

Epilogue

The Tilted Scales of Justice

This inquiry, with all its limits and flaws, has drawn a partly familiar, partly surprising picture about the place of human rights in human life and the human makeup.

Our conceptual and analytical clarifications have indicated that human rights are best understood as a subcategory of a particular normative position in which human beings find themselves: the position of having a subjective right. This position consists of complex normative relations including a rights-holder's claims to do or not to do X, a necessarily correlated duty of the addressee of the right to do or not to do Y, a privilege to do or not to do X on the part of the rights-holder and a necessarily correlated no-right of the addressee that the rights-holder does or does not do X. Powers and immunities are often part of the normative content of such a right.

Human rights are those subjective rights that protect specific goods of human beings, in particular dignity, life, certain liberties, equality and the material means for pursuing a dignified life. They are part of ethics and legally enshrined in (national) constitutions and supranational and international law. To limit human rights to human rights guaranteed in international law is a fundamental misunderstanding both of the current global legal architecture of human rights and of the explicit intentions of those constructing it.

The history of the development of the human rights idea and ultimately of the institutions embodying it reveals quite clearly that this idea has deep roots in humans' social form of life. This does not mean that we can expect to discover a universal declaration of human rights written by a prehistoric cave dweller. The lessons taught by the history of human rights are much more complex than this. This history is not about every aspect of ethics, but it is not just the history of the explicit concept of human rights either. There are various normative phenomena that are *not* human rights but still are important for the history of human rights, because they contributed to the formation of those building blocks that ultimately became the material for the explicit concept of human rights.

The most plausible account of this trajectory is that the raw material of the human rights idea includes specific, concretely situated not arbitrary, but principled moral judgments about the justness and moral rightness of particular intentions, actions and states of affairs – archetypically exemplified by Creusa’s rebellion against the permissibility of her rape in which she invokes the rights she enjoys, even towards a god. During a long historical process, these specific judgments were slowly objectified as to the goods protected, framed in abstract terms, generalized across cases, universalized across people, purged of persistent patterns of exclusion, ultimately made explicit in political and ethical thought and very recently turned into working institutions of positive law. This process was not a smooth ride but – as always in the history of ideas and social change – a tale of progress and regression, during which generations who lived under new and treacherous ideological stars consigned to oblivion the hard-won insights of their forbears, a history of struggle and of the successful suppression of ideas by force. A good example of this, with little consequence for the author but not entirely insignificant consequences for the history of human rights, is the banning of some of Las Casas’ works by the Spanish Inquisition and the effects that this ban had on Europeans’ self-perception of their role in the world, among many other such cases involving the consignment of unpleasant historical truths to the “memory hole” that Orwell so clear-sightedly described.¹

Some examples have illustrated this conclusion – from the political rights of Athenian noninclusive democracy to Enlightenment theories of rights. The discussion did not seek to provide a full account of the complex social, political, economic, religious and cultural contexts of these examples. Moreover, and importantly, no assumptions were implied about a linear, continuous, triumphant historical process, coherent ideas about rights over millennia or simple causal connections between the thoughts about rights of different epochs. The historical review served limited expository purposes: It pursued merely the modest aim of highlighting some important findings for the specific cognitive interests of our inquiry.

Importantly, our study has made the case that intellectual elitism and cultural myopia, which sometimes even smack of racist bias, must be avoided. If we are to steer clear of such prejudice, investigating indigenous cultures, including oral and acephalous civilizations, is of crucial interest. This book has argued that it is entirely implausible to deny human beings living in such societies and cultures the basic, principled moral intuitions that form the raw material of human rights. The voices of the victims of colonialism or slavery, as far as we know anything about them, speak rather strongly against the assumption that the human beings living in these cultures were just moral blank slates, who might have felt the pain of, say, dying in the desert like the Herero in the German genocidal campaign of 1904, but not its injustice.

¹ Orwell, *Nineteen Eighty-Four*.

There is thus substantial historical evidence to show that these moral intuitions are not limited to white, male Europeans (or any other subgroup of the human species), but form part of the common ethical heritage of human beings. The journey from such intuitions to an explicit concept of human rights is a long one. There is, however, no reason to assume that only one group of people can make this journey. No one group has privileged access to the idea of human rights. It should be noted that Europeans, the “West” or the “Global North” did not travel smoothly down this road either. The idea of human rights met with fierce resistance in Europe as elsewhere, and whatever sway it has over human affairs was wrested from the hands of the leading social and political powers.

The more recent history of the explicit idea of human rights only confirms these findings. The human rights project has been promoted by people from very different cultural, political and religious backgrounds, but with a common idea – the idea that governmental and social power has to be limited, that human beings and their well-being count equally, that humans owe each other concern and respect and that liberty is no minor affair for a human life.

