

THE COHERENCE OF HUMAN RIGHTS' FOUNDATIONS

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Abstract: To provide foundations for human rights is to prove coherence between focus (what we are talking about when we talk about human rights) and form (in what way we think human rights have a claim to necessity). This paper describes some permissible combinations of form and focus. This approach to foundations can also be shown to reconcile two propositions that might otherwise be assumed to be contradictory. On the one hand, we should reject the notion of a 'definitive' justification. On the other, we should admit the intelligibility of strong, moral, foundations for human rights.

Keywords: Foundations; Coherence; Epistemology; Human Rights; Justification.

Summary: I. INTRODUCTION; II. FOUNDATIONS; III. CONTEMPORARY FOUNDATIONAL DEBATES; IV. FOUNDATIONAL FORM; V. FOUNDATIONAL FOCUS; V.1. 'Human Rights'; V.2. '*Human Rights*'; V.3. '*Human Rights*'; VI. 'ESSENTIALLY CONTESTED CONCEPT' OR 'SAVING THE PHENOMENON'?; VII. CONCLUSION.

I. INTRODUCTION

It is the contention of this paper that, despite recent attacks on the notion, the idea of 'foundations' for human rights remains philosophically decisive. The idea of foundations for human rights should be seen as the requirement of coherence in an account of human rights' nature and necessity. It must, then, be an associated task of the paper to show why 'non-foundational' philosophies of human rights are conceptually mistaken.

One initial concern here might be whether the concept of foundations is able to transcend, rather than beg the question of, different disciplinary commitments. After all, our disciplines –law, ethics, political theory, history and others– themselves have foundational commitments that determine what is knowledge, certainty, or truth. So, when different disciplines produce markedly different accounts of human rights this is both evidence of the inherent instability of the subject matter and evidence of decisive

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epistemological differences between methodologically distinct disciplines.² Any talk of ‘foundations’ for human rights would, therefore, be the product of these different initial commitments.

Nonetheless, to analyse human rights we must, regardless of our other commitments, commit ourselves to showing *what* is being explained or justified, and *how* this is being explained or justified. No account of human rights –no account that has reasonable claim to be an account of human rights– lacks both conceptual commitments and normative commitments. The meaning of ‘foundations’, whatever else it means, must be understood as an assertion of how these two components, conceptual and normative, can be made coherent. So, there will no doubt be disciplinary differences in what aspects of the phenomenon of human rights we choose to be central. But unless we are committed to the belief that the language of human rights is nonsense and the practice of human rights is meaningless, the task of human rights theory is to explore to what degree there is coherence between our practices and our obligations. In this respect, and more generally, the present paper represents a critique of recent non-, or anti-, foundational work on human rights.³

I proceed by way of the language and meaning of ‘foundations’ in general and ‘foundations’ in the context of human rights in particular. This reveals a potential mismatch between deployment of foundations in social explanation and the use of foundations in the explanation of human rights. Turning to contemporary philosophies of human rights to consider the source and significance of this mismatch, coherence between form and focus is defended as the common standard by which these philosophies should be judged. It is concluded that it is inescapable, in analysis of human rights, to draw upon the idea of foundations-as-coherence.

II. FOUNDATIONS

What is it to make a claim concerning ‘foundations’? Part metaphor, and part discipline-relative term of art, a general characterisation would be analysis concerning the conditions or structures that make something stable or enduring. It is possible but exceptional to identify a foundation without qualifications: ‘the foundation of mathematics

² Concerning the former see Alasdair MacIntyre, *After Virtue* (London: Gerald Duckworth & Co., 1981) p. 67f, also Rory O’Connell, “Do We Need Unicorns When We Have Law?” 18(4) *Ratio Juris* (2005) pp. 484–503. Concerning the latter see the literature on essentially contested concepts. Generally, W.B. Gallie, “Essentially Contested Concepts”, *Proceedings of the Aristotelian Society* 56 (1956): pp.167-198. In application, Gunnar Beck, “The Mythology of Human Rights” *Ratio Juris* 21(3) (2008): pp. 312-47 and James Griffin, “First Steps in an Account of Human Rights” *European Journal of Philosophy* 9(3) (2001): pp. 306-27.

³ Most significantly, John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999) and Joseph Raz, “Human Rights Without Foundations”, in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 321-37.

is logic'; 'the foundation of success is a good breakfast'. Foundational analysis will more often be qualified. We might say 'such foundations will only be stable if....' We might say 'part of this practice has its foundation in x , but not other parts'. These qualifications allow the possibility of different foundations existing alongside, or underlying, the ones we have identified. They speak to the difference that perspective makes; there may be other perspectives revealing other defensible foundational claims.

More specifically, in identifying a foundation for a social practice we commonly imply that x is being made intelligible from an 'internal' point of view but not in the same way from an 'external' point of view.⁴ For example, actions have a foundation in the sense of there being conscious reasons for their taking place but this is not the sole explanatory perspective: 'the religious foundations of this ritual are found in scriptural passages, but the social foundation is group survival'. Generally, when we make a claim concerning foundations we are making a claim intending to explain something's necessity, i.e. some or all of its causes. But it is also characteristic of discussion of foundations that these need not be sufficient conditions to be considered foundational, and nor need they imply a single, authoritative, epistemological perspective.⁵

So, far from always implying axiomatic (or apodictic or self-evident), different uses of foundation suggest that we more commonly look to both its form and its focus. First, we have regard to the *form* of the foundational claim. Is something said to possess an origin, or have a reason for its endurance, or have the capacity for enduring change? We can ask of this form whether it amounts to explanation or justification. That is, whether it identifies causes or necessity (explanation), or whether it identifies causes or necessity and in doing so treats only one kind of necessity as ultimately necessity-conferring or law-like (justification).⁶ Second, we must also have regard to the *focus* of the claim. Is it intended to be complete and exhaustive? Or is it partial, aspiring to give foundations only to part of a larger phenomenon?

