The philosophy of human rights I

HUMR 5131 Fall 2017, lecture 4

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Overview of these three lectures

I. What is the philosophy of human rights? How can the concept of human rights be understood? (If time allows: about the task of justifying human rights)

II. Justifying human rights; what follows from a valid HR claim?

III. Complications: criticisms of human rights; conflicts of rights

Section 1: What is the philosophy of human rights

What is philosophy?

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What is the philosophy of human rights?

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What is the philosophy of human rights? An attempt at a description

The main questions:

1. Justifying human rights – both HR in general and specific HR

2. Identifying *which* HR there are and/or should be

3. Conceptual clarification ("What is a human right"?)

4. Studying what normative implications a HR claim has: Which duties (and for whom) follow from a human rights claim?

Amartya Sen's proposal

"A theory of fundamental human rights must address the following questions in particular:

1. What kind of a statement does a declaration of human rights make?

2. What makes human rights important?

3. What duties and obligations do human rights generate?

4. Through what forms of actions can human rights be promoted, and in particular whether legislation must be the principal, or even a necessary, means of implementation of human rights?

5. Can economic and social rights (the so-called second generation rights) be reasonably included among human rights?

6. Last but not least, how can proposals of human rights be defended or challenged, and how should their claim to universal human status be assessed, especially in a world with much cultural variation and widely diverse practice?"

(Sen 2004 p. 318-319).

Do we need a philosophy of human rights?

«There is a remarkable lack of connection between philosophical or theoretical debate on the one hand, and, on the other, considerable agreement on behalf of internationally recognized human rights»

(David Forsythe, *Human Rights in International Relations, 2nd ed.* p. 34)

Section 2: On the concept of human rights. What is a human right?

Pictures removed

Two types of human right

Moral human rights

- Normative domain: Morality
- Identified through the methods of ethics

- The implications of a valid HR claim are moral
- The «is» and the «justification» questions are one and the same

(International) legal human rights

- Normative domain: Law
- Identified through the methods of (international) law

- The implications of a valid HR claim are legal
- The «is» and the «justification» questions are separate

Interlude: on the relation between law and morality

- Two separate, yet quite similar, normative domains
- Independence of morality from law
- Independence of law from morality?

Law as it is:

      - vs. law as it should be

      - vs. what moral rules say on the same issue

Philosophy of human rights

Moral human rights

- Moral philosophy/ political philosophy
- Conceptual questions: What are moral HR?
- Justificatory questions: What justifies MHR?
- Are there any MHR at all?
- Which MHR are there?
- What implications do MHR claims have?
- ….

(International) legal human rights

- Philosophy of law/ Political philosophy
- Conceptual analysis
- What is the relation between legal and moral human rights?
- Which legal human rights *should there* be?
- Is the system of international legal human rights legitimate?
- …

What are moral human rights?

- The metaphysical question
- Moral rights ≠ claims about moral rights
- Defining moral human rights by their *function* in moral deliberation
  - Moral human rights as claim-rights
  - Moral human rights as «molecular rights» (Leif Wenar)
  - Moral human rights as general rights (Hart)
  - Moral human rights as «side-constraints»? (Nozick)
  - …
- Orthodox vs practical approaches

Hohfeldian analysis

- "A has a privilege to φ if and only if A has no duty not to φ."
- "A has a claim that B φ if and only if B has a duty to A to φ."
- "A has a power if and only if A has the ability to alter her own or another's Hohfeldian incidents."
- "B has an immunity if and only if A lacks the ability to alter B's Hohfeldian incidents."

(Formulations from Leif Wenar, «Rights», Stanford Encyclopedia of Philosophy, 2015)

A methodological interlude

"a philosophical definition of 'a right', like those of coercion, authority and many other terms, is not an explanation of the ordinary meaning of a term. It follows the usage of writers on law, politics and morality who typically use the term to refer to a subclass of all the cases to which it can be applied with linguistic propriety.

Philosophical definitions of rights attempt to capture the way the term is used in legal, political and moral writing and discourse. They both explain the existing tradition of moral and political debate and explain the author's intention of carrying on the debate within the boundaries of that tradition. At the same time they further that debate by singling out certain features of rights, as traditionally understood, for special attention, on the grounds that they are the features which best explain the role of rights in moral, political and legal discourse." (Joseph Raz, *The Morality of Freedom*, p. 165-6.)

- Cf the concept/conception-distinction

Two approaches to understanding the concept of moral human rights

Naturalistic/orthodox approaches

- 1789

- «The rights of the philosophers»

- «a right we have simply in virtue of being human» (Griffin)

- Pre-institutional

- HR are directed against all human beings

Political/practical approaches

- 1948, 1966

- «The rights of the lawyers»

- Human rights are defined by their role in contemporary human rights practice (emphasis on «international concern» (Charles Beitz)

- Depends on the existence of states

- HR are directed primarily against states

The naturalistic approach: Human rights as natural rights (Beitz)

- HR hold independently of positive law

- HR are pre-institutional

- HR are time-less

- HR are rights all humans have «solely in virtue of their common humanity» (Beitz)

Example: natural rights in the French «Declaration of the Rights of Man and Citizen» (1789)

«Men are born and remain free and equal in rights. […] The purpose of all political association is the preservation of the natural and imprescriptible rights of man.»

The political approach: «human rights as they actually operate in the world today»

- Methodological turn: in order to answer the question «what are HR?», we «consider the way that talk about HR actually functions in the world today.» (Beitz)

- We might pick up on different aspects of the way we talk about HR

Beitz on HR

- Concrete institutional standards
- HR are not minimal, but state «something more like necessary conditions of political legitimacy»
- HR play a variety of roles in world politics, including:
- HR can justify interference into a sovereign state's affairs
- HR are foci of political activity for NGOs
- …