

8 Rights and Human Rights

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What makes a right a human right? If we were to start in the realm of positive law, we might define human rights more or less by ostension. They are rights listed in certain multilateral treaties and conventions in international law, like the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). There is nothing wrong with definition by ostension; no other mode of definition is available for certain terms like simple colour words. But 'human rights' is a complex phrase and we should expect an account of its complexity to tell us how the terms it contains – 'human' and 'rights' – work together to constitute its meaning.

1 Rights

Human rights are *rights*: that is the first thing we have to explain. A legal right is a provision that is at one and the same time protective and constraining. It aims to protect (or promote) some individual interest and it does so by imposing duties on those whose actions or neglect are likely to threaten the interest in question. I believe the most useful elucidation of the idea of a right is provided by Joseph Raz. It is not uncontroversial; there are alternative accounts that emphasise personhood and respect rather than interests.¹ But I find Raz's account useful as a starting point, because it is the most comprehensive. 'To say that a person has a right', says Raz, 'is to say that an interest of his is sufficient ground for holding another to be subject to a duty.'² The interest may be important because of its material significance or because of its connection with liberty or dignity. Raz's account does not depend on any narrow conception of

¹ See, for example, F. Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (Oxford University Press, 2006), 237ff.

² J. Raz, 'Legal rights', *Oxford Journal of Legal Studies* 4 (1984), 1, at 14.

interest, though it does assume that interests are individualised concerns. Equally, the element of duty may involve a requirement to take some action which will serve the interest or to avoid some action which will impact adversely upon it. Again, the formulation is open. The important thing is that talk of rights is a way of talking about the grounds of duties: 'One justifies a statement that a person has a right by pointing to an interest of his and to reasons why it is to be taken seriously.'³

In spite of these advantages, Raz's analysis is complicated. If we are working in the realm of legal rights, the relevant grounding or justificatory relations have to be understood as legal in character. Moral justification is not enough. They are justifications recognised within the fabric of the law and they do legal work, not just policy or moral work. Talk of legal justification can make sense if we accept that, in Raz's words, 'legal rules are sometimes hierarchically nested in justificatory structures',⁴ in which some of the legal rules justify others. The justification may be direct and compelling so that one legal rule provides a decisive reason for holding another putative rule to be legally valid. But even short of that, that is, even if the legal justification does not in and of itself make the justified statement a true statement of law, still it is possible that something that can be identified as a legal justification 'provides a reason for changing the law so as to make the justified statement true'.⁵ Or it can provide a compelling argument in adjudication for interpreting a given rule in a certain way or, as Raz puts it, for developing the law in certain ways.⁶ After all, law comprises not only rules but also deeper principles, purposes and policies implicit in the whole fabric of a given legal system.⁷ So an understanding that a certain interest is important in law and that this importance is associated with a rule imposing a duty can be useful in determining the dimensions of the duty and various possible exceptions to it. A duty grounded legally in the interests of an individual may have different parameters and interact differently with other normative considerations to a duty grounded in, say, wealth-maximisation or general utility. Such information may also be used procedurally, to determine things like *locus*

³ Ibid., 5.

⁴ Ibid., 6.

⁵ Ibid., 11.

⁶ Ibid.

⁷ The best known account is that of R. Dworkin, 'The model of rules' in his book *Taking Rights Seriously* (Harvard University Press, 1977), 14, at 22ff.

standi in relation to duties identified in this way: we may say, for instance, that only the person whose interest is the ground of the duty has standing to bring an action for its enforcement.

So we talk of rights when duties are legally justified (in these complicated ways) by reference to certain individual interests that the law undertakes to protect. As a result, rights talk will often involve a complicated back-and-forth between formulations in terms of duties and formulations that are more like the identification of legally privileged interests. Sometimes rights (and human rights) identify duties directly. They may say, for example, ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’ (ICCPR, Art. 7.1). Notice that this formulation does not use the word ‘rights’, unlike, for instance, ‘Every human being has the inherent right to life’ (ICCPR, Art. 6.1). By itself, Article 6.1 does not tell us what the relevant duties are; it really just identifies a particularly important interest – namely, the individual interest in not being killed. A few duties are, however, listed in subsequent subsections of Article 6, like ‘Sentence of death shall not be . . . carried out on pregnant women’ (ICCPR, Art. 6.5). But the right specified in Article 6 might be used as a basis for inferring other more specific duties as well.

