



Re-grounding Human Rights as Cornerstone of Emancipatory Democratic Governance

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Abstract

Envisioning democratic and internationalist ways of exercising peoples' sovereignty beyond local and national borders requires the enrichment of human rights thinking with non-European cosmovisions, normative and legal thinking. Integrating human rights, environmental and climate law and the rights of nature plays a key role in building institutions and policies that can genuinely address the root causes of ecological destruction. Likewise, human rights should be at the forefront of the struggle to re-shape financial capitalism and its destructive economic model. They can guide transition processes towards more sustainable ways of production, distribution and consumption, but also towards the necessary protection of and support for care work. Finally, there is an urgent need for innovation in human rights institutions and practices. This goes from securing funding for independent work and combating corporate capture, addressing the colonial legacy still present in international law and human rights architecture, rebalancing the local, national, sub-regional, regional and international dimensions of human rights work, and finding ways to address the dilemmas of a state-centric human rights accountability and governance which do not fall into the traps of multi-stakeholderism.

Keywords Peoples' sovereignty · Environmental rights · Legal pluralism · Multistakeholderism · Corporate capture

The faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, was foundational for the United Nations. There is no doubt that the UN played a significant role in some of the achievements in human rights in the last 75 years. Yet today we are confronted with a UN crisis and a human rights crisis, both of which are part of a much deeper multi-dimensional and systemic crisis. New and visionary projects for emancipation of humanity and all living things, for achieving ecological, gender and social justice are urgently needed. This includes envisioning democratic and internationalist ways of exercising peoples' sovereignty beyond local and national borders. Can activists do business as usual in human rights work or do human rights also need to be re-grounded and deepened if human rights are to play a major role in developing these new visions? What role could human rights play in (re)inventing social and public institutions and the multi-scalar polities that we desperately need to overcome

the multiple crisis? This article offers some reflections around these questions grounded in the daily work of a practitioner focusing largely on economic and social rights. It starts by examining what type of conceptual developments are re-shaping the established human rights framework; and in which direction more developments are expected. It then details how dysfunctional the existing institutions supposed to hold (powerful) human rights violators accountable actually are; and what areas are key to address when working towards overcoming this dysfunctionality. Finally, it outlines the challenges that multi-stakeholderism is posing for human rights accountability.

Re-grounding Human Rights in Non-western Ways

Reconnecting with Nature

Over the past 70 years, a series of important human rights treaties have come into being. As human rights treaties are the results of historically and politically contingent processes, they do not cover the needs and aspirations of all

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oppressed groups, neither do they sufficiently reflect the values, normative concepts and legal traditions of all peoples on Earth. International human rights law is rather limited insofar as it has been shaped predominantly by Western powers. Therefore, it should be regarded as work in progress. A simple test should illustrate the long-standing flaws of human rights law: Does the word ‘nature’ appear in human rights treaties? Did they recognize the inextricable connection between human beings, their communities and nature and protect this relationship as a matter of fundamental right? The answer is no (Seufert 2020).

Despite our deep connection with the rest of nature, modern (western) thinking and actions, including law and policymaking, treat humans and the rest of nature as two separate, distinct and independent spheres. This separation is central to the deep ecological crises that the world is facing, and which are manifest most strongly in human-made global warming as well as in the dramatic loss of many living species. Both climate change and the current mass extinction will deeply affect human societies because we cannot escape from these massive disturbances. The emergence of the novel coronavirus SARS-CoV-2 and the profound crisis it has caused is the latest manifestation of this distorted relationship (Wallace et al. 2020). Addressing these existential crises will require us to overcome this separation, which was for long time also reflected in human rights concepts and agreements, and to reorganize our societal relationship to nature.

Indigenous Peoples are among the first who started challenging the limited conceptual framework of human rights. They struggled for more than 30 years for the UN Declaration on the Rights of Indigenous (UNDRIP). This declaration is a watershed development for at least two reasons: it recognizes the right to land and territory and thus the importance of land, water, medicinal plants, animals and minerals for sustaining human life; and it stresses the collective dimension of this and other rights.

