

Human Rights Without Foundations

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This is a good time for human rights. Not that they are respected more than in the past. The flagrant resort to kidnapping, arbitrary arrests, and torture by the US, and the unprecedented restriction of individual freedom in the US, and in GB, cast doubt about that. It is a good time for human rights in that claims about such rights are used more widely in the conduct of world affairs than before. There are declarations of and treaties about human rights, international courts and tribunals with jurisdiction over various human right violations. They are invoked to justify wars (e.g. Haiti, Somalia, and Yugoslavia). Observance of human rights is used as a condition of participation in various international programs, the receipt of financial aid, and so on. A number of impressive NGOs monitor respect for human rights. As John Tasioulas notes: 'discourse of human rights [has acquired] in recent times ... the status of an ethical *lingua franca*'.²

No doubt human rights rhetoric is rife with hollow hypocrisy; it is infected by self-serving cynicism and by self-deception, but they do not totally negate the value of the growing acceptance of human rights in the conduct of international relations. The hypocrite and the self-deceived themselves pay homage to the standards they distort by acknowledging through their very hypocritical and deceitful invocation that these are the appropriate standards by which to judge their conduct. However, the success of the practice of human rights, as I will refer to the range of activities I have mentioned, poses a problem for ethical reflections about them.³

¹ I am grateful to Ori Herstein for researching background legal facts. The paper was presented at the University of Connecticut 2005, as the Minerva Lecture, Tel Aviv 2006, and at the Philosophy of International Law conference at Fribourg 2007. I am grateful to comments from many on those occasions and in particular to J. Tasioulas, A. Buchanan, J. Griffin, J. Skorupsky, and S. Ratner.

² John Tasioulas 'The Moral Reality of Human Rights' p.1

³ Though the inadequacy of the approach that I will criticise, while being exposed in bright light by recent human rights practice, has deeper origins. It reflects a misguided understanding of the role of rights in morality, and in the justification of political and legal institutions.

1. The failure of the traditional doctrine

Human rights practice is not only becoming better established, it is also spreading its wings. An ever growing number of rights are claimed to be human rights, for example, the right to sexual pleasure; the right to sexual information based upon scientific inquiry; the right to comprehensive sexual education.⁴ It is declared that all persons have the right to a secure, healthy and ecologically sound environment. Future generations have rights to meet equitably their needs. All persons have the right to protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems.⁵ Some academics argue that there is a human right to globalisation.⁶ Others – that there are rights not to be exposed to excessively and unnecessarily heavy, degrading, dirty and boring work; to identity with one's own work product, individually or collectively; to social transparency; to co-existence with nature.⁷ And of course there is a right against poverty, and a right to be loved.

The ethical doctrine of human rights should articulate standards by which the practice of human rights can be judged, standards which will indicate what human rights we have. In doing so it will elucidate what is at issue, what is the significance of a right's being a human right. Some theories (I will say that they manifest the traditional approach) offer a way of understanding their nature which is so remote from the practice of human rights as to be irrelevant to it. They take 'human rights' to be those important rights which are grounded in our humanity. The underlying thought is that the

4 'Sexual Rights are Fundamental and Universal Human Rights Adopted in Hong Kong at the 14th World Congress of Sexology, August 26, 1999' see: <http://www.tc.umn.edu/~colem001/was/wdeclara.htm>

5 *Draft Declaration of Human Rights and the Environment* <http://www1.umn.edu/humanrts/instree/1994-dec.htm>

6 Michael D. Pendleton, 'A New Human Right – The Right to Globalization', *Fordham International Law Journal*, 22 June 1999, p. 2052

7 Philip Alston, 'Conjuring up new human rights: a proposal for quality control', *The American Journal of International Law*, July 1984, 78, pp. 607. He took many of the rights on his list from: Galtung & Wirak, 'On the Relationship between Human Rights and Human Needs', UNESCO Doc. SS-78/CONF.630/4, at 48 (1978); also Galtung & Wirak, 'Human Needs and Human Rights: A Theoretical Approach', 8 BULL. PEACE PROPOSALS 251 (1977)

arguments which establish that a putative right-holder has a human right rely on no contingent fact except laws of nature, the nature of humanity and that the right-holder is a human being.⁸ And they must also be important rights – why they must be important is not clear. Neither being universal, that is rights that everyone has, nor being grounded in our humanity, guarantees that they are important. However, philosophers tend to take it for granted that human rights are important rights.⁹

In recent times Gewirth was among the first to develop a traditionalist account:

... it is possible and indeed logically necessary to infer, from the fact that certain objects are the proximate necessary conditions of human action that all rational agents logically must hold or claim, at least implicitly, that they have rights to such objects. (46)

Gewirth argues that this ‘dialectically’ establishes that humans have a right, which is – by definition – a human right, to the proximate necessary conditions of human action.