How, then, are human rights and foundations related? Their foundations are of philosophical concern but talk of foundations accompanies human rights wherever they are, politically or legally, at issue. Such discussions often concern moral foundations. Some may be concerned with the historical pedigree or historical continuity of human rights. Others involve solving practical problems in the interpretation of human rights. Foundations play a greater or a lesser role in a number of practical and philosophical

⁴ For two different renderings of this distinction see H. L. A. Hart, *The Concept of Law*, 2nd Edition (Clarendon Press: Oxford, 1994) and Ronald Dworkin, *Law's Empire* (Oxford: Hart, 1998).

⁵ On the first point see G.H. von Wright, *Explanation and Understanding* (Routledge and Kegan Paul: London, 1971). On the second see Peter Winch, *The Idea of a Social Science and its Relation to Philosophy* (Routledge: London, 2012).

⁶ This definition is stipulative but elements can be found in Joseph Raz, *Practical Reason and Norms* (revised Edition) (Oxford: Oxford University Press, 1999) and von Wright (1971, p. 137f).

contexts, and variation in the meaning and function of ‘foundations’ is apt, at the very least, to give rise to the suspicion that its meaning is context-dependent.⁷

That problem, which is the core analytical concern of this paper, might be stated as follows. Explaining the foundations of social practices usually take the form of identifying composite causal conditions relating to a loosely defined or dynamic phenomenon.⁸ *The* foundation of human rights is, however, frequently treated as a singular phenomenon, and discussion of human rights characteristically treats human rights themselves as a singular phenomenon. *Does this entail that there is a mistaken tendency towards reductionism in analysis of human rights or, conversely, that the foundations relevant to human rights admit or require more precision than is characteristic of social explanation?* This is a variation on longstanding discussions relating to ‘foundationalism’ and ‘functionalism’, but the present enquiry is intended to achieve more clarity on the predominant uses of ‘foundation’ in contemporary debate.⁹ More importantly, it is argued that the epistemology related to the idea of a foundation can be put in much sharper focus by pursuing a question that keeps conceptual and methodological problems at the fore. There is a temptation to assume that if we face problems in identifying the focus or object of foundation then epistemological priority must be given to pragmatic modes of explanation.¹⁰ I intend to show that this is based on too hasty dismissal of the question of focus, which in turn encourages too hasty a dismissal of ‘strong’ foundational arguments. Nonetheless, for any foundational argument some unity in ‘human rights’ – be it conceptual or functional – must be defended. How has this been approached in contemporary debates on foundations?

III. CONTEMPORARY FOUNDATIONAL DEBATES

It is possible to identify two markers that signal the poles of contemporary debates. Gewirth’s work from the 1970s and 1980s on morality and human rights, and Rawls’ work from the 1990s on international law and politics.¹¹ The details of these works will be considered in passing, but the poles of debate that they represent are of more immediate importance. Crudely, an idealised picture of human rights faces a practical one. Or put

⁷ James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008) provides the most important reference point here but Charles Beitz, *The Idea of Human Rights*, (Oxford: Oxford University Press, 2009) provides an important, contrasting, response. The differences between these kinds of analyses are, as the general argument of this paper seeks to make explicit, simultaneously methodological, epistemological, and normative.

⁸ von Wright (1971, pp. 136-138).

⁹ For relevant analysis of the existing currents of thought, and for conclusions close to the present paper, see John Tasioulas, “Towards a Philosophy of Human Rights”, *Current Legal Problems* 65(1) (2012): 1-30.

¹⁰ See in particular Richard Rorty, “Human Rights, Rationality and Sentimentality” in S. Shute & S. Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993).

¹¹ Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago & London: University of Chicago Press, 1982). John Rawls (1999).

another way, an epistemologically pragmatic, and in certain respects 'realist' political philosophy (Rawls), confronts a systematic philosophy claiming logical connection between moral necessity, practical necessity, and the nature of the human (Gewirth).

Synthesis between these positions might be desirable and intelligible. Two examples will concern me, Waldron's and Griffin's. Waldron considers his account 'foundation-ish'.¹² He equates 'foundations proper' with axioms from which a theory can be deduced in its entirety, a model of foundation he considers inappropriate in this context.¹³ However, he does believe that his account of dignity and human rights, turning on the significance of status in democratic societies, is sufficiently foundational because status/dignity has good fit with certain important background assumptions concerning respect and recognition in law. Within democratic societies that respect the rationality of the individual all rational individuals are automatic and equal rights holder. 'Dignity' expresses this elevated status of the individual within a democratic society.¹⁴

Griffin, in his twin 'top-down' and 'bottom-up' approach, draws together ideas of moral necessity and personhood with the (pragmatic and principled) commitment to leave intact existing legal practices associated with justice.¹⁵ Moral necessity must bend at some point to this practical and principled necessity, and some aspects of personhood that could be considered human rights concerns are, for Griffin, better treated as rights within the normal legal practices associated with justice. This "is reinforced [...] by the most consequential statements about human rights in our time: the Universal Declaration of 1948 and virtually all subsequent documents of national and international law of human rights. These documents include procedural justice but not all of distributive justice, or of retributive justice, or of many forms of fairness."¹⁶ Griffin therefore bridges moral necessity and practice by treating personhood as a foundational concept with expansive consequences while accepting that another foundational notion, justice, must be allowed to coexist alongside personhood and human rights. Griffin must be distanced from Waldron by his clear separation of constitutional and human rights, and be distanced from Gewirth in his treatment of human rights as an essentially contested concept.¹⁷

The Rawlsian position is here represented by Raz. For Raz no analytical significance can be attributed to 'human rights'.¹⁸ We must then, like Rawls, turn to the

¹² Waldron (2013a, p. 5).

¹³ Waldron (2013a, pp.17-18).

¹⁴ "Similarly, we may say of "dignity" that the term is used to convey something about the status of human beings and that it is also and concomitantly used to convey the demand that status should actually be respected." Jeremy Waldron, "Dignity and Rank", *European Journal of Sociology* 48(2) (2007): pp. 201-237, at 205.

