

↻ | Introduction

CINDY HOLDER AND DAVID REIDY

Background

Over recent decades human rights have moved center stage within the theory and practice of international law and politics. This development has drawn the attention of philosophers, lawyers, political scientists, anthropologists, activists, politicians and diplomats, and others eager to understand or shape international law and politics. Whether as cause or effect (perhaps a bit of both) of this attention, there can be little doubt any longer that, as a feature of international law and politics, human rights are here to stay. So, too, then are the many questions, theoretical and practical, they raise.

As a theoretical matter, the most general questions to be raised about human rights concern their nature, function, justification and content. There is considerable overlap in and interaction between these questions, of course. How one thinks about the nature or function of human rights will shape how one thinks about their justification and content, for example. But it is nevertheless illuminating to consider the questions separately, at least initially.

Consider the nature of human rights. There is, first, the question of what it is to be a right. What distinguishes a right from what simply is right? What distinguishes these from what is good? And how are these three notions related? Then there is the question of what distinguishes human rights from other species and subspecies of the general genus “rights.” What distinguishes human rights from constitutional or legal rights, for example? What distinguishes human rights from moral rights generally? There was once, and in some quarters is still, extensive skepticism about the very idea or possibility of human rights on any understanding. But such skepticism is increasingly a thing of the past, and rightly so as the arguments adduced for it have proved insufficient to sustain it. This is not to say that more targeted and limited skepticisms about specific understandings of human rights or about particular human rights can be set aside. On the contrary, several of the chapters in this volume examine one or another version of such a targeted skepticism.

However there is today widespread support for the view that human rights are intelligible and really exist as a distinct kind or subspecies of rights. Moreover, while it is not uncommon or undesirable for human rights to achieve institutional embodiment as conventional legal rights, for example, by treaty, the majority view these days is that they are not fundamentally a kind or subspecies of conventional legal rights; rather they are a subspecies of moral rights. But as a subspecies of moral rights, human rights are not easy to understand. Are they simply timeless universal moral rights derived from or ingredient in the one true moral code binding all human persons and discernible by the light of reason? Or are they simply the moral rights that would have to figure, as a practical matter, into any reasonable public justification of specific contemporary historically contingent institutions? In particular, are human rights the moral rights that have to figure in justifications of institutions with a global reach, such as modern states engaged in international relations, the emerging international legal order, and various international and transnational organizations? On the first view, human rights are pre-institutional, pre-political moral rights susceptible perhaps to a purely theoretical justification. On the second view, they are post-institutional, post-political moral rights, the justification of which may be inseparable from the practical interest of people alive today in peacefully and successfully navigating and rendering publicly intelligible and acceptable the institutional and political world that history has bequeathed to us.

Questions such as these about the nature of human rights immediately invite questions about human rights' function and justification. For example, do human rights function mainly as a theoretical pre-institutional constraint on the institutions we might defensibly have? Or do they function mainly as a practical post-institutional criterion for reconciling ourselves to and further improving institutions as we find them? Either way, there are further questions about how human rights discharge their function. Do human rights function mainly by establishing a fairly determinate mandatory moral minimum to be secured universally? Or do they function mainly by establishing a less determinate, more open-ended aspirational ideal to be secured by each and all in their own way and on their own schedule, albeit in conversation with others? Within existing practice, human rights seem to function in both ways to some significant degree. When functioning in the first way, they seem to specify a key necessary condition of political sovereignty and the associated right to non-intervention. When functioning in the second way, they structure and serve as basic currency within an increasingly important domain of global political discourse.

Some particular human rights seem to function more the first way and others more the second. Is this an indication that there are different types of human right? Does it indicate that how human rights function may or should vary?

Functioning either way, there is an important and related question here about human rights and both the universal (that which necessarily is or ought to be common to the moral experience of all) and the particular (that which necessarily is or may be particular to the moral experience of only some) within human moral experience. This question concerns the function of human rights not only in terms of the scope of and permissible means to securing that which is universal but also in terms of the scope and role of human rights in defending that which is particular.

To some observers human rights have long seemed to function in a more insidious way: as a rhetorical or ideological mechanism by which powerful international actors legitimate the use of force, sometimes even the pointing of guns, to impose universally on others what is in the end no more than, at best, their own particular aspirational ideal, and at worst their narrow self-interest masquerading as an ideal. If human rights cannot be made to function otherwise than this third, darkly parochial possibility, then human rights may appear or pretend to be a subspecies of real moral rights when in fact they are not and there is, properly speaking, no justification for them. And even if in theory human rights could be made to function as more than rhetorical or ideological mechanisms of power, it may be that presently they do not. In either case, we ought to approach existing human rights discourse and practice with the aim of critiquing rather than justifying.