In none of the provisions I have mentioned are we told explicitly who the bearers are of the duties that are implied or specified. Certain things are to happen or not happen: that is the content of the relevant duties. Often we can make a pretty straightforward inference so far as rights-bearers are concerned. The duty specified in Article 6.5 is incumbent on whoever is responsible for the operation of the system of criminal justice in a country that permits capital punishment. And the duty specified in Article 7 is presumably incumbent on anyone who might be in a position to inflict torture or other forms of forbidden treatment.

But there may be other duty-bearers as well: people who have a duty to investigate allegations of torture and bring those responsible to justice, as well as people who train police and security forces and can organise things so as to make torture less likely.⁸ It is often said that rights like these are rights against the state. That makes sense: national states are formally

⁸ Elsewhere I have referred to these as ‘waves of duties’ associated with a given right, like the right assumed in Article 7.1 of the ICCPR. See J. Waldron, ‘Conflicts of rights’, *Ethics* 99 (1989), 503, reprinted in *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press, 1993).

speaking the parties bound by treaties such as the ICCPR. But states have a double or triple role in regard to these rights: *first*, states or state officials are often the primary threat to the interests protected by these rights; *secondly*, states are usually regarded as having the prime responsibility to stand up for these rights and protect them against violation; and *thirdly*, states are the parties whose consent and ratification makes the treaty in question a valid source of law. There is no contradiction here: states are huge and complex things and they bear interlocking duties of multiple kinds.

Raz's conception is particularly helpful in understanding so-called positive or social-economic rights. A provision like Article 7.1 of the ICCPR is, in the first instance, negative: it says that certain things are not to be done. Other rights provisions, however, impose affirmative requirements. Consider Article 12.1 of the ICESCR, which says that '[t]he States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Article 12 goes on to mention some particular things that need to be done, such as reduction of infant mortality, the improvement of industrial hygiene, the prevention of epidemic diseases, and an assurance of medical service for everyone. No doubt there are other things too, not specified, that need to be done in the way of health care and public health; Article 12.1 can provide a legal ground for arguing that they should be done as well. But whose responsibility is it to do or provide these things? The Article does not say. Nevertheless, by committing itself to the importance of the interest in health care, and by showing that that interest is important enough to justify the imposition of duties, Article 12 provides a reason for us to find out who is in a position to do these things and figure out on whom the duty to do them should normally be incumbent. In this sense the right comes before the duty; as Raz puts it, 'one may know of the existence of a right without knowing who is bound by duties based on it'.⁹

My examples have been taken from human rights covenants: I wanted to illustrate the ways in which human rights satisfy the basic logic of rights and how a grasp of that logic helps us understand the different textual forms in which human rights present themselves.¹⁰ But everything I have

⁹ J. Raz, 'On the nature of rights', *Mind* 93 (1984), 194, at 211.

¹⁰ Here I follow J. Raz, 'Human rights in the emerging world order' in R. Cruft et al. (eds.) *Philosophical Foundations of Human Rights* (Oxford University Press, 2015), 217, at 219–23.

just said could be said about legal rights generally, not only about human rights. It applies to property rights too and rights arising out of contracts and other legal relationships. My property right in a given house generates a standard package of duties (and duty-bearers) aimed at protecting my interest in the house. And saying, of X's duty to refrain from entering this house, that it is a matter of the interests protected by my rights of property distinguishes it (and its ramifications) from similar duties grounded in other ways, such as a duty imposed as a condition of probation, for example. Justifying duties by reference to the importance of individual interests is a distinct thing that law does, in all sorts of fields – distinct from other things it does – and when we take an interest in human rights we are taking an interest in that kind of thing.

2 Individual Rights

Human rights share with rights of all kinds a commitment to the importance of certain individual interests. We expect that all legal rules will be justified by reference to social interests generally, often in a utilitarian way – looking to the greatest interests of the greatest number of people in society. Rights are in question, however, when we are prepared to say, canonically, that just one person's interest is sufficient to justify holding others to be under a duty. (It may be an interest that each person shares with all others, but still it grounds duties not as an upshot of the cumulative importance of everyone's interests, but rather – and in the same way for everyone – on account of the importance of the interest in each individual case.) Rights disaggregate the general interest: they force us to look at what the protection of individual interests may require even when protecting those interests does not advance the greater interests of all. Of course we do not treat every individual interest in this way – separating it out from the general interest and giving it dedicated protection. We pick and choose. That is why *rights* is a special category, because it demarcates the range of individual interests that we are prepared to privilege in this way.¹¹

