

FUNDAMENTALS OF HUMAN RIGHTS THEORY

The assumption, common some years ago, that Western liberal democracies had solved the problem of the relationship between state and religion, with constitutional secularism as a main plank of the solution, now seems somewhat naïve and precipitous, akin to confident declarations of the ‘end of history’. Similarly, the days when the relationship between *human rights law* and religion was a quiet backwater, appearing to confirm arguments about the end of religion as a serious force in the world, are long gone, and ‘religious litigation’ is on the rise.

I hope I have persuaded you, on the basis of what I have said so far, that the relationship between human rights and religion in the judicial context is complex, changing, and problematic. My basic argument so far has been that the relationship between human rights and religion is becoming more conflictual for reasons having to do with the changing role of religion, and the changing role of human rights. The courts are intimately involved in adjudicating these conflicts, and in some cases they are centre stage, due to the changing institutional opportunity structure for litigation, both national and transnational. Although there is an overlapping human rights consensus between the main religions and human rights institutions, the current pattern of the relationship between human rights and religion is changing, and the hard-fought cases we have discussed are not simply anomalies.

In the previous three chapters, I have described three particular and, I argued, *central* problems that recur when courts have to deal with religious litigation: the teleological problem, the epistemological problem, and the ontological problem. All three problems are both the occasion for disputes, and (taken together) exacerbate other disputes, bringing the courts themselves into the fray,

preventing them from playing the role of standing above the conflict. So, what is to be done?

The temptation at this point is to introduce some *deus ex machina*, some device whereby an apparently insoluble conflict is unexpectedly solved by the contrived introduction of some new idea. The suggestions I'm about to make are not of this type, in two respects. We have already identified many of these methods previously; none should come as a surprise. As importantly, these suggestions will not 'solve' the problem, but rather only provide mechanisms by which the tensions I've identified may be addressed in a way that may prove more productive than the approaches adopted up to now have proved to be. So, what am I suggesting?

RETHINKING THE FOUNDATIONS

It is time to set the issues I've raised within the broader human rights debate. I suggest that the tense relationship between religion and human rights has resulted, at least in part, because the conflicts engendered relate to fundamental (and, so far, unresolved) issues that go to the heart of the human rights project itself. In the previous chapter, I suggested that the issue of what it means to be human has been a critically important area of dispute between secular and religious conceptions of human rights. Although there appears to be a common approach to the issue, in that both religious and secular understandings of human rights often resort to the concept of human dignity as a way of addressing that issue, human dignity has contributed little to the development of a consensus on the problem, and no common conception of dignity is yet discernible. Dignity discourse has, so far at least, done little to provide a conception with significant enough substantive content to solve the most profound issues in the judicial resolution of human rights claims: the appropriate balance between the individual and the community, including such questions as the appropriate limits on individual freedom; the appropriateness of the use of state power to ensure basic standards of material security; what rights should be attributed at the beginning of life and at the end of life; and how far we have responsibilities to ourselves and to others. On these, and other important human rights

issues, disputes will continue, in part because of the absence of a common approach to the ontological question.

We must, therefore, revisit the ontological problem if we are to make progress, but my approach will be initially indirect, and I will approach the problem by thinking more about the nature of human rights.

Human rights, it is clear, are a subset of rights in general, but what type of rights are 'human' rights, as opposed to other sorts of rights, such as the rights of citizens, or the rights of corporations, or the rights of states? Some of the implications of focusing on the 'human' in human rights are fairly obvious. If a particular subset of rights applies only to humans, that means that they don't apply to non-humans, but what types of creatures are not 'human'? Animals, presumably, but all animals? Foetuses? Those in a permanent vegetative state? These are some of the most controversial political questions, particularly in the culture wars, and they are deeply contested. But the issue of the human in human rights gets even more difficult when we remember that at least since the Universal Declaration of Human Rights in 1948, human rights are said to be founded on the principle of 'human dignity'. Again, that word, 'human'. So, the concept of the 'human' is built into the deep foundations of the idea of human rights, as well as the practice of human rights on a day-to-day basis.