Indigenous Peoples are not the only social group that depends on land and territory for their livelihoods, as well as for their very existence as community. Peasants, family farmers, fisherfolk, pastoralists and other rural people also depend on nature. They have traditionally questioned the idea of turning natural resources into commodities, and have consequently demanded state/social regulation to keep community-based control of natural resources as a matter of right. This demand has been finally met with the adoption of the UN Declaration on the rights of peasants and other people working in rural areas (UNDROP) in 2018. While respecting the distinct rights of Indigenous Peoples, UNDROP recognizes a right to land and other natural resources, rights to seeds and biodiversity, to water for livelihoods, to a healthy environment, as well as economic

rights protecting labour and the economic activities of the rural population.

The looming collapse of the earth system as well as the rapid degradation of local ecosystems is closely linked to the sharp increase of inequalities and the concentration of resources in the hands of a few powerful actors, the destruction of the social fabric from the community to the national level and resulting migration, as well as wars and famine. The consequence is increasing violence against communities and people, which is further exacerbated by the rise of authoritarianism in all parts of the world. Non-white, male people and in particular women are affected by such violence. On the one hand, these social groups are over-exploited to perform essential care work for society; on the other hand, they depend stronger on healthy ecosystems for their livelihoods.¹ There is indeed a close link between the way societies (mis)treat and exploit humans on the one hand and nature on the other.²

In this context, UNDRIP, UNDROP and the General Recommendation N° 34 on the rights of rural women of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW GR34) as well as the efforts to recognize a universal human right to a healthy environment and the rights of nature in national constitutions illustrate one of the emancipatory ways in which human rights are currently evolving.³ Human rights and ecological and climate concerns need to be brought together, in order to overcome the separation between humans and nature and to clearly formulate states’ obligations to ensure the recognition and value of care work as well as of healthy ecosystems, locally and globally. Existing entry points, such as the rights to biodiversity and the rights to land and natural resources, as well as their sustainable use, as recognized by UNDRIP, UNDROP and CEDAW GR 34 provide important building blocks. Indigenous Peoples and communities, in particular those of small-scale food producers, are those who take care of most ecosystems; protecting and strengthening their rights is therefore a key obligation of states. However, the process of reconciling legal frameworks would also have to address challenges such as establishing limits to the human

¹ For an analysis of the close linkages between the domination of nature and domination of women, Andrews et al. (2019).

² For Bookchin, ‘the very notion of the domination of nature by man [sic] stems from the very real domination of human by human’ (2005: 65); Andrews et al. 2019 *Supra* note 17.

³ In the context of authoritarian, nationalistic, racist and xenophobic tendencies, there are also attempts to re-shape human rights. See for instance, <https://www.state.gov/commission-on-unalienable-rights>. China is also actively trying to change the practices and rules of the UN human rights system. Paradoxically, the discourse of the European far right-wing movement may evoke or resemble the narrative of Indigenous Peoples’ rights—which is something progressive civil society movements must analyze and take into account.



use of natural resources and the question of how to deal with situations of conflicts between human needs and ecological protection.

Implementing UNDROP also provides an opportunity to re-interpret key instruments of environmental and climate law from a human rights perspective, taking into account UNDRIP as well as CEDAW GR34 and other relevant human rights standards. This is critical in order to clarify the relationship between the rights of peoples, groups and communities that directly depend on functioning ecosystems and the protection of such systems. The Convention on Biodiversity (CBD), for instance, is built upon the premise that states have sovereignty over the genetic resources in their jurisdiction. The question that arises from the recognition of specific rights of Indigenous Peoples and other rural people related to such resources by UNDRIP, UNDROP and CEDAW GR34 (as well as other human rights instruments) then is: What do states' sovereign responsibilities entail in terms of obligations to protect and guarantee communities' and peoples' rights? Answering this question could help policymakers and other actors understand that key to addressing the rapid decline of biodiversity and climate change is the effective protection of Indigenous Peoples' and other rural peoples' management and production systems, including their tenure rights and systems, among other measures. This, as well as a better linkage between human rights spaces with those dealing with environmental, biodiversity and climate issues is crucial in order to establish multifunctional and inter-sectorial policies and institutions, which are able to address the contemporary world's multifaceted challenges.