¹⁵ Griffin (2008, p. 41f).

¹⁶ Griffin (2008, p. 273).

¹⁷ Griffin (2008, p. 4) also Griffin (2001, pp. 306-327).

¹⁸ Raz (2010, pp. 336-337).

focal example of human rights –that of international, not domestic, law– where at least the language of human rights is prevalent. We should substitute Griffin’s generalisations about personhood for individual interests so pressing that they will commonly take the form of ‘moral rights’. Such interests can but do not necessarily become claims against the state. In the international arena there are potentially arguments to justify (given a certain quantity and quality of interference with such rights, and given that state inviolability is not absolute) one state taking action against another to enforce them. “[J]ust 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 limits to sovereignty, but do not necessarily constitute reasons for all measures, however severe, against violators.”¹⁹ Consequently, human rights are to be understood as an aspect of international legal discourse that depend for their efficacy on the acceptance of hypothetical imperatives that are themselves subject to existing international political and legal conditions. In essence, moral necessity is substituted for certain *pro tanto* reasons characteristic of international relations, and human rights, as political rights, have no foundations only conditions of efficacy.²⁰

The mixture of epistemological, methodological, and normative commitments represented here is clearly problematic. It is liable to suggest that comparison or adjudication between these positions is senseless because of radical differences in their normative commitments, or perhaps that our assessment will be dependent upon whether we have a strong intuition that a particular form of human rights practice is or should be focal in analysis. The following sections are intended to show that two components of human rights analysis are constant: form and focus. The remainder of the paper is intended to show that they are both necessary in analysis of human rights and represent the basis of foundational claims.

IV. FOUNDATIONAL FORM

Recalling our principal analytical question –do the foundations relevant to human rights *admit or require more precision* than is characteristic of social explanation?– our present concern is with what forms of foundation might be admitted or required in relation to human rights. This will involve simplified models of the positions outlined above. I identify ‘strong foundations’ with the claim that a foundation for human rights is necessary and can be identified. ‘Qualified foundations’ implies a claim that a foundation for human rights is necessary, that a foundation can be identified, but that this foundation may not be wholly intelligible. A ‘deflationary’ position implies that while foundational claims are characteristic of the concept, it is possible that more than one foundational position can be defensible in conceptualising human rights. ‘Anti-foundational’ is the position that any foundational claim is dissoluble into necessary conditions that can never, alone, supply sufficient conditions.

¹⁹ Raz (2010, p. 334).

²⁰ Raz (2010, p. 337).

'Strong' foundational arguments must take the form that human rights presuppose *x* as a singular, necessity conferring, principle. This presupposition may concern epistemological or moral necessity; this might be derived from deductions, transcendental deductions, or dialectically necessary arguments.²¹ The common characteristic is a singular, necessary, foundation that is identifiable. Whether this must necessarily exclude all other epistemological perspectives on the foundation is a question to be deferred.²² But only one principle has justificatory power vis-à-vis human rights. Other perspectives, then, will render only part of human rights intelligible as normative phenomena, or they will fail to make them intelligible at all. The strong foundationalist is likely to be associated with at least one example of a human right, typically the right to life, as an example showing linkage between foundational necessity and at least one human right that is the product of that foundation.²³

'Qualified' foundational arguments make foundations necessary but not sufficient for the defensibility of human rights. Waldron is a case in point where human dignity, as a 'status concept', provides the condition for human rights to be understood as necessary.²⁴ Human rights are 'contained' within that status notion. On the other hand it may be that human dignity itself has a ground or foundation that requires further explanation.²⁵ The pivotal claim here is the existence of a singular foundation, but a foundation that can be understood in different ways and that makes it possible for human rights to be explained in different ways. From one perspective human rights can be seen as directly founded on human dignity itself. From other perspectives our human rights need no talk of foundations at all because they function like, and within, the context of 'normal' legal norms. Here human rights are likely to be close to constitutional rights as 'apex' norms within legal systems but with human rights distinguished by the possibility of appeal to foundations different to those of other constitutional rights.²⁶

'Deflationary' foundational arguments admit the relevance of talk about foundations but does not commit to any single view of necessity. Thus we could, like Griffin, talk about a foundation or foundations (personhood and/or human dignity) and insist that these

²¹ For a cognitivist example see, Matthias Mahlmann, "An Introduction to the Mentalist Theory of Ethics and Law", in Pattaro (et al, eds), *A Treatise of Legal Philosophy and General Jurisprudence: Treatise 2 Foundations of Law* (Dordrecht: Springer, 2005), p. 84.

²² For instance, it is unclear whether 'the generic conditions agency', the foundational notion in Gewirth's work, can be considered synonymous with 'human dignity', these might be the same principle from two perspectives.

²³ Alan Gewirth, "Are There Any Absolute Rights?", *The Philosophical Quarterly* 31(122) (1981): pp. 1-16.

²⁴ Waldron (2007).

²⁵ Waldron (2013, p. 12) also Sen on freedom as human rights' foundational principle (Sen, A. 'Elements of a Theory of Human Rights' 32(4) *Philosophy & Public Affairs* (2004) pp. 315-356 at p. 323).

