attempting to apply rhetoric that is not truly universal.

Human rights are defined as rights held by individuals and groups on the basis of their humanity that protect and assert dignity against state and independent actors. They are meant to compel power holders such as governments and employers to protect the communities they claim to represent (Brysk 2018, 3). The emergence of human rights as a concept in global governing rhetoric is due in part to the failures of later utopian theories such as post-colonialism and self-determination, as explained by Samuel Moyn in *The Last Utopia: Human Rights in History*. As he argues, human rights emerged and are established based on the idea that they require low economic and political sacrifices in comparison to other utopian

counterparts of socialism and anticolonialism. Human rights thus entered our vernacular as a "throwaway line" and a means to "interrupt normal interstate relations," not as an ideal/framework for world governance. This is exemplified by Franklin Delano Roosevelt's use of human rights as a determinate of "norms that the state could go to war to protect" in 1942 (Moyn 2012, 51). Or, the use/employing of human rights discourse as a Cold War position to justify the invasion of Vietnam in the mid-1950s. Thus, human rights became the "ultimate victim of their own vagueness" (Moyn 2012, 64), and were mobilized by western countries, specifically the United States of America, to enforce post-colonial dominance on other nations under the guise of implementing international law and protecting individuals from communist thought (Moyn 2012, 84).

The vague definitions of human rights impacts their ability to come to fruition. In Madsen and Verschraegen's (2013) *Making Human Rights Intelligible*, the authors argue that for human rights to meaningfully exist they "must become institutionalized socially and become embedded in people's mindsets," (8). This means human rights discourse has to be effectively communicated and taken up simultaneously within our daily social lives and our political establishments. Given that the modern state has been the primary driver and enforcer of rights, the global/transnational institutionalization of human rights presents a sociological dilemma. The institutionalisation of human rights presents an issue for creating change as they "presuppose the willingness and ability of individuals to resort to the courts for the enforcement of rights" (Madsen and Verschraegen 2013, 10). An example of this failure is explored in an article by David Engel and Frank Munger (1996), "Rights, Remembrance and Reconciliation of Difference," which highlights the lives of two women living with a disability during the emergence and years following the implementation of the American Disability Act (ADA). Although Engel and Munger attempt to argue the importance and beneficial social changes that the ADA had on these women's lives, in reality the ADA gave them very little agency in terms of employing their rights legally. For example, both women expressed hesitation in asserting their rights out of fear for potentially undermining their own careers. As noted by one woman,

Sarah Lane, she feared creating the appearance that “her disability makes her different, less capable, [and] less independent” by asserting her rights through the court system (Engel and Munger 1996, 25). Additionally, the emergence of legislative disability discourse wasn’t effective in getting Sarah hired when compared to the social discourse and values in diversity programs of the time that often cited how it was “cool” to have Sarah there, essentially tokenizing her presence (Engel and Munger 1996, 22). For human rights to be transformative, those who they impact must be able to assert them without fearing negative legal and social outcomes/implications.

For human rights to create transformative change within society, they require the follow-through and support of state actors. Alison Brysk (2018) describes an optimistic view, arguing “human rights do not equal and cannot automatically produce justice” but that they help “guarantee [...] a fair and open space to seek justice” (96). This, however, cannot be the case when it is up to governments to provide this space. Brysk, in her “citizenship gap” concept asks the question “who is human” (Brysk 26) or in other words, who is considered by government powers humans/citizens that have rights. The foremost issue when relying on government institutions as the gatekeeper for rights is that even in democratic states that support and accept treaties and declarations on human rights, certain people (such as women, refugees, and persons in marginalized communities) are unable to access their rights as they are not considered a citizen or ‘human’. For example, the USA has created zones of exception (where national and treaty obligations don’t apply) like Guantanamo Bay, where the state processes and detains Caribbean migrants, or the more than 2,000 asylum seekers housed in the Manus and Nauru by the Australian government. These groups face violence and human rights violations daily. Human rights can only be a discourse of transformative change if state actors are actively and universally applying them, not if they are creatively circumventing them by creating loopholes and selectively choosing ‘who’ is human and where their rights exist.