While his argument has long been recognised to be logically flawed, it is typical of the traditional approach, which is roughly characterised by four, logically independent, features:

First, it aims ‘to derive’ human rights from basic features of human beings which are both valuable, and in some way essential to all which is valuable in human life.

Second, human rights are basic, perhaps the most basic and the most important, moral rights.

Third, scant attention is paid to the difference between something being valuable, and having a right to it.

Fourth, the rights tend to be individualistic in being rights to what each person can enjoy on his or her own: such as freedom from coercive interference by others, rather than to aspects of life which are essentially social, such as being a member of a cultural group.

⁸ ‘We may assume, as true by definition, that human rights are rights that all persons have simply insofar as they are human’ (A. Gewirth, HUMAN RIGHTS, U. of Chicago Press, 1982, 41). ‘The underlying idea is that all human beings, simply because they are human beings, are entitled to be treated according to certain minimum standards’ (Ch. Beitz ‘Human Rights’ ROUTLEDGE ENCYCLOPAEDIA OF PHILOSOPHY). One may allow that permanently comatose people do not have human rights. But one abandons the idea that human rights derive from our humanity once one says that babies or people with Down syndrome do not have (certain) human rights.

⁹ Cf., J. Nickel’s characterisation in ‘Human Rights’ STANFORD ENCYCLOPAEDIA OF PHILOSOPHY.

Traditional theories fail for several reasons. Exposing their flaws calls for detailed examination of each of them. Here I will point to three problems. They misconceive the relations between values and rights. They overreach, trying to derive rights which they cannot derive. And they fail either to illuminate or to criticise the existing human rights practice.

Gewirth, for example, thinks that since we all want and value having the proximate conditions of agency we must claim a right to have them. He ignores the possibility of believing that certain conditions are essential to our life, and even of striving to secure such conditions, without either claiming or having a right to them. Thus he misconceives the relation between value and rights. He also believes, e.g., that there is a general (overridable) right to freedom because ‘freedom is a necessary condition of human purposive action’ (15) – a claim which is evidently false if it means that, for instance, slaves cannot act purposively. In fact there could never have been any economic interest in having slaves but for the fact that slaves can act purposefully, and thus be useful to their owners.

I will turn to the third failure, the failure to exert critical pressure on the practice, later on. First let us look at a more interesting theory which broadly shares the same faults. James Griffin asks: What is the most important feature shared by all humans?

Human life is different from the life of other animals. We human beings have a conception of ourselves and of our past and future. We reflect and assess. ... And we value our status as human beings especially highly, often more highly even than our happiness. This status centres on our being agents — deliberating, assessing, choosing and acting to make what we see as a good life for ourselves.

Human rights can then be seen as protections of our human standing or, as I shall put it, our personhood. And one can break down the notion of personhood into clearer components by breaking down the notion of agency. To be an agent, in the fullest sense of which we are capable, one must (first) chose one’s own path through life — that is, not be dominated or controlled by someone or something else (call it ‘autonomy’). And (second) one’s choice must be real; one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes (call all of this ‘minimum provision’). And none of that is any good if someone then blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this ‘liberty’). Because we attach such high value to our individual personhood, we see its domain of exercise as privileged and protected.... (8-9)

Griffin too grounds all human rights in features which all human beings are supposed to share, and on the necessary conditions for their expression.¹⁰ He too takes human rights to be general moral rights, which may or may not call for recognition or incorporation in the law.

Griffin avoids one difficulty which undermines Gewirth's theory by relying not only on the fact that people value their personhood, but on its being valuable. But he too fails to show that that value establishes rights. His argument that personhood is not merely valuable but a ground of rights is: 'autonomy and liberty are of special value to us, and thus attract the special protection of rights.' (22) By that argument if the love of my children is the most important thing to me then I have a right to it.

