Rights from the Other Side of the Line: Postcolonial perspectives on human rights

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Abstract

This paper discusses the theorising of human rights from a postcolonial perspective, a process that entails placing the dominant human rights discourse in its social and historical context, in order to highlight the ways in which human rights are discursively constructed and become naturalised. The definition of human rights is problematised through an examination of both the more traditional European viewpoints as voiced by such theorists as Hannah Arendt and Giorgio Agamben, and from the postcolonial perspectives of such writers as Boaventura de Sousa Santos, Vivienne Jabri as well as Siba N. Grovogui. While readjusting the conception of human rights to one that expands beyond the borders of Western tradition and legalism to a recognition of how human rights are embedded in culture, it is hoped that such an analysis will broaden our understanding of the various definitions of human rights.

Keywords: Eurocentrism, Human Rights, International Law, Political Theory, Postcolonialism

Introduction

Human rights as they have traditionally been viewed had their birth in the European Enlightenment, where they arose in the midst of philosophic discourse around what it meant to be human and what intrinsic rights were attached. This Enlightenment discourse accompanied the movement in Europe away from the feudal age and towards capitalism, a period in which the previously "bound" person began to explore the meaning of his¹ status as a "free" person under the law and to define the social contract, and all that it entailed, between himself and the state. This was a process that Hegel described as the beginning of "civil society." Hegel's terminology serves to underline how traditional rights theories made the connection between ethics, civilisation, and the rights and duties of the citizen.

Because this notion of human rights came from the Euro-American historical experience, particularly through the French and American Revolutions, there has been a tendency to see human rights as something to be encouraged by the West in the postcolonial world. There is, therefore, a risk of not recognising the practice and policies of human rights that do not fit the Euro-American template. Behind this tendency may be perceived a Eurocentric bias toward thinking of civilisation and modernity as arising in the West and bestowed upon the non-Western world.

In recent years, however, focus has shifted towards an examination of human rights practices and policies as they have arisen outside the West and apart from direct Western intervention and influence. In fact, as Grovogui (2011) points out, "the concept of human rights contains cultural and historical notions of the human, of human faculties, and of the requirements of public and private lives" (46). Postcolonial human rights theory puts particular emphasis on notions of the human and on what it means to be a political and a private subject under the law. An awareness of postcolonial perspectives on human rights makes the limitations of the traditional conception visible while at the same time demonstrating the need for a new conception, including an acknowledgement of both the ways in which Western-grounded views have ignored or denigrated other rights, beliefs, and practices, and the ways in which other cultures have formally and informally asserted their rights that can be extended to those peoples not originally included or those peoples restricted by traditional views.

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¹ In the context of this paper, the masculine pronoun is employed in situations where, as in the case of Enlightenment human rights discourse, the subject under discussion was the male only. In other cases, where recognition of both genders is required, both male and female pronouns will be employed.

The purpose of this paper is to problematise the definition of human rights through an examination of both the more traditional European viewpoints and the postcolonial perspectives while readjusting the conception of human rights to one that expands beyond the borders of Western tradition and legalism to a recognition of how human rights are embedded in culture. It is hoped that such an analysis will broaden our understanding of the various definitions of human rights. I will begin by discussing some of the philosophical underpinnings of Enlightenment views of man and the rights of man, as well as how these were manifested in the declarations arising from the French and American Revolutions of the late eighteenth century. This examination will be followed by an explanation of the postcolonial critique of traditional human rights theories and how this critique has resulted in alternate conceptions of human rights viewed through the post-colonial lens. To this end, the contributions of African, Caribbean, and South American theorists are essential in showing the problems and limitations of the traditional perspective and how this can be expanded through awareness of postcolonial perspectives on human rights.

Conventional Approaches to Human Rights

In the West, human rights were set forth in a number of philosophical treatises that became the underpinnings of the French and American constitutions. Enlightenment political philosophers employed notions of reason and of ethics as rationally derived to attempt a definition of what it means to be a "man," his inherent virtues and vices, and the constitutional principles needed to ensure his rights. According to thinkers like Hugo Grotius, John Locke, Jean-Jacques Rousseau, and Immanuel Kant, man was first subject to what they saw as natural law, which varied, depending on the philosophical viewpoint, from a state of benign innocence to one of competitive savagery. However, these philosophers claimed that civilisation required development from a state of nature to a state of civilisation through the recognition and adoption of universal rights (although in the case of Rousseau, this development was accompanied by regret for the loss of primordial innocence).

The rights that man as a citizen and as an individual could expect were to be formally voiced in the declarations and constitutions that arose from the French and American Revolutions. These constitutions, although closely related in time, arose from differing societies with differing historical processes, but both were concerned, explicitly and implicitly, with defining the nature of "man," partly by a description of the "inhuman," and thereby delineating what would be considered as outside such definitions. These definitions, Grovogui (2011) observes, were needed in order to give rights a formal, constitutional voice, setting out the government's limits

of intrusion into both the private and the public sphere, as well as the expectations of aptitude and behaviour assigned to various groups. He comments that "These ideas, models, and views shaped the substance, essence, and nature of the legal dispositions imposed on citizens or required of individuals as a matter of constitutional justice" (48). The American Declaration of Independence, later expanded by the Bill of Rights, and the French Declaration of the Rights of Man and of the Citizen represented the Enlightenment covenants that were designed to guarantee such constitutional justice. Although they differed in the events that gave them birth, common to both conceptions of human rights were the belief that reason and morality were inextricably linked and that all that was considered "savage" in the individual came from "animal" instincts that must be suppressed.

