

## The Nature of Human Rights

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Contrast two conceptions of human rights which, following Beitz, we can call the orthodox and the practical conceptions.<sup>1</sup> The orthodox conception defines human rights as those rights that each human has against every other, at all times, in all places, under all conditions, and simply in virtue of her humanity. This orthodox conception is familiar from the philosophical literature on human rights, and any philosopher will know how to construct an orthodox theory of human rights using the standard tools of a consequentialist or deontological moral theory.

The practical conception of human rights is quite different, and is more familiar from international politics than from the philosophical literature. On the practical conception, human rights define a boundary of legitimate political action. Human rights specify the ways in which state officials must and must not act toward their own citizens, where it is understood that violations of these human rights can morally permit and in some cases morally require interference by the international community. This practical conception of human rights is what one finds in the various proclamations and treaties on human rights, such as the Universal Declaration and the Convention against Torture. Here I will explore why it is worthwhile for philosophers to theorize more about human rights understood in this second, practical way, and also say a few words about how such theorizing might be done. Thomas Pogge's account of human rights will provide the mileposts for the exploration of this topic.<sup>2</sup>

To an orthodox theorist, the practical question about human rights will appear misguided. The practical question turns on legitimate action by the officials of modern states, and is especially concerned to find rights whose violation will permit or require outside intervention. Yet why this emphasis on legitimacy, modernity, and intervention? And why, in particular, this obsession with the state? After all states are not the only sort of agency that endangers individuals through violence, coercion, and neglect. Strangers, family members, and multinational corporations also endanger individuals — in fact quite often these other agencies will threaten individuals more than does their state. Why then should we take the actions of state officials as a special topic for normative theory?

The answer is that, until recently, the state was to outsiders a moral black box. Until World War II state officials violated, coerced, and neglected those within their territories with almost total impunity, appealing to the Westphalian ideal of state sovereignty to immunize themselves from external criticism and intervention. Before the Second World War there were virtually no commonly accepted standards for justifiable interference into what was called the internal affairs of a state. State officials were almost incorrigible with respect to their treatment of humans within their borders, and this is what distinguished state officials from other actors like family members and corporations.

The Second World War showed that the state could not remain a moral black box to outsiders. After the Holocaust it became clear that standards were required for official conduct toward citizens, such that violation of these standards could license or even necessitate an international response. The language that postwar political leaders used to describe these standards was the language of human rights. Human rights were meant to fill the void in the space of moral evaluation and action that was created by the concept of state

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<sup>1</sup> Beitz 2004.

<sup>2</sup> Pogge 2002, 27-70.

sovereignty, given that this void had become morally intolerable. The human rights documents that were endorsed after the war were attempts to spell out what officials should never again do to those within their territories.<sup>3</sup>

Human rights so conceived are obviously immensely important for our politics, and so understanding which rights are such human rights should be a proportionately important topic for philosophical theory. Indeed a parallel from history may help to show how significant this kind of practical theorizing is. Before the seventeenth and eighteenth centuries, the official treatment of citizens was a moral black box not only to outsiders, but to those within the state's borders as well. State officials in this era claimed incorrigibility regarding the treatment of those within their territory — not under the Westphalian idea of state sovereignty, but under the older theory of the divine right of kings. The divine right of kings allegedly gave officials unlimited discretion over the treatment of subjects, such that no internal resistance to the crown was legitimate. The classic social contract theorists illuminated the justificatory darkness defined by the divine right of kings. Practical rights theorists such as Locke set out accounts of natural rights that marked out the boundaries of legitimate state action, where it was understood that violation of these rights could justify citizens' resistance and rebellion. The classical social contract theorists laid out standards of legitimacy that officials must meet on pain of suffering justified internal revolt, just as practical human rights theory lays out standards of legitimacy that officials must meet on pain of suffering justified external intervention. This parallel highlights the significance of practical theorizing about rights. It also incidentally shows that the natural rights theorizing familiar from classical social contract theory is actually more closely related to the practical approach to rights than it is to the orthodox theorizing with which we might ordinarily associate it.

## ***1. Human rights and the question of legitimacy***

The practical conception of human rights is an appropriate object for philosophical investigation. Any complete account of the rights of individuals will have a place for human rights so conceived, at least as long as the actions of state officials continue to have significant effects on the fates of those who reside in their territories. Yet of course once we understand human rights in this way, we want to know what human rights there are. Since asking the right question is often halfway to getting the right answer, I will first try to frame our question about practical human rights more precisely, before going on toward the end to suggest different ways that theorists might go about answering it.