Griffin is aware of a simple objection: are not people whose human rights were systematically denied, like slaves, nevertheless persons? His response is:

But that is not the picture of agency at the heart of my account My somewhat ampler picture is of a self-decider (that is, someone autonomous) who, within limits, is not blocked from pursuing his or her conception of a worthwhile life (that is, someone also at liberty) and furthermore typically realizes some of it. All three — choosing, pursuing, and realizing — are part of what we value in normative agency. If any is missing, one's agency, on this ampler interpretation, is deficient. (24)

But this response is fatal to the whole account. The problem is that (according to him) (a) being a person endows one with human rights, and (b) these rights are to one's continued existence as a person (they are 'protections of our ... personhood'). If personhood is understood as the capacity for intentional agency then human rights are indeed enjoyed by almost every human being, but they protect just what is essential for that capacity. They are rights against, for example, the administration of chemicals which seriously impair our ability to think, form intentions or act. They are rights against severe dehydration, sensory deprivation etc. But they do not include rights against slavery, arbitrary arrest, and the like as these conditions do not affect our ability to act intentionally. If, however, the rights are as ample as Griffin describes them, if personhood is the capacity to

¹⁰ Griffin postulates that what he calls 'personhood' is just one of two grounds for human rights, the other being practicability. For our purposes we can ignore this second ground.

choose one's own path through life — that is, not be dominated or controlled by someone or something else ... And ... one's choice must be real; one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes.

Then different problems arise. Take his first condition first: 'one must choose one's own course through life – that is not be dominated or controlled by someone or something else': Is it really true that someone who is dominated by his powerful mother, or controlled by his commitment to his employer (having signed a 10 year contract, on condition that the employer first pays for his education) less of a person than someone who is not so dominated or controlled? The circumstances I mentioned may or may not be undesirable, the life of the people so controlled or dominated may be better or worse as a result, but are those people really persons only to a lesser degree? I find it difficult to avoid the suspicion that Griffin is smuggling a particular ideal of a good life into his notion of being a person to the fullest degree.

Turn now to the third condition: 'having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes' – act here seems to mean act with a good chance of success, of achieving one's goals. This exposes an additional problem with Griffin's rich notion of personhood. Is it not so rich as to include all the conditions of a good life which one person can secure for another? Griffin thinks that there is no problem here:

that human rights are grounded in personhood imposes an obvious constraint on their content: they are rights not to anything that promotes human good or flourishing, but merely to what is needed for human status.¹¹

Finding a threshold to human rights is essential for the traditional approach. It takes human rights to mark a normatively exceptional domain. They deserve protection even

¹¹ Griffin provides 'an argument' for this conclusion:

... If we had rights to all that is needed for a good or happy life, then the language of rights would become redundant. We already have a perfectly adequate way of speaking about individual well-being and any obligations there might be to promote it. (8-9)

But, barring some argument that there cannot be alternative terminologies for talking about the same subject matter, this seems unconvincing.

if that requires exceptional measures. This task can only succeed if people do not have human rights to everything which will or may improve the quality of their life. For if people have such rights they are not exceptional, and they fail to play the role that traditional accounts assign them.

If human rights are rights of those with the capacity for intentional agency to preserve that capacity, the distinction between capacity and its exercise is relatively clear, and a case for the privileged standing of the capacity can be made, at least so long as it is not claimed that the privilege is absolute. But Griffin quite explicitly extends the grounds of human rights beyond the capacity for intentional action. He includes conditions making its successful exercise likely, conditions such as the availability of education and information, of resources and opportunities. At every point he adds 'minimal' – minimal education and information etc. But if minimal means some information, some resources and opportunities, however little, it is a standard easy to meet, and almost impossible to violate. Just by being alive (and non-comatose) we have some knowledge, resources and opportunities. Slaves have them. Griffin, of course, does not mean his minimal standard to be that skimpy. He suggests a generous standard. But then we lack criteria to determine what it should be. My fear is that this lacuna cannot be filled. There is no principled ground for fixing on one standard rather than another. The traditional approach offers a general theory of human rights as moral rights. There are good reasons for setting various limits to the legal implementation of those or other rights. They are mostly contingent reasons, relative to circumstances of time and place, and to the machinery of implementation there and then feasible. What Griffin does not provide are criteria for setting the minimal standards for human rights understood as universal moral rights which enjoy that privileged status, and which go beyond the minimum protection of bare personhood.

These observations expose the way Griffin over-reaches. He would have liked to explain the existence of human rights as rights to protect one's personhood. Such rights may claim to be privileged, but they do not reach as far as he wants them to reach. It is crucial to his claim that

Out of the notion of personhood we can generate most of the conventional list of human rights.