²⁶ Jeremy Waldron, "How Law Protects Dignity", NYU School of Law, Public Law Research Paper No. 11-83, <<http://ssrn.com/abstract=1973341>> [last accessed 16/07/14] (December 2011). This characterisation also partially captures core elements of Griffin's work, but Griffin's relationship with *foundations* is more complex and 'deflationary'.

are essential aspects of the discourse of human rights.²⁷ Nonetheless, ‘necessity’ itself is to be understood as complex and qualified. Griffin is concerned with the necessary conditions of personhood (qua moral necessity), the necessity of human rights themselves (qua minimum content of natural law within positive law), and the necessity of acknowledging the claims of justice as a corrective to the inflationary tendencies of human rights.²⁸ The foundations of human rights are the interplay of these factors, but that necessity is complex, works at a number of (normative and practical) levels, and accommodates the various perspectives relevant to human rights given that they are a dynamic phenomenon to which no single meaning can be attached. This kind of account is likely to point to the importance of both civil and political, and social and economic rights, to demonstrate that different kinds of foundational necessity are needed.²⁹

Finally, an ‘anti-foundation’ position would stress the contingent conjunction of a number of factors in the existence of human rights. We can reconstruct their uses in legal, political and other discourses such that salient features and certain preconditions are identifiable. But such preconditions do not amount to foundations because they do not amount to a singular necessity that links our discourse with our norms.³⁰ This is likely to privilege efficacious instances of human rights. The paradigm example of human rights in this instance would be those international human rights laws that most clearly overlap with humanitarian intervention as the international practice of responding militarily to ‘gross human rights violations’.³¹

These are four possible models of foundational forms. None, in the form presented, obviously fails to be a *foundational* analysis. This is partly because the language of foundations is imprecise, and partly because none is able to claim priority, qua foundational analysis, over the others because each has some explanative power. Put in terms of the question initially posed, human rights can *admit* significant variation in, but do not appear to *require*, any specific foundational form. However, if the presence of explanative power fails to provide means to adjudicate between the positions, the choice of examples of human rights might. Some examples of human rights (or human rights discourse) seem to invite a form of foundational claim. In fact, in some instances the direction of fit clearly

²⁷ Compare two of Griffin’s propositions in *On Human Rights*: “I propose, therefore, only two grounds for human rights: personhood and practicalities” (p. 44) and “A satisfactory account of *human* rights, therefore, must contain some adumbration of that exceedingly vague term ‘human dignity’, again not in all of its varied uses but in its role as a ground for human rights” (p. 20).

²⁸ Griffin (2008, p.13, p.149, p. 256f).

²⁹ Henning Hahn, “Justifying Feasibility Constraints on Human Rights”, *Ethical Theory and Moral Practice* 15 (2012): pp. 143–157.

³⁰ Jeremy Waldron, “Human Rights: A Critique of the Raz/Rawls Approach”, New York University School of Law Working Paper Series No. 13-32 (2013b), as well as Raz’s response (2013).

³¹ See Wilfried Hinsch and Markus Stepanians, “Human Rights as Moral Claim Rights” in Rex Martin and David A. Reidy (eds) *Rawls’s Law of Peoples: A Realistic Utopia?* (London: Blackwell, 2006). This contains a critical analysis of what Rawls considered to be “human rights proper” (p. 118 and ff).

moves from the example itself to the foundation. Can these differences in focus be evaluated independently of the forms that foundational claims take? This question is important because it may be this that has a decisive bearing on what kinds of foundations are *required* for human rights. I will attempt to show this cannot be answered satisfactorily.

V. FOUNDATIONAL FOCUS

Recalling again our question –do the foundations *relevant* to human rights admit or *require* more precision than is characteristic of social explanation?– our concern here is what might be ‘relevant’ to or ‘required’ by human rights. The justification of different standards of relevance or different foci presents a problem. If they are justified as foci in their representing the best, politically or legally, justified practice of human rights then this is bootstrapping: the product of one form of justification (political or legal justification) does not validate such products as standards for all forms of justification. If they are justified as foci in being the ‘dominant’ meaning of human rights then they are begging the question. So, parallel to the dilemma of one or multiple normative perspectives, here we face the question of whether there is some conceptual or phenomenological quality that *must* be present in our discussion of human rights in order to ‘save the phenomenon’, or whether the necessary or exemplary properties of human rights will always be ‘essentially contested’. This can be illustrated by some of the possible candidates for focal or characteristic properties of human rights.

V.1. ‘Human Rights’

Is it possible to talk about *the* group of human rights without also qualifying this as the group of ‘human rights used by lawyers’ or the ‘group of human rights of concern to ethicists’? Could there be some focal phenomenon, or common ground, associated with the very term human rights that is necessarily assumed in different practices? This points to more specific, and recurrent, points of contestation: whether there is a shared definition of human rights, whether such a concept is susceptible to ‘inflation’ or ‘deflation’, and whether its meaning can be stabilised by alignment with ‘moral’ or ‘political’ rights.

The phrase ‘human rights’ itself produces interesting, but arguably tendentious, points. Explaining the foundations of human rights is sometimes construed as pursuit of a harmonisation of a contrast between ‘political rights’ and ‘natural rights’ with ‘human rights’ either synonymous with the first or superseding the second.³² Neither could be considered precisely synonymous with ‘human rights’ itself. It appears as though human rights are intended to be enforced as legal rights (why else would they be called ‘rights’ as

³² William Talbott’s *Which Rights Should be Universal?* (Oxford: Oxford University Press, 2005).

opposed to ‘universal moral duties’ or ‘international aspirations’?). And ‘human rights’ appear to be intended to have authority other than the state itself (why would they be called *human* rights if their existence depended upon the legislative fiat of the state?). Whether or not we set any store on the phrase ‘human rights’ to generate analytically important information, it is certainly the case that they have escaped exclusive ownership by legal, moral, or political users and commentators.

The language of human rights can be a more precise first point of reference when treated as ‘those rights that accrue to humans by virtue of their humanity’.³³ This is useful in suggesting, at the very least, that human rights should be thought to instantiate value rather than be judged solely by their instrumental value. This is also problematic and the definition itself is contentious. Why might it not denote as rights only those immunities that we hold against the state (i.e. humans’ rights are those rights that exist irrespective of citizenship)? Moreover, to have membership of a group with distinctive characteristics (humans) is, alone, insufficient to entail a claim to have this characteristic protected.