Here is a more precise version of what I believe is the guiding question about human rights, practically conceived. The question is this: what are the considerations that state officials must and must not take into account when acting in ways that will affect the possibility of those in their territory leading dignified lives, such that failures to take these considerations into account will constitute a failure of legitimate state action, which will permit or require outside intervention when such is both feasible and appropriate?

This question has several parts; we can address its components singly. First, the question asks us to search for human rights conceived as moral claims which are in the first instance claims that individuals have against the officials who govern their territory. Individuals have human rights against the officials that have power over them, and if these officials fail to respect their rights then individuals may have secondary claims on outsiders to intervene. The rights claim is primarily against officials in the domestic government, and secondarily on outsiders who can act in the case of official failure.

Second, the question characterizes human rights as a criterion of legitimacy, which is the most primitive concept of normativity for political action. Officials who fail to fulfill the

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<sup>3</sup> See, e.g., Donnelly 1998, 3-17.

human rights of the citizens of their state forfeit the mantle of legitimacy for their actions. Such officials fail to attend sufficiently to the dignity of the individuals whose good they have been entrusted with, and insofar as they fail can be seen only as agencies of might, not of right. Human rights thus set the most basic standards of normative recognition for state action, drawing a line that separates the legitimate exercise of power from official crimes of violence, coercion, and neglect.

Third, the question specifies that the violation of these basic standards of legitimacy can permit or require intervention by outside agencies. Such intervention can in extreme cases involve military force, but as Beitz has noted, it can take other forms as well.<sup>4</sup> Intervention in response to non-fulfillment of human rights can also include economic sanctions, refusing entry to trade organizations such as the WTO, denial of development aid, or the provision of emergency assistance. What individuals in a country have a right to when their government fails to secure their human rights is that, under certain circumstances, outside agents act in some way that will remedy the breach and prevent further infractions. To do this, outside agencies may sometimes provide the object of the human right itself, as when foreign governments ship in food supplies. Or the outside agencies may take more indirect paths, for example by putting pressure on a national government to improve economic equity so that an adequate standard of living becomes possible for all its citizens. As Pogge says, what is important is that individuals have secure access to the object of their human right, by whatever means will be effective in creating this access.<sup>5</sup>

Fourth, outside intervention is only morally permissible when this would be both feasible and appropriate. Outsiders are only permitted to intervene when their intervention could be expected to be effective, and when it is not excessively costly for them. Moreover, since intervention is itself a potentially illegitimate political action, outsiders are only permitted to intervene when any coercive or violent means of their intervention can be justified by the evils they are attempting to prevent.<sup>6</sup>

Finally, the question about human rights is framed in terms of the considerations that state officials must and must not take into account. For example, we will explain the human right against torture by saying that officials must not take into account the fact that they could further their personal or political goals through torturing those who are subject to their power. And we will explain the human right to an adequate standard of living by saying that officials must work to create conditions in which all citizens can obtain decent food, clothing, and shelter. Human rights are here cast as direct constraints on official action and official inaction, and this is one place where we must diverge from Pogge's account.

On Pogge's understanding, human rights are primarily moral claims on social institutions, and secondarily moral claims on those who shape and support these institutions.<sup>7</sup> What individuals have a right to is that institutions secure for them access to certain goods. "Secure" here is defined probabilistically: what is important to Pogge is whether individuals are above or below some threshold of risk of lacking access to some good. Pogge asserts, for example, that whether an individual enjoys the human right against torture turns not on whether the individual is actually tortured, but turns rather on the *probability* that that individual will be tortured under the prevailing social conditions. This focus on probabilistic thresholds explains why Pogge prefers to speak of human rights as being fulfilled or unfulfilled, instead of their being respected or violated. Probabilities fulfill rights, while actions violate them.

Probabilistic considerations do have a place within human rights doctrine. Yet the unnatural ring of Pogge's language should make us suspect that probabilities cannot plausibly be built into the very definition of human rights as Pogge recommends.

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<sup>4</sup> Beitz 2001, 269-81.

<sup>5</sup> Pogge 2002, 69-70.

<sup>6</sup> Beitz 2004, 14.

<sup>7</sup> Pogge 2002, 38-48, 64-5.

