

UNIVERSAL HUMAN RIGHTS VERSUS PUBLIC INTEREST

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There is a strong, growing, tendency to take the present (widespread) convictions on human rights as a sufficient basis for their universality, i.e. for their status of 'trumps'. It is (often and often) claimed that since these days one can hardly conceive a genuine human life in the absence of some basic rights, the universality of rights has somehow become *unavoidable* for us. No philosophical difficulties (implied by the justification of universal human rights) are recognized as genuine and significant any more, and no philosophical sophistry is considered necessary or adequate any more: it is suggested that everybody should acknowledge the universality of rights (as a *manifest truth*, in Karl Popper's words).

The aim of this paper is to provide some arguments against this tendency of taking rights as 'absolutes', or as 'trumps'. In opposition to this tendency, my arguments are meant to support positions like Chris Brown's.¹

The target of my argument is a certain fashionable view about rights as 'trumps'. When the conception of rights as 'trumps' is justified by appeal to some 'absolute' source that justifies individual rights, it is not so difficult to show that a complete justification is actually lacking. But this view is sometimes based on the idea that universal human rights do exist, that they simply exist, and need no special justification in order to be recognized as such. Despite its lack of philosophical subtlety, this idea has a *prima facie* plausibility for *people who respect human rights*; such people tend to think as follows: «Isn't it obvious that human beings have a right to be protected against murder, or rape, or arbitrary arrest? Isn't it obvious that no 'sophisticated philosophical argument' is needed here any more?»

The suggestion behind such rhetorical questions is that the existence of rights is a *reality*. For instance, the right to life is, in some sense, as obvious and undeniable as a real fact (as 'the cat is on the mat', for instance). The reality of rights is then seen as supporting the conclusion that rights can function as 'trumps'. For, if rights are *real*, not 'relative' or 'subjective', what could prevent them from acting as *absolute priorities*? I shall take seriously this conclusion, and try to reject it.

My argument is structured as follows.

First premise: Even if we abandon the ideal of 'absolute justification', we cannot avoid the problem of consensus. In other words, even if we abandon the attempt to justify the existence of rights by appeal to 'absolutes' like «God's Commands», «Natural Law» or «Human Nature», we still face a problem: the certainty of the existence of human rights depends on human consensus. After all, our confidence that 'the cat is on the mat' is based upon consensus among competent observers. Similarly, our confidence in universal human rights should be based upon consensus among competent people. Not universal consensus, of course (no one expects agreement from such 'experts' on human rights as Saddam Hussein; we can safely exclude him and many others from the group of competent people); but a reasonable amount of consensus is still a must. To avoid the difficulties raised by «the multiculturalism debate», I shall avoid the topic of cultural relativity, and suppose that the consensus needed is (at least) consensus among open-minded (liberal, tolerant) people in well-developed liberal democracies.

Now, the question appears: is there sufficient consensus inside this select club? Apparently, yes. Most people in such countries agree on a list of universal human rights, like the one in the famous Universal Declaration on Human Rights (UNO, 1948). But is it enough? I think not.

Second premise: Even if one accepts the suggestion that the existence of rights is as obvious and undeniable as the fact that 'the cat is on the mat', one has to concede that *rights are different from facts* at least in the sense that they justify duties (for other people). According to Raz,² it is in the very nature of rights to justify duties. We are then compelled to acknowledge that consensus on rights implies not only consensus on some statements (like those present in the Universal Declaration on Human Rights), but also (a significant degree of) consensus on *duties*. If two persons agree that refugees have a right to help, but cannot agree at all upon the relevant duties (the kind and extent of help others must offer), then it is very dubious that they agree at all: some could claim that refugees are entitled to help in the (Pickwickian) sense that they should be offered a free of charge plane ticket to go back to their original country (from which they've just fled), which is probably the very opposite of what others would understand by help for refugees. Claiming that there is a significant degree of consensus between the two groups would be ridiculous. The existence of rights obviously depends upon a significant degree of consensus on duties implied by

rights (at least among what I have called open-minded people in well-developed liberal democracies).

Third premise: But (again as Raz noticed) the way from rights to duties is not as simple as we might want. Rights are not reducible to duties (although they can justify duties). Rights are grounds for duties, but they are never the only grounds; i. e., humans can hardly be thought of as 'rights enforcing machines' – as single-task machines, functioning to enforce rights. The passage from legitimate interests (that ground rights) to duties (implied by rights) is always mediated by interests (private and/or public). Raz seems to suggest that the intervention of interests is somehow *external* and *ulterior* to rights (i. e., we first of all have rights and then think about the particular conditions in which they should be enforced). But this could easily prove to be a conceptual mistake. If private and/or public interests mediate between legitimate *interests* (of a person who claims rights) and *duties* (of others towards that person), then the mediation is *internal* and precedes the establishment of duties. The connection between legitimate interests (that ground rights) and private and/or public interests (mediating the passage to duties) is what Wittgenstein used to call *an internal connection*. In other words: *before* one can establish what one's duties are (in order that some rights be enforced), one must conciliate the legitimate interests (that ground rights) with other important, private and/or public, interests, which can be in accord or in contradiction with the legitimate interests. The existence of accord means that the legitimate interests create duties; the existence of a contradiction means that duties are reduced or abolished. (Obviously, you have no duty to save someone from drowning, with the price of drowning yourself).

