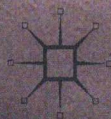




The Uses and Misuses of Human Rights

A Critical Approach to Advocacy

EDITED BY GEORGE ANDREOPOULOS
& ZEHRA F. KABASAKAL ARAT

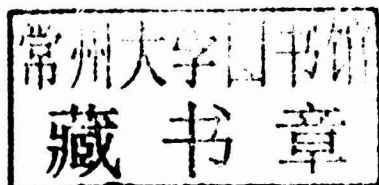


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ISBN: 978-1-137-40833-4

Library of Congress Cataloging-in-Publication Data

The uses and misuses of human rights : a critical approach to advocacy / edited by George Andreopoulos and Zehra F. Kabasakal Arat.

pages cm

ISBN 978-1-137-40833-4 (hardback : alk. paper)

1. Human rights advocacy. 2. Human rights. I. Andreopoulos, George J. II. Kabasakal Arat, Zehra F.

JC571.U83 2014

323—dc23

2014035723

A catalogue record of the book is available from the British Library.

Design by Amnet.

First edition: November 2014

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ACKNOWLEDGMENTS

This volume grew out of a series of papers presented under the theme of “The uses and misuses of human rights” at the Columbia University Seminar on Human Rights. It is dedicated to the memory of Professor Peter Juviler, whom we lost in 2013.

Peter was one of the founding fathers of the Human Rights Seminar at Columbia and a key reason as to why it has become one of the most active and intellectually challenging seminars on campus. Over the years, numerous scholars, students, advocates, and activists have benefited from his deep knowledge and extensive experience in the human rights field, as well as from his unparalleled kindness and generosity. His generosity was extended to the two of us in many ways, first and foremost by inviting us to serve as cochairs of the seminar. He always led us by example, inspired us at every turn, and became a mentor and a friend whose impact will remain with us forever.

This book could not have come into being without the assistance of a number of people. In particular, we would like to thank Bob Pollack, director, and Alice Newton, associate director, of the University Seminars at Columbia University for their unstinting support for this project. We would like to express our appreciation to the Schoff Fund at the University Seminars for their help in publication. In addition, we greatly appreciated the input of our fellow seminar members who, always ready to “dissect” ideas and arguments, provided invaluable insights and suggestions during the sessions in which some of these chapters in this book were initially presented as works in progress. Our very capable rapporteurs, Heidi Rosbe and Serdar Yalçın, were responsible for the extremely useful summaries of the main points of each session. The numerous challenges associated with steering such a project to publication were rendered manageable due to the dedicated work and impressive skills of our research assistant Ksenia Lewoniec. At Palgrave, it was a great pleasure to work with Farideh Koochi-Kamali, editorial director, Sara Dосkow, assistant editor, and Isabella Yeager, editorial assistant, whose sound advice

and eagerness to assist made our task easier. We are grateful also to Carol McGillivray and Ruth Elwell for their meticulous work at the stages of copyediting and indexing. Above all, our thanks is due must go to the contributors to this volume, whose work brought this project to fruition.

Last, but not least, a special note of thanks to our families, whose encouragement and understanding made the whole thing possible.

George J. Andreopoulos and Zehra F. Kabasakal Arat
New York, May 2014

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CHAPTER 1

ON THE USES AND MISUSES OF HUMAN RIGHTS: A CRITICAL APPROACH TO ADVOCACY¹

GEORGE ANDREOPOULOS AND ZEHRA
F. KABASAKAL ARAT

The evolution of human rights norms reveals a complex and uneven story. On the one hand, there have been unquestionable achievements, especially in the post-1945 period, which have challenged some of the traditional prerogatives of sovereignty.² More specifically, since the adoption of the Universal Declaration of Human Rights by the UN General Assembly in 1948, the setting of standards in human rights has advanced rapidly. Both the United Nations and regional human rights regimes have adopted declarations and treaties, many of which have been ratified by a significant majority of participating states. New constitutions, amendments, and legislative reforms tend to make explicit references to the promotion and protection of human rights (Daly, 2013). Treaty obligations and national laws have led states to establish national human rights institutions with wide-ranging mandates (Mertus, 2009).³ Advocacy organizations have proliferated, some of the perpetrators of serious violations have been brought to justice, people and activists have increasingly articulated their claims by employing a language of human rights, and very few people would openly admit to being hostile to the idea of human rights. This has led some analysts and commentators to refer to

human rights as the “lingua franca of global moral discourse” (Beitz & Goodin, 2009, p. 1).