As mentioned above, the constitutions that resulted from revolution were to set rules for both private and public morality as delineated in human rights, while at the same time recognising their separate spheres. The French, concerned with defining and establishing an ideal state that would replace the monarchy, put in place the Third Estate as the governing body, and through the Declaration of the Rights of Man and of the Citizen aimed to educate French citizens on their rights and duties to maintain public order. On the other hand, the American constitutional order aimed to foster the individual talents needed to build a new and thriving nation, with an emphasis on industry and science. Hence, the protection of freedom of speech and thought, as well as freedom from the intrusions of the state (private freedoms), are the matter of the First Such views also reflected the "scientific, moral, and legal and Second Amendments. significance" (Grovogui 2011: 48) of the human, whose intellect was perfectible through education. Where the French and American views aligned was in confining their constitutions to the white citizen subject, excluding slaves from the protection of guaranteed rights and, hence, from the fully human. Thus, as Cowell (2014) observes, it is necessary to distinguish between Enlightenment "ideals" of human rights as voiced in their covenants, and their practices. In reality, writes Cowell, these practices "were principally focused on granting and securing liberties from the state for a minority of individuals" through promising rights to some by excluding others (for example, women, slaves, non-citizens) from these rights (264). This exclusion, as well as the methods employed to accomplish it, is one of the chief concerns of postcolonial human rights theorists, who see traditional human rights theory and its applications as viable only when the rights of certain groups have been set aside.

Problematising Conventional Human Rights Perspectives

Such concerns, however, have also been voiced by those not considered to be postcolonial thinkers. The enshrining of human rights in such documents as the Declaration of the Rights of Man and of the Citizen as well as the Declaration of Independence and Bill of Rights has been recognised by modern theorists as both historically significant as well as limited and problematic. Two of the most important of these theorists are Hannah Arendt and Giorgio Agamben. Arendt was particularly concerned with the situation of refugees and the stateless created by war and with how human rights as they were currently formulated were powerless to relieve their plight. With its dependence on the duty of the sovereign state to guarantee rights, human rights policy did little to protect "human" rights when membership in a political community was a crucial requirement for protection. As James D. Ingram (2008) comments, "In practice, human rights ended up being rights people had after all their other rights had been taken away—in the end, no rights at all" (403). Human rights, therefore, were recognised more in their breach than in their observance. Arendt (1973) remarks on the "poignant irony" of "the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as 'inalienable' those human rights which are enjoyed only by the citizens of the most prosperous and civilized countries, and the situation of the rightless themselves" (279). Those most in need of having their rights ensured, she observes, are precisely those excluded through their statelessness from those rights.

Arendt (1963) was concerned with the question, as she herself put it, quoting Rousseau, "How to find a form of government which puts the law above man," particularly since those who have themselves set out to do so must act *against* the government of the time. Rousseau answers his own question: to put the law above man through the creation of man-made laws, "one would actually need gods" (183-184). In the absence of gods, Arendt uses the example of the American Revolution to demonstrate how it is "possible to have a politics of foundation in a world devoid of traditional (foundational) guarantees of stability, legitimacy, and authority" (Honig 1991: 98). It was the science of politics, argues Arendt (1963), that allowed the American founding fathers to situate their constitution in absolute law that was aimed at protecting their civil liberties. What resulted, she claims, was a paradox: "It was precisely the revolutions...which drove the very 'enlightened' men of the eighteenth century to plead for some religious sanction at the very moment when they were about to emancipate the secular realm from the influences of the churches and to separate politics and religion once and for all" (185-186). Such a paradox would

underlie the "civilising" missions that were based on supposedly scientific and religious principles.

Some of Arendt's statements, however, are problematic. In her comment in The Origins of Totalitarianism (1973) that refugees and concentration camp survivors are eager for national rights, which they trust more than natural rights because of "their realization that natural rights are granted even to savages," she manages to contrast the "civilised" European whose civilisation has been stripped from him or her through the savagery of war with those whom she sees as having been denied civilisation and thus not fully human (300). As seen in her other writing, Arendt divides humanity into those with and those without 'history,' implicitly devaluing those outside of 'history' (300). Klausen (2010) observes that such a division is a problematic one in terms of recognition of the development of human rights awareness if such awareness is dependent on a particular definition of culture and civilisation: Arendt, "simultaneously includes primitives within humanity qua humankind but excludes them from humanity qua historically developed faculty of culture" (395). Such normative conceptions of rights thus betray their Eurocentric origins. Klausen (2010) argues that the "antiprimitivism" of Arendt's theories "will need to be squarely confronted by political theorists" (397) if the currently stateless, the indigenous peoples, and those whose development of rights awareness has not followed the Euro-American path are not to be misjudged and in some cases mistreated by neoliberal governance systems.

