

# The Struggle for Human Rights

*Essays for Philip Alston*

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## 25

## Quite Enough (Still)

## Human Rights in (Times of) Crisis

Florian Hoffmann

C25

C25.S1

## 25.1 ‘You Learn to Know a Pilot in a Storm’: Dealing with Human Rights in (Times of) Crisis

C25.P1

In one of the most recent iterations of his career-spanning engagement with the trickiest and most contested issues in and around (international) human rights,<sup>1</sup> Philip Alston has sought to take on both what he has termed the populist challenge to human rights and the new intellectual critiques that have emerged in the former’s wake.<sup>2</sup> Hence, as many a time before, he has used his widely heard voice in academia, in the United Nations, and in the broader human rights community to argue against the detractors of human rights at a moment in world (and national) politics that he deems to be critical—both for human rights and for the plight of people across the globe. As usual, his tone has been measured, yet his argument clear cut and at times sharp; his perspective broad and non-sectarian, close to the legal mainstream while sensitive to its critique; yet always unforgiving of self-righteousness, complacency, or bad faith wherever detected. And, perhaps surprisingly for some, his vision has almost always been less orthodox and less predictable than might be expected from a heavyweight of the international human rights system. However, untypically for someone also known (and sometimes feared) for his glacial coolness and razor—sharp analysis (as well as his disarmingly dry sense of humour) vis-à-vis human rights violations and violators, there has been a tangible element of passion in this latest engagement that betrays a different dimension of concern. Indeed, in one well-publicised exchange on ‘Human Rights in the Populist Era’, he begins with the uncommonly bleak statement that ‘the world as we in the human rights movement have known it in recent years is no longer.’<sup>3</sup> What is implied here is not just the nostalgia of someone who actively helped build that movement, nor the occasional professional gloom over the seemingly unsurmountable odds that anyone working in human rights continuously faces. It is a more fundamental disquiet about the present times, which are, as he concludes, ‘extraordinarily dangerous [ . . . ] unprecedentedly so in my lifetime.’<sup>4</sup> For someone who to many of those who have worked with him has been as steady a rock in the structurally unsteady human rights sea as there may possibly be, this is quite an extraordinary statement.

C25.P2

Alston’s primary focus here is of course the recent right populist turn in many places both the global North and South and the attendant espousal of a hard right political agenda that

<sup>1</sup> ‘Gubernatorem in tempestate [in acie militem] intellegas,’ Lucius Annaeus Seneca and LD Reynolds, *L. Annaei Senecae Dialogorum Libri Duodecim* (E Typographeo Clarendoniano 1977).

<sup>2</sup> Philip Alston, ‘The Populist Challenge to Human Rights’ (2017) 9 *Journal of Human Rights Practice* 1.

<sup>3</sup> *ibid* 1.

<sup>4</sup> *ibid* 14.

had long been thought consigned to the history books. The latter has not only unburied the most rabid forms of neo-nationalist, xenophobic, racist, anti-LGBTQ+, anti-poor (and in fact anti-everyone and everything deemed to be associated with the liberal centre, the left, or, indeed, the modern world) discourse, but it has also and often with particular verve scorned human rights and their defenders.<sup>5</sup>

C25.P3

However, perhaps even more detrimental than this political manoeuvring has been the cognitive onslaught against the very idea of human rights that the often neo- or para-fascist ideological templates of these political movements have produced.<sup>6</sup> For unlike openly autocratic regimes, the new populist configurations rely on significant electoral support for their position, and thus on a growing public acceptance of discourses and practices explicitly opposed to human rights and what they stand for.<sup>7</sup> The societies in which these movements have come to power or are growing in support therefore tend to be deeply divided, in some cases so much so that there is no longer any common ground upon which a shared basic consensus on the sort of society people wish to have could be built.<sup>8</sup> Certainly human rights or even just the fundamental recognition of equal human dignity seem no longer to provide such common ground and have instead become increasingly contested as ways to frame political, social, or economic issues.

C25.P4

However, the populist offensive against human rights is, arguably, only the tip of a much bigger iceberg of troubles for human rights and the human rights movement—a fact Alston has implicitly (and sometimes explicitly) acknowledged in many of his recent writings.<sup>9</sup> For in parallel to the rise of the populist right, a new round of intellectual critiques of rights has emerged over the past decade or so, a fact that is as overtly surprising as it is deeply symptomatic for the current conjuncture.<sup>10</sup> Ironically, these new critiques have mostly been

<sup>5</sup> Gerald L Neuman and Harvard Law School (eds), *Human Rights in a Time of Populism: Challenges and Responses* (CUP 2020); César Rodríguez-Garavito and Krizna Gomez (eds), *Rising to the Populist Challenge: A New Playbook for the Human Rights Field* (Dejusticia 2018); Marcelo Alegre, 'Populism and Human Rights: Oil and Water?' (Sela Annual Conference, Athens GA, October 2016).

<sup>6</sup> This author is aware that the use of the term 'fascist' in connection with the contemporary turn to (right-wing) populism is both (somewhat) over-inflated and (therefore) highly contested. Broadly speaking, there seem to be two opposing schools of thought: one rejects the assimilation of contemporary forms of reactionary or authoritarian populism with the historical fascisms of Italian or German provenance on the grounds that the former allegedly does not fit all the characteristics of the latter and that their conflation therefore amounts to both misunderstanding the former and relativizing the latter; the other school of thought holds a wider conception of fascism in which structural similarities rather than historical context is deemed to determine an ideological framework's proximity to fascism; this author tends to the latter school, though would qualify the world views of these movements as neo—or para-fascist. Alston has, to this author's knowledge, not publicly opined on this. See, amongst an extensive literature, Enzo Traverso and Régis Meyran, *The New Faces of Fascism: Populism and the Far Right* (Verso 2019); Mabel Berezin, 'Fascism and Populism: Are They Useful Categories for Comparative Sociological Analysis?' (2019) 45 *Annual Review of Sociology* 345.

<sup>7</sup> Mark A Graber, 'Constitutional Democracy in Crisis?: The Right-Wing Populist Surge' <[https://intr2dok.vifa-recht.de/receive/mir\\_mods\\_00003968](https://intr2dok.vifa-recht.de/receive/mir_mods_00003968)> accessed 08 November 2020.

<sup>8</sup> For a seminal contribution here, see Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (1st edn, Zone Books 2015); Thomas Carothers and Andrew O'Donohue (eds), *Democracies Divided: The Global Challenge of Political Polarization* (Brookings Institution Press 2019).

<sup>9</sup> Alston, 'The Populist Challenge' (n 2); Philip Alston, 'Reply to Dudai and Nagaraj' (2017) 9 *Journal of Human Rights Practice* 25; Philip Alston, 'Human Rights under Siege: How to Respond to the Populist Threat Facing Human Rights' (2017) 25 *SUR International Journal of Human Rights* 267; Alston's strongly-worded report, UNHRC, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights—Note by the Secretariat' (28 April 2016) UN Doc A/HRC/32/31, 9.

<sup>10</sup> For an overview of some of the earlier (new) critiques, see Frédéric Mégret, 'Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law: The European and the American Experiences* (TMC Asser Press 2012); Malcolm Langford, 'Critiques of Human Rights' (2017) 14 *Annual Review of Law and Social Science* 69; see also, amongst many more, Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press of Harvard University Press 2012); Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap Press of Harvard University Press 2019); Susan Marks, 'Human Rights and Root Causes' (2011) 74 *The Modern Law*

premised on the paradoxical affirmation that human rights are at once ‘not enough’ and ‘too much’—they are, in other words, seen as too weak to address the root causes of the crisis, yet too strong in terms of the investment still placed in their promotion. Indeed, they have alongside similarly contested concepts—such as (representative) democracy, (neo)liberalism, or globalization—and in the unsavoury company of similarly tuned populist right critiques, come to be seen as primary symbols for what is wrong with today’s world. This in itself should give reason for pause: Why rights and why now? How does the claim of powerlessness and irrelevance square with the significant intellectual investment made to debunk rights at a moment when political hostility to rights seems anyways to have reached a peak?<sup>11</sup> Indeed, many of the arguments made in this latest round of critiques seem not to be much more than re-enactments of the critical points already made during earlier periods.<sup>12</sup> It seems at times as if human rights in the abstract have been singled out as a cipher for a much more fundamental critique of the (neo)liberal world order or, indeed, of certain dominant readings of Western modernity as such.<sup>13</sup>