On the other hand, all kinds of human rights violations and various forms of discrimination continue all around the world. Although progress can be noted in some areas, regression in other areas raises questions about the sustainability of improvements, if they are ever made. For example, industrialization, workers’ activism, and various conventions issued by the International Labour Organization (ILO) led to prolabor legislation and increased rates of unionization in the last century, but the progress has been uneven (varied from country to country and by industry) and, most important, wavering (ILO, 2005; Organization for Economic Co-operation and Development [OECD], n.d.). Parallel to the pattern of decline in the rates of unionization that began in the later decades of the last century, collective bargaining rights have been on the decline and even under attack in some places. In recent years, the most prominent example of such attack has been the targeting of public-sector unions in several states in the United States (Andreopoulos, 2012). Where collective bargaining is practiced, it has become a device through which workers invariably negotiate which of their “gained rights” should be compromised. Real wages have been declining, even before the financial crisis of 2008, despite the marked increases in labor productivity and profit margins in many industries. Informal economies, which remain outside the purview of labor law, have started to grow. Along with them have come sweatshops, human trafficking, and “new/modern-day slavery” (Bales, 2004; Kara, 2012). Industrial accidents that result in deaths and dismembering might not have reached nineteenth-century levels, but they are too frequent to be tolerated in the “age of human rights” and high technology. Yet, declining workers’ rights are tolerated, if not justified, for stimulating or sustaining economic development, competitive markets, and productivity.

Improvements in information and surveillance technology have reinforced states’ ability to control their population and endangered the right to privacy. Antiterrorism measures, which have increased both in number and severity, especially after the September 11, 2001, attacks in the United States, have undermined (nationally as well as internationally) human rights norms for the sake of security (Andreopoulos, 2011; Cherman, 2011; Duffy, 2004).

While the encroachment on human rights in the above mentioned examples may be considered as public/political choices among (seemingly) competing values—economic development and national security, on the one hand, and human rights, on the other—in certain circumstances human rights may also be undermined or violated in an effort to

promote them, often by their most well-intended advocates. This volume focuses on challenges to the effective and proper use of human rights and tries to identify strategies and contexts in which human rights advocacy can work in favor of human rights, as well as situations in which such advocacy may backfire or unintentionally cause harm.

USE, ABUSE, AND MISUSE OF HUMAN RIGHTS

We begin by clarifying the key terms that constitute the focus of this volume. By *use*, we refer to the advancement of human rights norms and effective application of the human rights framework and instruments in redressing injustices, especially when these involve systematic violations of internationally recognized norms. By *abuse*, we refer primarily to situations in which the advocacy of human rights is used as a disguise to pursue other goals, as well as to the deliberate distortion of the obligations drawn from human rights documents, and the manipulation of the aims and activities of human rights and humanitarian organizations. Lastly, by *misuse*, we refer to actions that are undertaken by sincere and devoted advocates of human rights but unintentionally undermine international norms, question the validity of *some* human rights, adversely affect the well-being of their intended beneficiaries, or violate others' human rights.

