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THE PHILOSOPHY OF HUMAN RIGHTS

The Philosophy of Human Rights

Contemporary Controversies

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and
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The Philosophy of Human Rights

Introduction

Human rights are important. First and foremost they are relevant for those fighting for respect for their own or others' human rights and for the improvement of situations in which fundamental rights are violated. But human rights are also of interest for politicians, political theorists, international lawyers, jurists, NGO activists, civil servants, and, of course, political and moral philosophers. Obviously, the interest in human rights is stirred by quite different reasons: some of them purely practical, some of them purely theoretical, most of them combining practical and theoretical concerns. Yet all those involved with human rights should share one fundamental concern: to know what is the nature of the subject they are talking about and in which way it has normative force. In other words, the clarification of the concept of human rights and the justification of these rights – the two core challenges of the contemporary philosophy of human rights – should matter to all who are interested, in one way or another, in human rights.

In offering such clarification and justification political and moral philosophy has something relevant to contribute to the general discussion of human rights. Being philosophers, we might be criticized for making such a strong claim as to the relevance of philosophy. But forgiveness might be granted in light of our willingness to admit that philosophical insights about human rights are not freestanding, nor do they, in general, enjoy priority. Rather they depend in turn on the political, juridical, etc. dimensions of the idea of human rights, that is, on the use of the concept in practice.

The main function of universal human rights seems to be to set a minimal standard for institutional and individual conduct on a global scale and to guarantee human beings protection from mistreatment through forms of universal legal rights. While an initial agreement about human rights may cover this general claim, it is disputed how to determine exactly the underlying moral idea of basic human rights – and whether it is a moral idea at all that generates the normative force of human rights. There are two primary ways to approach this problem. Some argue that human rights, by their very nature, are held by all human beings either simply because of their common humanity, their human dignity, or because a set of basic needs and interests

of all human beings is sufficiently important that their protection naturally has the status of a fundamental moral right. Others argue that human rights essentially perform a political function. According to these philosophers, the concept of a human right is dependent upon the concept of some political institution or other. In this vein, the violation of human rights is construed, e.g., as *pro tanto* justification for outside interventions on an international level such that the defining function of human rights is to set limits to state sovereignty.

In both cases – the moral and the political view – further questions loom. Some of them are concerned with the nature of human rights as rights. Can human rights be justified? If so, how? And what, if anything, is special about human rights as rights?

Then again, with respect to human rights, it often remains undetermined what the corresponding duties are. After all, it seems implausible to grant someone a right without offering some idea about how this right can be honored, that is to determine, who exactly shall have which obligation to account for the right in question. On one political conception human rights only obligate official agents such as governments or institutions. Others argue, however, that not only official agents but also individual agents can be said to be holders of human rights–corresponding duties. Following the debate about identifying the holder of rights corresponding duties it becomes important to determine the exact content of these duties.

Human rights are often taken to be essentially universal. But how can there be universal rights in view of the fact that there is such a variety of different, often competing moralities in the world? Is it plausible to assume that many moralities just get it wrong? Obviously, the question of whether or not human rights are universal is not only important from a philosophical point of view. It is also one of the most pressing challenges to the politics of human rights when it comes to promoting human rights as a standard of conduct in regions dominated by different moral standards.

The articles collected in this volume examine in detail these important and much disputed issues in the contemporary philosophical debate about human rights: (I.) the *clarification* of the concept of human rights, (II.) the analysis of human rights as *rights* along with the question of rights–corresponding *duties*, and (III.) the *universality* of human rights.

Moreover, the question of a *justification* of human rights is pertinent to each of these issues.¹

The *first part* of our volume is mainly concerned with the two conceptions of human rights already mentioned: the moral and the political conception of human rights. Our authors approach this issue from different angles.