It is this line of enquiry, not in itself senseless, that nonetheless gives rise to the dual threat of ‘deflation’ and ‘inflation’. Given an imprecise relationship with the human, human rights risk being deflated to an empty category unless additional criteria are imported to identify what, of *significant* human importance or of *pressing* social necessity, should be protected by human rights. Answering this question raises the problem of ‘inflation’, i.e. the possibility that human rights is so ideologically potent that it becomes extended beyond its proper remit.³⁴ Some variant of ‘ought implies can’ must then accompany human rights. These limitations must, at the very least, relate to what is intelligibly claimable by humans.³⁵ Beyond this, and in the absence of additional argumentation, ‘human rights’ could be used to denote any desiderata within the sphere of human possibility.

In sum, the best focus of interpretation we might be able to extract from this analysis is that human rights are intended to be internally self-limiting. ‘Human rights’ cannot reasonably be thought to represent an aspiration to dominate, or provide the means to define, the entirety of our normative language and practices. This is not, however, to suggest that anti-inflationists should have an epistemologically decisive voice in foundational debates: their choice of focus is important, but neither is this the only focus nor does it imply that the correct form of foundation is thereby decided.

³³ See Tasioulas, Gewirth, and Raz (*op. cit.*) for variations on, and criticisms of, this formulation.

³⁴ Gewirth (1986).

³⁵ Robert Stern, “Does ‘Ought’ Imply ‘Can’? And Did Kant Think It Does?”, *Utilitas* 16(1) (2004): pp. 42-61.

V.2. 'Human Rights'

This concerns common, general, or valuable properties of the species. The core focus of human rights enquiry should be connection with characteristic capacities of humanity, pressing aspects of humanity, or humanity as a cosmopolitan notion.

'Humanity' might be related to agency, reason-responsiveness, or self-constitution.³⁶ It suggests we may be able to generate a class of 'characteristic capacities of humanity', i.e. those interests or powers available to all and only humans. By extension, we may be able to exclude from human rights any and all interests that exist in the absence of distinctively human concerns (accepting, therefore, some 'deflation'). Conversely, it might be that we can extend human rights to all those capable of self-constitution or self-consciousness (accepting, therefore, some 'inflation'). Equally, it may be that 'characteristic capacities of humanity' gives support to the possibility that there is only one human right –the right to treatment consonant with the standards implied by 'humanity'– which is dynamic in both its content and its right-holder.

It is more common to attempt to limit human rights scope to 'pressing aspects of human life and agency'.³⁷ This could be construed as respecting human limitations and human vulnerabilities; it could imply a threshold for a distinctively or properly human life. A 'threshold' marks out a basic standard that it is proper to expect within certain practices (e.g. a standard of living) or a basic standard that it is proper to apply to certain practices (e.g. minimum or minimal thresholds).³⁸ Either way, these face the problem of the 'human' no longer being a value to be instantiated in human rights but a set of standards for which human rights have instrumental value alone.

The other option would be humanity as rights-holder or, in other words, the cosmopolitan claim that each individual possesses the same rights regardless of their state of origin. Here 'humanity' is juxtaposed with 'citizen', with the former meaning an object trans-national, or international, respect. Clearly this focus is of particular interest to deflationary- and anti-foundational theorists for whom there is a link with an established practice, namely humanitarian intervention. In fact this focus could be thought to have two facets: the justification of humanitarian intervention, and a more thoroughgoing commitment to moral cosmopolitanism.³⁹ It is not clear that the former should be the only focus of concern (why should we ignore the mass of domestic and regional human rights practices?) and the latter as a deferral of the problem. That is, are we concerned with

³⁶ See, *inter alia*, Jacques Maritain, *The Social and Political Philosophy of Jacques Maritain: Selected Readings* (London: Geoffrey Bles, 1956); John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 2011(1980)); Christine Korsgaard, *The Sources of Normativity* (Cambridge; Cambridge University Press, 1996).

³⁷ Gewirth (1986); Griffin (2008).

³⁸ Sen (2004).

³⁹ Waldron (2013b).

human rights that are already of trans-national concern, or those that should be of trans-national concern?

In sum, to take ‘*human rights*’ as focal is to produce a range of very different questions. What is the meaning of human? Is humanity a (factual) foundation, a (practical) limit to what we understand as human rights, or a (moral) limit to what ends can be served by human rights? And when we focus on humanity and the humanitarian must we prioritise international law and if so is this to be taken in its real or ideal form? These kinds of questions lend themselves to wide moral, social and political discussion, which may be part of the strength of human rights. They also point to the fact that any ‘self-limitation’ in the concept of human right is difficult to defend. Human rights are not coextensive with our normative concerns, but they come close to touching on most of them.

V.3. ‘*Human Rights*’

Are we concerned with the whole set of possible legal human rights or a sample of typical (or atypical) human rights claims? This is question-begging but it also points to the potential significance of dividing rights that are, and have been, routinely and successfully used as claims against the state, from those rights that are difficult to bring, or less frequently brought, against the state. Does such a division signify at least two classes of human rights? The contrast between will and interest theories give us the means to support such a division. Will theories, characterising rights by the capacity to bind the will of another agent, trace the normative force of rights to freedom and agency. Interest theory locates their value in the value of the interests that they protect.⁴⁰ Human rights are, in fact, often instances of rights brought successfully against states because states have the capacity to fulfil such rights (will theory). Other human rights, less successfully enforced or less frequently used, clearly express interests but are less easily seen as duties. Human rights with no obvious correlative duty holder, but having a link to interests, face the criticisms that interest theories often face.⁴¹ We must be in a position to prove that interests are a *sufficient* reason to hold another to be under an obligation. In the context of state responsibilities, and absent a more comprehensive normative theory, this may be difficult to prove.

On the will theory, the nature of the duty-holder is crucial in producing the *formal*, legal, property demanded of rights, namely their enforceability against correlative duty-holders whose choice of action can be constrained or directed. It is a central problem of focus to ask whether we take the typical duty-holder as definitive of human rights (a ‘vertical’ relationship with the state), or whether other duty-holders, including other private

⁴⁰ For a version of an interest theory see Tasioulas (2012); for a version of a will theory see Alan Gewirth (1986); for analysis of both see Cruft (2004).

