

Human Rights and Contested Agency

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1. Introduction

This special issue is dedicated to a critical exploration of human rights and contested agency, by which we mean the various implicit and explicit ways in which certain forms of agency are contested through human rights law and practice.

All throughout our life, from the moment we are born until to the moment we die, we human beings exercise agency, a concept generally understood to capture our power to think and act to exert influence over the world around us in order to satisfy our needs, desires, ambitions, etc. But just like we had no choice but to be born, we have no choice but to accept that our ability to do so is bound, influenced or produced by a set of interrelated personal, societal and environmental factors. We can think, to name but a few, of mental and physical ability, age, race, gender, sexual orientation, class, different systems of government and ideology, climatic conditions and so forth. For some, the conditions of life are enabling, functioning, supportive, inspiring, stable and permissive enough to exercise our individual and collective agency (as a family, a couple, a group, a movement etc.) in many different ways towards many different goals. Whereas most will agree with the basic normative principle that our freedom to act cannot be without limits to respect that of others, such an environment nevertheless provides a feeling of freedom large enough to sustain the belief that we can shape life in the way we want. For many others, conditions for exercising agency are more challenging due to various complicating factors, such as forms of structural oppression, power differentials, discrimination, violence, poverty, physical and mental illness, climate change, natural disasters, etc. These cut across regions, countries, neighbourhoods and households. One of the principle aims of the ‘universal’ human rights project is to identify and secure a set of rights that, if respected, provide all people everywhere with conditions and enough freedom to exercise their agency in a way that allows them to shape their lives as they desire it.

The concept of agency is thus anchored in general and specialised international human rights instruments that seek to protect and empower specific groups (e.g., children, women, indigenous people, refugees, people with disabilities). It is central to the recognition of such groups as subjects of a special set of rights, and with the recognition of subjectivity comes the recognition of all humans to act and make decisions on their own behalf. However, as the different contributions to this special issue demonstrate, despite this inclusive ambition, human rights law, custodians, judges and practitioners favour to recognize and take seriously agency when it is considered as the ‘right kind’, serving the ‘right goals’ in pursuit of a ‘good life’. Other forms that could arguably help one to pursue simply getting through life, such as choosing to do denigrating work, marrying young, or labour migration, are contested. This brings us to the three questions that constitute the throughlines of this special issue: How is agency conceptualized in various international human rights instruments? Does or should the current conceptualization accommodate the many diverse and challenging ways that agency is exercised? Can or should we think of alternative ways to do so?

In the introduction to this special issue we, as guest editors, first present a cursory account in which we seek to set the stage for a multifaceted exploration of human rights and contested agency by outlining the subversive nature of the institutionalization of agency through human rights law (Section 2). In Section 3 we then sketch an overview of the workshop that sprouted the collective and individual endeavors that led to the papers presented in this issue. We then present these different papers in Section 4, as well three threads that we believe draw the different contributions together. In the final section, Section 5, we leave you, the reader, with some concluding remarks and playful encouragements for how to engage with this issue.

2. The Institutionalisation of Human Rights and Agency

Philosopher James Griffin makes a case for agency being the most important ground for human rights. Through what he identifies as the “best philosophical account of human rights”, he argues that human

rights are essentially there to protect our ability to shape life as we desire it, but not to qualify how to do so.¹ In his own words:

“What seems to me the best account of human rights is this. It is centred on the notion of agency. We human beings have the capacity to form pictures of what a *good life* would be and to try to realise these pictures. We value our status as agents especially highly, often more highly even than our happiness. Human rights can then be seen as protections of our agency—what one might call our personhood. They are protections of that somewhat austere state, the life of an agent and not of a good or happy or perfected or flourishing life.”²

Yet what strikes us, is that the very term ‘human rights’ seems to challenge the idea that they are, or perhaps should be, non-prescriptive in nature when it comes how agency is to be exercised. Much like we use the words ‘rat’ or ‘pig’ as insults derived from our general negative perception of the creatures we have named this way, we generally invoke the word ‘human’ in an inherently positive manner because we believe that we are by nature ‘good’. A ‘humane’ or ‘humanist’ approach is considered a loving, caring and inclusive one. Something done with a ‘human touch’ is the kind of thing we encourage and appreciate. Despite all the evil and atrocities that we have committed throughout our history on earth, ‘human’ thus remains a standard of ‘good’. The term ‘rights’ has, by definition, a similar goodness about it. In their popular understanding, rights are about having ‘righteously’ justified ethical or legal claims or entitlements on the actions of other people and the institutions that govern us. As the following discussion on the institutionalisation of human rights will demonstrate, this semantic indication of an embedded prescriptiveness is reflected in practice. Human rights law does indeed seem to concern itself with questions of what kind of pictures and realizations of life are ‘good’? In fact, it seems rather pronounced on what kind agency is worthy of recognition and protection, and what should be contested. As we hope to make clear, far from ‘the best philosophical account’, this realist dimension of human rights is inherently political and unstable.