¹¹ Joseph Raz in his later work has sought to reconcile a concern with rights with a concern for the common good. Rights do not always have to stand in an antagonistic relation with the common good by setting up the idea of an individual interest having moral force irrespective of the effect on other interests. Sometimes this is taken care of by the fact that rights are universalisable. If X has a right to P, then Y and Z have such a right as well, even

In many areas of private law, rights can be held by entities like corporations. Formally, the structural logic is the same. We treat the corporation as an entity individuated or distinguished from the aggregate social interest and we indicate our determination to justify duties (on other corporations and on natural individuals) to satisfy or respect certain interests that the corporation holds. Human rights partake of the same structural individualism – distinguishing and privileging individuated elements of the social whole. However, I believe that in the case of human rights, the individualism is substantial not just formal. Human rights are rights held by natural persons – men, women and children – certain of whose individual interests are considered to be of the utmost importance even when they are distinguished from the social whole. The idea of human rights, in other words, is rooted in a sort of ethical or normative individualism which views the human individual as the most important entity that exists in the world.¹² By and large, then, human rights are rights held by natural individuals.

The one striking exception is the presence at the beginning of each of the human rights covenants of a right to self-determination, which seems necessarily to be held by human peoples rather than human persons.¹³ It is possible that this too could be disaggregated, so that the right of self-determination held by a people is ultimately derivative from some autonomy right held by natural individuals. (Analogously one might say that the free speech rights of a corporation might be treated as ultimately just an array of the rights that natural individuals have to organise in order to speak freely and with one voice within a certain corporate framework.¹⁴) But that would be a strained interpretation. It is better to

if they are, for time being, duty-bearers whose interests are impacted by rights. Rights are, in that sense, a good in common as between X, and Y, and Z. But Raz takes this further by suggesting that in the normal case, the reason for holding an interest of X's to be important enough to justify holding Y and Z to be under a duty, is that Y and Z will usually benefit from X's interest being treated in this way. See J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press, 1995), 45ff. I am sure this is true in some cases. But I do not follow Raz in thinking that this is necessary or the normal case with rights. We must be prepared to defend rights one at a time when the relevant interest is sufficiently important to the person whose interest it is, irrespective of the effects of that on the interests of others.

¹² For the varieties of individualism, see S. Lukes, *Individualism* (Basil Blackwell, 1973).

¹³ See ICCPR Art. 1.1 and ICESCR Art. 1.1.

¹⁴ Compare the debate about corporate speech in US constitutional law: see *Citizens United v. Federal Election Commission* 558 US 310 (2010).

recognise self-determination as partaking of individualism only in the structural sense I mentioned earlier, whereby a collective is treated as a separable entity individuated from the larger society (in this case, from the world as a whole).

3 Human Rights and Constitutional Rights

May only rights that are contained in international instruments count as human rights? If so, that is a problem, because one of the obligations states have under, say, the ICCPR is to ensure that provision is made for these rights in their national law. In Article 2 of the ICCPR, each state undertakes not only 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant' but also

Where not already provided for by existing legislative or other measures, ... to take the necessary steps, in accordance with its constitutional processes ... to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

This means we should expect to find human rights in national bodies of law as well, some of them in legislation or in new constitutional instruments adopted pursuant to Article 2(2), some of them there already perhaps pre-dating the ICCPR by many years. I suppose we might say that a right changes its character from *human* right to, say, *constitutional* right when it changes its habitat in this way. I think this would be unfortunate, however, as an approach to classification, not least because some of the statutes that make provision within a legal system for the national administration of rights that are also laid down in an international instrument have titles like 'the Human Rights Act'.¹⁵ I do not mean that there is no difference between rights as formulated in international human rights law and rights as formulated in national constitutions. There often are significant differences even when the latter are modelled on the former.¹⁶ But this does not

¹⁵ I have in mind the British statute of that name, enacted in 1998.