To 'generate' the conventional list he has to rely not on the protection of agency but on securing conditions which make it likely that agents will have a good life. That leaves him with no principled distinction between what human rights secure and what the conditions for having a good life secure.¹²

2. Alternative approaches

This leads me to a third worry about traditional accounts. The task of a theory of human rights is (a) to establish the essential features which contemporary human rights practice attributes to the rights it acknowledges to be human rights; and (b) to identify the moral standards which qualify anything to be so acknowledged. I will say that accounts which understand their task in that way manifest a political conception of human rights.

Theories like those of Gewirth and Griffin derive their human rights from concerns which do not relate to the practice of human rights, and they provide no argument to establish why human rights practice should be governed by them. There is nothing wrong in singling out the capacity for agency, or more broadly the capacities which constitute personhood, as of special moral significance. They are of special significance, and arguably they provide the foundation of some universal rights. Nor is Griffin wrong in thinking that not only the capacity for personhood, but also the ways it is or can be used, are ethically significant. The problem is the absence of a convincing argument why human rights practice should conform to their theories. There is no

¹² One additional point: Arguably, the capacity for intentional action is valuable for (and valued by) all human beings. Though it should not be confused with the value, if any, of longevity. It is the value of retaining the capacity for intentional action for as long as one is alive. It is valued by people who do not wish to remain alive, or who would rather end their life than betray their friend, etc. Once, however, we follow Griffin into the domain of 'rich agency' we can no longer rely on nothing more than the value of bare personhood. We have to pass judgment on what makes life good and meaningful, for that judgement is needed to establish the standard which must be satisfied for rich personhood to be respected. This result is unwelcome to those who think of human rights as a basic moral domain which can command the consent of people of various religious and ethical persuasions, a domain which transcends most, if not all, ethical disputes about the good life. Protecting the minimal capacity for intentional action may command such near universal consent, though the moment we raise the question of what overrides the duty to protect that capacity, or whether one has a right to it, the consensus evaporates. Regarding rich agency it does not exist at all.

point in criticising current human rights practice on the ground that it does not fit the traditional human rights ethical doctrine. Why should it?

Rawls's brief comments on human rights¹³ constitute the best known, though extremely sketchy, political account of human rights:

Human rights are a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy. (79)

Following Rawls I will take human rights to be rights which set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena.¹⁴ This is Rawls's and my answer to the first of the two questions an account of human rights faces: while human rights are invoked in various contexts, and for a variety of purposes, the dominant trend in human rights practice is to take the fact that a right is a human right as a defeasibly sufficient ground for taking action against violators in the international arena, that is to take its violation as a reason for such action.

Such measures set limits to state sovereignty for when states act within their sovereignty they can, even when acting wrongly, rebuff interference, invoking their sovereignty. Crudely speaking, they can say to outsiders: whether or not I (the state) am guilty of wrongful action is none of your business. Sovereignty does not justify state actions, but it protects states from external interference. Violation of human rights disables this response, which is available to states regarding other misdeeds.

So far states have been the main agents in international law, and I will continue to treat human rights as being rights against states. But I do not mean that human rights are rights held only against states, or only in the international arena. Human rights can be held against international organisations, and other international agents, and almost always they will also be rights against individuals and other domestic institutions. The

¹³ THE LAW OF PEOPLES. For a powerful defense of Rawls's position see Sam Freeman, 'Distributive Justice and the Law of Peoples'

¹⁴ Unlike Rawls who took rights to be human rights only if their serious violation could justify armed intervention, I take them to be rights whose violation can justify any international action against violators: making conformity to rights a condition of aid, calling on states to report on their conduct re protection of human rights, condemning violation, refusing to provide landing or over-flight rights, trade boycotts, and others.

claim is only that being rights whose violation is a reason for action against states in the international arena is distinctive of human rights, according to human rights practice.

This being so, we have the core answer to the second question as well: human rights are those regarding which sovereignty-limiting measures are morally justified. International law is at fault when it recognises as a human right something which, morally speaking, is not a right or not one whose violation might justify international action against a state, as well as when it fails to recognise the legitimacy of sovereignty-limiting measures when the violation of rights morally justifies them.

