

The philosophy of human rights I

HUMR 5131 Fall 2018, lecture 3

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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; relativism and human rights



1. What is the philosophy of human rights?



What is philosophy?



Interlude: Moral philosophy and the academic division of labour

A moral claim about what we ought to do in a concrete situation typically (not always!) requires two sets of premises:

1. Normative premises, in the form of moral principles of the form «If the facts are so and so, you ought to do X»
2. Empirical/descriptive premises, asserting that the facts are so and so



1. What is the philosophy of human rights?

1. Justifying human rights – both HR in general and specific HR
2. Identifying *which* HR there are and/or should be
3. How should the concept of HR be understood? (“What is a HR?”)
4. Studying what normative implications a HR claim has: Which duties (and for whom) follow from a human rights claim? How to deal with conflicts of rights?



Compare: 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)



2. On the concept of human rights

- What is a human right?
- What have you said when you have said that there is a human right to X?
 - Which implications follow from this claim?
 - How can you tell if the claim is correct or not?



Moral human rights vs legal human rights

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 (cf. Nickel: «HR need strong grounds. If we think of HR as justified moral rights, they simply do not exist apart from their grounds.» p. 53)

Legal human rights

- Normative domain: Law
- Identified through the methods of 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



Three separate questions

1. Is there a moral right to X?
2. Should there be a legal right to X?
3. Is there a legal right to X?



The relation between moral human rights (MHR) and the justification of legal human rights (LHR)

Possible views:

1. All MHR should be made into legal HR. (rejected e.g. by Sen)
2. One can only justify creating a LHR if there is a corresponding MHR (cf. Allen Buchanan on «The Mirroring View» in *The Heart of Human Rights* (2013))
3. We can justify LHR without identifying a corresponding MHR (Buchanan)



A canonical example: periodic holidays with pay

- Universal Declaration of Human Rights, article 24:
“Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”
- Cf. International Covenant on Economic, Social and Cultural Rights, article 7.



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)



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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.)



naturalistic vs political understandings of HR

Naturalistic/orthodox approaches

- 1789
- A right «we have simply in virtue of being human» (Beitz)
- Pre-institutional
- HR are directed against all human beings

Political/practical approaches

- 1948, 1966
- Human rights are defined by their role in contemporary human rights practice
- Depends on the existence of states
- HR are primarily directed against states



The naturalistic approach: Human rights as natural rights (Beitz ch 2)

- 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/ practical approach

- 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)
 - Step 1: define HR in terms of the *role* they play (in international affairs)
 - Step 2: look to actual practice in order to identify this role
- We might pick up on different aspects of the way we talk about HR



Motivation for the practical approach (Beitz)

- “It is this additional critical force – the use of a philosophical conception of human rights to argue for limitations of content and reform of international doctrine – that requires a justification. Why should we insist that international human rights conform to a received philosophical conception rather than interpret them, as they present themselves, as a distinct normative system constructed to play a certain special role in global political life?” (Beitz p. 68)



Motivation for the practical approach (Beitz)

- “ ‘human rights’ names not so much an abstract normative idea as an emergent political practice. Those interested in the theory of human rights are not at liberty to interpret this idea in whatever way best suits their philosophical commitments. Human rights is a public enterprise and those who would interpret its principles must hold themselves accountable to its public aim and character.” Beitz p. xii



Beitz on the HR practice (ch. 5)

1. HR protect urgent individual interests against standard threats
2. HR apply (in the first instance) to the political institutions of states
3. HR are matters of international concern: a government's failure to respect HR gives reason for action by agents outside the state



Why does the naturalistic/political-distinction matter?

- Just about how we use the words?
- The distinction is a way of asking which *arguments* can be used in justifying and criticizing HR
- The distinction is also relevant for discussions about the history and cultural universalism of HR