The problem that we identified in the previous chapter is, in part, that as the power of the human rights ideal has grown, as human rights have come to occupy more and more space in political and legal debate, the concept of the 'human' seems to be less clear, rather than more clear. What we have, in practice, is a significantly fractured set of responses to what the 'human' in human rights and in human dignity supposes. In most jurisdictions, animals do not fall within the protection of human rights and human dignity, but not in all. In some jurisdictions, foetuses are protected by the right to life, but comparatively few. Those in a permanent vegetative state may or may not be regarded as having the same human rights as those not in that condition. And so on.

With the expansion of human rights, the more contested it has become, and the more we need a good explanation of why human rights are normatively justified, if they are. Human rights are now

more contested than ever, not least in the United Kingdom, and the absence of a good normative explanation risks undermining the project. If we can't come up with a good explanation as to why human rights are a good thing, then what right do we have to force them on others, whether in Syria or in Belfast? And in attempting to provide such an explanation we almost immediately confront the question of the 'human'.

Let's step back from the most controversial questions for a moment and begin with the basics. Human rights should not be seen as exclusively or purely the creation of law. Nor should rights be subject to the whim of shifting majorities. Whatever the benefits of democracy, majoritarian preferences should not be seen alone as the basis for human rights standards. Democracy has important limits, and one of those limits is in the area of human rights. So, if human rights are based neither exclusively in law, nor determined by the principle of majority rule, on what exactly are they based? We have examined previously what might be called the 'orthodox' answer to this question, which is to suggest that human rights are those rights that attach to humans simply on the basis of their humanity, and for no other reason. This is sometimes also termed the 'naturalistic' justification, because it is based on an understanding of human nature. There are, of course, many naturalistic or orthodox theories. We saw that one variant of this is that human rights are derived from the idea of 'human dignity'. We saw that naturalistic approaches may be either metaphysical or non-metaphysical. Some argue that the concept of dignity depends on a metaphysical understanding of the human in relation to a deity. But there are also non-metaphysical understandings of 'human dignity' that are nevertheless naturalistic, where the dignity of the person is seen to derive from an understanding of what it means to be human, based on our observations of human experience.

But there are now sustained attempts by political philosophers to theorize about the meaning, scope, and justification of human rights on an *alternative* basis. One significant difference between these different philosophical approaches has to do with methodology: where do we start if we want to provide a normative account of human rights? Philosophers who adopt the orthodox, naturalistic account often base their account initially on a

priori reasoning (what I'll call practice-*independent* theories). But a more recent strand of philosophical theorizing has attempted to provide accounts that begin from the *practice* of human rights (practice-*dependent* theories), where what human rights are, and how they are to be justified are to be considered from the bottom-up: we should derive our normative justification from the practice of human rights, rather than using our normative justification to limit what should correctly be termed human rights. A prominent example of a practice-dependent theory is that of Charles Beitz, following John Rawls, where human rights are seen in practice as identifying those norms that would justify international intervention in another state to protect the state's own population against abuses.

There are significant shortcomings in practice-dependent philosophical accounts up to now. First, recent philosophical accounts of human rights that purport to be based on the actual practice of human rights are flawed, in so far as they seldom engage in a sustained way with the national and international *judicial* interpretation of human rights guarantees, focusing instead mainly on the international political practice of human rights, or on the text of human rights treaties, or on the limited judicial practice of one state, or on historical developments without appreciating the role of judicial practice in that history. Second, current practice-dependent philosophical approaches give too little weight to actual legal practice, since, were they to do so, they would not be quite as dismissive of 'orthodox', or practice-independent, approaches as they are. In other words, current practice-dependent approaches are incomplete as they stand at the moment. Third, a broader understanding of what constitutes relevant practice (including judicial practice, for example) would also require practice-dependent theories to confront the significant degree of substantive pluralism in our understandings of human rights as currently interpreted. Fourth, a broader understanding of that practice would also take more seriously still the institutional context in which human rights operate. For example, philosophical approaches require a deeper engagement with the fact that judicial institutions are so heavily involved. This poses a challenge in particular to those seeking to reconcile human rights with ideas of democratic participation. How

exactly, for example, does judicial independence cohere with a deep commitment to the democratic method?