Rawls's own statement of the conditions which would establish a right as a human right are, however, unsatisfactory. Human rights, Rawls tells us, are

Necessary conditions of any system of social cooperation. When they are regularly violated, we have command by force, a slave system, and no cooperation of any kind. (68)

This he says 'accounts' for the features of human rights, which may imply that that is the justification for holding the rights he lists as fulfilling the role he assigns to human rights. In *THE LAW OF PEOPLES* Rawls's explanation of social co-operation is very sketchy, but it implicitly refers to his earlier explanation of an ideal of social co-operation holding between 'free and equal moral persons' according to which 'social co-operation [is] not simply ... a productive and socially coordinated activity, but ... [one] fulfilling a notion of fair terms of cooperation and of mutual advantage.'¹⁵ 'Social cooperation', he wrote elsewhere, 'is always for mutual benefit ... [I]t involves ... a shared notion of fair terms of cooperation, which each participant may reasonably be expected to accept, provided that everyone else likewise accepts them ... all who cooperate must benefit or share in common benefits.'¹⁶ From this he concludes that human rights include

The right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly). (65)

Are human rights grounded in the conditions of social cooperation? The claim is marred by highly doubtful contentions about the conditions of social cooperation. He

¹⁵ 'Kantian constructivism in moral theory' (1980) reprinted in *COLLECTED PAPERS*, 325

¹⁶ *POLITICAL LIBERALISM* p. 300

says that societies which do not meet these, morally very demanding, conditions command by force.¹⁷ This seems false. Furthermore, not all societies which fail to respect the human rights which Rawls lists command by force. It is implausible to suppose, for example, that communities which do not recognise personal private property (one of his human rights) must command by force. Imagine a society where everything which is not common property is owned by the clan or the larger family, in the way that some small families organise their affairs. Why should they not enjoy social co-operation? Similarly, there is no reason to think that all feudal societies, or all sexist societies, which denied women property rights, and much else, commanded by force.

My main worry, however, lies elsewhere. It is about the way Rawls connects the conditions of social cooperation with the limits of sovereignty, of the internal autonomy of a political order. The moral limits of sovereignty depend not only on the conditions within the society. They also depend on who is in a position to assert the limitations of sovereignty, and how they are likely to act as a result. It is one thing, e.g., to set limits to the sovereignty of states within a well-ordered and reasonably just organisation like the European Union, and quite another to do so for the international arena say at the height of old-style colonialism in the 19th century, and still different today, the heyday of new style imperialism.

We must not confuse the limits of sovereignty with the limits of legitimate authority. The sovereignty of states sets limits to the right of others to interfere with their affairs. The notion of sovereignty is the counterpart of that of rightful international intervention. The criteria determining the limits of legitimate authority depend on the morality of the authority's actions.¹⁸ However, not every action exceeding a state's legitimate authority can be a reason for interference by other states, whatever the circumstances, just as not every moral wrongdoing by an individual can justify intervention by others to stop or punish it.

¹⁷ P. 68. So far as we know all political societies command by force in some sense. This fact is often invoked as the mark of a political society. I assume that Rawls has in mind something closer to 'command by force only'.

¹⁸ See on the conditions of legitimate authority my *THE MORALITY OF FREEDOM*, chapters 2-4 (Oxford: OUP 1986).

The point is controversial. One objection is that there are reasons to limit intervention in the life of individuals (respect for their autonomy and independence) which do not apply to states, since they do not have value in and of themselves. The objection is then reinforced by a distinction between principled and contingent factors which limit sovereignty. It claims that in principle actions exceeding the state's authority justify interference provided such interference is likely to succeed (in remedying the offence or preventing it) and is not counter-productive, that is that its overall benefits are not outweighed by its disadvantages.

While this counter-argument presents an appealing picture it is flawed both by a simplistic understanding of the moral importance of state sovereignty and by disregarding persisting features of the international situation. The moral importance of state autonomy was fully appreciated by Rawls, and is the reason for his insistence that his doctrine of the justice of the basic structure (of the state) cannot be simply extended to the international arena.¹⁹ As I see it, the core point, which is too complex to be dwelt upon here, is that much of the content of the moral principles which govern social relations and the structure of social organisation is determined by the contingent practices of different societies. Hence the principles which should govern international relations cannot just be a generalisation of the principles of justice which govern any individual society. This does not establish a precise analogy between interference with an individual and with a state, but it shows that respect for the independence and autonomy of the state is of great moral significance.