¹⁶ For a fine discussion of this 'dual positivisation', see G. Neuman, 'Human rights and constitutional rights: harmony and dissonance', *Stanford Law Review* 55: 203 (2003), 1863.

mean that legislators are not trying to set out human rights in what they lay down in their national charters.¹⁷

4 Human Bearers

We have to focus now on the ‘human’ in human rights. The obvious thing to say is this: wherever they are located, whatever the source of their status as legal provisions, human rights are rights that people have by virtue of their being human; they are rights supposedly held by all human beings. I think this is correct. Instruments such as the ICCPR seem to embody this understanding. The ICCPR is redolent with language like ‘every human being’ and ‘all persons’. It says ‘everyone’ is entitled to this or that protection, and that ‘no one’ is to be treated in this or that way. Admittedly some of the rights are conditional. Article 9.3 says that:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge ... and shall be entitled to trial within a reasonable time or to release

But the condition of arrest or detention might be satisfied, as the provision says, by ‘anyone’, and the requirement applies to each and every human being who falls into this category. Not only that but the Covenant requires explicitly, in Article 2.1, that the rights it lays down are to be applied to ‘all individuals ... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

Does this mean we made a mistake when we said there might be human rights in a national constitution or bill of rights? No it does not. A national instrument such as the US Bill of Rights usually applies to *all persons* not just to US citizens.¹⁸ What Section 2.1 of the ICCPR envisages is that each state ‘undertakes to respect and to ensure *to all individuals within its territory and subject to its jurisdiction* the rights recognised in the present

¹⁷ For a contrary view, see J. Rawls, *The Law of Peoples*, revised ed. (Harvard University Press, 2001), 79, which distinguishes sharply between human rights, on the one hand, and ‘constitutional rights or the rights of liberal democratic citizenship’, on the other. The reasons for Rawls’ view will become apparent in Section 6 below.

¹⁸ In some cases, the US document uses the language of ‘the right of the people’ (e.g. in the Second and Fourth Amendments). But these seem to be understood as individual rights that apply to ‘any person’, not as rights accruing to the American people as such.

Covenant, without distinction of any kind . . .’ (my emphasis). And that is what the US document does (and had done long before the framing of the ICCPR). The exception, I suppose, is that national constitutions usually restrict the democratic franchise to only their own citizens, so that in the US Constitution, for example, the Fifteenth and Nineteenth Amendments may not apply directly as human rights. But they do so indirectly. The position of the ICCPR is that anyone who is a citizen of a state has the right to participate in its government (Article 25). That is a human right; it is one that they have because they are human persons; but it applies to everyone, in respect of whatever their country of citizenship happens to be.

Is there any philosophical difficulty with the claim that human rights are rights held by all humans? Someone may offer the following objection. Humans evolved as a species hundreds of thousands of years ago. For most of that time, it hardly makes sense to think of human beings as right-holders; certainly they did not think of themselves in those terms. Moreover, if humans living, say, ten or twenty thousand years ago might be said to have had any rights, they would be quite different in character from the rights humans are now thought to have. Their ways of living – their ways of being human – are or were so different from ours.

I think this objection is important but that it can be answered. Our focus on human rights as legal rights means that our primary interest is prospective or forward-looking, from the here and now of the charters and covenants to ways in which humans might deal with one another in the future.¹⁹ What might or might not make sense as applied to Stone Age societies is disjoined from our present normative concerns by what Bernard Williams called ‘the relativism of distance’.²⁰ Its only relevance in this debate would be as a ground for doubting the application of human rights as we now understand them to some *current* ways of being human in the world or living in a human society. And it is true that humans live even now in so many ways and are so disparately situated in such different social, cultural, economic, political and legal environments that the task of specifying a common set of rights on the basis that ‘one size fits all’ can sometimes seem insuperable. But this does not mean that the human rights enterprise fails to make sense, just because it is conceived of in terms of

¹⁹ Cf. Raz’s claim in ‘Human rights in the emerging world order’, 225, that ‘human rights are synchronically universal, meaning that all people today have them’.

²⁰ B. Williams, *Ethics and the Limits of Philosophy* (Harvard University Press, 1985), 160–5.

universalism. Humans are similar in many important ways, just by virtue of their humanity, as well as different in many respects by virtue of the variety of their ways of life and ways of being in community. The enterprise of human rights law is the enterprise of trying to identify key interests that all humans have that are important and need protection from certain standard threats. That there may be such interests cannot be ruled out *a priori* simply by pointing to the bewildering variety of ways of being human.

The particular way in which the candidate interests are specified may be a matter of concern: our declarations talk about ‘technical and professional education’, ‘universal and equal suffrage’, and the right to ‘holidays with pay’.²¹ Such terms and ideas are familiar to us, but it is part of the understood pragmatics of human rights declarations that we look beyond these particular specifications to the universal human interests that they serve.²² It may be harder to do this in some cases than in others.²³ But the fact that we cannot always find formulations which are, so to speak, neutral as between different social, political and economic consequences does not mean that there are not important and universal interests underlying these particular expressions.