Before we proceed, several caveats are in order. First, norms, including human rights norms, are not exogenous to social interaction. While norms constitute a framework for existing rules, they continuously evolve as a result of the interplay between the rules and the actions of various actors. This interaction affects the substantive content of the norms, as well as their overall authoritativeness (Buzan, 1993; Sandholtz & Stiles, 2009). In this context, any discussion of use/abuse/misuse has to be situated within an ongoing interactive process where assessments of shared expectations about appropriate conduct may vary in accordance with the dynamics of the particular case/dispute. A good example of this would be the impact of a campaign seeking the adoption of a law regulating certain types of hate speech. This does not mean that there are no clearly identifiable normative signposts; rather what it indicates is that these signposts serve as baseline understandings in the effort to identify the "prevailing" shared expectations at a particular point in time. Second, the narratives of use, misuse, and abuse do not unfold in strictly compartmentalized trajectories; they inhabit the same public and private spaces, and their intersections at times render precise determinations of the actions involved (for example, abuse vs. misuse) and of intentionality (intended vs. unintended) rather difficult. What adds another layer of complexity in such determinations is the realization that sometimes misuse may be due to

limitations in or incompleteness of framing. Identifying the appropriate “schemata of interpretation” (Snow, Rochford, Worden, & Benford, 1986, p. 464), so as to draw the necessary links between practices and violations and guide collective action, is not always as clear cut as it may appear. However, there are many instances in which what appear as limitations in framing are actually the self-imposed constraints of an advocacy model that seeks different outcomes, while insisting upon the same course of action and resisting a critical reexamination of its fundamental premises.⁴ Third, though considerable differences between human rights and humanitarianism exist, as well as between human rights and humanitarian organizations, some of the issues of concern raised here are common to both. It is with these caveats in mind that one should examine the basic matrix of outcomes that we present in Figure 1.1 later in this chapter.

The ongoing discussion on uses, abuses, and misuses indicates that the human rights discourse, despite the challenges that it faces and its manifest shortcomings, does matter. As human rights entered the agenda of intergovernmental organizations, and they, along with major international human rights organizations, have broadened their understanding of human rights and their activity domains, the tendency to employ human rights language in framing various causes has increased. Amnesty International, which started in the United Kingdom in the 1960s with the limited agenda of opposing political imprisonments, has been expanding its area of activity both geographically and thematically (Clark, 2001). Especially since the 1990s, women’s rights, LGBT rights, and to some extent social and economic rights have started to be addressed in its press releases, reports, and meetings organized by its chapters. The other major international advocacy organization, Human Rights Watch, followed suit, though perhaps more cautiously. Ronald Holzhaacker’s essay in this volume examines the development of the framing of LGBT rights as human rights by focusing on its institutionalization in various jurisdictions.

As human rights gained currency and started to be used as a benchmark for legitimate social action, it also became more prone to abuse. For example, the United States’ wars in Afghanistan, which was originally launched to end the Afghan government’s support for Al-Qaida, and in Iraq, which was aimed at eliminating the weapons of mass destruction allegedly held by Saddam Hussein, were intentionally reframed as human protection operations; in particular, administration officials argued that the goals of these operations included the advocacy of women’s rights, liberating people from repressive regimes, and introducing democratic rights and procedures.⁵ The manipulation of human rights by the Bush administration to justify the use of force by “the coalition of the willing” against these countries and their subsequent occupations have

not only violated various rights of the people living in these countries but also endangered international human rights advocacy by enforcing skepticism among developing countries about the intentions of such advocacy.⁶

However, leaders in developing countries can be equally calculating and devious. For example, in July 2008, the government of Álvaro Uribe Velez allowed the Colombian military to use the disguise of the International Committee of the Red Cross (ICRC) to negotiate with a major opposition armed group, the Revolutionary Armed Forces of Colombia (FARC), and obtain the release of some high-profile hostages. While the act was presented as a humanitarian action and seen as a major victory against the guerrillas, it tainted "the neutrality" of the ICRC and potentially exposed its staff and other humanitarian workers to greater risk (Penhaul, 2008).

Rather than focusing on such blatant abuses, this volume is more interested in exploring *misuses* of human rights. With the best intentions, human rights may be promoted in a way that sells them short, neglects the input of the target population, or underestimates the undesirable impacts. The promotion and advancement of a right may engender backlash and cause reversals. Moreover, the actual content and intention of human rights advocacy may be misunderstood; the root causes of violations may be neglected; human rights may be interpreted narrowly; or beneficiaries may be defined in a limited way. Finally, the process of promoting the right of a particular group may undermine some other rights of the very same group or the rights of others.