The history of human rights did not start in 1948 with the adoption of the UN Universal Declaration of Human Rights (UDHR). Nor has it been a linear process for the progression of individual liberal freedoms as theorised by Western enlightenment thinkers. As sociologist Neil Stammers has shown, both the struggle *for* and institutionalisation *of* human rights have a strong social movement dimension and can be traced to many different ‘non-Western’ places and peoples.³ Take for instance Article 4 of the UDHR which states that “No one shall be held in slavery or servitude: slavery and the slave trade shall be prohibited in all their forms”.⁴ Few human rights issues relate so directly to freedom and agency as slavery, and it was one of the first matters to arouse wide international concern. The Haitian revolution (1791-1804), known to be the only successful slave revolution, undoubtedly played a key role in this development. After a long century of continuous colonisation, transnational slave trade and slave labour, a long decade of uprisings, resistance and warfare resulted in the retreat of the French, and the signing of the 1804 Haitian Declaration of Independence.⁵ The document was a formal acknowledgement of the personhood, freedom and agency of all who fought against slavery: “We have dared to be free, let us be thus by ourselves and for ourselves”.⁶ The subsequent Haitian Constitution of 1805 codified the abolishment of slavery, as well as a set of rights that were to protect the freedom and agency of all Haitians. The constitution, monumental as it was for the furtherment of human rights in Haiti and far beyond, also showed that the institutionalisation of agency holds subversive components. It became clear that the formal recognition and protection of agency was underpinned by a strong idea of how to use this agency to build a ‘a good society’, and who was encouraged to do so. A striking example was the article that stated that: “No person is worth of being a Haitian who is not a good father,

¹ James Griffin, “Discrepancies between the best philosophical account of human rights and the international law of human rights” (Presidential address delivered at the Meeting of the Aristotelian Society, University of London, 9 October 2000) (2001) 101 Proceedings of the Aristotelian Society 1 at 1.

² *Ibid* at 4.

³ See Neil Stammers, *Human Rights and Social Movements* (London: Pluto Press, 2009).

⁴ *Universal Declaration of Human Rights*, UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III).

⁵ Cyril Lionel Robert James, *The Black Jacobins: Toussaint L'Ouverture and the San Domingo revolution* (New York: Vintage Books, 1989).

⁶ Julia Gaffield, ed, *The Haitian Declaration of Independence: Creation, Context, and Legacy* (University of Virginia Press, 2016) at 243.

a good son, a good husband, and especially a good soldier”.⁷ There was no mention of mothers, daughters, or indeed wives. Furthermore, in the new republic everyone was considered equal in the eyes of the law, but no ‘whiteman’ was allowed to hold property. There were good reasons for this, of course, but it reveals the exclusionary power and contesting nature of human rights institutionalisation. Moreover, this all happened within a broader international political (economy) context, and the independence and freedom of Haiti and Haitians had immediate restrictive consequences for the agency of its citizens. France forced the new republic to pay crippling ‘reparations’, and together with the economic and political isolation imposed by the US and several European states, this pushed Haiti into ongoing impoverishment and instability which continues, to this day, to heavily restrict the opportunities of most Haitians to realise their pictures of a good life.⁸ In trying to make it through life, thousands are bound to use their agency to in ways that many defenders of human rights would contest as morally questionable, undignified and unwanted. Take, for instance, child labour.⁹