In Section 8, I shall say more about how the international community goes about identifying the individual rights that are to be privileged in this way. For a philosopher, it is tempting to say that we should first identify some master value like autonomy, dignity or equality and then derive individual human rights from that. But that involves, I think, an exaggeration of the unity of our rights declarations. They tend to be presented as lists, not theories. There may be many different considerations pertaining to the importance of individual liberty and well-being that have some claim to be taken into account in the setting up of such a list. The identification of human interests that are particularly and universally important is a work-in-progress and I think it is a mistake to insist dogmatically on a single source of rights just in order to give the list a spurious coherence or closure.

²¹ Universal Declaration of Human Rights (UDHR), Articles 26.1, 21.3 and 24.

²² For an attempt to do this in the case of the UDHR’s right to holidays with pay, see J. Waldron, *Nonsense upon Stilts: Bentham, Burke, and Marx on the Rights of Man* (Methuen, 1987), 180.

²³ See the discussion of specification in D. Miller, ‘Joseph Raz on human rights’, in Cruft et al. (eds.) *Philosophical Foundations of Human Rights*, 232, at 239.

5 Human Responders

It is possible that the term 'human' in 'human rights' may refer not to the right-bearers (and various aspects of their humanity) but to the class of people for whom violations of these rights are properly a matter of concern. Certain rights, it may be thought, are or ought to be matters of general concern among humans: as Immanuel Kant put it, 'a violation of right on *one* place of the earth is felt in all'.²⁴ The idea is that there is a class of rights such that no human should be indifferent to the violation of any right in that class. These rights are called 'human rights' because humans as such are called on to support them. Kant saw this as a change in the character of global community. Writing in the 1790s, he thought the world was much more interconnected in terms of moral concern than it had been previously. And of course we think it is even more so – *much* more so – 220 years later. We are now in a position to take rights seriously together in the world, not least because of the growth of human rights institutions themselves. As Joseph Raz puts it, '[o]ne of the most important transformations brought about by the pursuit of human rights has been the empowerment of ordinary people, and the emergence of a powerful network of non-governmental as well as treaty-based institutions pressurising states and corporations . . . in the name of individual rights'.²⁵

But it is probably best to regard this as a complement, not as a competitor, to the proposition that human rights are rights held by all persons in virtue of their humanity. The latter proposition is probably necessary to explain why these rights are also of universal human concern, and why these practices and institutions make sense in the context of international as well as national constitutional law.

6 Human Rights as Limits on Sovereignty

For some recent theorists, the most important thing about human rights is that they impose limits on sovereignty. The idea is that we can define a class of rights such that no government or international organisation is

²⁴ I. Kant, 'Toward perpetual peace', Ed. M. Gregor, *Practical Philosophy* (Cambridge University Press, 1996), 330 (8: 360).

²⁵ Raz, 'Human rights in the emerging world order', 226.

ever required by respect for the sovereignty of another state to acknowledge that violations of these rights are not anyone's business except the country in which the violation occurs. Humans live in separate political communities and usually the violation of their rights takes place inside those communities often at the hands of the local state. And ordinarily, the sovereignty of a state is a warrant for its rebuffing any formal criticism or denunciation of its policies by outsiders. But not in the case of violation of its citizens' human rights. Those rights trump sovereignty and they empower outsiders to interfere, in extreme cases by sanctions or by force, to uphold the rights in question. This is sometimes called a 'political' conception of human rights.

The best-known proponent of this view is John Rawls, in *The Law of Peoples*, though Rawls prefers to talk of the powers of whole peoples rather than the sovereignty of states.²⁶ Rawls says that the role of human rights is to specify limits to the principle of non-intervention associated with authority of a people in possession of a given territory. When certain rights are violated in such a community, the people and their government lose any standing to complain about interventions by other governments aiming to vindicate the rights in question. 'Their fulfilment [*i.e. respect for these rights*] is a necessary condition of a regime's legitimacy', and it is 'also sufficient to exclude justified and forceful intervention by other peoples, say by economic sanctions or, in grave cases, by military force'.²⁷

There is something to this view, but not much. If I can put the point in the language of sovereignty, certainly human rights are sovereignty-trumping principles. They are so because they preclude a sovereignty-based rebuff of any formal *démarche* or denunciation. But if the trumping of sovereignty is supposed to go beyond that – to the prospect of sanctions or armed intervention – then an account along these lines sets the bar too high.²⁸ Rawls was well aware that his particular criterion of importance – or anything like it – would tend to isolate as 'human rights' only a small subset of the rights that are usually given that designation. (Rawls suggested that, of the 30 rights listed in the UDHR, only the right to life and the

²⁶ J. Rawls, *The Law of Peoples*, 80. (For the emphasis on peoples rather than state sovereignty, see *ibid.*, 25–6.) See also J. Raz, 'Human rights without foundations' in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), 321, at 336–7.