There is a fifth problem, however, that is of particular relevance to the scope of this essay. With some notable exceptions (Hans Joas, Charles Taylor, John Milbank, Nicholas Wolterstorff come to mind), human rights theorizing based on human rights practice often regards the *religious* practice of human rights as embarrassing at best, malign at worst. The philosophical case for excluding religious understandings of human rights was put by John Rawls. When we were considering the epistemological problem, we identified an approach which involved the courts redefining religious arguments to conform to an idea of 'public reasons'. This idea crops up again in this context. Rawls argued that citizens engaged in certain political activities have a duty of civility which requires that they be able to justify their decisions on fundamental political issues by reference *only* to *public* values and *public* standards. This would exclude, in fact was possibly intended to exclude, religious narratives of human rights.

So far, then, I have suggested that recent philosophical accounts of human rights that purport to be based on the 'practice' of human rights (so-called 'practice-dependent' theories of human rights) are flawed, in so far as they seldom engage in a sustained way with the actual practice of human rights, and that this practice includes both national and international, legal as well as political, religious, and secular understandings. The main conclusion is that 'practice-dependent' philosophers of human rights do not practice what they preach and adopt a considerably more skewed and narrow understanding of the 'practice' of human rights than is justified, given the diversity of human rights typologies. Human rights practice has, in the main, run ahead of human rights theory.

In light of this, those purporting to ground their normative understanding of human rights in human rights practice have a clear choice: *either* they can reconsider how far they are *really* committed to basing their theories on this practice, leading them to decide ultimately to drop this structural feature of their argument. Alternatively, they may recommit to basing their understanding of human rights initially on the *actual* practice of human rights and significantly adapt their theories as a result.

My preference is for the second of these alternatives. A broader understanding of that practice would challenge some of the normative conclusions that existing practice-dependent theorists reach, as we shall see. Not engaging with the practice is too theoretically limiting.

RECONSTRUCTING A PRACTICE-DEPENDENT THEORY

What would a reconstructed practice-dependent theory of human rights look like, and how would it address issues of religion? My starting point for an attempted reconstruction distinguishes two different justificatory issues in constructing a normative theory of human rights. First, what is the ‘general justifying aim’ of the system? What justifies the creation and maintenance of such a system—what good can it achieve, what duty can it fulfil, what moral demand can it satisfy? Second, we need to distinguish the methods we adopt to further this system, including who may properly be accorded human rights, and how particular human rights should be determined and interpreted. We need to distinguish, in other words, the general justifying aim of the system, from how we pursue that aim. (Incidentally, Allen Buchanan’s new book adopts a similar starting point, although he and I end up in significantly different places.)

My suggestion is that the general justifying aim of the practice of human rights is, indeed, the pursuit of human dignity, in the sense that each human person, *qua* human person, possesses an intrinsic worth that should be respected. Let’s recollect what I suggested in the previous chapter regarding this claim. This is not an institutionalist claim, in the sense that the worth of a human person does not depend on any institutional recognition, and in that sense it is a foundationalist claim, but it is a weak foundationalist claim. In particular, we should not infer that the idea of human dignity instantiates any particular understanding of what human dignity consists in. It is not necessarily an understanding of dignity as autonomy, or of equality, or of communitarianism. In particular, it is not necessarily a *liberal* agenda. It is simply a claim that a human person has a moral worth as a person.

Recollect also that I suggested that two elements deriving from the claim to human dignity have developed which further this aim but also limit the methods of pursuing it, and these also are weak claims. First, some forms of conduct between persons are inconsistent with respect for this intrinsic worth (*the relational claim*), and, second, the state exists for the individual not *vice versa* (*the limited state claim*). The fault lines lie in disagreement as to what the intrinsic worth of persons consists in, what forms of treatment are inconsistent with that worth, and what the implications are for the role of the state. The different understandings of each of these elements of the concept of human dignity indicate that different conceptions of human dignity and different ways of pursuing it are identifiable.