Among the most controversial and significant critiques of conventional understandings of human rights is that of Giorgio Agamben, whose name is often paired with that of Arendt as two theorists whose notions have expanded perspectives on human rights. Agamben is in the forefront of a number of critics who see human rights as an excuse for the exercise of power in the form of interventions into the 'developing,' largely formerly colonised world. In some ways, Agamben's critique of human rights echoes that of Arendt, in that both perceive that rights as they are currently constituted and practiced are "biopolitical" rights, that is, rights that derive from being born within a particular state. However, it is Agamben's argument that the very enshrining of human rights allows hegemonic exercise of sovereignty against the "human." His theory of the "biopolitical" is based in part on Foucault's theory of the emergence of "biopower" in the modern age, but whereas Foucault sees biopower as differing from sovereign power, Agamben sees its roots as more archaic and as, in fact, allowing sovereign states and absolute monarchies to exercise their control over the human body. This phenomenon, he suggests, enables such eighteenth-century declarations as the Declaration of the Rights of Man

and of the Citizen, to conflate "man" with "citizen," and the natural with the political, to the extent that every aspect of life is under the control of the sovereign power (1998: 125).

According to Agamben, because the rights subject's "bare life" is ultimately the ground on which rights are inscribed, this life is constantly under threat by the withdrawal of rights and/or the suspension of the constitutional order. Agamben takes the distinctions made by Arendt via Aristotle between biological life or zoe and political life or bios to introduce a third term, "bare life" (1998: 11). Whereas Arendt sees the development of the public, political sphere as having arisen from the Enlightenment, Agamben goes a step further and posits that with the emergence of the modern "biopolitical" state, the lines between public and private have become blurred to the extent that it is the human body, not human actions nor human culture, that is the focus of granting or denying rights. He writes in his critique of Hobbes's notion of the "state of nature" that bare life "is not simply natural reproductive life, the zoe of the Greeks, or bios" but rather "a zone of indistinction and continuous transition between man and beast" (1998: 109). In this "zone of indistinction," the human is at the command and mercy of the sovereign state, becoming what Agamben calls homo sacer or "sacred man," whose persecution or execution is permissible because he exists outside the legal order of rights. Homo sacer may be a "sacrificial offering" whose suffering is permitted for the good of the larger society, or he may in fact be considered as dispensable because his life is of little or no value. Therefore, writes Agamben, modern treatments of human rights must grapple with the problem of belonging or lack of belonging to the dominant political community.

Hence, a modern focus on human rights involves "bearing witness to the human," according to Lechte and Newman's (2012) comparison of Arendt and Agamben, and ultimately "rethinking the human" whose nature transcends both biology and membership in the polity of the nation-state. Whereas Arendt argued that the rights of the human could only be protected within the political sphere, and that, therefore, the stateless and other oppressed groups must be bestowed citizenship within the political community, for Agamben "being human" means ultimately existing beyond the confines of the state, outside the designation of "citizen" as designated in the French Declaration of the Rights of Man and of the Citizen, for example, which states that men "are born and remain equal." Agamben observes of the inclusion of "birth" within human rights that it has inscribed a potentially dangerous connection between nation, citizenship, and biology. He writes that the modern citizen is "a two-faced being, the bearer both of subjection to sovereign power and of individual liberties" (1998: 125). In the end, Agamben highlights the problematic of Arendt's theory that it is political community that bestows "human" rights; as

Arendt (1973) comments, "Only the loss of a polity itself expels [someone] from humanity" (177). Therefore, not belonging to such a community allows the coloniser, for example, to think of the colonised as not fully human. However, whereas Agamben argues that given such tendencies there is no possibility of formulating a new conception of human rights postcolonial theory sees such a denial as itself arising from an implicit assumption that the Western "myths" of human rights are the only possible formulation. Postcolonial theory puts its emphasis on the very "bare life" of the human as at the basis of a new rights theory.

Postcolonial Theories

Postcolonial theories had their roots during the period of late colonialism, specifically arising from the work of Frantz Fanon, whose Black Skin, White Masks (2008), first published in 1952, has been called "the first book to investigate the psychology of colonialism." His theories were later expanded by such writers as Ashis Nandy, Ngũgĩ wa Thiong'o, and other theorists of colonial subjectivity. Fanon's treatise foregrounds the idea of "dignity" and the psychic damage that ensues when the black "subject" attempts to adhere to the definition of "man" voiced by the white oppressor. When that definition serves not only to "de-humanise" but also to exclude the subject from the rights accorded to the European coloniser, Fanon calls the inevitable internalisation of inferiority an "epidermalization" that leads to the collapse of the ego and selfesteem as his emulation of the white man will never lead to his acceptance as "white." Therefore, say postcolonial theorists, evaluating the ability of the colonised to adhere to human rights ideals which they had no part in formulating represents yet another dehumanisation of the colonial subject and a continuation of colonisation in the postcolonial world. Similarly, the "idealized" black man is also a white construct that has grown from white guilt, the guilt arising from European humanists attempting to explain and excuse the colonisation of Africa, the Caribbean, and Latin America. The history of the non-West, writes Fanon, is created by the West through the "absence" of that history; it is visible only in the effects it has had on the colonising states and in the mythologising depictions of exotic "savageries" such as cannibalism. The inferiority of the black is then inscribed in the "first chapter of history that the others have compiled for me, the foundation of cannibalism has been made eminently plain in order that I may not lose sight of it" (91). The "chapter of history" compiled for the subject of colonialism, say postcolonial theorists, assumes that the concept of human rights is one developed in the West and then bestowed on the colonised and formerly colonised.