Be that as it may. The main point I wish to emphasise is that the moral principles determining the limits of sovereignty must reflect not only the limits of the authority of the state, but also the relatively fixed limitations on the possibility of justified interference by international organisations and by other states in the affairs of even an offending state. When the international situation is one in which it is clear that international measures will not be applied impartially, that they will be used to increase the domination of a super-power over its rivals, or over its client states, etc. the moral

¹⁹ For his reasons see Scheffler, 'On the Moral Division of Labour' Aristotelian Society, supp. Vol. 2005, and Samuel Freeman

principles setting limits to sovereignty will tend to be more protective of sovereignty than in the relationship among states which exists within a union, like the European Union, which has relatively impartial judicial institutions and fairly reliable enforcement procedures.

Just as the moral limits of individual freedom vis a vis the state one lives in vary depending on the character of the government and the public culture of the state, but whatever they are they reflect not merely the principles of individual conduct but also relatively independent constraints on the justifiability of interference by others, so in the international arena the moral limits of state sovereignty vary with the relatively stable features of the international situation, but at any given time they are determined not merely by the moral limits to the authority of states but also by the possibility of morally sound interference by others.

This consideration is ignored by Rawls. It exposes a lacuna in his argument. Rawls's conditions of social co-operation, whatever we think of them, are relevant to the scope of state authority. They cannot determine the limits of sovereignty in the way Rawls suggests.²⁰

This criticism of Rawls's conception of human rights connects with a criticism I made against some proponents of the traditional approach: their failure to examine adequately the relations between value and rights. The same is true of Rawls. Quite rightly he did not claim that human rights set the only moral limits on the sovereignty of states, but nor did he explain what the other limits are and what distinguishes them from human rights. Some of his human rights, for example the human right against genocide, do not appear to be rights at all. To be sure committing genocide is wrong, but is it the case that I have a right against the genocide of any people? Do I have a right against the annihilation of other groups, e.g., of university professors? Not all wrongs constitute violations of rights. Not all the limits of either state authority or state sovereignty are set by rights. Rawls fails to examine the distinctions involved.

²⁰ Rawls's discussion of decent hierarchical societies, and of 'benevolent despotisms' can be taken to indicate that he allows for the distinction between the limits of legitimate authority and the limits of sovereignty. My criticism is that the argument for making the conditions of human cooperation the basis of human rights is radically incomplete by not taking the distinction into account.

On one central issue, however, Rawls's observations are consistent with the political conception of human rights: observation of human rights practice shows that they are taken to be rights which, whatever else they are, set limits to the sovereignty of states, and therefore arguments which determine what they are, are ones which, among other things, establish such limits.

3. Following the practice: the ordinary face of Human Rights

One immediate consequence of the political conception is that human rights need not be universal or foundational. Individual rights are human rights if they disable a certain argument against interference by outsiders in the affairs of a state. They disable, or deny the legitimacy of the response: I, the state, may have acted wrongly, but you, the outsider are not entitled to interfere. I am protected by my sovereignty. Disabling the defence 'none of your business', is definitive of the political conception of human rights. They are rights which are morally valid against states in the international arena, and there is no reason to think that such rights must be universal.

Quite a few writers accept the downgrading of human rights to those individual rights which are assertible in the international arena, denying them special stringency and universality, though they are not always aware that these are the implications of their writings, most often because they are unaware of the vacuity of the assertion that human rights set 'minimal standards'.

James Nickel, for example, thinks human rights are minimal standards for governments, but neither he nor Griffin nor the others identify what is the test of the standards being minimal other than that there are or could be higher standards on the same matters. He is also one of those writers who make light of the universality of human rights. According to him

some human rights cannot be universal in the strong sense of applying to all humans at all times, because they assert that people are entitled to services tied to relatively recent social and political institutions. Due process rights, for example, presuppose modern legal systems and the institutional safeguards they can offer. Social and economic rights presuppose modern relations of production and the institutions of the redistributive state²¹

²¹ MAKING SENSE OF HUMAN RIGHTS chapter 3 page 25

Nickel is following Tasioulas who observes that according to some views human rights must be possessed by

*all human beings throughout history - but only at the apparent cost of excluding rights that require or presuppose the existence of non-universal social practices and institutions, e.g. rights to political participation or to a fair trial. By contrast, I have suggested that human rights enjoy a temporally-constrained form of universality, so that the question concerning which human rights exist can only be determined within some specified historical context. For us, today, human rights are those possessed in virtue of being human and inhabiting a social world that is subject to the conditions of modernity. This historical constraint permits very general facts about feasible institutional design in the modern world, e.g. forms of legal regulation, political participation and economic organization, to play a role in determining which human rights we recognize.*²²

In this way accounts of human rights become almost indistinguishable from accounts of international political morality in so far as they involve respecting some individual rights.