Importantly, the history of human rights illustrates a further point. The problem of the inclusion of all human beings in the sphere of protection afforded by human rights is one of the core issues of human rights history. It lies at the root of major historical tragedies, including racism, slavery and the subjugation of women. This problem has two dimensions: first, the formulation of a proper concept of what makes a human being human and thus entitled to rights; and second, the proper application of this concept to all members of the human species. The former does not necessarily entail the latter. Various theories throughout history had a plausible idea of what human beings were but did not apply it to subsets of the human species, such as indigenous Americans because of racist prejudice or women because of misogynist ideas about women’s inferior capacity. This problem is far from solved – today, for instance, problems of bioethics or the rights of elderly people (which have become matters of life and death during the Covid-19 pandemic) show that the question of who is to be regarded as a (full) human being and bearer of rights is still open to intense debate in many aspects. Moreover, the question of the rights of nonhuman animals indicates yet another frontier of the theory of rights. The question of whether human beings have human rights is, however, independent of the question of whether and in which sense nonhuman animals have rights, too. One can assert the former without precluding the latter.

Our reflection on the justification of human rights has suggested that any justificatory account of human rights needs to formulate a theory of goods essential for human beings that are important enough to be protected by human rights, a political theory of the role of human rights in society that contributes to the enjoyment of these goods and a theory of the normative principles of justice, solidarity and respect for the intrinsic worth of human beings, the principles that are the ultimate sources of the normative position of rights.

In light of what we can reasonably assume about human beings, the protection of dignity, life, liberty, equality and the means to lead a dignified life is well justified by an anthropologically informed theory of human goods. Political theory offers no compelling case against human rights as ethical and political principles and legal institutions. Human rights promise not a perennially blissful Elysium, but something that nevertheless is very precious: an order in which certain basic demands stemming from the principles of justice, solidarity and respect are satisfied to such a degree that human beings can pursue meaningfully whatever their aim in life may turn out to be. Given the experience of the mass appeal and destructive power of totalitarian ideologies propagating the worthlessness of human life and existence as such, doubts about the need to protect basic goods of human beings by means of human rights are politically naive and a slap in the face for the victims of these regimes, who perished because of the mass support for the contempt of their rights.

A theory of human rights cannot rest its case here. Recent research on moral cognition and evolution has put the question of whether human rights are justifiably regarded as universally obligatory normative principles squarely on the table. Perhaps, this research implies, human rights are something quite different, nothing but a cognitive illusion necessarily produced by the structure of the human mind but without any claim to normative justification. Moreover, some evolutionary accounts of morality have asked whether a morality of human rights and correspondingly the institutions of the law are in fact irreconcilable with the kinds of proximate cognitive mechanism that natural selection could have produced in humans and that empirically determine moral judgment – that is, whether human rights do not ultimately demand the impossible of human beings as they really are.

Our survey of current neuroscientific theories of moral cognition and the evolution of the human mind has given ample reason to conclude, however, that nothing in this theoretical field undermines the legitimacy of human rights. There is no compelling empirical evidence or theoretical argument proving that human rights are cognitive illusions or anything of the sort. A sufficiently complex theory of evolution confirms the possibility of human cognitive faculties (whatever they may turn out to be) that do not merely produce the illusion of being directed by altruism, justice and respect, but are in fact determined by these principles.

A promising theory to account for the structure and content of human morality is the mentalist theory of moral cognition, assuming a common framework of human moral judgment, thought and sentiment, generated by a shared faculty of moral cognition – a moral competence with well-defined principles that enables human moral judgment with its rich volitional and emotional consequences. By means of a differentiated account of human cognition, this theory thus reconstructs an assumption that has guided the history of ideas since antiquity, namely that humans are endowed with a moral understanding that is one of the defining features of their human identity.

An empirical theory of the human moral mind provides no normative arguments for the justification of human rights as such. This is also true in the weak Goodmanian sense of taking an epistemic practice as an element of justification. Understanding a descriptively adequate account of human moral cognition as a presumptive, defeasible reason for the justification of the principles identified as empirically determining human moral judgment leads to the same conclusion: Ultimately, arguments for the normative validity of normative propositions must be derived from normative theory, not from psychological facts.

The theory of moral cognition nevertheless fulfills three important constructive functions. First, it helps to form nothing less than a rich, empirically grounded explanatory theory of the cognitive basis of human moral judgment and legal thought, which, if correct, would be a major scientific achievement. Second, it is a tool to assess critically theories that aim to delegitimize ethical precepts such as human rights with the means of moral psychology, neuroscience or evolutionary theory. Third, as a rather intriguing perspective, it provides reason to think that there is at least a partial congruence between normative ideas justified by normative theory and the empirical structures of human moral thought: In certain respects, human beings may turn out to be the creatures they ought to strive to be.

Any argument for the validity of human rights is fallible and open to criticism. But this does not mean that the propositions “It is justified to enslave black people” or “It is justified to rape women” enjoy the same epistemic status as “It is not justified to enslave any human being” or “It is a severe crime to rape women.” The history of skepticism has taught us that there is no argument proving beyond possible doubt that what seems true or right to human beings is in fact true or right. However, it also has long been clarified that there is no argument showing that what seems true or right to human beings is in fact *not* true or right – the latter being the well-known self-contradiction of a skepticism asserting the truth of the proposition that no proposition is true.