C25.P5

Several factors have, arguably, exacerbated this new debate: firstly, when these new critiques began to emerge around the publication of Samuel Moyn’s influential *Last Utopia* in 2010, the human rights community had itself taken an inward turn; it was marked by a certain ‘bubble think’ with a growing emphasis on the technocratic aspects of human rights advocacy and an ever deeper focus on (state-level) policymaking and regulation.<sup>14</sup> This has meant that, until recently, the ensuing debate has mostly unfolded as a *dialogue de sourds* with each of the involved constituencies unwilling or unable to actually engage with each other’s point of view. Hence, much of the populist militancy against human rights is largely oblivious of the real-life workings of national or international human rights systems, while the human rights community has so far mostly reacted to this challenge by simply proposing to do more of what it has always done. Likewise, few of the new (intellectual) critics of human rights have much footing in actual human rights work while coming, at times,

Review 57; Stefan-Ludwig Hoffmann, *Human Rights in the Twentieth Century* (CUP 2010); Walter Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press 2011); Aakash Singh Rathore and Alex Cistelean (eds), *Wronging Rights? Philosophical Challenges for Human Rights* (Routledge 2011); Susan Marks, ‘Four Human Rights Myths’ in David Kinley, Wojciech Sadurski, and Kevin Walton (eds), *Human Rights: Old Problems, New Possibilities* (Edward Elgar 2013); Robert Dickinson and others (eds), *Examining Critical Perspectives on Human Rights* (CUP 2012); Etienne Balibar, ‘On the Politics of Human Rights: On the Politics of Human Rights: Etienne Balibar’ (2013) 20 *Constellations* 18; José-Manuel Barreto (ed), *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars Publishing 2013); Eric A Posner, *The Twilight of Human Rights Law* (OUP 2014); Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013); Nelson Maldonado-Torres, ‘On the Coloniality of Human Rights’ (2017) *Revista Crítica de Ciências Sociais* 117; Christoph Menke, *Critique of Rights* (Polity 2020).

<sup>11</sup> Grainne de Búrca, ‘Shaming Human Rights’ (NYU School of Law 2018) Jean Monnet Working Paper 2/18.

<sup>12</sup> For example, Anne Orford’s successive contributions in Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP 2003) <<https://doi.org/10.1017/CBO9780511494277>> accessed 07 November 2020; and in Anne Orford, ‘Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice’ (2005) 18 *Leiden Journal of International Law* 179; and in Anne Orford (ed), *International Law and Its Others* (CUP 2009); in a similar vein and period, Wendy Brown, ‘“The Most We Can Hope For . . .”: Human Rights and the Politics of Fatalism’ (2004) 103 *South Atlantic Quarterly* 451.

<sup>13</sup> Mignolo (n 10); Florian Hoffmann, ‘Facing South: On the Significance of an/other Modernity in Comparative Constitutional Law’ in Philipp Dann, Michael Riegner, and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (OUP 2020).

<sup>14</sup> For example, David Kennedy’s well-known pieces: David Kennedy, ‘The International Human Rights Movement: Part of the Problem? (Part 2)’ (2001) 3 *European Human Rights Law Review* 245; David Kennedy, ‘The International Human Rights Regime: Still Part of the Problem?’ in Dickinson and others (n 10) 19–34; as well as Krizna Gomez, ‘Why Do Progressive Movements Struggle to Answer Populists? Because They Are Technocrats’ (*openDemocracy* 18 November 2019) <<https://www.opendemocracy.net/en/frontline-insights/why-do-progressive-movements-struggle-answer-populists-because-they-are-technocrats/>> accessed 07 November 2020.

uncomfortably close to the conclusions on human rights (defenders) drawn by populist politicians; conversely, besides trying to dig in its heels into an increasingly wobbly ground, the human rights community has not really sought to engage these new critiques on their own (intellectual) terms. Alston's uncharacteristically candid call for action must also be read as an attempt to wake the human rights community from a certain (self-content) lethargy. In doing so, he has, again, been an exception, as he has tended to think across and around these different bubbles with a view to understanding, rather than just reacting to the diverse challenges he has encountered—a stance that has, at times, confounded supporters and critics alike yet has given him a unique intellectual versatility for grasping the issues at hand. So here, too, he has argued that, on one hand, 'human rights proponents need to rethink many of their assumptions, re-evaluate their strategies, and broaden their outreach while [on the other hand] not giving up on the basic principles.'<sup>15</sup> The call is, hence, for a multi-front engagement with critique and against complacency, neither in despair nor in a spirit of 'business as usual'.

C<sub>25</sub>.P6

However, Alston's call to (intellectual and political) arms has also been seen in the context of one particular aspect of the current human rights crisis, namely its entanglement with the ongoing debate about the continued viability of the welfare state, or, more precisely, about the state's role in guaranteeing an adequate standard of living and an equitable distribution of basic goods such as health, food, water, housing, or education through a proactive economic and fiscal policy geared to these objectives. This is of course the realm of social and economic rights, long considered as 'second generation' (aka second class) and until relatively recently largely off the radar of the big human rights advocacy organizations, though the thematic area perhaps most closely associated with Alston ever since his entry into the world of international human rights protection. The passion with which he has led the current debate is, hence, not only due to a very real worry about the future of human rights, but it is, arguably, also linked to the fact that, as paradoxical as it may seem, social rights have been one primary target of the contemporary populist right. For they have come to be associated with classical welfare state entitlements and the rights-based social or transformative constitutionalism that has frequently emerged alongside it.<sup>16</sup> Although on the surface the populist right is all about economic nationalism and the preservation of the inherited privileges of its—however defined—core constituencies, and, hence, nominally against both political and economic liberalism, its actual economic agenda has almost always been subservient to the interests and premises of the neoliberal world order. Although it is debatable whether this apparently counterfactual alliance of (finance) capitalism and political nationalism is actually new or just newly transparent, on the ground it has meant that social rights have become primary targets that are associated with left welfare statism, developmentalism, and what would today be termed heterodox economic policies.<sup>17</sup> For the neoliberal right, the rights-based judicialization of social policies such as health, education, housing, food, or water and sanitation, as well as the parallel hardening of the international enforcement of

<sup>15</sup> Alston 'The Populist Challenge' (n 2) 2.

<sup>16</sup> Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65 *The American Journal of Comparative Law* 527; Günter Frankenberg, *Comparative Constitutional Studies: Between Magic and Deceit* (Edward Elgar Publishing 2018); LaDawn Haglund and Robin Stryker (eds), *Closing the Rights Gap: From Human Rights to Social Transformation* (University of California Press 2015); Randall Peerenboom and Tom Ginsburg (eds), *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (CUP 2014).

<sup>17</sup> Posner *The Twilight of Human Rights Law* (n 10); Gillian MacNaughton and Diane F Frey (eds), *Economic and Social Rights in a Neoliberal World* (Cambridge University Press 2018); Wendy Brown, *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West* (CUP 2019).

social rights, present unwelcome obstacles to large-scale austerity programmes and ‘anti-corruption’ public sector reforms. To the populist right in turn they represent a universalist egalitarianism that stands in the way of its (more or less open) espousal of ethnocentric or class-based inequality and social stratification, of its agenda to criminalize poverty and ‘the poor’ and, generally, of its re-affirmation of the primacy of executive ‘can do’ politics over judicial or administrative ‘meddling’.<sup>18</sup>

C25.P7

Against this backdrop, it is a deep irony, and one that has certainly not escaped Alston, that the latest round of intellectual human rights critiques has not only emerged roughly alongside the rise of the populist right, but also shares with the latter a particular antipathy for social rights, based, in essence, on the argument that they are either too powerful (for the right) or too powerless (for the left), or, curiously, simply irrelevant (for both) vis-à-vis the challenges of a (post-)neoliberal world. What these new intellectual critiques and the populist right’s disdain for rights converge on is the common theme that rights advocacy is allegedly the game of a small cosmopolitan elite that represents, depending on where on the political spectrum the charge is made, either a neoliberal or a left-wing conspiracy to undermine national sovereignty and democratic politics. Typically, Alston has responded to this challenge by not directly responding to the fundamental critique but, instead, by drawing on his vast experience from the frontlines of both the international human rights system and the human rights field. He has thus highlighted the numerous instances in which rights have been used, by people ‘on the ground’ as much as in national and international institutional settings (not least tribunals), as one, or, sometimes, the only defence against the full-scale dismantling of welfare policies and a mutilation of the state into a rump permanently incapable of advancing egalitarian politics.<sup>19</sup> And he has not minced his words when calling out the nature of the problem, such as when he described:

C25.P8

a world in which the richest 1% owns 48% of global wealth, and in which this imbalance continues to accelerate, is obscene. Radical inequality inevitably sustains extreme poverty just as surely as it sustains extreme wealth. And extreme poverty is best defined as a condition in which the vast majority of human rights cannot possibly be realized. In other words, inequality is not just as an economic issue, but also one of human rights.<sup>20</sup>

C25.P9

Yet, his vision has never been fundamentalist but rather pragmatic, with human rights always framed as a complementary means to advance human dignity through law, albeit a means still and quite uniquely endowed with both nearly universal symbolic currency and an evolved institutional infrastructure. Yet, as Alston’s recent call has underlined, it is now more important than ever for the human rights community to engage openly and constructively with the (intellectual) critique if it is to forge an ever-stronger response to its real opponent, notably the populist right. For unlike the intellectual critiques, its agenda is to destroy the intellectual foundations not just of human rights but also of those alternative ‘projects’ that motivate the current critique of rights.