Although they owe a debt to the work of Fanon and other early thinkers on decolonisation, postcolonial theories as formally recognised initially developed from considerations of how the

colonial/'oriental' subject of colonialism was depicted in literature and art. Postcolonial theories, however, cannot be contained within one brief characterisation. Just as postcolonialism also recognises that the colonial experience varies from continent to continent, and from colony to colony, as well as over the period of colonisation and beyond, so too postcolonialism as a theory is not a discrete set of principles. Rather, it is an organic and varied approach to examining and explaining the effects of colonialism on both the colonised and the coloniser, and it has continued to develop and expand since the formal end of colonisation. In fact, many postcolonial theorists are quick to point out that rather than there being three distinct periods of precolonialism, colonialism, and postcolonialism, the postcolonial does not begin simply when a colony attains independence, nor does colonialism end at that moment, since colonialism has acted as a disruptor to the historical experience, identity, and memory of the formerly colonised. According to postcolonial theory, then, mainly European philosophers and thinkers have produced theories embracing the universal, the entirety of humankind in, as Dipesh Chakrabarty (2000) remarks, "relative, and sometimes absolute, ignorance of the majority of humankind that is, those living in non-Western cultures" (29). The fact that those cultures have had their own theories and systems of rights suited to their own conditions and beliefs has also largely escaped notice. Among the universal theories produced in the "university" that Chakrabarty identifies as Europe are those setting out universal human rights and the ways they are embedded and expressed. This "European" version of "history" is inextricably linked, then, to "the modernizing narrative(s) of citizenship, bourgeois public and private, and the nation-state" (Chakrabarty 2000: 41). Hence, the colonial subjects come to see themselves as they are inscribed by the colonisers.

The colonised may be doubly inscribed with the projections of the coloniser when the "subaltern" is a woman, ironically the frequent subject of modern human rights activism. In her famous and seminal essay, "Can the Subaltern Speak," Gayatri Spivak (2010) criticises the "masculine-imperialist" ideology that gives rise to the "masculine-imperialist rescue mission" (48), a rescue mission that some postcolonial rights theorists assign to Western human rights law. Because the colonised woman is denied a voice, first by her gender and second through her very existence as a colonised Other, a history and a culture are created and interpreted for her, thus obstructing the possibility of any alternative histories. Spivak frames her critique around an analysis of "Intellectuals and Power," a conversation between Gilles Deleuze and Michel Foucault. Deleuze and Foucault, she writes, are "doubly incapacitated" and hence unable to recognise the nonuniversality of the Western experience and position, as well as the role played by gender in being denied a voice and hence access to power (23). Postcolonial theory aims to

emancipate and empower these and other voiceless subjects who have been marginalised by rights policies devised by the most powerful.

A somewhat similar depiction of the silencing of the colonised is developed by the sociologist Boaventura de Sousa Santos (2007), whose theory of abyssal thinking describes "a system of visible and invisible distinctions," with the invisible being the basis upon which the visible stands (1). Social reality, writes Santos, is divided into two realms, "the realm of 'this side of the line' and the realm of 'the other side of the line" (1). Abyssal thinking, according to Santos, is distinguished by the fact that the co-existence, the recognition in reality of both sides of the line, is impossible. In socio-political terms, the two sides of the line can be characterised as the dichotomy between "metropolitan societies and colonial territories," and the "tension between social regulation and social emancipation" (2). In the making of modern knowledge and modern legal systems, then, whole experiences (the experiences of those on the other side of the line, that is, the "colonial zone") are discarded, made invisible. In fact, according to Santos, "it was the global legal line separating the Old World from the New World that made possible the emergence of modern law and, in particular, of modern international law in the Old World, on this side of the line" (5). Modern international law, of course, is most apparent in the creation and ratifying of universal declarations of rights; these "universal" covenants, however, decided upon in the West and the global North, are then applied to the global South, the largely invisible "other side of the line."