Children’s work is an important shock absorber to families who find themselves in economic precarity, not only in Haiti but in all around the world, in the Global North and Global South.¹⁰ Few would contest that children tend to be more vulnerable to exploitation and to the risks that are associated to work than most adults are, especially work of the hazardous sort. Additionally, it is generally believed that children should be in school, and that working impairs them to do so. The UN Convention on the Rights of the Child (UNCRC) thus recognizes every child’s right to education (Article 28) as well as the right to be free from economic exploitation (Article 32).¹¹ To secure these rights, ratifying states are obliged to set a minimum age for employment. The underlying idea is that work under a certain age is detrimental, no matter the context or conditions, and that children are likely to not be capable enough to fully understand this. This effectively means that children under a certain age are not allowed to exercise their agency to earn money for themselves or their family, even if they would want to. But the practice of restricting children’s agency to work under the guise of protecting them from others as well as from themselves becomes more complicated when we consider that besides the UNCRC, almost all states have also ratified the 1973 International Labour Organisation’s (ILO) Minimum Age Convention No.138 on which binds states to set this minimum age to work at 15 years.¹² This convention was primarily created to secure the economic position of Western states by imposing labour standards onto ‘third world countries’, who were becoming fierce competitors on the global market.¹³

We hope that these few examples of human rights institutionalization provide a sense of how different forces and agendas influence how agency is normatively valued and contested, and how it can be said to shape people’s behaviour fronted by certain moral foundations such as a ‘good citizen’ or a ‘good childhood’. More broadly, it helps us to argue that when it comes to international human rights, the recognition and protection of agency is inherently political and generally constraint by more narrow conceptions of *the good life* than their universal and inclusive aspirations might suggest. The ever-changing nature of the material, social, political, economic and ecological circumstances under which people are exercising contested forms of agency, combined with the ongoing thirst for human right legislation and the interpretive nature of law, means that question of agency and human rights thus demands the continuous engagement of critical thinkers; a task that this special issue seeks to facilitate. Before providing an overview of the different contributions to the special issue, we believe it to be relevant to provide the reader with a brief account of the creative process which underpins his project.

⁷ Carolyn E Fick, “The Haitian revolution and the limits of freedom: defining citizenship in the revolutionary era” (2007) 32:4 *Social History* 394 at 413.

⁸ See Charles Forsdick, “Haiti and France: Settling the Debts of the Past” in *Politics and Power in Haiti* (Springer, 2012) 141.

⁹ See Tone Sommerfelt & Jon Pedersen, “Child labor in Haiti” in *The World of Child Labor* (Routledge, 2014) 427.

¹⁰ Michael Bourdillon et al, *Rights and Wrongs of Children’s Work* (New Brunswick: Rutgers University Press, 2010) c 4.

¹¹ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTC 3 [UNCRC].

¹² *International Labour Organization (ILO) Minimum Age Convention*, 26 June 1973 art 2 [C138].

¹³ Edward Van Daalen & Karl Hanson, “The ILO’s Shifts in Child Labour Policy: Regulation and Abolition” (2019) 11 *International Development Policy* 133.

3. Workshop on Human Rights and Agency

The contributing authors participated in a two-day in-person workshop on human rights and agency that we, the guest editors, organised at the McGill Centre for Human Rights and Legal Pluralism (CHRLP), in collaboration with the Van Vollenhoven Institute (VVI) of the Leiden University. They were asked to prepare a short presentation in which they reflected on the following set of questions in light of previous or ongoing research: How is agency conceptualized in various international human rights instruments? Does, can and should the current conceptualization accommodate the diverse and challenging ways that agency is exercised? Can and should we think of alternative ways to do so? The underlying idea was to collectively tease out reinterpretations and new perspectives to feed a critical and continuous discussion. Such a discussion indeed unfolded and flowed from presentation to presentation over the two days we spent together. Inspired by each other's research and insights, an array of pertinent questions were debated. We questioned the nature of agency. Is it freedom, empowerment or perhaps being capable to take sensible decisions under the right conditions? We debated the usefulness of conceptualising different kinds of agency, e.g., individual, libertarian, collective, relational. The different case studies provided ample examples to question the circumstances and power differences under which people exercise agency, and under which we can or supposedly cannot give consent. We agreed that under the guise of liberty and protection, the human rights project does indeed seem to carry a prescriptive mandate to determine what kind of behaviour is desirable, couched in implicit values of dignity and good citizenship. But when we talk about 'good' and 'bad' freedom, have we not just stopped talking about 'freedom'? The colonial legacy of the human rights did not escape our attention neither. Nor did the notion that this 'modern' project seems to have created a blind spot for more 'traditional' and non-Western ways in which agency is being exercised. And so how do we make sense of people who use their agency in ways that seem to go against the human rights legal framework, against prevailing ideas of dignity and the good society? Perhaps is it not so much about agency, but primarily a conflict of values, it was suggested. But then again, is human rights law even meant to change the lives of actual people, or merely the behaviour of states?