If it thus is possible that human beings do in fact understand something true and right about the object of their reflection when they think that they understand something true and right about an object, there is only one epistemological way forward: to seize this precious epistemic chance and to engage in the constructive, fallible pursuit of insight, based on whatever argument can be mustered in favor of a given proposition. That human beings are bound by the necessarily existing limits of their (moral and legal) understanding forms no reason not to travel as far as these boundaries permit. Looking at concrete arguments may provide some epistemological encouragement to pursue this course: For instance, it seems rather hard to maintain that there are not better arguments for the prohibition of slavery and rape (and the implied rights of people) than for the permissibility of such actions.

In this fallible, albeit meaningful sense, universal human rights are justified. However, the universalism that they imply is open for concrete human rights pluralism. One reason for this is epistemic modesty, which does not confuse the

possibility of universally valid insight with the assumption that one oneself (as an individual or as a community) has actually gained this universally valid insight. Abstract principles of human rights can, moreover, be realized in more than one form – there is not just one concrete way to a meaningful protection of human rights. Furthermore, human rights spelled out in concrete terms are about important choices of individuals and communities. Given human autonomy, both individuals and the communities they form retain the right to experiment with new ways of living, including varying ways of rendering human rights concrete that must be respected as long as they do not betray the core promises of human rights. Human rights universalism is therefore not wedded to a rigid system of indubitable content revealed by solitary master thinkers, but is a living aspiration, a quest to critically reappropriate the idea of human rights in endeavors that in the best case are collective and democratic, excluding nobody.

In sum, the argument leads to this encouraging conclusion: Principles of egalitarian justice, of human solidarity, care and respect for human dignity, together with a sufficiently rich concept of human existence and a political theory of the means for human flourishing embedded in a plausible theory of mind and its place in natural history provide good reasons to believe that the idea of human rights is as well-justified as anything ever has been in the history of fallible human thinking about morality and law.

Such a theory of human rights, which has answers to the theoretical challenges formulated by the many kinds of skeptics encountered in this inquiry, constitutes an essential element of the intellectual defense of human rights. This would be no small achievement.

The Greek poet Giorgos Seferis wrote in his poem *Santorini*:

Naked we found ourselves on the pumice-stone
 watching the rising islands
 watching the red islands sink
 into their sleep, into our sleep.
 Here naked we found ourselves, holding
 the scales that tilted towards
 injustice.²

² Giorgos Seferis, *Poimata* (Athens: Ikaros, 1998), 75 line 7–13, Gynmnpaiaia: A'. Santorini:

Βρεθήκαμε γυμνοί πάνω στην άλαφρόπετρα
 κοιτάζοντας τ' αναδυόμενα νησιά
 κοιτάζοντας τὰ κόκκινα νησιά νὰ βυθίζου
 στὸν ὕπνο τους, στὸν ὕπνο μας.
 Ἐδῶ βρεθήκαμε γυμνοί κρατώντας
 τὴ ζυγαριά που βάραινε κατὰ τὸ μέρος
 τῆς ἀδικίας.

Translation: George Seferis, *Complete Poems*, trans. Edmund Keely and Philip Sherrard (Vancouver: Anvil Press, 1993), 31.

This is how things are, after about 100,000 years of human civilization, ingenuity, foolhardiness, petty sordidness, enchanting and even sublime nobility, after much longing for and the intermittent reality of justice. We stand naked on the rough pumice-stone of our epoch and the scales are still tilted towards injustice. Human rights represent one attempt to balance these scales, never completely, never forever, never on all accounts, but for long enough to show sufficient respect to what humans owe to the better parts of their own humanity.

Human rights therefore are not trivial. They are more than playthings to satisfy one's intellectual ludic drive. Human rights are not the means of solving all of the world's problems. But there is a lot that depends on rights, most importantly the well-being of individuals and sometimes even their dignity and lives.

Moreover, respect for human rights is of great significance not only for those who suffer from human rights violations. It also is of some consequence for those people lucky enough to have their human rights sufficiently respected. At least this is so if they belong to the perhaps not insignificant number of people who, despite their own favorable circumstances, are still not able to breathe freely when they have to witness the ongoing tragedy of folly and pain, of repression and contempt for the equal worth of human beings that already have marked too much of human history because they sense the force of some probably quite common elements of human experience: To feel the spark of generous, liberating magnanimity that adds considerable beauty to humans' inner life and that makes it natural to care for our fellow mortals, whoever they are, wherever and under whatever stars they spend their short and precious time on Earth; to be enlivened by the unpretentious daily work of justice and human goodness; and thus to long for the profound relief of some fresh air bestowed by any modest steps towards a culture and law of human decency.