Challenging Financial Capitalism⁴

Another area of critical questioning of the existing human rights framework relates to whether or not human rights are a 'handmaiden' to capitalism. Capitalism is the main economic system today, and most people have no alternative but to rely on capitalist markets to access basic resources. At the same time, many deep criticisms have been levelled against capitalism, the concentration of wealth and power that it seems to entail, the exploitation of nature and workers and the subordination of women on which it depends. The idea of human rights that is dominant today emerged in Europe at the same time as the capitalist system, which co-evolved together. Rights, especially individual political rights and the right to property, arose as a new way to structure social relationships in a capitalist society, and an original focus was on protecting private individuals (and their wealth) from abuses or overreach by the state. How prevalent this understanding still is (Neier 2015) is illustrated with this

anecdote: Amnesty International considered supporting the advocacy work of UNDROP but in the end decided not to engage, because the Declaration explicitly recognizes the human right to land. Part of the normative content of the human right to land includes the obligation to undertake redistributive land reform in contexts of strong inequality and poverty. This would have gone against an organizational decision adopted by Amnesty International during the Cold War, according to which the organization is not supposed to work on issues related to the right to property.⁵

It is thus not surprising that important streams of the human rights movement do not challenge up front the existing economic system, namely financial capitalism, and its property relationships but rather frame the obvious problems of neoliberal absolutism as an issue of 'business and human rights'. Their efforts are focused on corporate responsibility and due diligence and on bringing companies themselves to respect human rights, either voluntarily or through state legislation. As a result, today business speaks the language of human rights, is influencing conceptually and practically human rights work, and is using a human rights discourse to increase its legitimacy in global development discourse.

Given the scale of human rights violations and ecological destruction driven by today's financial capitalism in particular, the 'business and human rights' approach may have brought some improvements in specific situations but it is failing to address the very scale and depth of these structural injustices. In this sense, it is failing the emancipatory potential of human rights. There are other streams of the human rights movement, which emerged rather from anti-imperialist, national liberation movements and from various grassroots struggles seeking economic justice that are increasingly focusing on overcoming the limitations of the 'business and human rights' approach. Noteworthy here are the efforts around the UN Treaty on Business and Human Rights seeking to clearly establish the obligation of states and the international community to mandatorily regulate transnational corporations and put an end to the rampant impunity of their crimes. Since the 1970's, civil society organizations have been calling for the adoption of binding international regulations for transnational corporations (TNCs). No specific binding international law currently exists to prevent harm by the activities of TNCs and the enterprises connected within their supply or global productive chains. Furthermore, there is an additional gap in international law with regards to the legal accountability of such entities. Existing voluntary regulations are vague and in some cases ambiguous. They have failed to provide effective human rights protection, especially with regards to

⁴ This draws on Sandwell et al. (2019).

⁵ Personal communication with Amnesty International staff in charge of Economic, Social and Cultural Rights issues.



the cross-border impacts of transnational business activities and the access to justice for affected individuals and communities. Instead, human rights crimes and abuses by TNCs have become widespread in the context of globalization.⁶

Other efforts go beyond prosecuting the wrongdoings of corporations. They are trying to use human rights to change some of the structures of the existing economic system: the field of tax justice is a prominent example where human rights organizations⁷ are urging states to strengthen their redistributive function in markets and society by reforming corporate global tax rules, closing down global tax havens, and re-shaping international institutions and agreements in order to be able to regulate global financial flows according to human rights obligations.

Likewise, grassroots social movements have used human rights for decades to challenge the idea that food, housing, health and education are commodities. If food is a human right and food systems are commons or public goods, individual/corporate property rights to land, water, forests, fisheries or seeds cannot be the predominant model which overrides all other forms of social relationship with these natural goods, particularly collective and community-based ones. The Human Rights Treaty Bodies as well as several UN Special Rapporteurs have analyzed in detail the impacts of privatization of public services on the enjoyment of economic, social and cultural rights; and have provided recommendations and guidance on how to overcome these challenges (Farha 2017; Boly-Barry 2019). Human rights should play a key role in re-shaping and regulating markets and property so that they are able to fulfil a social and public function. There is therefore an urgent need for a stronger connection between human rights and economic governance in the UN system. This includes recognizing the primacy of human rights over trade and investment as well as overcoming policy and law-making fragmentation and incoherence.

Paper Tiger or Imperialist Weapon?— Re-inventing Human Rights Accountability

Existing human rights institutions at both national and international levels embody high aspirations and have been critical to many struggles for human rights. Yet they suffer at the same time from fundamental shortcomings and limitations.