The strength of this special issue, we believe, lies in the fact that all these problems and critical questions resonated with all participants, and that it inspired each of us to flesh these out in an 'idea paper'; a format that holds the middle ground between a long essay and an academic paper. We, as the coordinators of the workshop and this special issue, like to provide some threads that we see as connecting the different contributions which are outlined below. These threads, we hope, will help you dance with each paper individually, and ultimately with all together.

4. Overview of Contributions

The first thread is the **moral life of human rights**. The first three papers of this special issue most explicitly explore how agency is conceptualised in human rights law, and how the latter seems to function to model societies that hold themselves and each other to a moral standard that 'we' seem to have agreed on as 'a good life'. **Frederic Megret's** paper takes up the phenomenon of 'dwarf-tossing' to demonstrate and question how moral agency is repressed through, not despite, human rights. He suggests that the concept of 'dignity' was invoked by different courts against the repeatedly and insistently stated agency of a little person himself. It resulted in a landmark human rights decision that was adopted against the beliefs and wishes of the very person alleging a human rights violation. What does the human rights framework have to offer to people who use their agency in a way that challenges the implicit moral dimension? How problematic is it that the human rights seem to project a specific model of human subjects, while the whole point of human rights is to have basic rights that allow for diversity and dissonance? The dwarf-tossing case, and how it was assessed by the human rights apparatus, opens up many avenues to explore broader questions around issues where claims of consent and necessity have been overridden by an often paternalistic and vague societal emphasis on dignity, for instance sex work, organ donation, euthanasia.

Vishakha Wijenayake's enticing paper helps us to further explore these questions, by discussing the agency of suicide attackers in the context of international human rights law. As she explains, in modern Western societies, suicide is pathologized and generally considered as behaviour caused by psychological issues, not an agentic act in which the person pursues an idea of life and death

they themselves define. International human rights law reflects this medicalized approach of end-of-life decisions in its legal construction of warfare and combatants, which clashes with other narratives that depict the deaths of suicide attackers as agentic acts. Considering that these alternative narratives are actually prevalent in many different places, the author questions the culture and genealogy that are dominant in the international human rights discourse. She suggests that a more culturally nuanced articulation of agency would be more adept at depicting how international law can relate to the narratives of agency constructed around suicide attackers.

Hoko Horii's paper on age of consent law illuminates that the moral life of rights and law take shape under different names. In the case of dwarf tossing as discussed by **Frederic Megret**, the concept of 'dignity' was invoked to negate the agency stated by the persons themselves. In a similar vein, Horii shows how in the context of criminalizing underage sex and modelling what a 'good life' and a 'bad example' of adolescent sexuality are, the concept of harm is deployed in legal processes to denounce certain sexual behaviours. As such, a legal reality is simultaneously being constructed in which it is assumed that adolescents under the set age of consent cannot consent to sexual activities, even if they claim they want to. In other words, the legal process exercises the power to determine what these adolescents' agentic acts are and what are not, based on the societal moral standard, which is often in fact the standard held by the individual legal actors dealing with the cases. The impossibility of consent is used as a paternalistic tool, to ban sexual relationships between whom power differentials exist. But such a strict and prohibitionist approach alienates the less powerful actor, because if we follow this logic they are considered to have no way of making an informed decision. Horii thus shines critical light on how international human rights treat children's agency, and pushes back against the assumed belief that children not (yet) 'full-fledged' humans, and that they subsequently lack 'full control' of their agency.

These three papers highlight that we encounter contradictions when we look closely at the discourse and practice of agency within the international human rights project. Despite that the core principles of human rights are considered to be universal, it seems that a conflict of values is always present. Otherwise said, whereas it is essentially a freedom-maximizing project that is supposed to be minimalistic, it has developed into a thick and value-laden regime. The moral life of human rights law is in the backdrop of the complex and problematic process of how certain subjects' agency may be further contested.

The second thread that runs through our collective inquiry is **the political life of human rights**. **Tanya Monforte's** paper shows how neo-liberal market forces shape armed conflicts and the role of children herein. Her paper contends that children are used as market levers to control and regulate conflict to secure the global market. There is economic rationality underpinning the continuation of wars, and the presence of child soldiers subsequently prolongs wars. The way in which children are managed as zones of peace, fits into a security logic that tries to control conflict. Essentially, children, as 'human potential' and cast in economic terms, are read as human and social capital and thus become a repository of meanings. This intrinsically neoliberal market ideology excludes children's agency within armed conflicts. The author suggests that rather than denying the rationality and agency of youth, it is important to understand what their choices signal. Her paper reminds us that there is a political economy of human rights that imposes rules and constrains options available to individuals and their agentic acts.