Postcolonial Approaches to Human Rights

It cannot be denied that Enlightenment ideas of "human" and of "rights" also served to legitimise colonialism. Beth Lyon (2002) has remarked upon postcolonial theory's attentiveness to 'a history still in process,' the effects of history as they are played out in the present in the postcolonial world (34). As postcolonial theorists have observed, at the same time as Enlightenment constitutionalism was ensuring rights to European and American citizens, it was denying them to non-Europeans, in particular those whom they had colonised. Santos observes that the legal system established in Enlightenment era Europe through the writing of rights covenants established a "tension between regulation and emancipation" whereby human freedom was protected through legal guarantees. However, on "the other side of the line," denial of rights was accomplished through the "tension between appropriation and violence" (9). Linked to this denial were the period's beliefs about civilisation and education, and the need to "develop" these qualities in the colonised subject. However, in reality, these beliefs were used to postpone indefinitely the endowment of rights. This postponement was accomplished,

according to Vivienne Jabri (2013), by emphasising "the dichotomy of modernity and tradition, civilization and barbarism, freedom and unfreedom," the former in each binary perceived as characteristic of the liberal self whose "global reach" meant that any notion of rights would reproduce a "racialised, culturalist, as well as gendered" postcolonial discourse (3). Jabri remarks on the tendency for "Western" theorists to attribute such tropes as "self-determination", 'free expression', 'progress' and 'scientific' knowledge, the primacy of mathematical thinking, contractual obligation, satire, and critique" to specifically European roots and to fail to recognise their expression in non-European contexts (32). Hence, the assertion of rights over such concepts is also not recognised except in European contexts or when they follow the pattern already established in the West.

It is also necessary to distinguish between the imposition of international law coming largely from the West and the notion of human rights. While the European ideal of rights given at birth and guaranteed by law was elaborated on and developed during the Enlightenment, this fact should not be taken to mean that prior to this time and outside of Europe the idea of rights did not have a hold. In recent years, postcolonial thinkers have looked outside of traditional human rights history to report on the awareness of rights outside of the West as revealed both in cultural and social practices and in formal documents. Nevertheless, conventional rights covenants still dominate social and political analysis; as Fitzpatrick and Darien-Smith (1999) argue, human rights have become an "instrument of occidental assertion" whereby the West judges the level of "civilisation" in the developing world through its adherence to Westerndetermined human rights standards (5). In addition, the signing of universal human rights declarations has not been without controversy. Universal covenants, although they may not have been consciously designed to do so, have tended to perpetuate inequalities that were introduced in colonial times. Nevertheless, theorists such as Siba N. Grovogui (2006, 2011) have pointed out that the colonised themselves had their own notions of the rights to be accorded to the human, and embedded these notions in their own revolutionary principles and in the constitutions that followed upon attaining independence. In addition, Gayatri Spivak (2010) observes that the idea of universal human rights as currently enshrined in international law has arisen from the period of turbulence and global economic restructuring contingent on independence from colonialism. Therefore, as currently practiced, the application of international law may be seen as the continuing of an imperialist project.

Just as the French and American Revolutions inscribed "the rights of man and of the citizen" and "the rights of the individual" into their constitutional documents, so too in modern times

the period of decolonisation and independence has been one in which a spotlight has been shone on the presence or absence of human rights practices. In fact, Jabri (2013) employs Hannah Arendt's notion of the "founding moment" that foregrounds the "declaration of independence" to show how this moment in part constitutes the nature of the postcolonial subject as a subject of politics and all that it implies in terms of rights and duties, or of their denial (67-68). Thus, a postcolonial approach to human rights must also include an analysis of how the postcolonial subject's situatedness in time (history) and space (the nation-state) impinges on his or her access to political and international rights. At the same time, in late modernity, states and international institutions have at their disposal the means to enforce their interpretations of human rights onto those societies that they wish to render "civilised" and "governable" in terms of their human rights practices.

As mentioned above, traditional human rights proponents see the notion of universal rights as arising from the period of revolution in Europe and in America in the eighteenth century. These rights would have to be encouraged in the newly independent former colonies of Africa, Asia, and the Americas. According to Grovogui (2011), implicit in the trust that European man was possessed of rationality and morality that would eventually lead to an enshrining of the justice of rights in legislation, was that "the reverse common sense applied to slaves in revolt in any country" (55). However, postcolonial theory sees the desire for and the establishment of rights policies as a grassroots growth (just as had been the case in France and America), coming from the oppressed themselves, rather than bestowed by their former oppressors. In fact, just as in the case of the French and American assertions of rights, arising from their perception of oppression by their rulers, so too the awareness of and assertion of the rights of the colonised and formerly colonised, to be authentic, must come from the oppressed themselves, rather than being bestowed or indeed theorised by the colonisers. As Mahmood Mamdani (1990) observes, "Without the experience of sickness, there can be no idea of health. And without the fact of oppression, there can be no practice of resistance and no notion of rights" (359). Mamdani refers to Paul Hountondji's observation that one can only "make human rights an invention of Western culture" if one ignores the fact that the oppressed have the right to their own experience of oppression and the right to express their indignation at the flouting of their own rights (359). The recognition of this fact is central to postcolonial human rights theorising.