²⁷ Rawls, *The Law of Peoples*, 80.

²⁸ Cf. R. Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011), 333.

right not to be tortured are clear instances of human rights; Articles 4 (anti-slavery), 7 (non-discrimination), 9 (protection from arbitrary arrest) and 10–11 (due process) may or may not be in this category ‘pending issues of interpretation’, while the remaining provisions, including the socio-economic provisions count as ‘liberal aspirations’ rather than human rights.²⁹) People do sometimes object to the proliferation of rights claims; but I do not think it warrants this truncation of the list.

I worry too that Rawls’ minimalism sells short the individualism of rights, by which I mean the trumping importance of each single individual’s right, irrespective of what is happening to other individuals. Consider a particular right which almost everyone accepts should be regarded as a human right – ICCPR, Art. 7.1, the right not to be tortured. Almost all of us accept that when some individual is tortured a human right is violated. But I do not think anybody believes that when *just one person* is tortured, humanitarian intervention by outside forces is justified to stop that torture or punish it. There is never any question of humanitarian intervention to vindicate just one person’s right. Does this mean that the general impression that Article 7.1 is a human right is a mistake, according to Rawls’ view? I think we have to reject that. As we saw in Section 3, the distinctive advantage of human rights has always been the way they force us to focus on individual wrongs, wrongs done to individual persons, rather than evaluating societies on the basis of the way they treat their members in aggregate terms. True, the view we are discussing does not adopt the worst sort of aggregation – trading off the wrongness of rights violations against the possible advantages that may accrue to a society therefrom. It is aggregative only in the sense that it sums up a large number of rights violations as a precondition for designating them as violations of *human* rights. But the ‘human’ now follows the particular remedy, which is a response to the aggregate, rather than the right itself, which was always understood to be individual.

No doubt if hundreds or thousands of people were being tortured, there would be some prospect of a forceful international response. So thinking about human rights in virtue of the appropriateness of international

²⁹ Rawls, *The Law of Peoples*, 80n. A page or so earlier (79), Rawls offered an even more restricted list: ‘a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide’.

intervention makes most sense when it is applied to large clusters of individual rights. And probably that is a sensible limitation on what is now known as ‘humanitarian intervention’. It is, in Rawls’ phrase, the ‘*systematic violation of these rights*’ that trumps sovereignty: the normal principle of non-intervention does not apply to states where ‘serious violations of human rights are *endemic*’.³⁰ Charles Beitz says something similar: ‘a society’s failure to respect its people’s rights *on a sufficiently large scale* may provide a reason for outside agents to do something’.³¹ But these practical and sensible limits on humanitarian intervention should not be used to narrow our understanding of human rights themselves.

The final objection to the Rawlsian conception has been stated by David Miller. When the international community does intervene, either formally or forcefully, against violations in a particular state, the intervention is usually justified on the grounds that it is human rights that are being violated by the state in question. The complaint that human rights are being violated is not just a way of intimating intervention; it is characteristically a way of justifying intervention. But then there must be some distinct content that talk of human rights brings to the justificatory table. One must be able to say why human rights violations are wrong and use that account to provide a substantive justification of intervention. The former is not just a way of intimating the latter. As David Miller puts it, the argument ‘*begins* with human rights violations, and *ends* with reasons to infringe sovereignty’.³² We need to know what count as human rights in order to get the political argument underway, and it must be something about the rights that makes us think intervention is appropriate. It looks like we have no alternative, then, but to countenance an understanding of human rights along the lines of that sketched out in Section 4.

7 Important Rights

Joseph Raz has remarked that there is no guarantee that human rights are important if they are understood along the lines of Section 4: ‘Neither being universal, that is rights that everyone has, nor being grounded in our

³⁰ J. Rawls, ‘The law of peoples’ in the Belgrade Circle (ed.), *The Politics of Human Rights* (Verso, 1999) 32 (my emphasis) and Rawls, *The Law of Peoples*, 38 (my emphasis).