Weak though it is, however, the general justifying aim I've identified, human dignity, does provide a normative foundation for the system of human *rights* as a whole. Note that I distinguish between human *dignity* and human *rights*. Human rights are best thought of as concerning the delivery of the general justifying aim of protecting human dignity; human rights are to be seen as one strategy by which human dignity is pursued. Human rights are not the only way in which dignity is pursued. The human rights system consists of a set of norms that are institutionalized in related but different sets of practices: international, diplomatic, legal, constitutional, moral, revolutionary, and *religious*. In this, my approach is clearly influenced by Rawls, in the sense that human rights don't just exist out there floating free; they have to be institutionalized to make them 'real'. Where I differ from Rawls is that I do not limit the institutionalization of human rights to the narrow range of institutional practices that he does. In particular, I include religious understandings of human rights as appropriately regarded as contributing to the construction of a practice-dependent theory.

Given the pluralism of different subsystems of human rights, different rights aiming to further human dignity may (perhaps even *should*) result. Dignity may also provide a critique of the human rights system. It is perfectly compatible with my approach, indeed my approach requires, that each human rights subsystem can and should be assessed for ways in which it does *not* adequately pursue human dignity, or might better pursue human

dignity. It provides, therefore, a constraint on what human rights can consist of in each of these subsystems. It would reject, for example, an attempted justification of an approach to the pursuit of human rights that simply handed all power over to an unconstrained state. But, again, this is a relatively weak constraint.

In practice, these critiques are both internal to the subsystems I have described, and external to those subsystems. Each subsystem develops over time particular ways of understanding the implications of the general justifying aim of human rights and therefore provides the opportunity for an immanent critique of the understanding of human rights within that system. But the fact that there are different subsystems means that there is the possibility that one subsystem's understanding of the general justifying aim may conflict with that of another, and this both encourages and facilitates external critique of the approach to human rights adopted in these other subsystems. The human rights system, in practice, is strongly pluralistic, not just institutionally but also normatively.

INTEGRATING 'ORTHODOX' APPROACHES

There are several particularly important respects in which this suggested revised approach has advantages, but I'll focus on only one. It helps us to go beyond the current divide between 'orthodox' and practice-dependent approaches. The sharp distinction between practice-dependent and practice-independent approaches collapses once we get to grips with the actual practice of human rights. As Liao and Etinson suggest, the contrast between political and naturalistic conceptions of human rights is 'at least overdrawn if not wholly misleading'. 'Practice-dependent' theory should be refined by the inclusion of distinctively 'orthodox' elements.

Lea Ypi has sought to present a convincing theoretical framework that would integrate both practice-dependent and practice-independent approaches, one in which space is made 'for a more dynamic reading of the relationship between political ideas and political practice'. She focuses on 'contestation' in seeking to interpret the function and purpose of institutional practices. We need to reflect critically, she argues, on *particular* conflicts. We should explore 'the different concepts protagonists invoke to render it meaningful, the kinds of theories that they deploy to

explain its occurrence, and ... the interpretive paradigms upon which a combination of all these features eventually relies'. Examining these contestations is critical because it enables us to identify how 'the relation between preservation and innovation of principles unfolds given particular practices: it helps to clarify, for example, which conceptual categories of the past are eliminated or shown to be morally problematic, and which ones are emphasized, updated, or invented from scratch'.

She insists, rightly in my view, that 'one needs to give more careful thought to the way the ideal and non-ideal approaches reciprocally interact'. For Ypi, ideal and non-ideal roughly correspond with practice independent and practice dependent respectively. In the conflicts that we analyse, she suggests, we will see how various interpretations of the function and purpose of current institutions will be advanced.

If these interpretations are inadequate or unable to capture emerging claims and concerns, the groups who are most affected by the conflict will contest the meaning or conceptual categories associated with them. They will ... attempt to appropriate these categories and to interpret them in a different way—a way that tries to link them to first-order ideal principles and seeks to promote an alternative set of claims.

This will all seem quite technical philosophy, but the point is important. Putting it somewhat simplistically, what she is suggesting is that institutions change and move on in part by incorporating externally generated normative standards. The implication is that, in the legal context, and I suspect in at least some religious contexts, changes in human rights interpretation occur in part when these bodies incorporate elements of orthodox human rights thinking into their practice. A practice-based approach to human rights must, therefore, recognize that human rights practice is itself sensitive to naturalistic orthodoxy, and that the supposed sharp dichotomy between practice-dependent and practice-independent approaches is therefore exaggerated.