A significant example is provided by Siba N. Grovogui (2011), who in his essay "To the Orphaned, Dispossessed, and Illegitimate Children: Human Rights Beyond Republican and Liberal Traditions" analyses how Haitian slaves of the eighteenth century perceived human rights

when compared to the constitutional enshrining of such rights in the French and American Revolutions. He calls "myopic" the traditional view of a straight line development from civil and political rights to economic and cultural rights as this view "cannot be aptly grafted onto other traditions of human value" (45). The common thread of the condition of slavery runs through all three revolutionary experiences—that of France, of the United States, and of Haiti—but whereas the drafters of the French and American covenants were members of the white political elite, the drafters of the Haitian constitution were themselves members of the very group excluded from the former two documents. The dichotomy between the bestowers and the recipients of rights, and the primacy given to the recipients in terms of their ability to determine their own human rights paths, is one that is emphasised in postcolonial thinking.

Grovogui (2011) distinguishes between the notions of the subject of rights in these three For the French, the subject was the citizen, and the rules concerned the declarations. relationships between citizens and between the citizen and the government, with the rights that ensued from this relationship. In the American States, the individualistic subject wished to protect his rights from a government that he perceived as potentially encroaching on them. In both, the desire was to afford protection against government oppression. However, because in Haiti the slave had never enjoyed constitutional protection, the purpose of the constitution was to moralise what it meant to be human and to ensure what was needed to sustain life. Hence, it included within its provisions the illegitimate child, the orphan, the divorced and abandoned woman, and others normally excluded within its constitutional order. In the preamble to the Haitian Constitution, it is stated that the document is "the free spontaneous and invariable expression of our hearts, and the general will of our constituents" (as cited in Grovogui 2011: 54). In contrast to the Enlightenment mistrust of unrestrained emotion as characteristic of those still living in a state of nature and needing to be educated to a state of reason, Haitian human rights relied on what Grovogui (2006) has elsewhere called "the politics of the gut." Furthermore, in a strikingly progressive move, the Constitution stated that all beneath its protection, of whatever race, would be considered to be Black: "the Haytians [sic] shall hence forward be known only by the generic appellation of Blacks," thus turning a term of exclusion into one of inclusion (as cited in Grovogui 2011: 57). In addition, because as slaves the Haitians had been victims of the slaveholders' intrusions into their private lives, the Constitution ruled that marriage and divorce were given legal protection and provided a set of laws many of which were to be judged on individual circumstances, but not without due legal process. One of these laws stated that "The house of every citizen is an inviolable asylum" (as cited in Grovogui 2011: 59). Adding awareness of the Haitian Constitution to the already widely studied French and

American constitutional orders can demonstrate that, while the delineation of human rights in the West played a significant role in its history and indeed in the history of the world, Western human rights theory alone cannot account for the ways in which rights have been perceived and expressed globally.

Also central to postcolonial notions of human rights is the recognition that the contents of a notion of human rights are not unchanging, but are rather subject to both historical and social contexts. In Africa, for example, post-war independence took place against the background of rivalry between the two main former colonial powers, France and Britain, for continued access to the continent's resources, and of the entrance of the United States as it sought to block Soviet influence on the newly independent states. One can see from this example the continued involvement of the West in the governance practices, and specifically the exercise of human rights policy, of the newly independent African states. Despite the African state's own history of colonisation and of the drive for independence, the West has inserted itself and its experience into African human rights policies and practices. Behind the issue of African human rights, therefore, as pointed out by Mamdani (1990), "there stand different and contradictory forces, both external and internal" (362), the most significant external force or example being that of the United States.

The promise of rights, thus, became a weapon of the Cold War. Because African "revolution" ultimately threatened the stability upon which the French, British, and American powers relied and allowed inroads for Soviet influence, writes Mamdani (1990), the former colonial powers offered the solution of "rights": "The historical significance of this should be clear if we realise that power is to popular sovereignty as rights is to the rule of law. It was thus a rearguard action that sought to displace the discourse of 'revolution' with that of 'reform" (363). Hence, in Africa, as elsewhere in the postcolonial states, human rights represents a site of contestation, whereby in some states the guarantee of rights may represent an attempt to avert revolution, and in others the battle for reform may represent the beginning of the revolution itself. While it is not possible to generalise the attitudes toward human rights held by the peoples of such a large continent, the perception of certain patterns of needs not addressed by the universalist and individualist emphasis of Western-engendered human rights covenants has arisen in the last four decades. There has developed a critique of Western human rights concepts in favour of approaches to human rights rooted in African cultural practices of communalism and egalitarianism. The result has been the drafting of the Banjul Charter of Human and Peoples' Rights, which was agreed on in 1981 and implemented in 1986. This was followed in 1987 by

the establishment of the African Commission on Human and Peoples' Rights. The title of the Charter itself indicates the ways in which it differs from other universal treaties on human rights. In addition to protecting the "human" rights of the individual African, it also refers to collective "peoples" rights, as well as both collective and individual duties. Sirkku K. Hellsten (2004) has suggested that the Banjul Charter sees as inextricably linked both individual and collective rights, as well as the duties which must be fulfilled in order to realise them. The Banjul Charter, however, has met its share of criticism from a number of international lawyers, human rights scholars, and philosophers, who take exception to what they call the relativist nature of collectivist values and practices. The result has been a broadening of the gap between Western and African approaches to human rights along with a valorisation of individualist (Western) above collectivist (African) approaches.

