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Can Human Rights Law Overcome Political Inaction?

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The litigation cases, such as on climate change action and social and environmental justice, brought by civil society against governments have demonstrated how the law can be a tool for holding politicians to account and spurring them to act, in line with their commitments and obligations. Yet human rights law is rarely cited as a means of working towards solutions in these areas and is sometimes dismissed wholesale as unfit to meet contemporary challenges. Serde Atalay and Michael George Marcondes Smith argue that the potential of a human rights-based approach to answer today's crises is being overlooked.

Humanity today faces growing pressures and mounting challenges across a wide range of areas: climate change demands international cooperation, the Covid-19 pandemic has led to unprecedented government intervention in the lives of citizens, and poverty and inequality remain persistent problems. These demonstrate how nation-states struggle to collaborate even as the world becomes increasingly entangled and globalised. This context calls for a re-evaluation of human rights as an instrument not only for the individual, but for society as a whole. Human rights law needs to recognise the changing nature of the multiple crises confronting humanity and expand its scope to actively address the most pressing issues we are facing.

Rather than engage in a critique of human rights that "deconstructs" the field, unmasking its various biases and failures, it is more productive to recognise its potential for addressing the shared challenges we face. An appraisal of international human rights law can uncover flaws, limitations, and room for reform. Its contradictions can explain how the language of rights has at times been weaponised against crisis response measures during the pandemic. However, as climate litigation has shown in different contexts, a human rights-centred approach nevertheless harbours great potential to push governments to act, and to hold them to account.

The nature(s) of human rights

From its inception, human rights law has been founded on a conception of the "individual" as an autonomous entity possessing rights – an idea that can be traced back to at least the Enlightenment, John Locke, and the rise of liberal ideals. However, this conception of human rights focused on the individual is partial. It ignores how individuals are part of social constructions that determine their wellbeing.[1] An individual does not exist on their own; they are part of systems in which absence, abundance, struggle, and conflict exist. Imagining individual as isolated entities does not accurately reflect the realities of a world where each new crisis highlights our interconnectedness and reasserts the need for collective action.

The centring of the individual has given way to a framing in which the whole legal system is perceived and explained as one of protection against interferences by the state. In other words, human rights assume a protective function against the evils of those who are in power. In this framing, international human rights law is merely a conveyor of standards of restraint.

However, as many have convincingly argued, full protection under the law requires not only stipulating what cannot be done but also clarification on what should be done.[2] These two aspects of human rights correspond to the "negative/positive obligations" dichotomy in law. This distinction has been sharpened further by the separation of civil and political rights on the one hand, and economic, social, and cultural rights on the other.[3] Both forms of obligations are important and must be vigorously defended.

Human rights are as much about the active protection of rights as they are about not interfering with individual freedoms. Losing sight of this point leads to a disregard for protective action to the benefit of not just one, but many. In the face of climate change, poverty, and the health crisis, this collective interpretation of human rights obligations has been absent, causing some to declare human rights as insufficient. However, human rights remain an instrument that can overcome political inaction to fight suffering and injustice.

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Politics vs. law

A more proactive use of human rights law does face significant barriers. In the context of climate change litigation, governments have argued that certain matters can only be addressed by the political executive, rather than the courts. This idea, though justified in certain cases, has become a cliché that can turn any issue with far-reaching consequences into a "no-law" zone. It is true that the separation of powers is one of the oldest principles of constitutional democracies and that some matters are better left to politics. However, the sweeping use of this argument creates a bubble of unaccountability.

Recent successes in climate change litigation have offered a way out of this bind. In the famous "Urgenda" case, the Supreme Court of the Netherlands rejected the arguments by the Dutch government that emission reduction targets were not a matter for the courts. Instead, the court found that the state was violating the law by not meeting its obligations to act. The court did not enter into the discussion of how the Dutch government should meet its targets but merely determined that it had to honour its commitments. By setting a reasonable boundary as to how much it interferes with an issue that requires immediate state action, the court ultimately prevented the government from escaping the consequences of derogating from its obligation to act against climate change.