However, no critique of contemporary human rights discourse and practice is likely by itself to establish that human rights must or will always function as mere ideological legitimization of the exercise of power on the international stage, or that every corner of contemporary discourse and practice so functions. Significant domains of contemporary discourse and practice seem to function genuinely as morally defensible attempts to secure universally a mandatory moral minimum or to organize voluntary international undertakings around various attractive and widely and potentially universally shared aspirational ideals. And so even if a critical stance is necessary and appropriate with respect to some domains of human rights discourse and practice, in other domains there will be no avoiding the task of, and so questions regarding, substantive justification.

Can we justify human rights without appealing to a robust conception of human nature? Should we try? Can we justify them without asserting the unique truth of a comprehensive moral doctrine? Should we try? Can

we publicly justify them as morally essential to the emerging international order when that order is one that includes both liberal democracies and non-liberal and/or non-democratic states? Should we try? These questions lead inexorably into substantive questions about whether certain rights claimed to be human rights can really be justified as such. Here we come to questions about the content of human rights: what goes on the list of human rights? How does that list get settled? Does the list have to be settled to be effective? Human beings have many pressing interests, not all of which will underwrite a specific human right. So which interests do underwrite specific human rights? What's the normative relationship between the interests that do underwrite a right and the ones that don't? If we don't turn to a survey of the most pressing interests widely shared among human persons to answer this question, what do we turn to? And to what extent must we specify and attend to the reasonableness of the duties entailed by a candidate human right when determining whether it is properly included in the list?

Some of the most difficult questions raised by contemporary human rights theory and practice sit at the intersection of the theoretical and practical considerations bearing on content or list questions. Among them: for any given human right, or for human rights generally, how is respect for the universal to be balanced against respect for the particular? And how is respect for the individual to be balanced against respect for the groups in which individuals live and make intelligible their lives? What role can or should human rights play when it comes to the rapidly changing global economy or global environment? Is there a human right to democracy that can be invoked in support of various and highly visible democratization movements, whether national, international or transnational? Which, if any, human rights are properly enforced coercively, whether by unilateral, multilateral or international institutions and initiatives, and when? Is the enthusiasm that so many bring to the human rights project as it has unfolded historically in recent decades justified? Should it be tempered? Reformed? It is these sorts of hard questions, addressed from multiple disciplinary perspectives and with an eye to both theory and practice, that this volume takes up.

Overview of the chapters

What are human rights?

In Part I Chris Brown, Neil Walker and Rex Martin consider the question "what are human rights?" Chris Brown opens with a very basic and

controversial question: do human rights require an account of what it is to be human? Claims about what makes for a distinctively human existence have an unsavoury history in the Western intellectual tradition, but Brown argues that the idea of a human right necessarily relies on an account of what is good for all people everywhere. Reluctance to rely on an account of human nature is grounded in a legitimate worry about how such accounts have figured in approaches to otherness that associate difference with inferiority. However, Brown argues that the lesson is not that there are no commonalities across people that may safely be used as grounds for claims about human rights. The lesson is that the specific content of various communities' customs is not a good ground for such claims. That there are commonalities in the subject matter of human communities' customs, on the other hand – that peoples universally treat certain activities or relationships as central to who they are and whether they live well – can be plausible grounds for identifying rights that can be justified in virtue of what it is to exist as a human.

Neil Walker takes up a different question: how can human rights both serve as a common standard that identifies the minimal conditions of equal moral standing and recognize divergences in conclusions about what is normatively significant about and in a particular context? Walker argues that the tension this question points to is inherent to human rights' function as a regulatory architecture and must be explicitly addressed or else risk compromising that function. Pretending that the tension is only apparent and easily resolved does not address the tension and undermines the effectiveness of human rights concepts by leaving unarticulated what is to be accomplished by describing human rights as universal and what human rights are supposed to rule out. Pretending that the tension is a fundamental incoherence that is impossible to resolve does not address the tension and undermines the effectiveness of critical engagement with human rights concepts by leaving unarticulated why commonalities that seem obvious and incontrovertible are either illusory or, if they are real, are not grounds for common cause. Walker describes the tension as between generality and uniformity in standards and particularity and difference in applications. He argues that although resolving it has become both more challenging and more urgent in the context of globalization, the plural configuration of international institutions offers a productive way forward. The key is recognizing the modest reach of the universality proposed by human rights institutions. For example, Walker argues that international human rights institutions do not presuppose a comprehensive political morality, and that increasingly human rights communities are multi-scalar and multiply configured. Human rights themselves are disaggregated, open-ended and

locally implemented. In this, human rights concepts and institutions are a complex blend of the universal and the particular.