In the first paper, "Human rights: questions of aim and approach", *James Griffin* does two things: He argues that to determine its approach in a principled way, every theory of human rights needs to have a clear aim, and he bases his own approach on the aim of giving more determinateness to the concept of human rights as it figures in our ongoing public human rights discourse. The concept of human rights must be better specified, according to Griffin, as a precondition for rational debate about existence conditions of human rights, the content of particular human rights, and potential conflicts of rights. The theory this aim leads to is characterized and defended as piecemeal (as opposed to systematic like Kant's, Mill's or Wellman's approach to human rights), monist (not pluralist) concerning the basic values human rights are grounded in, and evaluative (not functional, as e.g., the approaches of Dworkin, Nozick, Rawls, Raz and Beitz). The basic evaluative concept in Griffin's approach is the concept of normative agency. But since Griffin wants to determine a concept of human rights that meets the practical constraints of uptake (it should actually be used in public discourse) and durability (it should be stable in this use) he also takes these "practicalities" into account.

In "On the nature of human rights" *John Tasioulas* sketches three broad families of answers to the question of what is the essential nature of a human right: (1) the Reductive View, according to which human rights are best understood without essential reference to the notion of a (moral) right, e.g. as universal human interests, (2) the Orthodox View, according to which human rights are universal moral rights possessed by all human beings simply in virtue of their humanity, and (3) the Political View, which makes some political role, or set of roles, an essential aspect of the nature of human rights. Tasioulas argues that a suitably interpreted version of the Orthodox View is preferable to both of its rivals: unlike the Reductive View, it is able to capture the distinctive moral significance of human rights as normative standards, whereas unlike the

1 The following summaries are in many cases based on abstracts provided by the authors.

Political View it does not make the discourse of human rights beholden to extraneous institutional considerations.

In opposition to the moral conception of human rights held by Griffin, Tasioulas and others, different authors argue in favor of what is sometimes called a political conception of human rights. They think that the essence of human rights is determined by their having a specific political function, e.g. to limit the sovereignty of states. This political conception, it is often argued, is closer to the contemporary human rights practice than the traditional view of human rights, and this is seen as a reason to accept it. However, *Peter Schaber* argues in his paper "Human rights without foundations" that the political view of human rights should not be accepted. He attempts to show that this conception does not pass the adequacy test that the political view itself proposes for a satisfactory theory of human rights, nor does this view give us the justification of human rights that is needed. Instead, Schaber provides his own defense of a moral view of human rights in which the concept of human dignity plays a pivotal role.

In "The moral and political conception of human rights – a mixed account" *Erasmus Mayr* also focuses on the dispute between adherents of the political and moral conceptions of human rights, which turns on the question of whether human rights are essentially distinguished as such by their specific political function. Some adherents of the political conception, like Joseph Raz, combine the view that human rights have an essentially political role with the claim that they are a sub-class of moral rights. This, according to Mayr, makes a combination of both approaches appear attractive, where, so it seems, the political conception of human rights answers the conceptual question of what human rights essentially are, while the moral conception offers the most attractive answer to the question of how human rights claims are justified. However, Mayr argues that we cannot expect both conceptions to be capable of the sort of "convergence" that this combination would require. Instead, one should follow a moderate version of the political conception, regarding both the question of what distinguishes human rights from other individual rights and the question how human right-claims can be justified. It turns out, however, that this does not make human rights dependent on the actual existence of states, and that a convincing political account of human rights even requires that human rights are, by and large, universal rights that human beings possess qua human beings – just as the moral conception claims. The resulting account of human rights which Mayr advocates can therefore aptly be called a "mixed" account.

The *second part* of this volume focuses on issues related to the notion of “rights” in the term “human rights”. Is it possible to justify rights on a consequentialist basis? What’s special about human rights as rights? What are the duties corresponding to human rights and what is their scope?