An illustrative case of "well-intentioned" misuse, which resulted in hurting the population it intended to help, would be the Child Labor Deterrence Act, a bill drafted by United States Senator Tom Harkin in the early 1990s and intended to protect children's rights by banning the import of goods produced by child labor to the United States. It is reported that the threat of the bill led garment manufacturers in Bangladesh to lay off 50,000 child workers. But, a follow-up study by UNICEF found that these "freed" children, who lacked education and skills, had been pushed into making a living through activities such as "stone-crushing, street hustling and prostitution," which are definitely "more hazardous and exploitative than garment production" (UNICEF, 1997, p. 60).

It should be noted that even if the Harkin bill had not had such detrimental impacts on the very same children it intended to help, its effectiveness as a device for advancing children's rights, or more narrowly ending child labor, would be questionable. According to the ILO (1998), only a fraction of child labor is employed in export industries.⁷ In fact, commodity bans, consumer boycotts, and similar symptom-oriented measures

that do not address root causes, such as poverty, or that ignore other rights of children (e.g., the right to education) are not likely to have a lasting impact, even if they have a broader reach (Arat, 2002). Power differentials and commodification inherent to such acts of advocacy can also endanger the emancipatory prospect of human rights, as discussed in Joel Pruce's chapter in this volume.

In addition to the power differentials between advocates and target populations, the theory of intersectionality draws attention to power differentials *within* the "disadvantaged" group targeted for help. Introduced by feminist theorists, *intersectionality* is simply defined as "an analytical tool for studying, understanding and responding to the ways in which gender intersects with other identities and how these intersections contribute to unique experiences of oppression and privilege" (Symington, 2004, p.1). Pointing to the fact that "women" do not constitute a monolithic category, this approach stresses that the multiple and layered identities of each woman make her experience gender discrimination differently. Thus, a policy that may advance the rights of a certain segment of women may not help some other women, or even hurt them and their rights.

The dynamics of humanitarian intervention and aid make these actions particularly prone to misuse and abuse, even if they are carried out with the utmost sincerity and goodwill. Here misuse involves the issue of moral hazard and relates to the calculated risks taken by persecuted groups. The argument, using the example of an ethnonational group seeking to advance a claim of self-determination, can be summarized as follows: An ethnonational group in pursuit of self-determination would not normally pose a military challenge to a repressive regime because of the fear of retaliation. However, the prevailing humanitarian intervention discourse, a discourse characterized by proliferating humanitarian triggers for action (Andreopoulos, 2010), may encourage such a group to pursue an armed struggle for secession or autonomy. The leadership of the group engages in a rational calculation of the risks involved: if the group proceeds with a military challenge and wins, then the goal of self-determination is achieved; if it proceeds but fails, then the images of massive and indiscriminate killings of civilians would prompt the international community to intervene. Since both scenarios yield an outcome that is likely to serve their interests, leaders of these groups are prepared to tolerate mass killing of their own civilians. Hence the moral hazard involved; the discourse of humanitarian intervention, which, according to its proponents, is intended to stop or prevent human rights abuses, inadvertently acts as their trigger.⁸

There are many factors that can contribute to misuses. Some of these factors pertain to key features of the human rights discourse, while others

result from the function of human rights as power mediators—namely, from the way in which they “structure power relationships between individuals, individuals and groups, and individuals and political institutions, especially where those relationships are characterized by unequal distribution of material resources” (Reus-Smit, 2009, p. 38). In fact, the ability of the “normative media” to structure power relations “in less socially destructive ways” (Reus-Smit, 2009, p. 39) enhances the risk of misuse of the human rights discourse by its advocates.⁹

Indeterminacy is a key feature of the rights discourse (Sunstein, 1995). Rights are invariably general propositions that offer little guidance as to the specific policy prescriptions that would be consistent with adherence to the relevant norms, as it can be observed in debates on free speech. For example, how should we view legislation criminalizing hate speech? One view, which is reflected in US law, is inimical to the criminalization of hate speech. Another view, reflected in the laws of some other Western liberal democracies (e.g., Canada, France, and Germany), argues in favor of criminalizing certain forms of hate speech, like Holocaust denial (Ignatieff, 2002). In their eagerness to advance their respective cause, advocates of each point of view can, and often do, undermine the rights of others.