<sup>18</sup> For example, Brown, *In the Ruins of Neoliberalism* (n 17); Darren J O’Byrne, ‘The Rise of Populism, the Demise of the Neoliberal and Neoconservative Globalist Projects, and the War on Human Rights’ (2019) 9 *International Critical Thought* 254.

<sup>19</sup> While a point Alston has made throughout his career (and UN mandates), it is evidently particularly prominent in his current mandate on Extreme Poverty and Human Rights; an exemplary statement is Philip Alston, ‘Extreme Inequality as the Antithesis of Human Rights’ (*OpenGlobalRights* 27 August 2015) <<https://www.openglobalrights.org/extreme-inequality-as-the-antithesis-of-human-rights/>> accessed 07 November 2020.

<sup>20</sup> *ibid.*

C25.S2

## 25.2 Not Enough or Too Much: New Critiques of Human Rights in the Era of (Neoliberal) Populism

C25.P10

Both the latest round of intellectual critiques of human rights and the rise of the populist right—and its specific targeting of human rights—emerge in the context of a general social fallout generated by the neoliberal world order that has become increasingly manifest during the past decade or so.<sup>21</sup> Established legitimization narratives no longer work as the gap between what people perceive as reality—which has of course itself become a highly contested concept—and its ‘official’ image has become unbridgeable. Rising inequality, the precarization of labour, and the immiseration of growing sections of society, especially—but increasingly not only—in the global South, have led to massive disenchantment amongst those being –or feeling—left behind.<sup>22</sup> The consequent structural instability and social fragmentation has in turn led both to an ever more forceful policing of discontent by public authority and to a (right) populist turn based on old and new irredentist narratives.<sup>23</sup>

C25.P11

One backdrop to this development is the gradual transformation of the role of the state after World War II, from one geared to the provision of ‘welfare’ and ‘development’ driven by a broad (if often highly selective) egalitarian logic, to one largely limited to policing market functionality and insuring market failures, and therefore accepting of the social stratification produced (and required) by the market.<sup>24</sup> The contemporary state thus operates in a comparatively reduced policy space that structurally curtails its capacity to directly attend to the demands brought to it by its constituents, including in the area of social and economic policy.<sup>25</sup> Hence, while in Western constitutionalism’s near dominant script, the state remains the main duty bearer vis-à-vis its citizens, fulfilment of its concomitant obligations

<sup>21</sup> For example, William Davies, *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition* (Revised edn, Sage 2017).

<sup>22</sup> For example, Alston’s strongly worded statement on austerity measures in Brazil: OHCHR, ‘Brazil 20-Year Public Expenditure Cap Will Breach Human Rights, UN Expert Warns’ (*UN News*, Geneva 9 December 2015) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21006>> accessed 07 November 2020; as well as his much-noted visits to the United States and the United Kingdom in his capacity as Special Rapporteur for Extreme Poverty and Human Rights; see OHCHR, ‘Statement on Visit to the USA, by Professor Philip Alston, United Nations Special Rapporteur on Extreme Poverty and Human Rights’ (*UN News*, Washington 15 December 2017) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22533>> accessed 11 September 2020; OHCHR, ‘Statement on Visit to the United Kingdom, by Professor Philip Alston, United Nations Special Rapporteur on Extreme Poverty and Human Rights’ (*UN News*, London 16 November 2018) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23881>> accessed 11 September 2020.

<sup>23</sup> Jan Erik Grindheim, ‘Why Right-Leaning Populism Has Grown in the Most Advanced Liberal Democracies of Europe’ (2019) 90 *The Political Quarterly* 757.

<sup>24</sup> This is of course not to romanticize the classical welfare state not least as it is not necessarily associated with an egalitarian logic; there are many cases in which the real-life incarnations of these state models have preserved established social strata and have ‘purchased’ greater equality only at the cost of the purposive exclusion or minoritization of certain categories, such as women, ‘minorities’, or immigrants, or indeed of the global South (aka the third world); it is nonetheless the case that welfare states tended to actively seek to balance the interests of capital and labour within their jurisdictions and, at least under the specific conditions of post-war (Western) Europe and (North) America, were thereby able to prioritize redistributional policies that had social inclusionary and equality-enhancing effects; similarly, the classical developmental states of the South—especially the (so called) Asian Tigers; see, classically, TH Marshall, *Class, Citizenship and Social Development* (CUP 1950); Frank Nullmeier and Franz-Xaver Kaufmann, ‘The Post-War Welfare State Development’ in Francis G Castles and others, *The Oxford Handbook of the Welfare State* (OUP 2012) ch 6; Giandomenico Majone, ‘The Regulatory State and Its Legitimacy Problems’ (1999) 22 *West European Politics* 1; David Trubek, ‘Developmental States and the Legal Order: Towards a New Political Economy of Development and Law’ (2008) University of Wisconsin Legal Studies Research Paper 1075, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1349163](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349163)> accessed 07 November 2020.

<sup>25</sup> Florian Hoffmann, ‘Revolution or Regression: Retracing the Turn to Rights in “Law and Development”’ in Jarna Petman (ed), *Finnish Yearbook of International Law, Volume 23* (2016) 45–70.

increasingly transcends its jurisdictional and fiscal remit.<sup>26</sup> Indeed, while ‘on paper’ states continue to be the sovereign monads of Vattelien international law, they have factually mutated into nodes within overlapping normative networks that can only fulfil their fundamental tasks collectively, in conjunction with other states, intermediated by international organizations or, indeed, alongside different types of non-state actors such as corporations or civil society organizations.<sup>27</sup> A further element of this transformation has been the growing juridification and, indeed, judicialization of politics under the auspices of an expansive rule of law and good governance agenda. Ever more aspects of national and international political life have become legalized and judicial bodies have (been) turned into core instruments for the disciplining of the domestic and international policy process.<sup>28</sup> This has in turn fostered the technocratization of democratic process and exacerbated the legitimacy gap that is at the base of the turn to the populist right.<sup>29</sup>

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Human rights have been in the midst of these transformations and have variously been seen as either handmaidens of the neoliberal advance or as instruments of its containment, as productive of an unrealistic sense of (welfare) entitlement or as a necessary entrenchment thereof, as overstressing the fiscal capacity of individual states or as a privileged idiom to articulate and concretize human dignity in a post-national world. The increasing legalization of politics has exacerbated this ambivalence, as it has shifted rights to the centre of the policy process while simultaneously tightening the constraints under which governments must operate in order to fulfil the resulting obligations.<sup>30</sup>

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Yet, while the growing ambivalence that surrounds rights discourse has certainly pierced the aura of self-evidence that surrounded it in the 1990s, rights remain, despite debate about their role and pedigree, a ‘fact of the world’ and still provide one of the principal frameworks for people on the ground to protest against real or perceived injustice and to demand minimally dignified living conditions.<sup>31</sup> Perhaps it is precisely this strange facticity of rights language in the face of not only their permanent violation but also continuous contestation that lies at the base of this latest round of critiques, all of which appear to be driven both by puzzlement over their strangely stubborn resilience as well as by irritation about the public attention they still draw, to the detriment of alternative ‘projects.’<sup>32</sup> What is more, none of these critiques are entirely new, they are arguably merely the newest iteration of particular strands in the history of ideas about human rights and most directly succeed the previous round of debates that took place during the so called era of human rights triumphalism in the 1990s and early 2000s.<sup>33</sup> Some critics of the critics have in fact argued that most if not all

<sup>26</sup> For example, Hoffmann, ‘Facing South’ (n 13).

<sup>27</sup> This contention of course engages a large and diverse literature on the transformation of the state, state sovereignty, and the ‘international,’ which cannot be reviewed here; in (international) law, relevant reflection includes, for example, Benedict Kingsbury, Nico Krisch, and Richard B Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15; Andreas Fischer-Lescano and Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999.

<sup>28</sup> Ran Hirschl, ‘The New Constitution and the Judicialization of Pure Politics Worldwide’ (2006) 75, 721; Florian Hoffmann, ‘The Future of Social Rights’ in Nehal Bhuta (ed), *The Futures of Human Rights* (2020).

<sup>29</sup> Alexander Somek and Michael A Wilkinson, ‘Unpopular Sovereignty?’ (2020) 83 *The Modern Law Review* 955; Michael A Wilkinson, ‘Authoritarian Liberalism as Authoritarian Constitutionalism’ (2018) LSE Legal Studies Working Paper No 18 <<https://ssrn.com/abstract=3281320>> accessed 07 November 2020.

<sup>30</sup> Hoffmann, ‘The Future of Social Rights’ (n 28).