³¹ C.R. Beitz, *The Idea of Human Rights* (Oxford University Press, 2009) 105–6 (my emphasis).

³² Miller, ‘Joseph Raz on human rights’, 235 (emphasis in the original).

humanity, guarantees that they are important'.³³ Part of our response to this should be to say that the guarantee that human rights are important comes mainly from their being *rights* – that is, it comes from the identification of individual interests whose importance is sufficient to justify holding other people to be under a duty. No trivial consideration can pass that test.

The point is not only that *duties* are justified in this way, but that they are justified on the grounds of the importance of *individual* interests, considered apart from the aggregate (e.g. utilitarian) desirability of protecting them. Indeed, the duties that are generated in this way may have priority over duties generated out of aggregate considerations. It is common to say that rights are trumps over utility: an individual has a right when some interest of his or hers is important enough to warrant imposing a duty to protect it even at the cost of what would normally be a decisive consideration of the collective interest.³⁴ If a right, considered as such, is important enough to do that, it is probably important enough to have a pretty powerful presence in the law that embodies it.

That said, we may agree with Raz that human rights charters do characteristically include rights that the world community regards as important. This need not be definitional, though; perhaps it is more a matter of the pragmatics of legislation and covenant-framing. We invest energy in the framing of bills of rights and in the eliciting of support from the international community in order to highlight the more urgent duties that governments are under, to bring into focus the more important individual interests that underlie these duties, and to rivet attention on the individual rights and interests that time and experience have shown are particularly vulnerable and that international and constitutional law are capable of doing something about.

Raz, I think, is wrong to see the importance of human rights as nothing more than a reflex of the momentousness of the sanctions associated with rights violations: '[H]uman rights are inevitably morally important', he says, for '[i]f they were not they would not warrant interference in state sovereignty'.³⁵ Their importance does have a political dimension, but it is

³³ Raz, 'Human rights without foundations', 323.

³⁴ This way of putting the point is adapted from R. Dworkin, *Taking Rights Seriously* (Harvard University press, 1977), 191–2.

³⁵ Raz, 'Human rights without foundations', 337.

the politics of the framing and ratification of rights covenants not the politics of interference with sovereignty.

8 Moral Rights?

I have proceeded throughout this chapter on the basis that human rights are a sub-class of legal rights, distinguished by the range of their application or by their importance or by the remedies associated with their violation. In all of this, is it a mistake to have neglected the view that human rights are, in the first instance, *moral* rights – rights recognised by morality?

The advantage of such a view is that it would indicate an isomorphic vantage point from which a given legal charter – like the ICCPR or the UK's Human Rights Act – can be evaluated, both for what it includes and for what it leaves out. Moral rights would have the same shape as legal rights, and so it would be easy to compare them. Thus, we could have resort to a list of moral rights and see whether our legal list 'mirrors' that in some appropriate way.³⁶ Or rather, since not all moral rights will be rights attributed to people on the grounds of their humanity, we will work with a list of moral *human* rights as a standard for testing the adequacy of our list of *legal* human rights. James Griffin does this in his book *On Human Rights*; he constructs a list of moral rights and then he uses that to highlight 'striking discrepancies' between his own list and the lists contained in documents like the UDHR, the ICCPR and ICESCR.³⁷

We certainly need some such standard, because no body of positive law is self-justifying. Human rights law has what some jurists have described as a distinctively suprapositive aspect. Gerald Neuman puts it this way:

Positive fundamental rights embodied in a legal system are often conceived as reflections of non-legal principles that have normative force independent of their embodiment in law, or even superior to the positive legal system . . . The alternative normative systems may include natural law, religious traditions, universal

³⁶ A. Buchanan talks (critically) of the 'mirroring view' in his book, *The Heart of Human Rights* (Oxford University Press, 2013), 17–23. See also A. Buchanan, 'Why international legal human rights?' in Cruft et al. (eds.) *Philosophical Foundations of Human Rights*, 244, at 245–9. For a response to this critique, see J. Tasioulas, 'Human rights' in A. Marmor (ed.), *The Routledge Companion to the Philosophy of Law* (Routledge, 2012), 348.