Charles Beitz, noting both the range of human rights, and the range of their uses, observes that

Taken together, these rights are not best interpreted as ‘minimal conditions for any kind of life at all’²³ The rights of the Declaration [of Human Rights] and the covenants bear on nearly every dimension of a society’s basic institutional structure, from protections against misuse of state power to requirements for the political process, health and welfare policy, and levels of compensation for work. In scope and detail, international human rights are not very much more minimal than those proposed in many contemporary theories of social justice²⁴

Not surprisingly Beitz, who regards human rights as the standards of international justice, also rejects their strict universality:

International human rights are not even prospectively timeless. They are standards appropriate to the institutions of modern or modernising societies ...²⁵

These authors do not always agree with one another, nor do they agree with my view, namely that the politics of international human rights is drifting towards becoming just the politics of international relations, in so far as they acknowledge individual rights.

While recognition of that drift is more common among those who embrace the political conception, its traces can be found among more tradition-minded writers. An

22 Tasioulas, ‘The Moral Reality of Human Rights’ 2-3. He first advanced this view in ‘Human rights, universality and the values of personhood: Retracing Griffin’s steps,’ *European Journal of Philosophy*, 10: 79-100

23 The reference is to Ignatief, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* p. 56

24 Beitz, ‘What Human Rights Mean’ *DAEDALUS* (2003) 36, at 39

25 *Ibid.* 44, also. 42-43.

example of that is Amartya Sen's recent foray into the field.²⁶ Sen's explanation is too narrow in limiting human rights to rights to various freedoms, which leaves the right not to be tortured (in mild ways which do not affect one's freedom), and rights to privacy which do not impede freedom, for example, beyond the range of human rights. But apart from that his analysis is simply an analysis of factors which are relevant to the morality of action. His human rights are moral rights, which may or may not call for legal recognition, may or may not be defeated by any number of conflicting considerations, and so on and so forth. He recognises the drift in human rights practice away from taking them to have foundational standing or exceptional importance, while failing to recognise the source of that drift in the adoption of a political conception of these rights.

4. Where do human rights come from?

A few clarifications: First, I am not dealing in this article with the merits or drawbacks of the practice of human rights, or any aspects of it. My aim is to characterise in abstract terms the moral standards by which the practice is to be judged.

Second, I do not deny that there may be universal human rights which people have in virtue of their humanity alone. My criticism of that tradition is primarily that it fails to establish why all and only such rights should be recognised as setting limits to sovereignty, which is the predominant mark of human rights in human rights practice.

Third, just as rights generally while being reasons for taking some measures against their violators do not normally give reason for all measures, so human rights set some limits to sovereignty, but do not necessarily constitute reasons for all measures, however severe, against violators. Similarly, they may sanction action in some forum, but not in others.

Finally, rejecting the universality of human rights is no endorsement of moral relativism. If whether someone has any of the human rights depends exclusively on contingent **non-evaluative** facts then irrational moral relativism reigns. But that is not the view here defended. Rather it is a version of the familiar and benign social relativism: there is

²⁶ Sen, 'Elements of a theory of human rights' *PHILOSOPHY & PUBLIC AFFAIRS* 32 (2004) 315.

a moral duty to drive on the left in one country and on the right in another. Which it is depends on contingent non-evaluative facts: that everyone drives this way in one and the other way in the other country, but not on them alone. It also depends on a universal moral precept, namely that one should drive safely. But if the fact that there is a right to jury trial in one country and not in another equally depends on some more general moral right, say a right to fair trial, is not the traditional approach vindicated: All morally sound human rights, it claims, are either universal rights or applications of such universal rights to the conditions of this country or that.