⁴¹ Gewirth (1986).

individuals, are implied by the concept itself ('horizontal' effect).⁴² Fidelity to the existing 'complexity' of human rights suggests that the state should be taken as a central case and horizontal effect treated as over-idealisation. Fidelity to the 'value' that human rights instantiate suggests that nothing excludes this effect other than the accidental practicalities and principles of existing legal systems. These starting-points, previously problematised as epistemologically distinct starting-positions, should also be thought to be *normatively* problematic when they recur, in a modified form, in attempts to reconceptualise human rights as 'moral rights'.⁴³

The meaning and function of any division between legal and moral rights depends upon the moral, legal or political context in which the division is used.⁴⁴ Against the backdrop of contractarian theory, the division broadly identifies certain aspects of 'private conscience' (moral rights) that, while nominally excluded by an authoritative legal system (legal rights), should be granted respect; this can, but need not, be aligned with the division between self- and other-regarding duties.⁴⁵ The same division would have a very different function against a natural law backdrop where the opposition indicates that some moral rights have, rightly, an enforcement mechanism attached to them (legal rights) but that some quasi-rights may also, wrongly, have an enforcement mechanism attached to them (they are nominally 'legal rights' but lack moral justification).⁴⁶ In contrast, against the backdrop of a separation thesis treating legal rights as distinct on the basis of their authoritative issuance from a social source, authority and normativity do indeed create two distinct, but also two incommensurable, classes of rights. Commitment to the separation thesis would indeed bifurcate legal and moral rights, at the expense of also insisting that any justification of human rights is entirely beside the point: they are either authoritatively issued by a social body or not.⁴⁷ In essence, any attempt to draw normative certainty from this juxtaposition is frustrated by the range of background claims that give it meaning. We may be able to justify a conception of the meaning and function of moral and legal rights in the context of human rights and use this to identify exemplary instances of such rights. But clearly we are then no longer committed to *finding* the focal instance of human rights. We are *constructing* it on the basis of other foundational commitments.

Two related foundational foci emerge from this emphasis on rights: the question of correlativity, and the question of giving stable meaning to the contrast of moral and legal rights. This yields, in an important sense, a question of perspective. Lawyers wish to make

⁴² Gewirth (1986).

⁴³ For an account of the general conceptual characteristics taken to be possessed by moral rights see Wilfried Hinsch and Markus Stepanians (2006).

⁴⁴ Hinsch and Stepanians (ibid.) rely upon "life, liberty, security" to vouchsafe universal entitlement to moral rights (p. 121).

⁴⁵ Allen W. Wood, *Kant's Ethical Thought* (Cambridge: Cambridge University Press, 1999), p. 44.

⁴⁶ Deryck Beyleveld and Roger Brownsword, *Law As a Moral Judgment* (London: Sweet & Maxwell, 1986). Robert Alexy, "Law, Morality, and the Existence of Human Rights", *Ratio Juris* 25(1) (2012): pp. 2–14.

⁴⁷ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 2009).

sense of there being duty-holders and therefore enforcement, ethicists the possibility of human rights having a non-trivial claim to being both rights *and* moral. The attempt to determine what is *required* or *relevant* to human rights' foundations collapses here into whether and how we admit competing epistemological and normative commitments to shape our *conceptualisation* of the phenomenon in question.

VI. 'ESSENTIALLY CONTESTED CONCEPT' OR 'SAVING THE PHENOMENON'?

These attempts to narrow the focus of foundational enquiry are not successful because they stand in isolation from foundational forms. They have no supporting epistemology able to justify them as more, or less, relevant to 'human rights properly understood'. That is, none of these lines of enquiry seems to be conceptually authoritative or decisive because the characteristics of the class as a whole do not exist independently of the claims to necessity found in different foundational forms. Form and focus are therefore separable but also indivisible. Our normative choices must affect our conceptual choices and *vice versa*. This is, therefore, to begin to approach the principal question directly: is there a mistaken tendency in analysis of human rights towards reductionism? Has the philosophy (and perhaps the grammar) of 'human rights' falsely erased crucial divisions between human rights laws, ethically defensible human rights, human rights without foundations, and so on?

At the very least, a number of methodological choices are in evidence, none are theory-neutral, and their *prima facie* defensibility implies a kind of human rights pluralism. We have analysis by definition, focal examples, reconstructions of international practice, distinctive human capacities, and moral rights. These are not only diverse but so epistemologically varied as to make the multiple-perspectives position seem ineluctable. This position can now be recast as a distinctive *methodological* choice in theorising about human rights, namely to make the choice of focus primary and the form of foundational argument secondary. Different choices of focus can be justified, though such justification inevitably also comes at a cost: treating some things generally considered to be human rights as failing to be 'human rights proper' (for example regional or domestic laws) or privileging the perspective of ethicists or lawyers (for example in prioritising moral rights or international law). Acceptance of this cost is the characteristic trait of both anti- and deflationary-foundational positions.

But the problem is more acute than this, because concentration on focus reveals the many constructive aspects of our understanding of human rights. It is not simply that the foundations of human rights must be thought to imply at least two dominant perspectives, but that these are themselves the products of choices and commitments. Other choices and commitments may be possible. In sum, the problem is more specific than that of multiple perspectives but rather that of the essentially contested concept problem. Our concept is, on that account, *nothing but* the product reconstructive or interpretive practices we are

already committed to.⁴⁸ The alternative to this would be commitment to something like 'saving the phenomenon'. That is, demanding characteristics that *must* be found in any defensible foundational reconstruction.⁴⁹ A focus on rights and duty-holders will serve as an example of these positions.