Another example relates to the “war on terror,” which has engendered some “rehabilitation programs” for suspected terrorists and terrorist supporters. Directed at such persons in detention with the objective of changing their belief and value systems (United Nations Counter-Terrorism Implementation Task Force, 2010), these programs are expected to contribute toward the prevention of terrorism and, thus, advance human rights goals, such as the security of persons and the protection of human life. However, they also raise serious questions concerning respect for freedom of conscience and religion, as well as for physical integrity rights (Flynn, 2012). In other words, both proponents and opponents of rehabilitation programs can, through their advocacy, undermine human rights, though different sets of rights for the intended beneficiaries. While proponents can undermine the freedom of expression and religion, as well as the physical security of suspected terrorists, opponents can undermine the physical security of civilians.¹⁰

A quintessential example of conflicting rights appears in relation to women's rights. It is noted that recognizing peoples' right to self-determination or the right to religious freedom tend to undermine women's rights when the culture or religion in question happens to be essentially discriminatory, or interpreted as such by the male elite (Arat, 2003; Okin, 1999). The way women's rights are advanced, however, may have certain detrimental ramifications, including the subversion or undermining of some feminist goals. Violence against women has been a widespread violation of human rights,

and advocates of women's rights push for effective sex crime prosecution. According to Kristin Bumiller, however, criminalization has made the feminist movement in the United States "a partner in the unforeseen growth of a criminalized society" with racialized consequences that are most profoundly felt by the minority and immigrant men and by "women who are subject to the scrutiny within the welfare state" (2008, xii). Considering the process more of a co-optation and subversion by the state, Ana Clarissa Rojas Durazo contends that the criminalization "created a dual advantage for the state"; in addition to treating the perpetrator as the sole responsible party and positioning the state as an ally of the battered women, it supported the state's expansion of the "prison industrial complex" (2007, p. 118).¹¹

Some of the complications surrounding human rights can be attributed to what Christian Reus-Smit characterizes as their institutionally referential role.¹² According to him, human rights are institutionally referential in three ways: (1) they are institutionally ambitious; (2) they are institutionally presumptive; and (3) they are institutionally dependent.¹³ Here, we focus on institutional dependence. Institutional dependence signals that the substance of a right cannot be "actually enjoyed" and cannot be "socially guaranteed against standard threats" in the absence of an enabling institutional context.¹⁴ Institutions are supposed to be designed to offer protection and shape our collective understandings about individual and group entitlements. However, the construction of such understandings is a highly contentious process that often privileges particularistic/narrow, as opposed to broader/inclusive, understandings of such entitlements. The essay by Cyanne Loyle and Christian Davenport in this volume explores the ways in which transitional justice institutions and processes can be subverted or misused by governments, despite the best intentions, or with the acquiescence of the international community and transitional justice practitioners.

Although it is often treated as a case of success, the Truth and Reconciliation Commission (TRC) in South Africa demonstrates various problems (TRC, 1998). Critics note that by restricting its mandate to "gross violations of human rights," the TRC left out important lower-level systematic violations that constituted integral features of the identity of the apartheid regime. This is worth emphasizing since the struggle against apartheid was instrumental in shaping the modern human rights movement (Leebaw, 2007, pp. 231–32). Thus, what initially appeared as a justified focus on the sheer brutality of that regime eventually led to an incomplete portrayal of the landscape of apartheid and missed the critical elements responsible for its establishment and maintenance.

POWER AND HUMAN RIGHTS

Human rights can be empowering for those who have been repressed and discriminated against, and international human rights declarations and treaties serve as leverage for those who try to improve human rights conditions. But it should be noted that human rights have not always been advanced by the marginalized or on their behalf. For example, the Magna Carta, a document from early thirteenth-century England, is often presented as the first legal protection of rights against encroachment by the state. But the Magna Carta was also the product of a power struggle. Devised to protect the property rights of noblemen against the increasing power of the monarch, it was a settlement among the members of the same class and served the interests of those who were already in power (Arat, 2006).