The example of Tanzania and its move from the *Ujaama* or Brotherhood politics of its first leader during independence, Julius Nyere, to the politics of market democracy can demonstrate the clash of traditional and postcolonial approaches to human rights. As a socialist, Nyere argued that *Ujaama* (Brotherhood or Familyhood Socialism) represented the communalist and egalitarian ideals of precolonial Africa that had been lost under colonialism and foreign influence and that must now be reclaimed. In such a system, there was no need for the amassing of wealth as the ideal of mutual self-reliance would be pursued. However, when the socialist beginnings of the state of Tanzania gave way to a pluralistic democratic government which pursued investment in development, it was seen that many marginalised groups had been left outside the benefits of such development. It had been assumed, writes Hellsten (2004), that "as elsewhere in Africa, change with the political system [would not] require a change in fundamental human values, since the values are found in the *communalist* history of Africa" (73). Such beliefs rest on what Ingram (2008) calls the "horizontal effect of human rights" (406), the notion that not only must governments guarantee rights, but that the individuals themselves are responsible for ensuring the rights of those around them.

As a result of such beliefs, the protection of individual rights in Tanzania has clashed with the premises of the African Charter, particularly where protection of communal rights is perceived to conflict with individual rights. In fact, the first Tanzanian constitution did not even include a Bill of Rights, justifying its absence in the return to traditional collectivist cultural practices that needed no legal grounding. Rights protection was seen to be a Western construct employed in the past to justify colonialism and in the present to block development goals. However, even with the adoption of a Bill of Rights within the Constitution and the signing on to the African

Charter of Rights, the violation of individual rights can be and has been legally justified through an appeal to the public good. In addition, there are contradictions between the Bill of Rights and other parts of the Constitution; for example, Tanzania's Preventive Detention Act allows for the president's detaining and indefinite holding of any person perceived to be dangerous to the public good. These contradictions have led to criticism by traditional human rights and legal scholars who see in such conflicts justification for the enforced (if necessary) imposition of universal human rights on the postcolonial world.

On the other hand, such criticism also reveals the value of postcolonial approaches to human rights that see rights as ideally arising organically from the social and historical realities of the postcolonial state. In the case of Tanzania, for example, it would appear that colonisation and subsequent decolonisation made return to a pre-colonisation rights system, although idealised, difficult if not impossible, thereby necessitating, in the eyes of the West, human rights intervention. In this sense, the imposition of international law and neoliberal values may be seen as displacing the local rights system and thereby threatening the independence of the postcolonial state (Chimni 2006: 3). It does so by ignoring the uneven development of these states, lumping them together under the label of "Third World" or "developing states," thus constituting their citizens as the Other in need of rights to be encouraged or bestowed by the "First World," and making them vulnerable to hegemonic domination through the demands of adherence to international law. According to Chimni (2006), it is only through collective action and collective struggle against such hegemony that postcolonial states can protect the rights of their peoples despite economic and gender differences (6-7). In such situations, it is not universal human rights bestowed by the West that are appealed to, but the rights to autonomous communitarian decision-making.

This situation is particularly the case with property rights, which represented one of the primary threads in Enlightenment rights philosophy and declarations, as these statements were intended to be expressions of what could be expected both by and of those who considered themselves to be civilised. One crucial factor in moving from a state of nature to that of civilisation, Enlightenment thinkers argued, was the ability to keep one's property safe from the depredations of unrestrained monarchs. The establishment and protection of property rights were seen as fundamental to progress, and hence when land previously communally shared was privatised through colonisation, this step was described as key to the establishment of civilisation in the colonised world. Kant, for example, characterised property ownership as a postulate of pure reason and, hence, an inevitable step on the path to civilisation. Therefore, property became

identified as a legal concept, and as such was granted legal protection "as a natural, sacred, and inviolable right" (Schacherreiter 2014: 231) in such documents as the 1789 Declaration of the Rights of Man and of the Citizen. Yet, as Judith Schacherreiter (2014) argues, "There are additional troubling dimensions to ethnocentricity and universalism which go beyond the mere fact of human rights being embedded in 'Western' concepts" (227). A determinant of the achieving of modernity and the move away from the feudal past was the dividing up of the commons into privately held property. Hence, the communal holding of land that had been characteristic in Europe before capitalism and in the Americas before the coming of the Europeans was dismissed as primitive and in need of reform.

The indigenous peoples of the Americas were in the eyes of the colonists, then, and (postcolonial theorists would argue) in the eyes of the Enlightenment thinkers who provided their justification, "not yet fully developed humans." They were the Other considered necessary for the civilised Europeans to define themselves against and for these same Europeans to bring into the modern period and thus bestow "humannness" upon them. As Schacherreiter (2014) observes, rather than being approved as another form of legal property ownership, "The common usage of land is not recognized as an autonomous legal form of land tenancy, but reduced to a 'not yet property', a space without law and cultivation. It represents the state of nature which is characterized by the absence of law in general and property rights in particular" (231). Therefore, those who hold traditionally communitarian values, those Others who, in the words of Santos exist on "the other side of the line" of civilisation, tend towards invisibility when rights policy is set. In fact, following Santos' line of thinking, that there is no possibility of coexistence of both sides of the line, the modern can only prevail through causing the vanishing of the traditional. Beyond "this side of the line," that is, colonially-sponsored modernity, "there is only nonexistence, invisibility, non-dialectical absence" (Santos 2007: 1-2).