<sup>31</sup> Eduardo Rabossi, ‘La Teoría de Los Derechos Humanos Naturalizada’ (1990) 5 *Revista del Centro de Estudios Constitucionales* 159.

<sup>32</sup> For an example of dimly concealed irritation, Kennedy (n 14), which, despite a gap of ten years, displays the same sense of exasperation with the international human rights movement.

<sup>33</sup> For example, Susan Marks, ‘The End of History? Reflections on Some International Legal Theses’ (1997) 8 *European Journal of International Law* 449.

substantive points about human rights have already been made during that period, which was dominated by debates about cultural relativism, liberal versus communitarian political theory, and the meaning and consequences of (neoliberal) globalization.<sup>34</sup> While this is broadly true, the circumstances in which human rights now operate and in relation to which the new critiques are made have become much more dramatic and therefore more revealing of the underlying issues faced by and held against human rights—a point that Alston has also made.<sup>35</sup> In addition, there have been a number of methodological shifts in relation to the earlier debates, most notably the mobilization of historiography as a tool to critically dissect the meaning of human rights over time as well as an attempt to measure and critically assess the empirical workings and effects of human rights.<sup>36</sup> These two methodological turns have raised the stakes of the debate and require a new level of response—with Alston having, again, been a pioneer within the human rights community in taking up this challenge.<sup>37</sup>

So what does the challenge consist of? One way of slotting these new critiques is in relation to the classical political categories of left, right, and centre, as per the respective positions assumed by their exponents or by the critical instruments employed. This is a common if contestable classification, as the meaning of the left–right spectrum has become (somewhat) fluid and as at least some of the critics have been loath to be identified with these traditional political positionalities—a certain irony given that all critiques contend in one way or another that human rights stand in the way of dealing politically with what, in their view, is fundamentally political. Yet, for all the deficiencies of the left–right spectrum, it is, arguably, still relevant not only to understand what human rights are intellectually up against but also to where these positions stand vis-à-vis the parallel (right) populist programme.<sup>38</sup>

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<sup>34</sup> Some of the most discussed critical engagements were, ironically, published as part of the Oxford Amnesty Lecture series; for example, Barbara Johnson (ed), *Freedom and Interpretation: The Oxford Amnesty Lectures, 1992* (BasicBooks 1993); Stephen Shute, *On Human Rights: The Oxford Amnesty Lectures* (Susan Hurley ed, Basic Books 1993); Olwen H Hufton, *Historical Change and Human Rights: The Oxford Amnesty Lectures* (Basic Books 1995); Matthew J Gibney (ed), *Globalizing Rights: The Oxford Amnesty Lectures 1999* (OUP 2003); Nicholas Owen (ed), *Human Rights, Human Wrongs: The Oxford Amnesty Lectures, 2001* (OUP 2003); Tony Evans (ed), *Human Rights Fifty Years on: A Reappraisal* (MUP 1998).

<sup>35</sup> Alston ‘The Populist Challenge’ (n 2) 1.

<sup>36</sup> On the historiographical turn in human rights, Samuel Moyn, *Human Rights and the Uses of History* (Verso 2014); Jan Eckel, ‘Human Rights and Decolonization: New Perspectives and Open Questions’ (2010) 1 *Humanity* 111; Jenny S Martinez, *The Slave Trade and the Origins of International Human Rights Law* (OUP 2014); Roland Burke, *Decolonization and the Evolution of International Human Rights* (University of Pennsylvania Press 2013); Daniel R Maul, *Human Rights, Development and Decolonization: The International Labour Organization, 1940–70* (Palgrave Macmillan 2012); Fabian Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria* (1st edn, University of Pennsylvania Press 2013); Steven LB Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (2016); for the empirical turn in human rights, Philip Alston and Colin Gillespie, ‘Global Human Rights Monitoring, New Technologies, and the Politics of Information’ (2012) 23 *European Journal of International Law* 1089; AnnJanette Rosga and Margaret L Satterthwaite, ‘The Trust in Indicators: Measuring Human Rights’ [2008] *Berkley Journal of International Law* <<http://www.ssrn.com/abstract=1298540>> accessed 10 November 2020; Debora Valentina Malito, Gaby Umbach, and Nehal Bhuta (eds), *The Palgrave Handbook of Indicators in Global Governance* (Palgrave Macmillan 2017); Kevin Davis and others (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (OUP 2012); Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge 2010).

<sup>37</sup> For instance, his engagements with, on one hand, human rights historiography in Philip Alston, ‘Does the Past Matter? On the Origins of Human Rights’ (2013) 126 *Harvard Law Review* 2043; and, on the other hand, empirical human rights research such as in Alston and Gillespie (n 36); or in Philip Alston, ‘Towards a Human Rights Accountability Index’ (2000) 1 *Journal of Human Development* 249.

<sup>38</sup> It is, arguably, also the most—and perhaps the only—concrete way to distinguish these various positions at this moment, as the (taxonomically) more relevant question of their epistemic pedigree and vision is not addressed in sufficient detail (in these critiques). While this deeper engagement needs, thus, yet to be had, both on part of the critics and on part of their critics, the left–centre–right taxonomy shall here be used for heuristic purposes and very much in (invisible) quotes.

C25.P15

The rights–critical spectrum can hence be seen as being made up of, firstly, a right critique that takes issue either with the universalism and egalitarianism of human rights as entitlements meant to be held by everyone equally, individually and in abstraction from any form of collective identity; or with their (legal or moral) trumping of the ‘objective’ requirements of social (self-)organization through market mechanisms within a capitalist framework. Of these two seemingly incompatible—though, arguably, deeply entangled<sup>39</sup>—views, the former can be broadly associated with the populist, the latter with the neoliberal right. It is the neoliberal right critique that has gained particular intellectual currency through the likes of Eric Posner and others working in the wake of the ‘law and economics’ movement.<sup>40</sup> It argues, *in nuce*, that rights—in particular when they come in the form of constitutionally entrenched or internationally positivized and fully justiciable social and economic rights that mandate minimum levels of social protection—are impediments to the efficient allocation of scarce resources through market mechanisms and, as such, distort the formation of the ‘just market value’ of such basic goods such as health care, education, housing, or food, water, and sanitation. In this vein, rights are seen as standing in the way of austerity measures required to correct (allegedly) inefficient welfare policies that purport to provide these goods through redistributive schemes. Posner’s rights critique is embedded in a wider diatribe against international law, which he sees as a similarly distortive attempt to establish an international rule of law despite the absence of a world state.<sup>41</sup>

C25.P16

Next, a new centrist critique has been dominated by the revisionist human rights historiography around Samuel Moyn that sees as ‘the most troubling shortcoming of the contemporary attempt to give human rights a history [... the distortion of] the past to suit the present.’<sup>42</sup> As an antidote, this new revisionism has contested the semantic unity of what has been called human rights and has, instead, advocated a ‘discontinuist’ reading of the various events around which the human rights narrative has been constructed.<sup>43</sup> The overarching point has been that the politics surrounding the progressive legalization of (international) human rights reveals their fundamentally epiphenomenal character as ideological constructs legitimating and naturalizing (great) power politics—a perspective that does not, however, much transcend the long-held premises of classical (political) realism. Moyn in particular has notoriously proposed to divide the post-World War II timeline of international human rights into two fundamentally distinct semantic phases, with the former ranging from their inception in the 1940s to just after the decolonization period in the 1960s, and which engages rights language in order to express claims for national sovereignty in the context of Third World emancipation; and the latter, as of the 1970s to the contemporary period, in which rights are re-signified as a simultaneously anti-sovereignist and anti-communist cosmopolitan project meant to substitute (real-existing) socialism as the primary ideal for emancipatory politics.<sup>44</sup> This later project, however, is, to Moyn, entirely utopian, driven by

<sup>39</sup> Brown, *In the Ruins of Neoliberalism* (n 17).

<sup>40</sup> Posner, *The Twilight of Human Rights Law* (n 10).

<sup>41</sup> Eric A Posner, *The Perils of Global Legalism* (University of Chicago Press 2009).

<sup>42</sup> Moyn, *Human Rights and the Uses of History* (n 36) 13.

<sup>43</sup> See further, Florian Hoffmann and Bethania Assy, ‘(De)Colonizing Human Rights’ in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (OUP 2020) 198–215.

<sup>44</sup> Moyn, *The Last Utopia* (n 10) 120ff.