The legalistic approach to human rights entails the individualisation of rights, and effectively “ignores the ways in which breaches of rights operate in a collective and institutional way, and cannot easily be attributed to individual subjects” (Madsen and Verschraegen 2013, 10). This is exemplified by Montgomery (2001) in their work, *Imposing Rights? A case Study of Child Prostitution in Thailand*. Montgomery argues that the UN Convention on the Rights of the Child fails to account for complex and nuanced cultural circumstances unique to individual youths that cannot be solved with a top-down approach, but rather require community-level work to be properly analyzed and studied. “When imposing rights from above and removing children from their families in the name of universal human rights,” states do not address the social and economic structures of poverty which create the vicious cycles that make children vulnerable to the violation of their rights (Montgomery 2001, 97). Moreover, punishing the children’s parents through legal means, as accorded by Article 9 (87), can ultimately exacerbate and harm the children’s other rights, such as Articles 5, 8, 19, 26, and 27 which deal with family support. This does not result in a comprehensive, holistic solution or ensure that the dignity of children will be upheld. Therefore, legalistic human rights discourse regarding the implementation of children’s rights is not transformative as it does not address the core issues that result in the rights of children being violated. Rather, this approach inadequately attempts to deal with a far greater and more serious issue.

Human rights declarations being universally ratified serves more as a testament to the moral achievements of states, than to their actual efforts to stop violating the basic rights of their citizens. When human rights doctrines attempt to assert themselves as universal, they propose a misguided assumption that ignores how human rights are constructed “by and in society” (Madsen and Verschraegen 2013, 9). As Madsen and Verschraegen argue, “the common association of human rights with universal and foundational claims about humanity easily leads to interpretations presuming that human rights can exist without social preconditions, or even beyond the realm of society” (7). However, in doing so, they overlook the caveat that because rights are described in vague, aspirational terms, they can be interpreted in multiple ways, allowing for national governments to easily shrug off legal

obligations and declarations. For example, the rhetoric of human rights as gender-neutral has been critiqued in feminist theory as being inadequate for addressing concerns of gender and human rights. Wanda Wieggers (2009) while explaining the limitations of human rights in custodial cases, argues that an attempt to champion equality and human rights here erases the essential issues at hand. This is done by essentializing the importance of a parent's genetic relations to a child, therefore discounting the physical and emotional labour that goes into parenting, regardless of a biological relationship. Wieggers presents the Saskatoon Dad case in which the father ('Adam Hendricks') "contested the de-facto custody of an infant boy who had been transferred by his birth mother ('Rose Swan') to another family, the Turners, shortly after his birth" (Wieggers 2009, 2). Despite the father being absent during the pregnancy, Hendricks' biological position as the child's father established his claim receiving as much weight as Swan's (3). Similarly, in Lori Chambers' work (2010) *'In the Name of the Father': Children, Naming Practices, and the Law in Canada*, she presents the Trociuk case, where an unmarried father asserted his right to impose his name upon his children at the time of birth, despite his non-existent relationship to the mother (12). The assertion that both biological parents have equal rights and decision-making powers regarding a child, regardless of their presence in the child's life, highlights the challenges faced by the women and mothers asserting their rights in these cases.

The failure of human rights as universal rhetoric arises from the fact that while they are ideologically designed to represent society as a whole, it is up to dominant structures and social institutions to establish and enforce these rights. Thus, minorities who may not align with dominant powers must often change their personal narratives to better align with dominant understanding of human rights. While human rights are seen as universal, cultures are not. For example, Sieder & Withcell (2001) argue in their work, *Advancing Indigenous Claims through the Law: Reflections on the Guatemalan Peace Process*, for the importance of Indigenous identities in Guatemalan political discourse. These identities further the rights of these groups through the use of 'foreign' legal strategies that shape the way they are represented and perceived within dominant legal discourse (201). Ultimately, this reduces Indigenous

cultures into categories and customary norms which can more easily be codified within the legal system (213). This poses the question of whether human rights are an appropriate discursive strategy when working from an international perspective, and what sort of balance must be struck between the imposition of western conceptions of human rights on indigenous groups. This conflict highlights the limitations of human rights in their ability to engage meaningfully in a discourse without losing the nuances and complexities of given cultural contexts.

The setbacks of human rights discourse and its inability to be transformative as discussed above becomes further evident through its assertion of universality, and the corresponding use of "vernacularization". This is the process where international concepts are situated, adapted and translated [to specific contexts], attempting to make non-local concepts meaningful to local audiences, whether successful or not (Goldstein 2013, 111). If human rights are to be transformative and universal, they should not have to require the translation of a discourse or legal applications to fit local vernaculars. Contradictory understandings of human rights can emerge when attempting to translate them to other cultures such as in the Barrios in Cochabamba, Bolivia, as illustrated by Daniel Goldstein (2013) in *Whose Vernacular?: Translating Human Rights in Local Contexts*. Goldstein's analysis argues that through multiple vernacularizations, "competing understandings of human rights can emerge, often differing greatly from their intended transitional meanings and values" (111). For example, the Cochabamba police have employed the human rights rhetoric as an explanation to the rise of crime. Police officers are often found stating in the press "that laws that limit the arbitrary detention of suspects and require evidence of guilt to incarcerate them are detrimental to citizen security" (116). This context positions the police as local vernacularizers/translators, who claim that human rights are a hinderance to the safety of the local communities. Resulting in locals mistrusting and misunderstanding their core purpose (their protection). This example highlights the limitations of human rights as a holistic discourse, as they lack a shared and agreed-upon understanding of what the implicit values of human rights predicate.