Utilitarianism and other forms of consequentialism are frequently criticized on grounds that the impersonal pursuit of maximum aggregate goodness fails to provide adequate room for fair distributions and individual rights. In his paper “Problems with some consequentialist arguments for basic rights” *Samuel Freeman* examines three kinds of arguments consequentialists have made for moral, human, or basic individual rights that respond to these criticisms. First, there is the indirect consequentialist framework provided by J.S. Mill; second, there are distribution sensitive accounts of well-being and other goods; and third, there are accounts that directly incorporate rights and other moral concepts into the good that is to be maximized. In response to Mill, even granting he has shown that basic rights and liberties are necessary for individual well-being, Freeman argues that this does not warrant the conclusion that *equal* rights and *equal* freedoms are always or even ever necessary to maximizing the *sum total* of individual well-being. He thinks that similar problems apply to the second position, which incorporates equality of goods (of welfare, autonomy, etc.) or other distribution-sensitive values into the consequentialist maximand (argued for by T.M. Scanlon, Larry Temkin, Bill Talbott, and Philip Pettit). According to Freeman, equal distribution of one or more goods does not imply equal rights of the kinds advocated by liberal and social democrats or human rights advocates. Finally, the third position, best represented by Amartya Sen, argues that equal rights and fair distributions are themselves intrinsic goods to be promoted for their own sake. Freeman contends that this position is not really consequentialist but rather is a pluralist intuitionist conception that requires balancing aggregate goodness against antecedent moral principles of fairness and individual rights.

Rowan Cruft’s essay “Human rights as rights” defends the thesis that individualistic justification is one of the hallmarks of human rights. Combining this conception of human rights with standard worries about socioeconomic and other “expensive” rights can tempt one to take the phrase “human rights” to refer to any individualistically justified weighty normative consideration – including considerations that are not rights in Hohfeld’s sense. Cruft maintains that abandoning a Hohfeldian conception of rights is problematic in several ways: for in-

stance, it makes it difficult to distinguish rights from their grounding values, and can make it unclear in what sense rights-violations genuinely wrong right-holders. But the essay ends with the suggestion that – due to the nature of individualistic justification – these problems are less worrying for human rights than for other rights.

The aim of *Corinna Mieth's* paper “On human rights and the strength of corresponding duties” is to determine the strength of individual duties corresponding to human rights. While Onora O’Neill claimed that the existence of social human rights depends on the allocation of corresponding duties, Elizabeth Ashford holds that it is not the existence but the realization of social human rights that depends on their institutionalization. From this she concludes that there are individual duties to institutionalize human rights under non-ideal circumstances. Mieth focuses on the strength of these duties. She suggests a reconstruction of the strength of duties according to three criteria. The first criterion is the significance of the good that is protected by a right and the corresponding duty. This leads to a differentiation of the strength of duties according to the theory of goods that diverges from the differentiation of negative and positive duties found in the theory of action. Furthermore, Mieth defends the idea that reasonable demandingness can be considered a second criterion for the strength of duties. Thirdly, the specificity of the content of the duty has relevance for its strength. If this is correct, then the duties of an average person to institutionalize human rights are only weak. Therefore, Mieth proposes a shift from duties to responsibilities. Even if duties of institutionalization are underdetermined in general and therefore only weak, it may be possible to assign responsibilities to improve human rights standards.

The last contribution to the second part of this volume also addresses the question of the demandingness of rights-corresponding duties but focuses on individuals as duty bearers. In his paper “The moral demandingness of socioeconomic human rights”, *Jan-Christoph Heilinger* asks whether excessive demands for moral agents speak against a moral framework such as socioeconomic human rights. In other words, is an account of human rights that embraces welfare rights unsound if it turns out to be extremely burdensome for moral agents? After an analysis of the relationship between human rights and the corresponding, potentially overdemanding duties, Heilinger argues that not only institutions but also individual agents are addressed by these duties. Next, he introduces the “moral demandingness objection” as a meta-theoretical criterion to judge the soundness of a moral theory and shows different

ways in which a moral theory might demand more than agents can do or can be reasonably expected to do, particularly in the context of human rights. His paradigm case is the alleged human right to adequate food and its corresponding duties. Heilinger argues that excessive demands mirror the current circumstances of extreme but in principle preventable world poverty. Hence, extremely burdensome demands should be taken neither as an argument against the moral theory of human welfare rights nor as a pre-emptive exculpation of agents failing to live up to the duties corresponding to these rights. However, obligations corresponding to welfare rights are not the only type of obligations for moral agents; therefore, they should not always and exclusively strive to fulfill these obligations.