Conclusion 1: conciliation of legitimate interests (that ground rights) with other private and/or public interests (relevant to the duties that might be grounded by rights) is a component of rights, an *internal element* of rights.

But then we can give the following argument:

If

1. there can be no agreement on rights, without a significant amount of agreement on duties (grounded by rights)
2. there can be no agreement on duties, without a significant amount of agreement on the correct conciliation of legitimate interests (that ground rights) with other important private and/or public interests

then

3. there can be no agreement on rights, without a significant amount of agreement on private and/or public interests and on the way they should be reconciled with the legitimate interests that ground rights (*Conclusion 2*)

It might be the case that the demands made by rights coincide with those made by public interests; such a coincidence eliminates any dilemma about priorities. But, unfortunately, it is not always the case that such dilemmas can be avoided: that is why in cases of deep social crisis, governments are allowed to ignore the demands made by individual rights and to concentrate on those made by important public interests. In such cases, the priority of 'universal' rights is abandoned, while the priority of some public interests wins. So we do have here a problem of reconciliation between the demands made by rights and the demands made by public interests. That is:

consensus on rights (among competent people) implies consensus upon the reconciliation that is needed between the two kinds of demand.

In order to see the full force of this idea, one has to bear in mind that:

A/ the 'normal' way to legitimate break or trespassing of human rights is public interest; the easiest (and probably the most frequent) way to legitimate a break of human rights is public interest (see Brown, *ibidem*, p. 109).

B/ the main differences on human rights (in different political regimes, societies or cultures) come from different understandings of the way this reconciliation should be made (remember, for instance, the differences between libertarians and social-democrats in understanding human rights)

C/ expressions are not introduced as universal instruments; they are meant to be used in certain situations (language games), and the concept of right is meant to be applied precisely in situations in which some people's legitimate interests are to be protected from other interests, including public interests; there is thus *an internal connection* (Wittgenstein) between 'demands made by rights' and demands made by '(public) interest'.

Thus, the existence of consensus on human rights implies the existence of consensus on the necessary reconciliation between the demands made by rights and the ones made by public interest. *And this is precisely what is lacking.* Brown's example about the right to carry firearms in the US is telling. Most British citizens

think that human rights (the right to life, for instance) and public interests (to diminish the number of life-threatening crimes) should be reconciled in such a way that self-protection (with guns) should not be permitted; many Americans seem to think differently. There is thus no consensus between the two nations (separated «by a common language»!) on what 'right to life' means, because there is no consensus on *what kind of duty* this right creates: does it create a duty to block access to guns, or a duty to open access to guns?

Of course, the objection can be raised: «even if in some situations consensus is lacking, in many others the consensus is present». But the answer can simply be: «True, but irrelevant». For what is at stake here is *the universality* of rights, i. e. their capacity to function as 'trumps'. Partial consensus is irrelevant, for it can only prove *particular commitments to rights, not their universality*. The British think that human rights and public interests should be reconciled in such a way that self-protection (with guns) should not be permitted; the Americans seem to think differently. *There is no consensus on what 'right to life' means*, and consequently the 'right to life' cannot be used as a 'trump'.

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Wittgenstein insisted that expressions are introduced and meant to be used in certain particular situations (*surroundings/Umgebung*); their application (and consequently their meaningfulness) is thus established only for such particular situations. We simply don't have rules of application for all the 'surroundings' that could exist, for any possible case: i. e., we do not have consensus and meaningfulness *in general*, we only have consensus and meaningfulness for some particular kinds of situations. As he said, there is no such thing as an 'universal' meaning of *hope*. We only understand the word in certain contexts, against a certain background, in certain 'surroundings'. There is no such thing as 'universal' meaning, but only *particular* meanings. Expressions have meanings only to the extent that there is consensus upon situations of use, upon the way in which they can be used in certain cases.