³⁷ J. Griffin, *On Human Rights* (Oxford University Press, 2008), 194.

morality, or the fundamental ethical values of a particular culture. The legal rights are sometimes described as positivisations or concretisations of pre-existing suprapositive norms, or legal provisions are explained as merely recognising pre-existing suprapositive rights. The suprapositive force of the norms provides one source of legitimation for the enforcement of the legal norms. Reference to the assumed content of the suprapositive norms may provide one source of guidance in the interpretation of the legal norms.³⁸

But I wonder whether it is necessary here to posit moral human rights or even natural rights as suprapositive counterparts to legal human rights. There is no particular logical difficulty in doing so. If we can talk of moral duties, we can talk of moral rights. Nonetheless it is worth considering some of the things that were said in Jeremy Bentham's well-known diatribe against natural rights as 'nonsense upon stilts'. Bentham said:

In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights. But reasons for wishing there were such things as rights, are not rights; – a reason for wishing that a certain right were established, is not that right – want is not supply – hunger is not bread.³⁹

It is possible for us to develop a moral theory of human rights which consists in reasons for thinking that we should formulate and proclaim certain norms as legal human rights without necessarily thinking of those reasons as rights themselves. No doubt we should hesitate when Bentham intimates that those reasons will usually be utilitarian in character – that is, when he says that the proper task is to ask

not what are our natural rights, but what in each instance ought to be our legal ones upon the principle of utility, that is, what are the rights which, in each instance, it would be for the happiness of the community that the law should create, and what means it should employ to secure us in the possession of them.⁴⁰

Since – as we believe, though Bentham did not – rights and human rights have trumping work to do, we will not normally be looking to justify them on the basis of utilitarian considerations. But that does not mean that the only moral considerations in play are themselves to be regarded as rights.

³⁸ Neuman, 'Human rights and constitutional rights: harmony and dissonance', 1868.

³⁹ J. Bentham, 'Anarchical fallacies' in Waldron, *Nonsense upon Stilts*, 46, at 53.

⁴⁰ J. Bentham, 'Supply without burthen or escheat *vice* taxation' in Waldron, *Nonsense upon Stilts*, 70, at 75n.

Perhaps we should say that any moral consideration that argues directly in favour of a legal human right must necessarily be a moral human right. I am not sure what I think about that. All I know is that if there are moral considerations that argue for the inclusion of a putative legal human right, which cannot itself be represented as a moral right, we should pay attention to it nonetheless. What is most important is that we include in our charters of rights those rights that there is most reason to include, not just those that can be represented as moral rights.

At the end of Section 4, I observed that philosophers are interested in the possibility that human rights can be derived from the importance of values like equality, dignity or autonomy. (James Griffin, for example, seeks to show that a full theory of human rights can be derived from the importance of human personhood and the associated principle of autonomy.)⁴¹ There is nothing wrong with such a project: these abstract values are highly significant and it is well worthwhile tracing out their implications. But human rights, as a body of law and practice, is a matter of political argument. The propositions that figure in documents like the ICCPR and the ICESCR represent the conclusions of a variety of arguments, generally accepted in the world, about the ways in which governments can pose a threat to and/or secure protection for individual interests that we have reason to regard as important. Now, human individuals are complicated entities and so are their relations with governments. There are many different aspects to their vulnerability and many different things that they might hope for or expect from those set in authority over them. We try to set these various things out in normative arguments. Some of those arguments yield moral propositions that can be stated snappily in something like a rights format; others require paragraphs or treatises. But the latter can be as much arguments for legal human rights as the former. And our rights declarations represent in conclusory form the accumulated heritage of such arguments, which have come to us in successive phases of political concern. Sometimes the concerns are about pain; sometimes they are about property. The concerns are sometimes liberal, sometimes democratic, and sometimes socialist. There are concerns of all sorts, made articulate in our traditions in lots of different ways.

Human rights, I said earlier, come to us in the form of lists and I think we should respect that mode of presentation. There seems to be no particular

⁴¹ Griffin, *On Human Rights*, 149ff.

reason why the right not to be tortured is Article 7 of the ICCPR and Article 5 of the UDHR; no reason either why freedom of religion is postponed until Article 8 of the UDHR whereas it is included as Article 4 of the ICCPR. Rights in our bills and covenants are just one damned thing after another. They are all rights of individuals but each represents a particular concern. And the lists on which they appear are practical documents: when we are faced with a violation or an alleged violation, it is incumbent on us to focus our concern on the particular right at stake and its particular importance to the individuals who are supposed to bear it, without prejudice to the speculative possibility of its derivation from some other overarching value that unites it with other items on the list.