This response is both right and wrong. It is right that vindicating any evaluative proposition relies, among other facts, on universal evaluative truths. But it is wrong in assuming that moral rights can be established only by reference to other moral rights. Typically rights are established by arguments about the value of having them. Their existence depends on there being interests whose existence warrants holding others subject to duties to protect and promote them.²⁷ Thus the right that people who made promises to us shall keep them depends on the desirability, that is the value, of being able to create bonds of duty among people at will. That desirability – consisting in improved ability to plan for the future, to form common projects, and to forge common bonds – governs the scope of the right: only people for whom the ability is valuable have the power to make promises (and that may exclude very young children, mentally retarded people, etc.) and only matters regarding which it is desirable to be able to form such bonds at will, can be the object of promises (and that may exclude commission of immoral acts etc.).

So the political conception of human rights can and should accept universality of morality. Its essence as a political conception is that it regards human rights as rights which are to be given institutional recognition, rights which transcend private morality. That explains why it is not common to find the right to the performance of promises as a human right. It is pretty universal in application, as any human of mature mind has it. Yet it is not one which should be given legal or other institutional recognition. Some

²⁷ THE MORALITY OF FREEDOM

promises, to be sure, merit such recognition, but not all of them, and therefore there is no human right that promises made to one be kept.

Human rights are moral rights held by individuals. But individuals have them only when the conditions are appropriate for governments to have the duties to protect the interests which the right protect. A good example is the right to education. The right lacks universality for it exists only where the social and political organisation of a country makes it appropriate to hold the state to have a duty to provide education. Hence while the right to education is an individual moral right the considerations which establish it are complex and not all of them relate to the interest of the right holder. The primary, though not the only, relevant interest of the right-holder is to be equipped with whatever knowledge and skills are required for him to be able to have a rewarding life in the conditions in which he is likely to find himself. Whether education, in a sense which involves formal instruction, is needed to meet that individual interest is itself a contingent matter. When it is required the question arises: what is the most appropriate way of securing it for all? Under some conditions the state should be a guarantor that education is provided, and when that is so people have a right to education, and when it is so more or less throughout the world the last question arises: should states enjoy immunity from external interference regarding their success or failure to respect the right to education of people within their territory? If the conditions of the international community are such that they should not enjoy such immunity then the right to education is a moral right.

So that is where human rights come from. They derive from three layers of argument: First, some individual interest often combined with showing how social conditions require its satisfaction in certain ways (e.g. via various forms of instruction) establishing an individual moral right. Some writers think that some rights are as they may say rock-bottom, that is not deriving from any individual interest. Needless to say if there are such rights they too will belong with this part of the argument. The second layer shows that under some conditions states are to be held duty bound to respect or promote the interest (or the rights) of individuals identified in the first part of the argument. The final layer shows that they do not enjoy immunity from interference regarding these matters. If all parts of the argument succeed then we have established

that a human right exists. Each layer presupposes the previous one, but to establish the conclusion of each layer requires considerations specific to it. So understood human rights enjoy rational justification. They lack a foundation in not being grounded in a fundamental moral concern but depending on the contingencies of the current system of international relations.

5. Conclusion

I have not offered an analysis of the concept of a human right. There is not enough discipline underpinning the use of the term 'human rights' to make it a useful analytical tool. The elucidation of its meaning does not illuminate significant ethical or political issues. Focusing on the use of the term in legal and political practice and advocacy, I claimed that it either relies on the legal recognition of human rights as limiting state sovereignty, or claims that they should be so recognised. Given that, I posed the question of which individual rights warrant such recognition, and what precise limits to sovereignty they should be taken to set.

One result is that a right's being a human right does not entail that it is either basic or very important. To that degree this approach deflates the rhetoric of human rights. But given the moral significance of rights which set moral limits to sovereignty human rights are inevitably morally important. If they were not they would not warrant interference in state sovereignty. Nevertheless, the political conception does point towards a normalisation of the politics of human rights. That is an inevitable consequence of the success of human rights practice. It is part of processes which saw the development of regional organisations, like the EU, of functional organisations like the WTO, and of a myriad of multinational regimes, like that regarding the utilisation of deep sea resources, all of which eroded the scope of state sovereignty. It is due to the ambitions of some states to achieve singular world domination, and of others to limit that ambition. These developments enriched human rights practice, without necessarily improving conformity with human rights.

We are in the midst of fast changes in the shape of international relations. As a result human rights practice is in flux, and the indeterminate character of my observations reflects this flux. That is inevitable, and being more precise and

determinate than conditions allow is no virtue. Should we see further growth of state-transcending standards and institutions, including further international recognition and enforcement of individual rights, the rights will lose much of the aura of exceptional standing which is currently associated with 'human rights'.