In a similar vein, **Camille Marquis Bissonnette's** paper on terrorists and terrorism critically engages with the political nature of international human rights law and its consequences for the agency of those involved. The deprivation of the agency of 'terrorists' and 'terrorist groups', which takes the form of various stringent sanctions, is done through a politically motivated, and rather arbitrary process of 'labelling'. The space for the arbitrariness of counterterrorism measures is increased in proportion to the limited agency of individuals and groups labelled as terrorists. Whereas Tanya Monforte's contribution points out the mechanism of protection under the guise of capitalism, Marquis Bissonnette illustrates how the mechanism of labelling functions to deprive agency under the guise of 'security'. This contribution strongly resonates with Wijenayake's paper on the agency of suicide attackers which equally criticises the practice of labelling, and the ease by which it is mobilized when there are clear political, and international security concerns.

In relation to these observations on the contradictory nature of agency in international human rights, the third thread is **the mobile life of human rights**. On this, **Francois Crepeau** and **Idil Atak**

explore how the protection, empowerment and agency of migrants has been conceptualised in the 2018 Global Compact on Migration. Key to the Global Compact is the emphasis on the desired ‘facilitation’ of mobility by states. This means allowing migrants to go where they will thrive and reduce barriers to mobility; a policy which thus relies on recognising the agency of migrants. This has additional instrumental advantages. For instance, since people ask for asylum because there is no regularized worker migrant status, it will reduce pressure on refugee determination systems. It also diminishes the power of criminal networks, as prohibition breeds crime. Recognising and facilitating the agency of migrants to go where they can thrive, find their place in the host society, will contribute their voice to social progress and human security. In practice, unfortunately, there are a plethora of reasons for why governmental actors contest migrant’s agency instead.

Laurence LeBlanc, focusing on independent migrant children who participate in the evacuation protest in Tunisia, argues that they exercise their agency as a process of self-identity formation and articulation. By claiming to not belong in Tunisia, their sentiments grew and changed, and their identities developed and were articulated publicly. By protesting, these children provide important insights that migrant children are not passive subjects of global migration governance and protection, but subjects of action. The piece then suggests that governments and institutions should legitimate their protests and expressions even as they challenge global migrant controls. Her observation finds that, by acting as subject and being recognized as such, the children give insights into the value of recognizing agency. This piece, together with all other contributions to this special issue, suggest that the current conceptualization and regulation of agency in human rights praxis have not succeeded in accommodating the diverse and challenging ways that agency is exercised. The question here is whether we can and should think of alternative ways to do so.

One of the ways, suggested by **Nandini Ramanujam** and **Kassandra Neranjan** in the last contribution of this special issue, lies withing the training of a new generation of human rights practitioners. By assessing the experiences of university students in a human rights internship program, the authors demonstrate that the philosophical underpinnings of the capability approach – understanding agency as a critical element of the freedom to pursue desirable opportunities which allow for the enjoyment of a life one values – has been effective in fostering a nuanced, real, pluralistic understanding of advancement of human rights. Their piece highlights the value of critical human rights education and the role different understandings of agency plays in it. In coming to terms in how the different theoretical ponderings presented in this special issue apply to everyday praxis, the authors invite us to think of agency as the link that transforms abstract ‘human right’ into an actual ‘human capability’.

5. Concluding Remarks

We, the guest editors of this special issue, enjoy baking banana bread. We have tried emulate this process of magical chemistry and unexpected outcomes to the academic project presented here. Sometimes, bringing new and vastly different ingredients or studies together, produces new flavours and insights. Sometimes, adding a pinch of spices or a bit of boldness, creativity, curiosity and openness advance intellectual activities. Such endeavour is essentially collective. Daring to mingle and to share our work, ideas, coffees and meals, as well as the enjoyment of an intellectual life one values, seems to us a necessary quality for bettering our academic environment and outcomes. This special issue, by showing that human rights law, its enactments and implementation complexify the idea that they are to promote or protect human agency and challenges the normative purpose of introducing agency to the human rights instruments. It invites us to probe underlying ideas about what a good life is, and to do so by taking a close look at different cases, subjects, groups and their identities, conceptions, and ways to discuss different lives we value. It challenges and complexifies the primary function of protection of agency, and opens up the possibilities for an alternative form of advancing human rights, which is fairer, truly emancipatory, and efficient in practice.