Similarly, the Bill of Rights enacted after the Glorious Revolution in England, was mainly about the rights of the members of the parliament, who belonged to the landowning class. The philosophical justification of the "new" rights-based regime of postrevolutionary England of the eighteenth century was offered in the writings of John Locke, who, while advancing the idea of representative government, limited the right to participate in government to estate holders. The three inalienable rights, "life, liberty, and estate," promoted a notion of individual freedom that rested on property ownership (Locke, 1952). The American Declaration of Independence and Constitution also subscribed to the Lockean notions. The other famous eighteenth-century human rights document, the French Declaration of the Rights of Man and Citizen, likewise promoted property rights and certain freedoms, without addressing the material basis of "égalité." Needless to say, all these declarations excluded women.¹⁵

The Universal Declaration of Human Rights and the subsequent human rights treaties mark a departure from these earlier documents by expressly subscribing to the principle of equality in dignity. Their broader scope, both in terms of the types of rights and the populations covered, makes human rights appealing to the most disadvantaged and marginalized. It must be this emancipatory promise that makes Sam Moyn refer to human rights as "the last utopia" and include the failure of other emancipatory internationalist ideologies, such as anticolonialist nationalism, communism, or "Marxist humanism," among the factors that account "for the relevance of human rights in the last three decades" (2010, p. 213).

Similarly, Costas Douzinas recognizes that "human rights have become the principle of liberation from oppression and domination, the rallying cry of the homeless and the dispossessed, the political programme of revolutionaries and dissidents" (2000, p. 1). Yet, he also adds that the

appeal of human rights “is not confined to the wretched of the earth.” Pointing out that “the owner of Harrods, the former managing director of Guinness Plc, as well as the former King of Greece have all glossed their claims in the language of human rights” (Douzinas, 2000, p. 1), he declares: “Human rights have won the ideological battles of modernity” (Douzinas, 2000, p. 2).

While popularity itself can be taken as an indicator of progress, if the left and right, weak and powerful, oppressor and oppressed, all invoke human rights, this popularity becomes a cause for concern. Indeed, a vocal critic of human rights, Gary Teeple, considers human rights as a product of capitalism and the rights articulated in the Universal Declaration as deceptive: “their possession does not mean that everyone is actually equal or can in fact exercise or benefit from those rights” (2005, p. 4). “The fact,” he notes, “[that] those on both the left and right on the political spectrum often find themselves promoting causes in the name of human rights requires explanation” (Teeple, 2005, p. 6).

This is a point that merits careful consideration. One does not need to share the main premises of Teeple’s approach in order to be concerned about the hijacking of the emancipatory aspects of the human rights discourse. Most critics of the current phase of globalization argue that the powerful actors, the key players in the global economy and politics (such as the World Trade Organization, International Monetary Fund, United States, United Nations, and major transnational corporations), *undermine* human rights in their decision making (Abouharb & Cingranelli, 2007; Cox, 2007; Evans, 2011). Yet, one may need to be more concerned about the embracement of human rights by powerful actors, since they can and often do compromise the emancipatory promise/potential of human rights. In fact the seventeenth- and eighteenth-century notions of human rights are revived by libertarians and neoconservatives, and they are alive in neoliberal economic programs and constitutional projects that seek to align property rights with individual freedom in the service of the public interest. This can be considered a misuse and, in certain situations, an abuse of human rights.

Since the subversion of the emancipatory promise of human rights is not hypothetical, the growth of an amorphous chorus of human rights raises suspicion. Thus, according to Conor Gearty, “the human rights tent should not be so broad that everybody can be squeezed into it” (2006, p. 144). While Gearty and many other advocates of human rights see the popularity of human rights among the mighty as problematic for the advancement of human rights in practice, others consider the recognition of a large number of rights as having a diluting effect (Wellman, 1999), or resulting in ineffective advocacy. Preferring pragmatism over