Here is an example that shows why. On Pogge's understanding, there could be no human rights non-fulfillment even if officials of the Indian government ordered the kidnapping and torture of ten randomly selected Indian citizens — either for the officials' own entertainment or to complete some secret medical experiment. This could not count as a human rights non-fulfillment on Pogge's definition because there is no way that these tortures would push the average Indian citizen below any worrisome risk-threshold of insecurity regarding torture.<sup>8</sup> Yet this result is implausible. Torture occurs, but allegedly no one's right against being tortured has been left unfulfilled. We must find a characterization of human rights that captures the fact that the Indian government's torture of ten citizens would indeed violate human rights, and the characterization of human rights that I am recommending does capture this fact. On my characterization we can say that officials must never under any circumstances take into account that they could further their personal or political goals through torture, and if they act on such a consideration they will in each instance violate a human right.

On the characterization of human rights recommended in this article, we can take probabilities into account where they are relevant and leave them aside when they are not. For example, we can say that officials must never under any circumstances take into account that they could further their goals through torture; while also saying that officials must act so as to keep all citizens above some probabilistic threshold of being safe from violent assault in the streets. We can say that some human rights are violated by discrete official actions, and that others are violated if officials fail to create the social conditions where access to some good is reasonably secure. This characterization allows for the important probabilistic feature in Pogge's account, while not permitting it to consume the whole definition.

## ***2. The role of international political documents in human rights theory***

I have suggested that the right question to ask about human rights practically conceived is this. What are the considerations that state officials must and must not take into account when acting in ways that will affect the possibility of those in their territory leading dignified lives, such that failure to take these considerations into account will constitute a failure of legitimate state action, which will permit or require outside intervention when such is both feasible and appropriate. How, then, to proceed when answering such a question? There are of course many different ways of setting out a theory. Here I will suggest a basic norm and a starting point, and then four possible paths for developing the theory of human rights practically understood.

In developing a theory of human rights we are searching for standards of legitimacy. We are searching for standards of legitimate state action, which when violated will legitimate outside intervention. Because our target is legitimacy, we should use, I believe, a basic norm of reasonable acceptance. This norm requires us to find standards for the exercise of political power that all individuals who are subject to this power would have reason to accept, whatever their cultural background or conception of value in life. This norm of reasonable acceptance is a variation on the Kantian imperative to respect the humanity of each individual, and it has been developed in different directions by theorists in the Kantian tradition like Rawls and Scanlon.<sup>9</sup> The norm is particularly appropriate when developing a theory of political legitimacy, since it mandates that those with political power be able to

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<sup>8</sup> "A person may fully enjoy X [a basic good] even while her access to X is insecure (as when persons relevantly like her, say blacks or vocal government opponents, are beaten or threatened). Conversely, a person may be temporarily deprived of X, through a crime by a rogue government official perhaps, in a society that is very effective in preventing crimes of the relevant type ... . My institutional [understanding of human rights] regards only the first case as a human-rights problem." Pogge 2002, 65.

<sup>9</sup> For the importance of the idea of legitimacy in Rawls's work see Wenar 2002 and 2004. For the relation between Scanlon's norm of reasonable agreement and international duties of assistance, see Wenar 2003.

justify their exercise of authority to those whose freedom and well-being may be diminished by their actions.

Now in adopting a norm of reasonable acceptance we will be making things harder for ourselves, because we have so little to work with. I mentioned before that any philosopher will know how to construct an orthodox theory of human rights, using the standard tools of a consequentialist or deontological moral theory. Yet using a norm of reasonable acceptance makes it particularly hard to know how to proceed in theorizing about practical human rights. How to begin the search for standards of legitimacy, when our only theoretical constraint has such minimal internal structure?

We could start back in the philosopher's study, trying to arrive a priori at universally acceptable standards for state action and outside intervention. Yet I believe we should, rather, begin with the political documents about human rights such as the Universal Declaration and the various conventions that have been widely ratified. When looking for what could reasonably be accepted, that is, we should start with what has actually been accepted. The theorist's task, then, will be to develop theory that rationalizes, that corrects, and that extends the accounts of human rights in the various declarations and conventions — to extrapolate from what political leaders have actually accepted to what all individuals could reasonably accept. There are two reasons to begin here in what could be called the global public political culture. The first is simply that starting with content "out there" instead of "in here" will tend to reduce the personal and cultural biases to which we all are subject. Second, and more importantly, there is a second-order norm of reasonableness that says that under good conditions the most reasonable starting point for determining what people could reasonably accept will be the focal point of that which has already been agreed.