(Northern) liberal elites and therefore ‘not enough’ when it comes to taming the neoliberal beast.<sup>45</sup>

C25.P17

To Moyn, human rights (in their post-1970s connotation) suffer from the crucial blind spot of (in)equality, as they allegedly neither articulate an egalitarian utopia nor are capable of serving as instruments against inequality.<sup>46</sup> By exclusively focussing on floors of protection rather than on any ceiling, they actually end up doing part of neoliberalism’s dirty work of maintaining the lowest strata of society just around subsistence level while removing any cap on how far upward stratification can go. Hence, insofar as human rights merely imply formal status equality and not distributive equality, they are, in this view, unsuitable as instruments against the neoliberal social fallout. Yet, while Moyn’s contentions on human rights and (in)equality mimic the classical Marxist critique of rights (on which more will follow), he appears not to be prepared to actually engage in Marxist analysis. Instead, he eschews consistency in order to occupy a middle-of-the-road whereby rights are meant to be neither all bad nor enough to address the structural problems of contemporary societies. But he largely refrains from taking an explicit position in the ongoing discussion on the roots causes of these problems and skirts question of alternatives.<sup>47</sup>

C25.P18

Lastly, a set of what could, broadly, be termed new left critiques tend to see human rights as an ideological configuration that distorts our understanding of social reality.<sup>48</sup> More specifically, they claim that human rights do not seek to address social ills, such as different forms of violence, oppression, or exploitation by state and non-state actors, discrimination, inequality, immiseration, and, generally, the denial or curtailment of human dignity, on a structural level but merely individually and piecemeal. As such they are taken to help maintain these causes (cumulatively ‘the system’) intact or even aid their proliferation and they obscure and obstruct more effective ways of addressing them. Insofar as human rights substitute genuinely political action—which is here often understood as involving the open struggle over (material or immaterial) distributional schemes—with a (legally) formalized and individualized approach to merely the symptoms produced by these underlying causes, they effectively de-politicize or even naturalize the latter and thereby contribute to their continuity and reproduction. They are, hence, seen as essentially system stabilizing and retrogressive.

C25.P19

This broad bottom line forms the intersection of a host of otherwise distinct but often cross-referenced left critical projects that have emerged or re-emerged during the past decade or so. The specific genealogies and assumptions of these critical theories cannot be sketched here, but their central theme is, arguably, already set out in Marx’s triple critique of rights. To him, they, firstly, articulate a fundamentally anti-social, atomistic, and purely self-interested conception of human nature; secondly, they are co-constitutive—as supposedly ‘equal’ property rights—of the commodity form and thus act as central elements of the capitalist reproduction regime; and, thirdly, they are ideological smokescreens that cloak the inherent inequality of commodity exchange through the mirage of equal rights.<sup>49</sup> Many, but not all, of the new left critiques are explicitly or implicitly premised on this contention and

<sup>45</sup> Moyn, *Not Enough* (n 10).

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.*

<sup>48</sup> See the rights-critical literature listed in (n 10); in particular, Balibar (n 10); Barreto (n 10); Dickinson and others (n 10); Hopgood (n 10); Maldonado-Torres (n 10); Menke (n 10); Marks (n 10); Mignolo (n 10); Rathore and Cistelean (n 10).

<sup>49</sup> Darren J O’Byrne, ‘Marxism and Human Rights: New Thoughts on an Old Debate’ (2019) 23 *International Journal of Human Rights* 639.

they have, consequently, framed rights as ‘part of the problem’ of capitalism (aka the neo-liberal world order) rather than as a solution.<sup>50</sup>

C25.P20

In essence, these rights-critical perspectives have transposed the Marxian baseline into different theoretical keys, so that the ideological cloaking function of rights vis-à-vis class difference in Marx is turned into one in relation to race, women, gender, or coloniality/subalternity. The critical algorithm is, however, the same, namely that rights help paint over and are thereby implicated in the exclusion, exploitation, or elimination of certain categories of humans. This process is seen as not accidental but constitutive of modern/Western (aka capitalist, racist, gendered, or imperialist/neo-colonialist) societies and cannot, as the logic of rights presumes, be addressed through the very state apparatus—as the primary addressee of rights claims—that is itself a product of and necessary element in capitalist reproduction. To be sure, like Marx himself, many of these critiques acknowledge a positive role for rights in particular moments or in relation to specific issues, or at least as a tactical device to advance specific progressive causes; yet they would insist that the problematic aspects of rights prevail and that, therefore, an investment in rights as a politically relevant form of struggle is misplaced.<sup>51</sup>

C25.P21

In sum, then, human rights are too much for the right critique and too little for the centrist and left critiques. To be sure, none of these intellectual interventions should, *prima facie*, be thrown in with the unqualified rumblings of the populist right. These are, ultimately, attempts at a good faith engagement with what, from their perspective, has been an overly dominant discourse and attached professional community.<sup>52</sup> Yet, the political empowerment of the populist right, and the centrality the critique of human rights plays in its rhetorical strategy, makes this crunch time for human rights—a time, in other words, in which even the critique within the confines of intellectual debate is not politically innocent but has to account for the consequences of the vision it enounces. Likewise, the defence of human rights has to engage with these alternative visions and make its case beyond the mere reiteration of the self-evidence of the existing framework. As Alston put it with characteristic frankness, ‘human rights proponents need to urgently rethink many of their assumptions, re-evaluate their strategies, and broaden their outreach, while not giving up on the basic principles.’<sup>53</sup> This is, arguably, at the heart of Alston’s dual injunction against both the new critics and the established human rights community, lest both sides end up unwittingly playing the game of the populist right.

C25.S3

### 25.3 Beyond ‘Straw Rights’: Some Initial Responses to the Intellectual Critique(s)

C25.P22

In order not to play that game and reduce human rights to a mere cipher, the critique must be taken seriously and the case for human rights must be built in response to it. This evidently much larger endeavour can only be outlined here. It must begin with a (preliminary) assessment of the critical angles sketched earlier in order to frame the types of responses required; starting with the (neoliberal) right critique, it is, on a base level, perhaps the most

<sup>50</sup> See, again, Kennedy (n 14).

<sup>51</sup> Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (2019), at 378.

<sup>52</sup> David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

<sup>53</sup> Alston, ‘Human Rights under Siege’ (n 9).

straightforward to respond to as it actually takes human rights quite seriously. Indeed, it considers the proliferation of rights and their (increasing) enforcement through judicial or quasi-judicial bodies to be potentially perilous to the functioning of a capitalist market economy.<sup>54</sup> The neoclassical framing of capitalism that underlies this reading is notoriously premised on the ideal of a largely unimpeded market logic as the fundamental principle behind a resource efficient social order. Human rights, alongside redistributive welfare policies and, generally, all state intervention beyond the maintenance of market functionality are here seen as potentially detrimental to that order and therefore as dangerous. While the guaranteeing of basic civil rights in the domestic sphere is taken to be required in order to allow for rational agents to operate ‘freely’ and therefore efficiently, rights activism that is capable of distorting the outcomes of ‘free’ market exchange is clearly as bad inspired by what one of this vision’s doyens has notoriously termed a mirage, notably social justice and the egalitarian ideals attached to it.<sup>55</sup> Hence, contrary to the left and centrist critiques, the neoliberal perspective has no difficulties with associating rights with equality and, indeed, it disdains them for precisely their egalitarian impulse that contradicts the vertical differentiation that the logic of capitalism requires. Even though Posner and others have couched their treatises in the language of ideology, critique in order to expose rights as the plaything of left liberals and closet socialists, rights do not really play an ideological function in this framework. On the contrary, to the neoliberal critique, they are pretty much doing what they advertise, which, in turn, essentially corresponds to what most in the human rights community think they should be doing. This is, incidentally—or maybe not so incidentally—, as true for the neoliberal as it is for the populist right critique as both are inconvenienced by what they see as the excessive and excessively successful use of rights to promote what are to them all the wrong causes—amongst which are (redistributive) public policies to guarantee universal access to minimum welfare standards premised on the equal dignity of all, including non-nationals. The fact that these two ‘rights’ both associate rights and their defenders with these causes obviates the need for further response.

The centrist critique, in contrast to the (neoliberal) right critique, does treat human rights as an ideological construct, and thus as both epiphenomenal and ephemeral, but does not frame this contention as a formal ideology critique; instead it mobilizes the purported objectivity of historical fact to make its case (of sorts) against human rights. A reprieve to it will, hence, involve an engagement with the historiographical premises under which the revisionist historians operate, an endeavour to which Alston has himself contributed with his seminal review *Does the Past Matter? On the Origins of Human Rights*.<sup>56</sup> There he unmasks the revisionists’ portrayal of the human rights movement as following a crudely anachronistic ‘linear progress narrative’ as a straw person image that side-lines the real questions about historiographical method that underlie the revisionist argument. For that argument, in essence, contends that the question of whether, or not, the concept of human rights is semantically continuous over time and whether, or not, its use by different actors at particular moments only serves the ideological cloaking of ulterior motives is one of mere historical fact; hence, whoever musters the more accurate historical evidence, which of course the revisionists claim to have been doing, is bound to ‘win’ the debate.

<sup>54</sup> Posner, *The Twilight of Human Rights Law* (n 10).