In the Americas, and particularly in Mexico, this attitude resulted in the colonial dispossession of land that had been previously held by the indigenous populations, and the practice was continued by Mexican governments following independence as a sign that Mexico had moved away from its "barbarous" past and could take its place among modern, developed nations. Throughout Mexico's history, however, popular counter-movements have attempted to take back the land, using what Schacherreiter (2014) identifies as postcolonial discourses to challenge the universalisation of private property as a human right. During the Mexican Revolution, in the Zapatista Uprising of 1994, and since that time, both indigenous and non-indigenous groups have called for a reversal of the so-called agrarian reform which abolished earlier communal

agrarian structures, and their arguments against privatisation and commercialisation have been echoed in other Latin American countries. These arguments have targeted not only land ownership, but also privatisation of parks and other public services, such as internet service. As Schacherreiter (2014) observes, "In the context of Latin America, defending the commons against appropriation implies their defense against neo-colonial forms of propertization" (237-38). Santos (2007), too, has remarked upon what he calls the "return of the colonizer" through "the new indirect rule" whereby the state withdraws from regulation of social and public services, leaving them to be privatised by powerful non-state elites. He calls this "the rise of social fascism, a social regime of extremely unequal power relations which grant to the stronger party a veto over the life and livelihood of the weaker party" (16-17). In this pattern, the rights of the powerful elites are used to deny the most basic right, the right to life itself, of the weak majority. Propertisation and privatisation, and their protection as human rights, then, can be viewed in postcolonial theory as merely modern representations of the colonial dispossession of indigenous land and all that this dispossession implies about one-dimensional attitudes towards tradition and modernity.

Conclusion

The need to take account of traditional, non-Western approaches to human rights within modern human rights analysis has been foregrounded in recent years by the increasing number of challenges to the established human rights regime and by the growing awareness of the need to address social and cultural practices before civil and political rights can be agreed upon and enforced. It is here that postcolonial human rights theory has a role to play, in pointing out not only the position of those who have been marginalised or excluded by traditional approaches, but also the acknowledgement and formalisation of rights outside of the Euro-American sphere of influence. A promising result of the inclusion of postcolonial approaches to human rights is the opportunity they offer to the human rights community. This opportunity is now being recognised. In making suggestions for the United Nations Committee on Economic, Social, and Cultural Rights—suggestions concerning the United Nations' addressing of the rights most often ignored in favour of political and civil rights—Beth Lyon (2003) comments that "[p]ost-colonial theory can provide a meaningful interrogation of the goals and methods of the human rights regime" (2), providing human rights organisations the opportunity to examine their agendas and mandates. At present, while the language of the International Covenant on Civil and Political Rights is clear, strong, and unambiguous, the International Covenant on Economic, Social, and Cultural Rights is couched in more hesitant terminology. For example, its enforcement clause states that "Each State Party...undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures" (UNOHCHR 1966: Part II, Article 2; italics added). With economic, social, and cultural rights the primary concern of the peoples of the developing world, postcolonial theorists have argued that such "lip service" to non-political and non-civil rights reflects the desire of the West to keep the awarding of such rights as rewards for compliance with their own political and economic ambitions toward the non-West.

As more and more powers to set policies and to enforce human rights are passed to international institutions, some postcolonial theorists argue, the still developing postcolonial states are being limited in their right to independent self-development, which includes the right to establish and enforce human rights. More significantly, Siba N. Grovogui (2011) cites a number of serious results of the assumption by the West of an exclusively European and American history of human rights, including within the assertion at the United Nations of Western positions to solve current non-Western crises, that social and economic rights (of chief concern in much of the 'developing' world) are less pressing than civil and political rights, and that "non-Western idioms protecting human faculties and capacities are simply localized translations of the more universal Western language of human rights" (42-43). The power of the Westernised, traditional conception of human rights is also present in the implicit assumption of the need to intervene in situations where violators of human rights may be characterised, either directly or implicitly, as barbaric and savage.

However, there are a number of genealogies of human rights extant today; in the postcolonial states, those which have the most relevance are very often not the traditional histories that place their origin in the West. Grovogui (2011) comments, "Western categories are neither historically unique nor morally indispensable to an ethical life. Every imaginable duty and obligation in the area of human rights may be validated and defended by most of the world's moral systems, even if they have different inflection and, therefore, legal, political, and moral implications than the Western conception" (45). Postcolonial perspectives on human rights can serve to remind us of the existence of both the variety of moral systems and of the ways in which they intersect, providing an opportunity to expand the interpretation and the application of universal human rights.

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