Analogously, one could say, «there is no such thing as universal rights, but only *particular* rights». Human rights exist only to the extent that there is consensus on their application, i. e. on the way in which demands implied by them should be reconciled with interests (and public interests). In many cases, there is a reasonable amount of consensus on the priority of rights over other private or public interests; in such cases, rights should be respected as if they were 'universal' (i. e., 'absolute') and

they do function as 'trumps'. But in many other cases, the consensus needed is lacking; opinions (concerning whether priority should be given to rights or to some important public interests) are divided. Consequently, in such situations rights cannot function as 'trumps'. But since the universal consensus needed in this respect is lacking, there can be no such thing as universal rights (i.e., absolute rights).

A confusion must be prevented here, though. Rights always remain universal, in the sense that, once accepted as rights (and as having, in the relevant context, a priority over other legitimate demands), they apply to everybody, not just to some particular persons (*sense 1*). But, on the other hand, even rights that are universal in the *sense 1* still remain particular in another sense (*sense 2*): they only apply when consensus exists on the existence of a 'normal' background which makes their application possible, i. e. when consensus exists that no 'special' political requirements prevail over them or overrides them. As Raymond Geuss remarked, “virtually all states will have provisions for overriding individual rights in times of natural disaster, civil unrest, or armed foreign invasion”.³ But this boils down to a recognition of the fact that rights are particular, in the sense that, even if recognized as having a priority over many other legitimate interests, they only apply in cases where no (exceptional) prevailing public interest is at stake. Now, this obviously implies that some sort of consensus must exist as to whether such a prevailing public interest exists or not, or as to whether the priority of individual rights should be recognized (against the particular background) or abolished temporarily (due to exceptional circumstances). But this means that universal human rights simply cannot function as trumps, because they exist only to the extent that there is consensus on their application, i. e. on the way in which demands implied by them should be reconciled with other interests (mostly public interests). Since there is no universal consensus in this respect, there is no such thing as universal rights.

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Sources of error. But where our conviction about the universality (the 'absolute' character) of rights springs from? From *rationalism*, in Michael Oakeshott's sense, *i e. from our tendency to overestimate* abstractions, formulations, sentences. What one finds in the Universal Declaration on Human Rights (UNO, 1948) are abstractions, and there could be consensus on them, but the consensus on abstractions is negligible or largely irrelevant. What is really needed here is a consensus on practices (of reconciliation between the demands made by rights and demands made by public interests). Many think (and Raz among them, it seems to me) that we first of all have consensus on a certain general right (*prima facie* consensus) and then we have particular situations in which we judge whether grounds for enforcing that right are strong enough (stronger than other grounds, working in the opposite direction) to take action. This seems to be a mistake. We first of all have particular situations, with certain rights applicable to them, and only then we tend to generalize. We can agree on many particular cases in which some individual rights apply (function as 'trumps'), but still disagree on other cases. And where consensus on some particular situations is lacking, no *universal* commitment to human rights can exist. Analogously, it is not the case that we know in general what *hope* is, and then, in some particular situations, we ponder on whether the general idea applies or not; it is rather that we know what hope is only in some particular situations, and in other cases we extend the use of the word if and only if we discover a sufficient number of *family resemblances*. And, of course, the decision whether the number is sufficient or not is a matter of consensus among competent speakers. There can be no universal sense of hope, then, but only particular senses, and they exist only to the extent that consensus exists on those particular situations and on the relevant family resemblances. If people do not agree on whether duel is a game or not, they do not have *universal consensus* upon what games are... and *no universal meaning of 'game' can exist* (but that does not imply that the word is useless). In the same way, the absence of consensus on the priority of rights over public interests in some situations leads to the conclusion that no universal (i. e., absolute) rights can exist.

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Moral: Rights as Rabbits. I am not absolutely sure that Quine was right, but if he was, then when the Western anthropologist and the member of a jungle tribe agree on the word 'rabbit', they may mean different things. Linguistic consensus is not enough.

My point is that in the case of rights, exactly like in the case of translation, *linguistic consensus is not enough*.

One could thus defend a thesis about *the 'indeterminacy' of rights*, somehow parallel to Quine's thesis about *the indeterminacy of translation*. (But don't be scared: I am not going to argue that Saddam Hussein has a different but equally correct understanding of rights as we have).

If the British understand something by 'right to life' (e. g., a right to be protected by police), and the Americans understand something else (e. g., both the right to be protected by police and the right to carry guns), this is some sort of indeterminacy of rights: where police protection exists, some (the British) see a rabbit (protection by police surveillance), where others (the Americans) see only rabbit-parts.

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Let me summarize by trying to answer the following question: *When we agree upon rights, what are we actually agreeing upon?* There are at least two different interpretations that should be considered.

Interpretation 1: when we agree on rights, we agree on the legitimate (rights-creating) interests, we agree that they create duties (for others), but not necessarily upon what these duties are (i. e., on the existence of some duties, but not on *which* duties are exactly implied). I think one can find strong objections to this interpretation.