Rex Martin takes up questions about justification. He examines whether it is possible to justify human rights for and to all people everywhere, and whether human rights must be conceived of as “natural,” in the sense of pre-political, for universal justification to work. Martin begins by distinguishing four different dimensions of human rights’ universality: that they are rights of all persons, that they establish responsibilities for all persons, that they are justifiable to and for all persons, and that they are feasible in all contexts. Against this background, he considers several common arguments against treating human rights as applying to all people everywhere: that the most plausible candidates for universal rights and duties are moral constraints on individuals rather than claims against societies or governments; that the most commonly named human rights cannot, as a practical matter, be universally implemented and may not, as a matter of justice, be demanded in all contexts; and that some human rights are rights of groups or are rights that apply only to a sub-set of human beings. Martin argues that in all these objections there is a mistaken conflation of the pre-political traits or criteria that figure in universal justification and the justification itself. For Martin, universal justification requires showing that a right is justifiable to and for all people everywhere. This requires establishing that almost all people can reasonably be expected to see a right as being of benefit. Universal justification does not require that it can be shown that a right would benefit every single person; it is enough to show that it is reasonable to expect that almost all people would see the right as being of benefit to a vast number of people. So although organized society and governments are emphasized in human rights, they are not the only addressees. And although the explanation of why some rights are universally justifiable may depend on the empirical fact of the prevalence of the modern state, neither having human rights nor having a specific human right will depend on specific facts about the government to which a human is subject. Finally, that a right is group-specific is not necessarily incompatible with its being universally justifiable, as almost all people may reasonably be expected to see the benefit for vast numbers of people in rights related to circumstances or properties that create special vulnerabilities.

How do human rights relate to groups and culture?

Part II takes up the questions of whether and how human rights might protect the interests of particular and typically minority groups, including

religious, ethnic, linguistic, or other groups; and, relatedly, whether human rights can be reconciled with the obvious fact, and to the normative desirability, of cultural diversity. Alison Dundes Renteln begins with the familiar question of whether cultural relativism poses a threat to human rights. Taking note of the distinctions between descriptive and normative relativism, universal and absolute truths, moral pluralism and moral skepticism, and so on, she concludes that the relativism championed by many anthropologists in the mid twentieth century poses no threat to human rights. However, this does not mean that cultural diversity can be ignored or does not render many human rights questions very hard indeed. Taking up a number of cases – female circumcision, corporal punishment for children within the family, certain gendered religious practices, varying conceptions of disability, and so on – and paying attention to the full range of human rights bearing on these cases, Renteln shows just how difficult these questions can be, but also just how morally necessary it is to grapple with these questions and arrive at cross-cultural, shared understandings of what human rights require across diverse cultural contexts.

Peter Jones then takes up the question of whether human rights can be held by groups or can be held only by individuals (even if individuals qua group members) severally. The question arises because it is sometimes said that without human rights held by groups as such the human rights movement threatens the structure, ends and even survival of some groupings. Jones takes the right to political, collective self-determination to be a group right of this sort. In the absence of a right to self-determination of the group as such the human rights movement would constitute a threat to free, independent, self-determining bodies politic. This suggests that there is a good reason to try to make sense of the idea that at least some human rights may be held by a group as such. Jones argues that we can make sense of this idea, but only if we reject what he terms a “corporate” understanding of the group, where the right is held by the group understood as an “it” that transcends and is independent of the individuals whose relations constitute it. Many who reject group human rights do so because they reject the corporate understanding as the only way that a group as such could be a right-holder. But there is an alternative, “collective” understanding of the group in which the group is not an “it” but a “we.” On the collective understanding, the members of the group hold the right jointly, as a “plural subject.” The right to collective, political self-determination understood in this way is not a right that human beings can hold simply as individuals or as individuals qua group members. And it is not a right that ought to be thought of as held by some reified nation or state that transcends and

is independent of the individuals out of whose relations it is constituted. Rather, it is a right properly thought of as held only by a “we,” by individuals jointly together as a group. Jones then extends his analysis to show how other putative group rights might be vindicated as human rights by appeal to this collective understanding of the group. Of course, that any group right might, formally speaking, be vindicated as a human right does not establish that it ought, substantively speaking, to be so vindicated. Group rights must not violate the human rights individuals hold as individuals and they must be justified by reference to the compelling interests that the group, that “we” in some sense, have, interests sufficiently weighty to justify the duties the right imposes on others. Still, this clears the way to a meaningful notion of group rights as human rights, one that might well serve the interests of human persons not only as individuals or individuals who happen to belong to groups but as “plural subjects” or a “we” (as in, e.g., “we the people”). To be sure, there are limits to the work that can be done by the collective understanding of groups. For example, it is hard to see how the claimed human right of indigenous groups to reparations for historical injustice could be vindicated by appeal to a collective understanding of the group.