Our understanding of human rights thus far is that their goal is to fulfil and protect human dignity. However, when attempting to fulfil a subjective understanding of an individual's human dignity, the human rights framework begins to contradict itself. Human rights cannot be a transformative discourse when the expectation that competing rights are being upheld is simultaneously brought forward. Susan Okin (1999) makes the argument in *Is Multiculturalism bad for Women* that when asserting cultural group rights, individual rights should not be looked over. In particular, this can be applied to intersections of culture and gender, such as the impacts of 'cultural practices' like pressuring rape victims to marry their abusers, a practice common in some communities in Latin America, rural Southeast Asia and parts of West Africa (Okin 1999, 15). In advocating for the group rights of cultural minorities, liberal societies do not address these issues. This is because liberal states view cultural groups as "monoliths," ignoring the differences in beliefs within them and avoiding what happens in more private spheres, like households (Okin 1999, 12).

This tension between the private and public spheres is also highlighted by Janice Stein (2007) in *Searching for Equality*, who analyzes the contradictions that enforcing human rights can have when protecting religious practices that might be discriminatory, but still protected under Canadian laws pertaining to religious freedoms. An example of this might include allowing public officials and justices of peace to refuse officiating same-sex marriages if they violate their religious beliefs and freedoms (11). To be clear, this argument is not as elementary as implying that discriminatory actions can take place as long as they are protected under religious freedoms. Waldron (2013) explores this conflict in her book *Free to Believe*, arguing the alternative. She argues that when the equality of rights comes into conflict with freedom of religion, equality will win out every time. When rights come into conflict with one another, it necessitates a proper balancing of rights on the part of the judiciary, and the prioritizing of the importance of some rights over others (Waldron 2013, 165-166). For example, in *Bruker v. Marcovitz* "a private claim to the exercise of religious freedom was denied by the courts" (Waldron 2013, 67). Ms. Bruker and Mr. Marcovitz were married and then divorced under Canadian law, however, they were both Jewish and for a divorce to be accepted [in the religious sense], the husband had to provide a *get*. Without one, Ms. Bruker would not be considered divorced or

able to re-marry according to her religion (Waldron 2013, 67). Ms. Bruker ultimately won the case, however Waldron argues that this was an infringement on Mr. Marcovitz's religious rights. Because Ms. Bruker could frame her argument as an issue of equal rights, she won. Regardless of the result, cases like these set a precedent for the discourse of human rights and religious freedoms. Another example of equality of rights being positioned this way, is in the argument made in the case of the Hutterian Brethren of Wilson Colony, who were denied the ability to have a driver's license without photo identification in order to align with their religious values. Because their argument couldn't be one of equality like in *Bruker v. Marcovitz*, the courts were not as favourable.

In the previous pages, I have explored the limitations that human rights discourse has in creating transformative change. Human rights are socially constructed, and socially implemented through our cultural and political institutions. Because they are enshrined in a state-centred legal system, they place their importance on the role of the state in enforcing them, or on individuals for calling upon the justice systems to gain access to protection. However, human rights as a discourse of transformation fails when the barriers to do so are either too great socially, as depicted by the example of Sara Lane and Jill Goldings hesitation to assert their rights under the ADA; or, are inaccessible due to governments decisions to ignore human rights discourse as illustrated by Alision Brysk with the citizenship gap. Furthermore, in the attempt to make human rights a universal doctrine, advocates fall short in their ability to address the intersection of issues present in the rights discourse, illustrated by Wieggers and Chambers' discussion of gendered custodial battles. Likewise, international cases of mistranslations and the opportunistic co-opting and vernacularization of human rights contradicts the fundamental values of human rights. Lastly, human rights discourse is limited in its ability to be transformative because in its goal of primarily protecting the dignity of one person, the rights of others can simultaneously be limited, as illustrated in the competing rights case of collective vs individual illustrated by Wieggers and Stein, and religious rights versus equality rights as illustrated by Waldron. This is not to say human rights don't have a place within society as defenders of human dignity; but rather, by recognizing their limitations, there can be an ushering in of new tools to better address the cultural, political and economic challenges faced by people.

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