Objections to Interpretation 1. There are several implausible consequences of *Interpretation 1*:

A/ both China and the USA appear as having agreed on human rights, although not on the duties implied by human rights (i. e., not on how human rights should be protected); on ends, but not on means;

B/ suppose there was a religious sect that accepted the existence of everyone's right to self-defence, but accepted no violent actions – a sect that asked all believers to defend themselves exclusively by praying; such a sect could be considered as having the same views on human rights as most of us, and differing from us only as to the means one is allowed to use in order to defend oneself.

But since **A/** and **B/** can hardly be accepted, we are led to

Conclusion 1: agreement on rights is conditioned by a significant degree of agreement on duties (that must be fulfilled in order that rights be protected).

Interpretation 2: when we agree on rights, we agree both on legitimate interests and (to a significant extent) on the relevant duties (created for others by those legitimate interests); where there is no agreement at all on the relevant duties, there can be no agreement on rights (except in a 'Pickwickian' sense).

There are several arguments that support this interpretation.

Argument 1: a significant degree of agreement on duties is conditioned by a significant degree of agreement on individual and public interests that can conflict with the legitimate interests meant to be protected by rights.

It is not the case that we first recognize that we have duties, and only after that check whether those duties can be fulfilled (i. e., whether they are or are not conflicting with other legitimate interests than those meant to be protected); rather, we first check whether the legitimate interests meant to be protected by rights can be reconciled with other legitimate interests (including public interest), and only then recognize (or not) the existence of some relevant duties.

Example 1: the duty of jumping into water to save a drowning person does not exist for someone who cannot swim (and is thus in danger of drowning himself); it is not the case that he has a duty, but cannot fulfill it (because he cannot swim).

Objections are still possible, of course.

Objection to Interpretation 2: one does not have a duty to jump into water, but only a general duty to help (that can be fulfilled by making a phone call, asking others to jump into water etc.)

Reply to the above objection: we believe in general duties simply because we assume that in general fulfilling duties (in order to protect legitimate interests) does not imply a conflict with other legitimate interests (individual and/or public); *it is only because we presume there is no conflict between these two kinds of interests that we accept the idea of general (unspecified) duties* (i. e., we make a 'no conflict'-supposition).

Example 2: if by simply making a phone call or by asking others to jump, one put others or oneself at deadly risk, even those ways of helping would not be considered a duty; a sea captain whose ship is in danger of sinking (and its passengers

in danger of drowning) is not required to jump into water to save a certain drowning person (he presumably has other, more important, things to do, things on which the safety of many people depends); if we feel that the captain should jump, it is because we assume that he does not put in jeopardy the life of his passengers by doing that.

Thus, the hypothesis can be made that *behind any specific kind of duty there is a supposition that by protecting the legitimate interests (through fulfilling of that duty) one does not put in jeopardy other legitimate interests.*

Conclusion 2: agreement on rights implies not only a significant degree of agreement on the relevant duties, but also a significant degree of agreement on the relevant individual and public interests, and on the way they should be reconciled with the legitimate interests meant to be protected by duties; there can be no real consensus on rights, where there is no real consensus on interests, in particular on public interests and on the way they should be reconciled with the legitimate interests meant to be protected by duties.

Conclusion 3: the consensus on rights is lacking not only among different cultures or political regimes, but also among nations who understand differently the reconciliation between public interests and duties meant to protect rights; and the lack of consensus prevents the functioning of rights as 'trumps'.

Example 3: if the British (or for that matter, the French) attitude towards possession of fire arms by individuals is different from the American attitude (I am not sure whether it is), then the British (the French) simply have a different view of human rights as compared to Americans.

Conclusion 4: the consensus on human rights is not reducible to the consensus on some sentences in the Universal Declaration on Human Rights adopted by the UN in 1948, or in another document (Constitution etc); such a consensus implies the existence of a significant degree of consensus on the way duties (meant to protect persons who claim rights) are to be reconciled with other legitimate interests, in particular with public interests; as long as such a consensus on reconciliation between interests is lacking, the consensus on human rights is lacking too (and not only between Americans and Iraqis or Chinese, but also between Americans and British, or French).

Conclusion 5: thus, the fashionable idea that the existence of rights is as obvious as the truth of 'the cat is on the mat' is plainly false; the existence of rights is not *a manifest truth* (in the Popperian sense), and the so called 'consensus on human rights in the international community' is simply a piece of propaganda.

¹ Chris Brown *Universal human rights: a critique*, in Tim Dunne, Nicholas J. Wheeler (eds) *Human Rights in Global Politics*, Cambridge University Press, 1999

² Joseph Raz *The Morality of Freedom*, Clarendon Press, 1988

³ Raymond Geuss *History and Illusion in Politics*, Cambridge University Press, 2001, p. 132