### ***3. Strategies for theorizing human rights***

The political documents on human rights have only received the actual agreement of politicians, which is not the same as the reasonable agreement of all individuals. We can see this as an opportunity for theory, instead of as an impediment. One way to go about theorizing human rights is simply to check the documents already agreed to for biases that are predictable artifacts of the process of their endorsement. For instance, since it was political leaders instead of citizens who have directly endorsed and ratified the documents, we should expect the documents to be biased toward those interests that all political leaders have in common. For example, all political leaders share an interest in being free from scrutiny over corruption. Moreover, we should also expect the political documents to be slanted toward Western or perhaps better enlightenment values, since the nations professing these values have been politically much stronger in the times the political documents have been affirmed. Putting these two sources of bias together, a theorist might reflect on the fact that a human right against political corruption has not been declared in any of the various political documents that political leaders have agreed to, even though such a right may in many circumstances be just as important as the human right to democratic participation which has often been proclaimed.

I will close by mentioning three other paths of theorizing about human rights, beyond this path of correcting the biases we could expect from the political process of their endorsement. The most obvious path is to work on the internal coherence of the list of rights that have been declared in the international human rights documents. The goal here is to find theory that lies beneath the lists of rights, to give these rights congruity, and to explain why some rights should be on the list while others should not be. One example of this kind of theorizing is Henry Shue's work on basic rights, which emphasizes the incoherence of acknowledging civil and political rights while denying subsistence rights, as the United States continues to do.<sup>10</sup>

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<sup>10</sup> Shue 1996.

Another example at a deeper level is Pogge's development of a thin conception of human flourishing.<sup>11</sup> Pogge's thin conception is a piece of theory intended to give a unifying account of the diverse sets of goods that are alleged in the political documents to be the objects of human rights, and to be used as a tool for evaluating which of the human rights that have been declared are genuine. Pogge's explanation is that these diverse goods are those that all could agree are necessary for developing or realizing a worthwhile life. Pogge emphasizes that the demand for reasonable agreement explains why human rights are and should be framed in terms of less controversial means to flourishing like nutrition and education, rather than in terms of more controversial components of flourishing like spirituality. The elaboration of such a thin conception of human flourishing is an excellent example of how theory can increase the internal coherence of the human rights documents that have achieved political assent.

Another path for theorizing is to extend human rights theory so that it coheres with related areas of rights. For example, a theorist might attempt to link the rights that define legitimate governance to the rights that define legitimate military action. Just as the conventions of human rights profess to set standards that officials must follow concerning the citizens whose good is in their care, so the Geneva Conventions profess to set standards that officials must follow concerning citizens of states against whom they are waging hostilities. One could use this conceptual isomorphism to inform the theories on both sides. For example, we should presume that whatever standards bind officials in their treatment of "enemy" civilians should also bind officials in the treatment of their own civilians. So the Geneva norms against collective punishments and forcible transfers should be translatable into norms of human rights, giving us a new language for condemning, for example, what Saddam did to the southern Shi'ites after the first Gulf War. We might also be able to work in the other direction, for example, using human rights norms of the presumption of innocence and the requirement of fair trial to develop the theory of enemy combatants. If that kind of theorizing were successful, it could shed light into the dusky area of international law in which the prisoners in Guantánamo Bay currently exist.

The final and most ambitious strategy for theorizing human rights is what might be called vertical integration. We might here attempt to extend human rights theory to apply to moral relationships that are as yet unstructured in the global political culture. As we have seen, rights set standards for agents who are entrusted with the good of their own citizens. The laws of war set standards for agents whose actions will affect the welfare of citizens of hostile nations. Yet we can also go beyond these relations, to explore the moral standards for agents whose actions can affect the well-being of foreigners, but who are neither officially entrusted with these foreigners' well-being, nor at war with their countries.

This is what Pogge has done in some of his most challenging writings.<sup>12</sup> Pogge's work on the limits of sovereignty argues for the necessity of extending human rights standards to apply directly to the conduct of international leaders and even to the actions of privileged individuals — that is, you and me. Pogge's main moves are to expand our awareness of the coercive nature of the global institutions such as the World Trade Organization, to highlight the pervasive effects of these institutions on individual well-being, and then to extend the definition of human rights to comprehend entitlements against all those who support coercive institutions, whether these institutions are domestic or international.

All of these moves are bold and deserve further scrutiny. We might, for example, wish to discuss at greater length this final step of stretching the very definition of human rights so that these rights apply in the first instance to both national and international institutions. Yet Pogge's work in amplifying the central idea of human rights so that it reaches to global threats to human dignity should serve as one model for theorists who are looking to deepen and to extend our understanding of human rights, practically conceived.

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<sup>11</sup> Pogge 2002, 27-51.

<sup>12</sup> Pogge 2002, especially chapters 4-8.