Ayelet Shachar pursues the relationship between human rights and group and cultural diversity by looking to the issue of how minority religious women seek to navigate their way between the apparently competing claims of equality and of respect for diversity, especially in contemporary Western liberal democracies. Shachar examines claims both to be included in the public sphere (e.g., is it permissible legally to prohibit women from wearing the veil in public places?) and to withdraw from the public sphere (e.g., is it permissible for religious groups to establish their own systems for adjudicating disputes, say in the areas of family law?). The latter pose questions especially hard within the context of societies, like contemporary liberal democracies, that have sought to establish a secular rule of law clearly separated from religious authority. Shachar carefully explores the interests of women within a context defined by the intersection of religion, gender, family, the rule of law, liberal democracy, human rights, and increased mobility across borders and so across legal and religious contexts. Seeking a reasoned middle way that avoids a “your rights or your culture” dilemma, and that acknowledges the claims of both religious commitment and gender equality, Shachar urges a form of regulated interaction between religious and secular sources of authority, consistent with maintaining a baseline defined by the rights that must be guaranteed to all.

Claudio Corradetti notes at the outset of his chapter that the Wars of Religion set the historical context for the emergence of the right to freedom of conscience and expression. Human rights and pluralism, cultural, religious, ethnic and so on, have been interacting from the beginning. Engaging critically the complex history of this interaction, Corradetti aims to tease out of our current practices and understandings a conception of the relationship between human rights and cultural pluralism adequate to our current tasks and times. He argues that human rights constitute the conditions of communicative rationality, and so normatively valid social coordination, between persons across diverse but never fully or radically incommensurable or mutually unintelligible cultures, contexts and worldviews. The Wars of Religion put on the table a principle of communicative freedom (freedom of thought and expression) and thus put us on the admittedly crooked path to our current situation within which human rights underwrite and facilitate not only communicative freedom, but also communicative rationality aimed at normatively binding social coordination across all the world's peoples. Properly understood human rights make possible a certain kind conversation, one that need not threaten cultural diversity.

What do human rights require of the global economy?

Some of the most challenging questions that arise in connection with human rights regard the effects and operation of the global economy. Adam McBeth begins Part III by asking about the human rights responsibilities of non-state actors such as intergovernmental organizations and multinational corporations. McBeth observes that from the perspective of the rights-bearer, it is obvious that their rights may be and are violated by non-state actors. But do non-state actors have duties under international legal regimes? Under a purposive approach to international legal interpretation – an approach that emphasizes the purposes or goals of international legal instruments – it is not difficult to establish that non-state actors have duties not directly to violate human rights and not to interfere with the protection and promotion of human rights by governments. However, it is difficult to identify and develop effective mechanisms of accountability for non-state actors. McBeth argues that rule-making intergovernmental organizations, such as the WTO, are accountable for how their rules impact human rights enjoyment, including the impact of the terms under which an organization's rules are negotiated, and the manner in which those rules are interpreted and applied. Intergovernmental organizations that directly engage within communities, such as the World Bank, are accountable for

their performance standards and their policies on the choice, structure and conduct of projects. Corporations are accountable for accepting regulation of their activities, for refraining from contributing to human rights violations, for preventing such violations from occurring when they can do so, for mitigating human rights violations when they can, and for supporting and securing access to remedy for rights violations. McBeth notes that as the international legal mechanisms currently operate, the accountability of both international organizations and corporations for their conduct with respect to human rights is primarily normative rather than operational. This means that failure to respect human rights is recognized and accepted by non-state actors themselves as a legitimate basis for criticism; but there are few if any effective mechanisms for converting this criticism into changes in the way such actors operate. Attempts to develop and augment the effectiveness of accountability mechanisms for non-state actors are underway in many parts of the world. As yet, these are primarily located within and focused on municipal, or national, legal systems.

Tony Evans takes up the question of whether human rights empower people with respect to the global economy. He begins with the observation that post-World War II the story of human rights is typically told as a story of arrival and completion of an international moral project with only the practical work of implementing norms still left to do. This story has closed off the rich, explicitly political debate about what human rights ought to be for implementation to be an appropriate and worthwhile international project. Moreover, the typical story about human rights has encouraged the handing over of the task of implementing and assessing the success of human rights to an international political order that is dominated by Western capitalist states. Against this background, the shift away from states and towards international institutions that is associated with globalization has not translated into improved enjoyment of human rights in the sense of improved conditions of life for actual persons. Instead, this shift has exposed a tension between advocating for global forms of governance and advocating for human rights. Historically, human rights discourse has contrasted national and local threats and barriers to human rights with international support and assistance. However, state and local political actors may have interests in health, education, water and nutrition of local populations and local communities that global actors do not. Consequently, in the same way that processes of globalization have challenged the coherence of claims that states are appropriate and effective vehicles for the priorities of local communities, so too have these processes challenged the coherence of claims that global institutions