<sup>55</sup> Friedrich A von Hayek and Friedrich August Hayek, *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice* (University of Chicago Press 1978).

<sup>56</sup> Alston (n 37).

C<sub>25</sub>.P<sub>24</sub> This, however, as Alston points out, is a ruefully under-complex treatment of the historiographical challenge at hand. Indeed, it fails to respond to a series of methodological questions that inform the way in which human rights can be reconstructed historically. As he puts it:

C<sub>25</sub>.P<sub>25</sub> Moyn heavily discounts the significance of the ebb and flow of rights discourse across the centuries, and of the often long and bitter struggles that have helped to shape today's complex and multifaceted human rights endeavors. By doing so, he is able to conjure up a parody of the human rights movement with shallow and unconvincing roots, defined almost exclusively from an America-centric vantage point, and sure to be swept away by the emergence of an international order no longer dominated by the West. Such a vision might explain what some consider to be the parlous situation of human rights in certain advanced democracies, but it does little to help us understand why, for example, one of the most vibrant human rights cultures in the world today is to be found in India.<sup>57</sup>

C<sub>25</sub>.P<sub>26</sub> To respond to the latter, it would be necessary to first reflect on some of the foundational questions of historiographical method: Is it, for instance, synchronic context or diachronic reception that bestow ideas such as human rights with meaning at any one point of time? Are ideas articulations of fundamental propositions, timeless *philosophemes* that occur in different guises throughout concrete history, or are they, instead, *epistemes* that emerge from the material and linguistic conditions of their societal context;<sup>58</sup> or are they instantiations of the intentions of their articulators who think within specific discursive practices;<sup>59</sup> or is the meaning of human rights really a combination of all of these? And how are ideas transmitted across time, how is the relationship between author and reader, removed in time and by hermeneutic horizon, conceived?<sup>60</sup> If the revisionist charge against progress narratives has correctly pointed to the latter's anachronistic use of historical evidence, the revisionists have not really provided a more complex and self-reflective historiography either. Instead, they have tended to style the debate as one over the correct reading of historical fact rather than assuming what it really is, notably an exchange over incommensurate metatheoretical positions on the history of the idea of human rights.

C<sub>25</sub>.P<sub>27</sub> Hence, where progress historiography seeks to inductively (re)construct causal connections between different event contexts (aka periods) to establish the cross-temporal meaning of human rights, the revisionist approach starts from a particular premise about that meaning and then proceeds to find its articulation in a specific event context. In other words, the former approach seeks to establish meaning from presumed facts, the latter the facts from presumed meaning.<sup>61</sup> It is, however, these presumptions that represent the open flank of either approach. For if the progress narrative's quest for cross temporal meaning carries the inherent risk of over-interpretation and anachronism, then the revisionists are bound to base the plausibility of their narrower definition on diffuse assumptions about general

<sup>57</sup> *ibid* 2081.

<sup>58</sup> For example, Donald R Kelley, 'What Is Happening to the History of Ideas?' (1990) 51 *Journal of the History of Ideas* 3; Reinhart Koselleck, *Vergangene Zukunft: Zur Semantik Geschichtl. Zeiten* (Suhrkamp 1979) 130; as well as, generally, Leonard Krieger, *Time's Reasons: Philosophies of History Old and New* (University of Chicago Press 1989).

<sup>59</sup> Quentin Skinner, 'Meaning and Understanding in the History of Ideas' (1969) 8 *History and Theory* 3, 35.

<sup>60</sup> Melvin Richter, 'Reconstructing the History of Political Languages: Pocock, Skinner, and the *Geschichtliche Grundbegriffe*' (1990) 29 *History and Theory* 38; Hans-Georg Gadamer, *Truth and Method* (2nd edn, Continuum 2004).

<sup>61</sup> Hoffmann and Assy (n 43) 205.

intellectual history.<sup>62</sup> The historiographical debate on its own will thus remain inherently inconclusive as each of the two positions is marked by what could be termed a hermeneutic ‘problem of induction’—that is, within a certain set of premises, no amount of additional evidence will corroborate the correctness of these premises vis-à-vis their opposite, but will tend to merely reinforce them.<sup>63</sup> This leads to an incremental closure of the epistemic horizon and to increasing incommensurability vis-à-vis alternative interpretations. The only unequivocal fact that materializes from this debate is that human rights emerged in the 1940s from earlier incarnations as a powerful signifier that, because of its very conceptual openness and semantic indeterminacy, has engaged people’s imagination all through to the 1970s and on to the contemporary period. This, then, represents their conceptual continuity, despite and because of their discontinuous use in different contexts and periods.

C25.P28

History alone will not therefore resolve the question of whether human rights are, can, or should be relevant to transformative social change in general, and to advancing equality in particular. The question of whether human rights as they are used by, amongst others, the human rights community as of the 1970s are actually the same thing as the rights that commanded at least some sustained attention during, say, the post-World War II or decolonization periods; or whether those rights are in turn recognizable re-incarnations of their use in the anti-slavery or women’s suffrage movements in the nineteenth century, or, indeed, of national bills of rights as of the eighteenth century, needs to be reformulated.<sup>64</sup> The real question is, arguably, neither whether the conceptual continuity of human rights can ultimately be demonstrated nor whether their use in these different instances can be shown to have been ‘authentic’ by some semantic standard or to have merely been ‘ideological’; the real question is how human rights have acquired such power of signification over time and beyond any semantic coherence or political salience. The answer to this question lies, arguably, not only in the archives but also in the multifaceted practices associated with rights discourse, from its ‘colloquial’ use to articulate injustice and demand accountability, via its continued appearance as a form of political protest and militancy, to the complex dynamics of rights-based litigation and its repercussions. Hence, the meaning of rights and their specific relevance at any one moment cannot primarily be determined by their genealogy –and some pre-determined functionality associated therewith—but it rather resides in their evolution over time. The latter is driven not by a uniform and hermetic human rights movement but decentrally by all those using rights across a diversity of contexts and by the emergence of various (intended and non-intended) consequences thereof.

C25.P29

Indeed, the left critique, arguably, also suffers from this genealogical bias, as it tends to derive the meaning and role of rights from premises about their origins and base function rather than from an engagement with ‘rights-in-practice.’ Hence, their focus is on the ideology

<sup>62</sup> See, inter alia, Samuel Moyn and Andrew Sartori, ‘Approaches to Global Intellectual History’ in Samuel Moyn and Andrew Sartori (eds), *Global Intellectual History* (CUP 2015).

<sup>63</sup> This involves a large and multifaceted discussion on the historiography of ideas and historical method that cannot be easily be summed up; see, generally again Richter (n 60); Aviezer Tucker, *A Companion to the Philosophy of History and Historiography* (2011) part II; as well as recent discussion in international legal history, such as Rose Parfitt, *The Process of International Legal Reproduction* (2017); Anne Orford, ‘International Law and the Limits of History’ in Wouter Werner, Marieke De Hoon, and Alex Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (2017) 297–320.

<sup>64</sup> See, inter alia, Alston ‘Does the Past Matter?’ (n 37); Alston and Gillespie (n 36); Alston, ‘Towards a Human Rights Accountability Index’ (n 37); Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press 2009); Lynn Hunt, *Inventing Human Rights: A History* (First published as a Norton paperback, WW Norton 2008); Peter N Stearns, *Human Rights in World History* (Routledge 2012); Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (3rd edn, University of Pennsylvania Press 2011).

critique of right by which their ideological function must be exposed and (thereby) transcended. As argued earlier, while the particular critical vectors employed to this end are diverse, they all broadly follow the framework set out in Marx's critique of rights in capitalism and therefore tend to reconstruct rights in relation to premises about their genesis rather than through an analysis of the real-life practices they underwrite. This would seem to make the Marxist account of rights prone to deductive over-interpretation in the sense that the factual workings and effects of rights 'out there' are exclusively deduced from premises about their function in the political economy of capitalism. While this conforms with the historical materialist method, it risks an under-complex account of the 'real' life of rights (under capitalism). For rights activism is not static but highly time-dynamic, involving elements—people, institutions, legal frameworks—that, over time, generate effects that generate further effects and so on. In the language of systems theory, which also owes some debts to Marx, 'rights-in-practice', produce systemic recursivity, self-reflexivity, and, more often than not, nonlinear consequences.<sup>65</sup> The state is here a test tube in which the different and decentrally generated impulses from the different uses of human rights are mixed together to produce uncertain and often unstable outcomes. While some of these impulses may well be generated by corporate actors seeking value maximization—much in the way already understood by Marx—many actually come from the smallest units of agency, notably people, who nearly always resort to (legal) rights as a last resort to try to resist the concrete instantiations of an ever-advancing commodification process.