In commitment to saving the phenomenon we insist upon certain characteristics that must be contained in any 'recognisable' account of human rights. We therefore insist that certain characteristics, for example a link with the state and its powers, are conceptually necessary in such an account. But note that, in seeking to insist upon shared and focal characteristics, what is being insisted upon is a *reasonable, not definitive*, account of the focus of our concerns. The characteristic is not necessarily intended to supply a criterion for identifying all and only human rights, only to insist that an account of human rights without *x* would fail to reach the standard of being, reasonably, considered an account of human rights. With this commitment we could choose to treat the state, as duty-holder, as focal. This would be amenable to qualified-, deflationary-, and anti-foundationalists. It would challenge any strong foundational argument insisting that correlativity is unimportant for foundations. But, as is implied by the foregoing typology, a strong-foundational position need not be thought of as synonymous with a rejection of correlativity.

Alternatively, human rights as essentially contested suggests that not only are these foci artificial –they seek to reduce a phenomenologically and conceptually multifaceted concept possessing dynamic real and ideal aspects to a definitive characteristic– but that the concept itself only has meaning within various dynamic practices. The language of human rights must take its meaning from its use and from the historical exemplars that dominate our thinking. In this sense the lawyer's instance that the state as duty-holder is axiomatic sits alongside that ethicists' belief that any duty-holder is possible. These are different worlds and only anti- or deflationary- foundational forms will accept their coexistence because of their acceptance of the coexistence of different forms of normative necessity.

Framing this contrast as a contrast between the 'reductionism' of saving the phenomenon and the interpretive plurality implied by the essentially contested concept position, we return again to the question initially posed: have philosophies of human rights shown *excessive reductionism* or do the foundations relevant to human rights *admit or require more precision* than is characteristic of social explanation? But the choice should now be treated as artificially stark. 'Foundations', in relation to any social phenomenon, could presumably admit the possibility of both 'reasonable' reconstructions and a plurality of perspectives. We can, in other words, reject the essentially contested concept charge if this is taken to mean that a plurality of perspectives on human rights entails that no

⁴⁸ See note 1 (*supra*).

⁴⁹ See Alexy (2012). Also, in a very different way, John Finnis, 'Human Rights and their Enforcement', in John Finnis, *Human Rights and the Common Good* (Oxford: Oxford University Press, 2011), pp. 19-46.

reconstruction of human rights can be *reasonable*. Human rights themselves do require and admit some precision in the relevant foundational claims, because the potential foci, while extensive, are not limitless. The challenge of foundational analysis is rather to demonstrate *coherence* between focus (the claim that a particular quality must feature within an account of human rights) and form (the justification or explanation that renders this necessary). It is precision in this coherence that foundations for human rights demands, not axiomatisation nor, conversely, the layers of explanation appropriate to social phenomena more generally.

What types of coherence are possible? The strong foundationalist needs to insist on *both* saving the phenomenon and a singular, justificatory, perspective. What it cannot do is to claim that this will yield all possible human rights. To be definitive in that sense implies something more than saving the phenomenon. It implies a link between normative necessity and conceptual completeness that the dual requirements of form and focus will not admit. Provided the proponent of strong foundations treats their use of human rights as reasonable but not definitive, the essentially contested charge must be rejected for placing an artificially high standard on the phenomenological content, and epistemological exclusivity, of our attempts at justification.

For this reason, strong and qualified foundational positions are liable to collapse together at some points. On the one hand, both are liable to demand that a reasonable account of human rights should include ‘non-correlative’ rights.⁵⁰ On the other hand, their reasons for rejecting the essentially contested charge may be different. The qualified foundationalist is someone who admits multiple perspectives on human rights and their foundations, but who also argues that there is a singular phenomenon to be saved even if uncertainty will inevitably surround human rights and their foundations. The strong foundationalist argues that, given the reasonableness and coherence of their foundational analysis, such uncertainty is a mistaken manifestation of demanding categorical reassurance where reasonableness is adequate. The deflationary foundationalist is defined by rejecting the normative singularity of the phenomenon *and* insisting that a plurality of perspectives is permissible. Foundational claims only capture one, potential, aspect of our conceptualisation of an essentially contested concept. The anti-foundationalist, then, in accepting multiple perspectives and an essentially contested concept, in the process rejects the idea that the language of foundations captures anything at all.

Consequently, it is not the case that seeking foundations for human rights involves a rejection of the explanatory pluralism of social explanation. No form of foundation described here must entail, for instance, that historical narratives of human rights’ relationship with democracy and justice are meaningless. This flows from the epistemological claim that no foundational form is tied to the ideal of a definitive justification of human rights. That is, we cannot erase the distinction between form and

⁵⁰ Note the difficulty of situating Sen’s work in this respect. Freedom is essential for a theory of human rights, but so too are ‘threshold conditions’ of importance and ‘influenceability’ (2004, p. 319).

focus such that foundational necessity alone generates the complete class of human rights: we have to *make sense* of human rights' history rather than seeing in it a series of failed philosophies of human rights. This also means that the charge of essentially contested concept is defused. Demanding a 'definitive' concept of human rights is ruled out in favour of a reasonable account. And the problem itself should be treated as over-stated: no existing foundational account, however strong, insists that the class of human rights can be determined exclusively *a priori*, a point stressed even by staunch defenders of Gewirth: "legal idealism, even in an optimal social setting, makes no romantic assumption that the general acceptance of governing moral principles will mark the end of regulatory conflict and controversy, of legal difficulty and dispute."⁵¹

It is inevitable that examples become important, not merely for their illustrative function but for the coherence of the foundational project pursued. The strong foundational association with examples like the right to life are precisely the kind of focal example that other foundational positions are likely to reject, either as failing to show that a class of rights exist or as failing to exhibit the kinds of formal legal limitations that such a right would be subject to if legislated or adjudicated. The question is, however, whether this focus is reasonable and sits coherently with the formal, epistemological and normative, aspects of the foundational analysis. Assuming that it is, any further demand that the phenomenon be saved can be dismissed as seeking too definitive an account. In essence, this coherence between formal and focal aspects reaches the standard of foundational intelligibility without the need to prove that all other conceptualisations are wrong.