INTEGRATING PLURALISM

My suggested approach accepts that human rights law and human rights practice beyond the legal sphere is, indeed, pluralistic, and

argues that this pluralism is not randomly chaotic, or dysfunctional, or temporary. Building this pluralism into human rights theory thus accurately reflects the diverse nature of human rights, including judicial adjudication and religious narratives within that system. From this perspective, human rights is seen as providing a forum in which tensions and conflicts over some of the most basic epistemological and ontological questions are engaged. From this perspective, it would be puzzling if a highly pluralistic system of human rights (or perhaps it would be better to describe it as a set of associated communities of human rights) had *not* emerged. The pluralism of the system is not, therefore, a problem to be overcome, but a critically important and central aspect not only of the proper understanding of human rights law but also of human rights as a whole, one to be recognized and cherished for the critical reflexive function it encourages.

My preferred approach is dialogic. This should not be confused with a *dialectic* process, despite the fact that both critically emphasize the importance of conflict and tension. The goal of a dialectic process is to arrive, via conflict and tension, at a *solution* to the apparent conflict, a solution that establishes primacy over other solutions. In a dialogic process, on the other hand, various 'solutions' coexist in tension with each other, and continue to do so. One solution may hold more salience than another in particular circumstances, but it may be supplanted if the preferred strategy does not have the desired effect of providing a forum in which those in conflict continue to engage. For Richard Sennett, the dialectic approach attempts to lead to closure and resolution, whereas in a dialogic process differences can remain essentially unresolved at a fundamental level. But, under my preferred approach, the lack of resolution of the contradictions in human rights disputes is not to be regarded as a failure, but rather as essential to the system. The practice of human rights adjudication, human rights law, and human rights courts become the site of a provisional and (politically) temporary accommodation that helps us to live together, despite the basic conflicts that are brought to court; we agree to abide by the decisions of a decision maker whom we agree, for the moment at least, is broadly legitimate and competent. Human rights adjudication is seen as an enterprise in which the judge is not only engaging with the

dispute in hand, attempting to arrive at a justified and reasoned judgment, but doing so in a context in which the nature of the judge's resolution of the question is (politically) provisional.

My preferred approach is not, therefore, a static model, but one open to continuing change, including change involving the continued suitability of human rights law itself to provide the forum in which these contested questions are considered at all. Not only is the actual result in a particular case open to revision, but the judge's legitimacy in arriving at the decision at all is also provisional. That is an important and defensible role for human rights law, and human rights courts, but it is a modest one.

The danger with this approach is that it may appear to legitimize a highly relativistic critique of human rights law, in which the failures of human rights law are construed as a necessary part of the system, therefore delegitimizing the enterprise. I do not think this is so, not least because the emphasis on the temporary and provisional nature of human rights law, and therefore the possibility of an external critique of any particular human rights subsystem, including human rights law, offers hope for the disappointed and a spur to activists to change the interpretation, and even the system, and argue for a better resolution. Perhaps most importantly, my preferred approach leaves open a view of human rights as political and moral and legal and social *and religious*, one in which debate is encouraged within and between these arenas of discourse, as to what human dignity requires.

Dignity, therefore, has the added function of challenging and disrupting apparently settled positions. Dignity has the capacity and role of serving as the basis for critique of societally determined understandings of human rights, whether they are religious, or legal, or political. Dignity may also, therefore, cut across rights, keeping human rights concepts from becoming unquestioned. Dignity may, indeed, outstrip rights. It may, then, function in some way as a ground for rights but also a ground for the critique of rights. Thus, for example, those who consider that dignity protects the integrity of the human person will be able to use the concept of dignity to criticize an interpretation of rights that is too cramped to protect that person, or to criticize a claimed extension of rights that seems not to reflect or protect human dignity. So, dignity will help to provide a certain kind of

critical distance from rights, reducing the tendency to fetishize rights in contemporary society. This does not, however, necessarily undermine the argument that dignity is a foundation for rights. If dignity is part of the foundation, it can provide a basis for criticism of current interpretations of specific rights.