C25.P30

To be sure, this is not a romantic story of 'little people' (eg Galanter's 'have-nots') going against the 'big bad state' or 'big bad companies' (the 'haves') through human rights upheld by heroic courts, because the results of rights-driven judicialization are neither uniform nor uniformly in favour of the 'have-nots'.<sup>66</sup> Fundamentally, their repercussions over time grow less transparent as complexity augments. Yet that is the point: not that 'rights-in-practice' may (also) be enactments of neoliberal-capitalist ideology but that they are capable of irritating 'the system' despite and beyond their ideological function. Concretely, rights irritate Marx's 'law of value' in capitalism in two ways: they produce a certain form of (legal) uncertainty against capital's requirement of a certain form of legal certainty and they can, momentarily though, over time, cumulatively, impact on the amount of extractable surplus value in particular sectors, forcing capital to adapt in unplanned ways. This dual irritation, generated from within 'the system' itself and regardless of its concrete consequences at any one point of time, produces subversive—and potentially emancipatory—dysfunctionalities. Marx himself recognized the self-subversive potential of capitalism though neither he nor his followers, nor anyone else, have so far been able pinpoint exactly how this process unfolds: whether it is only self-conscious struggle or also the more diffuse and complex interaction of emergent properties, including—but not limited to—those that are generated by the long term and indirect consequences of rights-based activism.

<sup>65</sup> See, inter alia, Günther Teubner, 'Counter-Rights: On the Trans-Subjective Potential of Subjective Rights' in Poul F Kjaer, *Law of Political Economy* (2019).

<sup>66</sup> See, classically Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95–160, doi: 10.2307/3053023; Douthett Lettinga and Lars van Troost, *Can Human Rights Bring Social Justice?* (2015); Alicia E Yamin and Siri Gloppen, *Litigating Health Rights: Can Courts Bring More Justice to Health?* (2011); Ferraz, 'Harming the Poor through Social Rights Litigation: Lessons from Brazil,' (2010) 89 *Texas Law Review* 1643, at 1667.

C25.S4

## 25.4 Quite Necessary (Still): Human Rights in an Unequal World

C25.P31

Ultimately, all three intellectual critiques as well as their distorted reflection in the populist right's histrionics, might be due to a deeper frustration with the world that has been emerging over the past decades. Frustration tends to derive from two sources, one pointing to the past and the disappointed expectations of how differently that world could, should, or might have emerged from an earlier vantage point; the other to the future and a sense of despondency over the often seemingly unsurmountable odds involved in actually changing the world to align with those expectations. Where these critiques of course differ is about what the expectations and the odds for realizing them are. For the neoliberal (right) critique it seems to be a world without redistributive welfarism and the gradualist egalitarianism associated with it, a vision that, at least for its critics, is plainly on course to being achieved but which, for its proponents, is apparently still being challenged by the, to them, irritating recurrence of such macroeconomic challenges as financial crises, climate change, pandemics, as well as political claims for social justice underwritten, inter alia, by rights-based social constitutionalism.<sup>67</sup> By (unsurprising) contrast, the right's frustration is the left's (and also centrist's) hope, namely the achievement of social justice through equality, broadly understood as encompassing both status and distributional equality and, concomitantly, the eventual elimination of exploitation and discrimination. If, as especially Moyn argues, this vision, was already only insufficiently realized during the West's post-war welfarist consensus—not least on account of its asymmetric application both within and in relation to the global South—the rise of neoclassical economics and neoliberal governance as of the late 1970s has systematically undermined egalitarian politics and marginalized equality as a political objective. Indeed, the apparent fall in interstate inequality over the past decade, largely due to the rise of China and other emerging economies, seems to have been bought through a rise in intrastate inequality the world over.<sup>68</sup> From this vantage point, inequality is not only an essential denial of social justice but also a root cause for the (re-)emergence of the populist right and the breakdown of neoliberal governance.<sup>69</sup> Yet, to these critics, it has largely been excised from mainstream political discourse and has been replaced by a fragmented and depoliticized focus on 'the poor,' on vulnerable groups, and on mere survival sufficiency. Human rights are, as was seen, alleged to being key instruments through which this replacement is realized.<sup>70</sup> They are therefore seen as part of the odds that frustrate the achievement of equality by impeding its return to the centre of political struggle.

C25.P32

Unlike the right critique (whether neoliberal or populist), this cannot but resonate within the human rights community as, arguably, a majority of its self-conscious adherents would identify with the overall aim of social justice and equality. It must therefore be open to engage in critical self-reflection on whether the human rights optic might inadvertently have been drawing attention away from neoliberalism's underlying distributional scheme by narrowing in on specific issues and on partial and minimum remedies.<sup>71</sup> It has also to openly query whether and to what extent human rights activism, not least in and through

<sup>67</sup> Frankenberg (n 16) 101.

<sup>68</sup> See, inter alia, François Bourguignon, *The Globalization of Inequality* (Thomas Scott-Railton tr, Princeton University Press 2015).

<sup>69</sup> Gaby Oré Aguilar and Ignacio Saiz, 'Introducing the Debate on Economic Inequality: Can Human Rights Make a Difference?' (*openDemocracy* 27 October 2015) <<https://www.opendemocracy.net/en/openglobalrights-openpage/introducing-debate-on-economic-inequality-can-human-ri/>> accessed 07 November 2020.

<sup>70</sup> Moyn, *Not Enough* (n 11) 212ff.

<sup>71</sup> See Kennedy (n 52), chs 6, 7.

the courts, might impede potentially more effective and macro-level collective political action, ranging from traditional party electoral politics, via collective (economic) interest representation through trade unions and similar, to broader and often transnational social movements.<sup>72</sup> However, while such querying might provide a more nuanced view of human rights as a means to the end of equality, it will not reveal a fundamental divergence with that end. For anyone as immersed in the real-life human rights community as Alston is, the idea that the latter would espouse inequality as a positive good or happily tolerate it as the inevitable cost of the freedom of a few is spurious. Most contemporary human rights defenders would see themselves as committed to equality every bit as much as their critics, though would understand their human rights activism as a relevant and, indeed, indispensable element of this commitment. While there are, as Alston clearly pinpoints, some in that community who seem to have blind faith in the universal self-sufficiency of human rights, there are many others who hold a more realistic view of rights-in-practice and their place in the bigger scheme of things—with Alston and his unrelenting (self-)irony and disdain for any form of human rights romanticism being, again, the case in point here. Hence, and crucially, where these views and those of the critics differ is not in the commitment to equality but in the assessment of the stakes involved in a transformative politics towards equality. For if the point of the (left and centrist) critics merely was to recuperate equality as a central theme of progressive politics, then their primary focus on human rights and human rights defenders would seem diversionary; even if the critics' handmaiden contention was all there was to human rights, it would still be perplexing why the handmaiden rather than her lady (aka neoliberalism or capitalism) should be picked out for particular censure. After all, and as the neoliberal rights critique plainly demonstrates, the defenders of the dominant political economy are not at all keen on human rights, especially in the comprehensive package in which they are framed today.

C25.P33

Yet, beyond mere rhetoric, when it comes to assessing the long-term impact of human rights as measured against concrete alternative approaches, the jury is still very much out. The test the critics have imposed upon themselves requires them to show that, on one hand, such alternative approaches promise to generate a much stronger transformative energy than human rights have been able to; and, on the other hand, that these alternatives are actively impeded in their emergence by human rights (activism). Both of these conditions express legitimate concerns and call for serious engagement on part of the human rights community, a point Alston has, as was seen, repeatedly made when, for instance, he clearly acknowledges the 'importance of reflecting on the deeper values underpinning human rights' and alerts that we must not merely 'assume that the mere invocation of the latter is sufficient to capture the deeper essence of the enterprise in which we are engaged'.<sup>73</sup> However, if human rights defenders have—in fact for quite some time—been called upon to critically examine their practices, to conjecture their long-term impact, and to cultivate a big-picture vision of their activities, their critics, too, must heed the call to ground their argument in a concrete and plausible outline of social transformation without human rights.<sup>74</sup> That alternative transformational strategies and pathways exist few would doubt. In fact, many human

<sup>72</sup> ME Glasius, 'Economic and social rights and social justice movements: some courtship, no marriage, no children yet' in Ida Lintel, Antoine C Buyse, and Brianne McGonigle Leyh (eds), *Defending Human Rights: Tools for Social Justice: Volume in Honour of Fried van Hoof on the Occasion of His Valedictory Lecture and the 30th Anniversary of the Netherlands Institute of Human Rights* (Intersentia 2012).

<sup>73</sup> Alston, 'Reply to Dudai and Nagaraj' (n 9).