The first problem has to do with the lack of adequate funding. Human rights receive only 3.3% of the total UN

regular budget. In 2019, the Office of the High Commissioner for Human Rights announced the potential cancellation of the third session of six different human rights treaty bodies but in the end managed to raise the necessary resources. The decreasing budgetary allocation forced the Human Rights Council to reduce the number of its meetings with the result that it eliminated all general debates during its June 2020 session and further reduced speaking time for all participants. Regular state contributions to the human rights system are being replaced by earmarked funding. This development has led to some areas such as business and human rights and SDGs being well resourced whereas the regular functioning of the human rights treaty bodies is permanently threatened of halting. A similar situation has happened with the Inter-American System of Human Rights. Human rights institutions thus heavily rely for their functioning on ‘voluntary contributions’ by states, private institutions and even business enterprises. This situation is seriously threatening the independence and impartiality of the entire human rights system, which may become a victim of corporate capture.

Another, more complex problem relates to the inability of the existing human rights mechanisms to hold powerful states and transnational corporations accountable. There is no world court on human rights nor any other effective mechanism to prosecute human rights violations worldwide. With the resurgence of nationalism, the questioning of universal values and norms is on the rise, and the readiness of nation states to follow the recommendations of the UN system or the rulings of the regional human rights courts is vanishing.

Nationalist governments conveniently instrumentalize the colonial and imperial history of international law in order to disregard human rights. Indeed, geopolitics rather than legal or ethical considerations, often determine where human rights criticisms and sanctions emerge and against whom they are directed. The fact that, for example, the International Criminal Court has targeted African leaders almost exclusively, while failing to bring charges relating to the US invasion of Iraq among other things, is well known. Much of the effective human rights sanctions emerge not from impartial, independent bodies but from US or European foreign policies. In this sense, human rights continue to have a serious problem of being (perceived) as an instrument of Western interventionism.

Thus, there is a need to overcome inherited colonial structures in the human rights architecture. One possible way to go is to rebalance the role of national, regional and international human rights mechanisms. Indeed, there may be an overemphasis by professional human rights organizations on international human rights institutions, while strengthening local and national human rights institutions may be equally or even more important in the current juncture. Another

⁶ <https://www.fian.org/en/news/article/how-could-a-un-treaty-make-transnational-corporations-accountable-2660>.

⁷ See for instance the initiative for Human Rights Principles in Fiscal Policy which is developing a compendium of Principles and Guidelines that summarize the human rights standards applicable to fiscal policy in Latin America. <https://derechosypolitica.fiscal.org/en/>.



possible road is to strengthen the regional bodies not only of the regional human rights systems (which are also heavily criticized for furthering US imperialism as in the case of the Inter-American system) but also of sub-regional bodies.⁸ Finally, South-South human rights diplomacy as was practiced to some extent during the government of Luiz Lula da Silva in Brazil could be another path to envision new ways of upholding universal norms.

Another challenge for effective human rights accountability relates to the non-recognition of the primacy of human rights vis-à-vis trade, investment and property law. Human rights tend to be segregated in specialized human rights bodies whereas structural, far-reaching decision are taken by economic or environmental institutions in total disregard of human rights. Overcoming silos, fragmentation and lack of policy coherence with human rights obligations at national and international level is one of the most urgent priorities when re-imagining the way our institutions are to be designed.

Human Rights Beyond States? The Debate Around Multi-stakeholder Initiatives

Finally, it is important to acknowledge the expansion of multi-stakeholder initiatives (MSIs) and their impacts for human rights accountability (Gleckman 2018; FIAN International 2020). MSIs bring together a variety of actors ('stakeholders') that are identified as having a stake (i.e., an interest) in a certain issue and should therefore play a role in addressing it. The term 'stakeholder' covers both those who are directly affected by an issue (e.g., malnourished communities) as well as those who have an economic interest in it (e.g., companies producing nutrition products). Broadly speaking, MSIs bring together governments, civil society and private sector actors but can include UN agencies, philanthropies and private foundations, research institutes, and academia as well. Within the last two decades MSIs have become a widely accepted modality for addressing complex global policy challenges. A central element in the projected need for MSIs is the perceived inability of multilateral bodies—usually UN agencies set up, funded and governed by governments—to make any meaningful progress in finding solutions to these issues. It is argued that the complexities of today's problems make it impossible to rely on a single actor—the state—alone and that everyone must work together to achieve change. The 2030 Agenda for

Sustainable Development embodies most prominently this new type of governance. Underlying it and other agreements is an assumption that companies, in particular transnational corporations, have gained such power that it will only be possible to achieve changes (including the improvement of poor company behaviour) when they are invited to the table and become 'part of the solution'. But in reality, MSIs raise serious human rights concerns.