Whatever the nature of human rights might be, and whatever their status as rights exactly involves, one feature seems to be essential in any case: Human rights are universal rights. Nevertheless, anyone claiming that human rights are universal is confronted with the fact that there are quite different moralities to be found in the world – present and past. So, are human rights really universal? Is there enough common ground between all moralities for a justification of human rights? Do we even need such a common ground? The papers of the *third part* of this volume try to answer questions like these.

In his paper “Common humanity as a justification for human rights claims” *Simon Hope* argues for two related conclusions. His primary concern is to investigate the standard justification for human rights in the modern human rights culture: That *human rights are held in virtue of our common humanity*. Hope argues that the depth and breadth of moral diversity raises serious questions about whether the features of common humanity standardly appealed to can stand as intelligible moral reasons to the bearers of different forms of life. At the same time, he does not think a retreat to a Rawlsian-inspired “political” conception of human rights is justified. Ordinary moral reasoning does not break down completely when addressed to an unbounded domain of agents. Although necessarily constrained, ordinary moral reasoning about the human condition can justify human rights claims. But that reasoning must appeal to vulnerabilities inherent in the human condition, rather than features of personhood, if intelligible reasons are to be advanced.

On the one hand, the universality of human rights is, as it seems, part of their very nature. On the other hand, when we look at the mor-

alities actually endorsed by different persons/cultures etc., we find a great variety, including quite different views on the nature and importance of human rights. From a philosophical point of view, there seem to be two different options, one as unsatisfactory as the other: Either we must assume that many people/cultures etc. are deeply wrong about fundamental moral matters, or we have to admit that human rights are not universal after all. In his paper “Human rights and moral diversity” *Gerhard Ernst* tries to find a solution to this problem by outlining a morally decent form of moral relativism. He is convinced that there is a deeply contingent element in morality as such which allows for some variation concerning a morally acceptable stance towards human rights.

The present volume presents new philosophical papers, written by leading philosophers in the field, inquiring into crucial aspects of the current philosophical debate about human rights. It includes selected papers from a workshop on the philosophy of human rights held in 2009 at the Venice International University as well as invited papers. The Venice workshop was part of a project on human rights established by the *Junge Akademie* and the *Berlin-Brandenburg Academy of Sciences and Humanities*. First and foremost we thank the authors for their contributions to this volume. We also owe our gratitude for generous financial support to the Udo Keller Stiftung–Forum Humanum. Furthermore, special thanks go to Erich Ammereller for pulling most of the weight in organizing the workshop just mentioned, and to him, Konrad Petrovsky, Tobias Pulver, and Karsten Schoellner for their help in preparing this volume.

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The editors

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I.

Human Rights: Moral or Political?

Human rights: questions of aim and approach

JAMES GRIFFIN

1. The question of aim and approach

I shall step back from the discussion of human rights going on now in philosophy, political theory, and jurisprudence and ask a question about it – the discussion. What are we philosophers, political theorists, and jurists trying to do? One might think that the answer is obvious: we are trying to understand better what human rights are. But that answer is most unclear. ‘Human rights’ as used in ethics? Or in the law? Or in political life? If in ethics, rights derived from over-arching ethical principles, as Kant derives his account of ‘natural rights’ from his Doctrine of the Right, or John Stuart Mill derives his account of ‘rights’ from the Principle of Utility? Or ‘rights’ as used now in evaluating particular societies? If in the law, the law as it is? Or as it should be? And the law where? If in politics, in its history? Or in an empirical account of political institutions? Or in setting standards? All of these different aims themselves require different approaches.¹

2. Systematic and piecemeal approaches

One might think that the most rational approach is what I shall call ‘systematic’. One starts, ideally, by developing a general theory of value, then one develops a theory of ethics in general, then a theory of rights in general, followed by theories of *legal* rights and *moral* rights, and finally by a theory of *human* rights, either *moral* or *legal*. In our day, Carl Wellman provides a distinguished example of this approach (Wellmann 1985, ch. 1 and 1997, ch. 1).

A different approach is what I shall call ‘piecemeal’. One starts with a particular notion of human rights, say, the notion that emerged from the long natural rights/human rights tradition starting in the Late Mid-

1 This paper is a substantially revised version of Griffin 2010.