<sup>74</sup> See for an early sum up of the self-critique, Florian Hoffmann, 'Shooting in the Dark: Reflections Towards a Pragmatic Theory of Human Rights (Activism)' (2006) 41 *Texas International Law Journal* 403; and matured by Sarah Knuckey and Margaret Satterthwaite in Chapter 24 in this volume.

rights defenders actively participate in or are at least sympathetic to such strategies, which range from the conventional means of political participation provided in (liberal) democracies, via experimental forms of alternative living, and to more radical and anti-systemic protest movements. Indeed, contrary to their portrayal by Moyn, most people who talk and practice human rights do not do so as a comprehensive political ideology exclusive of other political ideologies or hermetically associated with just one political ideology (liberalism); instead they see human rights as one instrument amongst others to articulate a broad band of political visions grounded in much more complex ideological frameworks. That rights-oriented argument is so (relatively) prevalent in political discourse can thus be read in quite the opposite way from what the critics claim: not that it is a sign of the crowding out of alternative projects but of the frequent use of rights as an articulation of precisely such alternative or transformational projects. Indeed, few, if any human rights defenders would consider their advocacy of, say, economic and social rights as self-sufficient and exclusive of parallel engagements on other fronts. While a human rights optic may place a particular spin on the means a transformational politics can take, the political visions behind rights advocacy are, arguably, as widely open and can be as radically transformational as any alternative framework.

C25.P34

However, against such objections, the critics have tended to build up a dramatic contrast between, on one hand, a professionalized, managerialist, and elite human rights expertocracy (which, in this cliché image, also tends to be from the global North, white, male, Euroamerican(ized), middle class, and, generally, heteronormative); and, on the other hand, those ‘others’ who are (primarily) the victims of human rights violations and subjects of that human rights expertocracy, subaltern, voiceless, often poor(er), overdetermined, and epistemically (re)colonized, as well as frequently in or from the global South and outside of the dominant identarian traits characteristic of the expert class.<sup>75</sup> Needless to say, as a central figure in the international human rights movement—and hence as part of that expertocracy—Alston has had to weather this storm, too, which, by his own account, has at times felt like an additional crosswind in already exceedingly rough seas.<sup>76</sup> However, the devil lies again in the detail here, as a critically self-reflective human rights community must, in principle, be open to being examined in terms of its makeup and functional logic and how the former impact on its relationship to those it purports to aid and protect. Yet, while it is important, indeed, indispensable, to spell out the deep structure, blind spots and dark sides of the epistemic community that pervades professional human rights advocacy, the critics commit a category mistake when they single out the human rights community as a major ‘part of the problem’ or, indeed, as a problem as such.

C25.P35

For what is really meant by this critique is not some problem but rather the deep structure of late (capitalist) modernity itself, a deep structure that afflicts (nearly) everyone everywhere and that determines both the immanent horizon of our knowledge and the threshold for social change. The great achievement of critical thought has not been to overcome this deep structure but to make it explicit and to enjoin us to face up to what modernity really

<sup>75</sup> Accounts in this vein range from Matti Koskenniemi, ‘The Effect of Rights on Political Culture’ in Philip Alston, Mara R Bustelo, and James Heenan (eds), *The EU and Human Rights* (OUP 1999); Matti Koskenniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power’ (2010) 1 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 47; Kennedy, ‘The International Human Rights Movement’ (n 14); Kennedy, ‘The International Human Rights Regime’ (n 14); to Julia Juaréz Krabbe, *Race, Rights, and Rebels: Alternatives to Rights and Development from the Global South* (Rowman & Littlefield 2015).

<sup>76</sup> For example, his public lecture at the London School of Economics (LSE), Alston, ‘The Populist Challenge to Human Rights’ (9 December 2016) <<https://www.youtube.com/watch?v=kAy4RUPVA2w&t=4266s>> accessed 07 November 2020.

always was, notably a deeply ambivalent, hybrid, complex, and contingent message that is very different from the clichéd image enshrined in the *Western* progress narrative.<sup>77</sup> Two contentions follow from this in relation to the human rights community: firstly, that the tendency towards professionalization, managerialism, and, generally, the ‘will to power’ through knowledge is not particular to the human rights community but is inherent to all modern social formations, including those that pursue alternative ways of social transformation. Yet, this modern mode of governmentality is not a hermetic but highly dynamic and often nonlinear process that continuously generates new emergent properties that can be system stabilizing but also transgressive and transformational. No amount of (human rights) managerialism can overcome this fundamental contingency, but neither can a self-conscious ‘counter-disciplinarity’ that rejects all knowledge regimes.<sup>78</sup>

C25.P36

The second contention is that the reality of the human rights community is much more diverse than the caricature dichotomy of elite experts versus victimized subaltern ‘others’ allows for; human rights agency is distributed much more diffusely and is highly dynamic over time; there are clearly power asymmetries and epistemic hegemonies, but they unfold through complex processes of interaction and are continuously manipulated, subverted, side-lined, and re-signified by those stylized by the critics to be merely on the receiving end of the human rights industry.<sup>79</sup> Indeed, the claim of a hegemonic and potentially epistemicidal human rights expertocracy seems to problematically assume that those subjected to it have no meaningful agency (epistemic or otherwise) of their own and are merely under the sway of false consciousness—an assumption that would fly in the face of the express intent of the critics. Indeed, anyone who has experienced the deeply committed yet highly diverse forms of human rights advocacy in some parts of the global South and the fundamental importance accorded to rights by people up against seemingly insurmountable odds could not but give the lie to any such claim.

C25.P37

In the end, the reality of human rights is simply more complex and less determined than either the true believers or their critics are prepared to admit.<sup>80</sup> Fortunately, that complexity is now beginning to be explored both in the incipient turn to ethnography in international legal scholarship and in the growing field of empirical studies of human rights.<sup>81</sup> What emerges from these explorations is that human rights remain the discourse of choice for most people in most places when it comes to framing claims for fundamental human dignity and social justice, but that this framing is only the beginning of a dynamic process that, especially when it becomes institutionalized—for instance in courts—produces diverse

<sup>77</sup> Historically, this argument can be seen to have unfolded between Max Horkheimer, Theodor W Adorno, and Gunzelin Schmid Noerr, *Dialectic of Enlightenment: Philosophical Fragments* (Stanford University Press 2002) and Michel Foucault’s ‘Governmentality’ (eg in Graham Burchell, Colin Gordon, and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991)); Florian Hoffmann, ‘Discourse’ in Jean D’Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019).

<sup>78</sup> Martti Koskeniemi, ‘Law, Teleology and International Relations: An Essay in Counterdisciplinarity’ (2012) 26 *International Relations* 3.

<sup>79</sup> Hoffmann, ‘Facing South’ (n 13).

<sup>80</sup> For the true believer category, see Makau w Mutua, ‘The Ideology of Human Rights’ (1996) 36 *Virginia Journal of International Law* 589.

<sup>81</sup> For the ethnographic turn, see Fleur Johns, *Non-Legality in International Law: Unruly Law* (CUP 2013); Luis Eslava and Sundhya Pahuja, ‘Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law’ (2012) 45 *Journal of Law and Politics in Africa, Asia and Latin America* 195; Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (CUP 2015); for the empirical turn, see again the literature in (n 36); Kevin L Cope, Cosette D Creamer, and Mila Versteeg, ‘Empirical Studies of Human Rights Law’ (2019) 15 *Annual Review of Law and Social Science* 155; Gregory Shaffer and Tom Ginsburg, ‘The Empirical Turn in International Legal Scholarship’ (2012) 106 *American Journal of International Law* 1.

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outcomes over time. Whether these outcomes are taken to be progressive (aka transformational/advancing social justice and equality) or regressive depends, in part, on the criteria used to measure progress and on the particular point in time at which this measurement is taken. Should the impact of rights, for instance, be measured by their symbolic or material empowerment of injusticed individuals and groups,<sup>82</sup> or by their effect on poverty reduction,<sup>83</sup> or in terms of their effect on distributional (social) justice?<sup>84</sup> And is it sufficient to just look at their short-term direct effects (or lack thereof), or should longer-term and indirect effects also be considered? And how ought these criteria and the respective spatial and temporal cut off points be chosen?

C25\_P38

Perhaps, overall, the way ahead is to adopt a *long-duree* systemic perspective and look at rights as a form of decentralized social accountability that generates long-term repercussions and irritations. These can and do produce progressive outcomes at particular moments, but they can and do also provoke backlash and regression. Indeed, in part the populist right's obsessive bashing of rights is, arguably, just such a backlash. But, from a systemic point of view, this is not the end of the story and it will itself produce counter reactions that will mobilize human rights as one among several means to (re)claim equality and to articulate solidarity in a frequently counterfactual and always subversive insistence on human dignity in the face of its denial. Like few others, Philip Alston has been part of this endeavour and his continuing presence gives us hope that this storm, too, can be weathered.

<sup>82</sup> João Biehl and others, 'Judicialisation of the Right to Health in Brazil' (2009) 373 *The Lancet* 2182.

<sup>83</sup> Daniel M Brinks and Varun Gauri, 'The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights' (2014) 12 *Perspectives on Politics* 375.

<sup>84</sup> Ferraz (n 64).