The Urgenda case has been instructive elsewhere. Climate Case Ireland (Friends of the Irish Environment v. Government of Ireland) determined that the government's climate action needs to be specific enough in its articulation under the law. "Excessively vague" and

“aspirational policies” were not enough to meet clear legal demands. Similarly, the case of Notre Affaire à Tous and Others v. France filed against the French government for failing to fulfil its obligations under the Paris Agreement has led the Paris Administrative Court to hold the French government accountable. These cases demonstrate how the law can help overcome stagnation imposed by political agendas. Although these cases are not based on human rights law, they engage the law to push states to fulfil their obligations to safeguard the wellbeing of humanity, both now and in the future.

The case of People’s Union for Civil Liberties v. Union of India & Ors. before the Supreme Court of India in the early 2000s is an example of rights protection through the proper enactment of human rights law. The case challenged the state for its failure to allocate excess grain, which was withheld for official times of famine. In its judgement, the Supreme Court recognised that the right to life was endangered due to lack of access to food and ordered the government to distribute the grain. To this day, this case is considered a great example of active rights protection.

It is worth noting that these litigations took place at the national level. Such developments have been rather scarce at the international and regional levels. One significant, still unfolding case at the European Court of Human Rights is Youth for Climate Justice v. Austria et. al., brought by a group of young people against the biggest polluters of Europe. It remains to be seen how the court will adjudicate. All of these examples illustrate how human rights – bearing in mind that the Universal Declaration of Human Rights covers many social rights such as workers’ rights and medical care – could be used more assertively in a manner that remains mindful of where the line between politics and the law needs to be drawn. Our claim is not that this line must be disregarded altogether, but rather that it needs to be redrawn in the context of human rights.

The real potential of human rights

How can a human rights-based approach inform our understanding of the response to the Covid-19 pandemic and the legal dilemmas it has brought to the fore? For states, the health crisis pits the positive obligations that human rights bring against the negative duties, in ways that are at times conflictual. The right to health is recognised in international and regional human rights systems. The fulfilment of this duty and hence, effective protection of the right to health, does not conflict with any individual freedoms but only with the resources of a given state, so a judgment as to when this duty will have been fulfilled cannot be given in abstraction. However, the point is that failure to protect the right to health is not just a matter of policy but also a matter of human rights.

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Throughout the pandemic, individual rights have necessarily been curtailed. For example, measures such as quarantining and travel restrictions limit freedom of movement. One

reading sees human rights making two opposing demands on states, simultaneously obliging them to act to protect health and to refrain from acting to protect other rights. This seems to highlight a contradiction in human rights: which should be given priority? If we are to take human rights as a means of protecting the atomic individual and heavily lean on its negative, rather than positive potential, we risk falling into a dangerous exercise of protecting freedom for the individual over what is best for collective health. However, a more complete understanding of human rights, with due regard to its positive and protective function, balances the needs of the collective and the rights of the individual and recognises how states can and should weigh one against the other.

Human rights are not radical liberties that atomise and separate the individual from their social context. The endless critiques of human rights' failures are not constructive and only lead to undermining their potential legal value. Instead, human rights should, to the greatest extent possible, be deployed as powerful tools against current and future crises. As to whose shoulders this effort falls upon, the answer does not point to a single actor. States – as the main duty-bearers; civil society – as the ones enabling the realisation of human rights on the ground and connecting policymakers, communities, human rights defenders and practitioners; and individuals – as the main rights-holders within the communities they belong to; all have a part to play. Only a concerted, effectively communicated, and widely shared understanding, informed by shared experiences and needs, can help in carrying out the project of human rights for the betterment of all.

Footnotes

[1] Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties, OUP 2008, pp. 16-18.

[2] See Fredman; Henry Shue, *Subsistence, Affluence and US Foreign Policy,* Princeton University Press 1996; Susan Marks, 'Human Rights in Disastrous Times' in James Crawford and Martti Koskenniemi (eds.) *The Cambridge Companion to International Law,* CUP 2012, 309-326.

[3] Without prejudice to the fact that there are positive obligations inherent to civil and political rights, as well as negative obligations inherent to economic, social, and political rights.

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