VII. CONCLUSION

The requirement of reasonableness and coherence in foundational claims demonstrates that analysis of human rights does not differ radically from the methods and goals of social explanation *tout court*. In either case, we need not accept that all forms of explanation are reasonable, and nor need we demand that all reasonable accounts of the phenomenon should yield coherent justifications. However, it is significant that in relation to justificatory philosophies of human rights we do not impose a test of *how well* the phenomenon is saved. It is defensible to have a narrow focus (for instance the right to life or international political discourse) and insist that only this has a coherent relationship with a conception of necessity. It is testament to primarily *normative* significance of human rights that whole areas of practice can thereby be defensibly sacrificed on the altar of consistency provided that what we are left with can be granted necessity. So, the methods of social explanation may well be useful in analysing the factors that shape the legal, political, and linguistic practices that surround human rights. But it is the province of foundational accounts of human rights to seek an account that encompasses coherence and

⁵¹ Deryck Beyleveld and Roger Brownsword, "Principle, Proceduralism, and Precaution in a Community of Rights" *Ratio Juris* 19(2) (2006): 141-68, p. 143.

reasonableness in such a way that our normative commitments remain central. This, however, should not be confused with the ‘definitive’ task of offering a justification that is able to transcend the phenomenon and become conceptually productive of all human rights properly so-called.

REFERENCES

- Alexy, R., “Law, Morality, and the Existence of Human Rights”, *Ratio Juris* 25(1) (2012): pp. 2–14.
- Beck, G., “The Mythology of Human Rights”, *Ratio Juris* 21(3) (2008): pp. 312-47.
- Beitz, C., *The Idea of Human Rights*, (Oxford: Oxford University Press, 2009).
- Beyleveld, D. and Brownsword, R., *Law as a Moral Judgment* (London: Sweet & Maxwell, 1986).
- “Principle, Proceduralism, and Precaution in a Community of Rights”, *Ratio Juris* 19(2) (2006): pp. 141-68.
- Dworkin, D., *Law’s Empire* (Oxford: Hart, 1998).
- Finnis, J., *Natural Law and Natural Rights* (Oxford: Oxford University Press, 2011(1980)).
- ‘Human Rights and their Enforcement’, in John Finnis, *Human Rights and the Common Good* (Oxford: Oxford University Press, 2011), pp. 19-46.
- Gallie, W.B., “Essentially Contested Concepts”, *Proceedings of the Aristotelian Society* 56 (1956).
- Gewirth, A., *Human Rights: Essays on Justification and Applications* (Chicago & London: University of Chicago Press, 1982).
- “Are There Any Absolute Rights?”, *The Philosophical Quarterly* 31(122) (1981): pp. 1-16.
- Griffin, J., *On Human Rights* (Oxford: Oxford University Press, 2008).
- “First Steps in an Account of Human Rights”, *European Journal of Philosophy* 9(3) (2001): pp. 306-27.

- Hahn, H., “Justifying Feasibility Constraints on Human Rights”, *Ethical Theory and Moral Practice* 15 (2012): pp. 143–157.
- Hart, H. L. A., *The Concept of Law*, 2nd Edition (Clarendon Press: Oxford, 1994).
- Hinsch, W., and Stepanians, M., “Human Rights as Moral Claim Rights” in Rex Martin and David A. Reidy (eds) *Rawls’s Law of Peoples: A Realistic Utopia?* (London: Blackwell, 2006).
- Korsgaard, C., *The Sources of Normativity* (Cambridge; Cambridge University Press, 1996).
- MacIntyre, A., *After Virtue* (London: Gerald Duckworth & Co., 1981).
- Mahlmann, M., “An Introduction to the Mentalist Theory of Ethics and Law”, in Pattaro (et al, eds), *A Treatise of Legal Philosophy and General Jurisprudence: Treatise 2 Foundations of Law* (Dordrecht: Springer, 2005).
- Maritain, J., *The Social and Political Philosophy of Jacques Maritain: Selected Readings* (London: Geoffrey Bles, 1956).
- O’Connell, R., “Do We Need Unicorns When We Have Law?”, 18(4) *Ratio Juris* (2005) pp. 484–503.
- Rawls, J., *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).
- Raz, J., *Practical Reason and Norms (revised Edition)* (Oxford: Oxford University Press, 1999).
- The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 2009).
- “Human Rights Without Foundations”, in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 321-37.
- Rorty, R., “Human Rights, Rationality and Sentimentality” in S. Shute & S. Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993).
- Sen, A. ‘Elements of a Theory of Human Rights’, 32(4) *Philosophy & Public Affairs* (2004) pp. 315-356.

- Stern, R., “Does ‘Ought’ Imply ‘Can’? And Did Kant Think It Does?”, *Utilitas* 16(1) (2004): pp. 42-61.
- Talbott, W., *Which Rights Should be Universal?* (Oxford: Oxford University Press, 2005).
- Tasioulas, J., “Towards a Philosophy of Human Rights”, *Current Legal Problems* 65(1) (2012): pp. 1-30.
- Waldron, J., “How Law Protects Dignity”, NYU School of Law, Public Law Research Paper No. 11-83, <<http://ssrn.com/abstract=1973341>> [last accessed 16/07/14] (December 2011).
- “Human Rights: A Critique of the Raz/Rawls Approach”, New York University School of Law Working Paper Series No. 13-32 <<http://ssrn.com/abstract=2272745> or <http://dx.doi.org/10.2139/ssrn.2272745>> [last accessed 27/02/15] (2013).
- “Dignity and Rank”, *European Journal of Sociology* 48(2) (2007): pp. 201-237.
- Winch, P., *The Idea of a Social Science and its Relation to Philosophy* (Routledge: London, 2012).
- Von Wright, G.H., *Explanation and Understanding* (Routledge and Kegan Paul: London, 1971).
- Wood, A.W., *Kant’s Ethical Thought* (Cambridge: Cambridge University Press, 1999).