On the one hand, MSIs create the illusion of inclusiveness and democratic governance but in reality, they are blurring differences in the rights, interests, roles, responsibilities and legitimacy of the diverse actors. No distinction is made between 'rights holders' and especially communities most affected by human rights violations, who have a legitimate right to participate in decisions which concern them/affect their lives; corporations, which pursue private economic interests and are accountable to their shareholders; and governments ('duty bearers') who have been elected by their people to represent them, and have an obligation responsibility to act in the public interest. The claim that everyone is equal conceals important power imbalances between and among participants. By failing to acknowledge and address existing power asymmetries between and within stakeholder categories, MSIs are likely to reproduce these asymmetries by giving de facto more voice to the powerful participants with more means to influence, including through the financial resources at their disposal, the direction of the initiative.

MSIs are also sidelining critical voices, narrowing solutions to what is acceptable for corporations and avoiding thus structural and systemic changes. Indeed, MSIs are important vehicles for corporations to influence public policy decisions that may affect their profits, while white-washing themselves as participating in something that benefits the public good. Through their participation, they shift the debate towards solutions that benefit their interests and away from those that would negatively affect their market and profit interests. In this sense, MSIs legitimize the role of business as players in governance, and help them shift the image from being 'part of the problem' to being 'part of the solution'.

A central concern is the shift away from the relation between states as duty bearers and people as rights holders. In transferring public functions, including the development and implementation of public policies, to MSIs, lines of accountability between states and people become distorted. It is no longer the state that people can turn to for claiming their rights, or seeking accountability for the negative impacts of public policies and actions. Who is to blame for the negative impacts resulting from misguided actions or recommendations of an MSI; or for the foregone impacts of promoting one strategy over another? What means do people have to hold an MSI accountable? Rarely do MSIs have effective mechanisms in place to allow for complaints by affected communities. Moreover, the lack of transparency

⁸ Here we refer to the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC), the Bolivarian Alliance for the Americas Peoples (ALBA), Common Southern Market (MERCOSUR) and the Association of Southeast Asian Nations (ASEAN).



in internal decision-making procedures and channels of influence makes it extremely difficult to attribute negative impacts to the actions and influence of an MSI, and allocate responsibility within a given initiative. While MSIs often claim to be highly transparent, important issues such as how decisions are taken (who is particularly influential in these), especially in relation to disputed matters, are often obscure. Similarly, the influence of MSIs over the direction of public policies is often through informal channels, beyond the scrutiny of the public. Communities are rarely aware that a certain programme or action is influenced by / derives from a multi-stakeholder initiative, when these are carried out through the government or individual members of the initiative.

Conclusions

The Black Lives Matter movement, the Chilean feminist collective ‘Las Tesis’ and their performance ‘El violador eres tú’, the myriad of groups in India supporting migrant workers amidst the pandemic, the environmental youth movements protesting against extractive industries destroying the planet, peasant and indigenous food producers bringing food to poor people in cities who have lost their income amidst the lockdown, all these movements for dignity, for racial, gender, social and climate justice are testimony that human rights struggles are very much alive and vibrant and that they have a key role to play in shaping new visions for democratic governance. Part of building these new visions relates to enriching human rights thinking with non-European cosmologies, normative and legal thinking. Integrating human rights and environmental/climate law and the rights of nature plays a key role in building institutions and policies genuinely addressing the root causes of ecological destruction. Likewise, human rights should be at the forefront of contributing to re-shape financial capitalism and its destructive economic model. They can help guiding processes of transition towards more sustainable ways of production, distribution and consumption but also towards the necessary protection of support for care work. Finally, there is an urgent need for innovation in human rights institutions and practices. This goes from securing funding for independent work and combating corporate capture, addressing the colonial legacy still

present in international law and human rights architecture, rebalancing the local, national, sub-regional, regional and international dimensions of human rights work, overcoming fragmentation and lack of institutional coherence with human rights, and finding ways to address the dilemmas of a state-centric human rights accountability and governance which do not fall into the traps of multi-stakeholderism.

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