

The Justification of Human Rights

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I am honored and pleased to be part of this conference which brings together distinguished representatives from such an impressive array of countries. Moreover, this is an extremely important topic, and it is a pleasure to discuss it in some depth with such worthy panelists.

I shall briefly outline my position on the subject, bearing in mind the concern of the organizers to address the role of secular and religious referents and warrants in the process.

In a nutshell, my position regarding the justification of human rights is based on an effort to recover and rehabilitate the natural rights tradition. I take the idea of natural rights not to depend on religious belief, though it certainly seeks to protect and accommodate it. Rather, it depends on an understanding of human nature as “rational, self-aware, and morally responsible,” as one author says.¹

This understanding supports a primary notion of subjective rights, which means that all individuals, as individuals, possess an entitlement to demand (or have demanded for them) a certain performance or forbearance under threat of sanction for noncompliance. The understanding also entails certain correlative duties and obligations owed by every individual in respect to protecting the rights of others.

Incidentally, moral and legal rights are distinguishable in regard to the character of the applicable sanction: *legal rights* are physically enforceable within a system taken to possess authority over a monopoly of legitimate force; *moral rights* are otherwise enforceable, for example, by verbal censure.

The range of subjective rights under consideration is focused especially on the protection of certain requirements for survival taken to be common to every human being. Among other things, natural rights protect against *arbitrary force*, which, minimally, is the infliction of death, physical impairment, severe pain/suffering for entirely self-serving and/or knowingly mistaken reasons. To refer only to self-interest or knowingly to deceive in the act of inflicting death, severe pain, etc. is “morally incomprehensible” because the reasons given are no reasons at all. This

¹ Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150-1625* (Atlanta: Scholars Press, 1997), 76.

is not an observation about what human beings happen to believe or not. It is an observation about what, as rational and moral agents, human beings *are able* to believe or not, *are able* to make sense of or not. It is about the meaning of moral reason as regards the justification of action pertaining to critical aspects of human survival. Thus, the random slaughter of some twenty-four school children and teachers in Newtown, Connecticut last year is necessarily regarded as an act of “senseless violence.”

On this understanding, force (as sanction) may be used in response to arbitrary force so long as it is demonstrably aimed at combating and restraining arbitrary force, and does that consistent with three “rules of reason”: necessity, proportionality, and effectiveness.

Accordingly, I hold that human rights language, consisting of rights regarded as both moral and legal, rests on this understanding. Let me make six points by way of elucidation.

1. Human rights language was drafted and codified in direct response to a paradigmatic case of arbitrary force, namely, the record, particularly, of German fascist practices before and during World War II.
2. It enshrines a basic set of rights, referred to in Art. 4 of the ICCPR as “nonderogable” (nonabridgeable) rights, which protect everyone against the worst forms of arbitrary force (extra-judicial killing, torture, “cruel, inhuman, or degrading treatment or punishment,” enslavement, denial of due process, etc.). We should add to this list what are called, “atrocities crimes,” as codified in the Statute of Rome: genocide, war crimes, and crimes against humanity. There is no corresponding list of nonderogable rights in the ICESCR, but there are some interesting developments in that direction. In General Comment 14, the Human Rights Committee has enumerated a set of “core obligations” requisite for guaranteeing Art. 12 of the ICESCR, which guarantees “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,” and it has ruled that “a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations...which are non-derogable.”² Failure to enforce these

² The core obligations, which every State party is bound to comply with, are such things as, “ensuring the right to access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups”; “ensuring access to minimum essential food which is nutritionally adequate and safe, and to ensure freedom from hunger for everyone”; “ensuring access to basic shelter, housing, and sanitation, and an adequate supply of safe and potable water”; and “ensuring equitable distribution of all health facilities, goods and services.”

obligations, where feasible, would constitute arbitrary neglect, a close relative of arbitrary force.

3. It adds a set of “derogable” rights (abridgeable under only the most extreme circumstances, such as emergencies), like freedom of speech, assembly, and participation in government that are designed to assure maximum protection against the violation of nonderogable rights.
4. Though human rights language explicitly obligates individuals, it also obligates states, meaning that states exercise force legitimately insofar as they enforce human rights; otherwise, they administer force illegitimately, which is to say, arbitrarily.
5. With the development of the modern state, the technology of repression has outstripped the organs of restraint, making all the more urgent the protection of human rights.
6. Violations of nonderogable rights and prohibitions against atrocity crimes are “wrong in themselves”—“outrages,” that is, against the “conscience of humankind,” in the updated language of the Preamble to the UDHR, and they are also a severe threat to “peace in the world,” as it also says.

Thus, the moral foundation of human rights language consists of “natural” rather than “extranatural” or “supernatural” assumptions concerning the absolute inviolability of prohibitions against arbitrary force. The idea of natural rights also pertains to the protection of public goods—health, safety, order, and morals³—that are assumed to be of common natural concern as vital requirements for human survival. The natural grounding in both cases is “secular” in the sense that it is accessible to and obligatory upon all human beings, regardless of distinctions “such as religion,” in the words of Art. 2 of the UDHR.

Where, then, does religion come in? A key feature of arbitrary force as practiced by the German fascists was the relentless imposition by force of a specific set of beliefs upon everyone under their control. That meant persecuting all religious and other forms of dissent. Such actions were a serious violation, according to a natural rights understanding, because coercion is not a justification for believing the truth or rightness of anything. When someone says, “Believe what I tell you or I’ll

³ It is not clear that the term “public morals” has any determined meaning in human rights jurisprudence.

punish you,” that is a clear case of arbitrary force—of using force without justification. Expressions of belief can of course be curtailed by coercion, but that just begs the question whether such coercion is justified.

In human rights language, therefore, such reasoning protects “conscience, religion, or belief” against “being subject to coercion which would impair...freedom to adopt a religion or belief of [one’s] choice” (Art. 18, para. 2, ICCPR).

When held up alongside the “natural” justification of human rights language, the special protection of “conscience, religion, or belief” (and the practices associated with them), assured by Article 18 of the UDHR and ICCPR, introduces what I call, a “two-tier” system of justification.

The first tier lays down a “natural” (secular) justification that serves to hold people everywhere accountable to the terms of the language, backed by a provision for universally legitimate enforceability (subject to the three “rules of reason”), as well as to provide standards of protection to which everyone may appeal, regardless of religious or other identity.

The second tier permits and secures a wide, highly pluralistic range of “extranatural” justifications for human rights language, and, of course, for much else related to the broad expanse of human social life and experience. Second-tier matters are irreducibly pluralistic because, among other things, they involve intimate, subjective experience in regard to social attachment, loyalty, and identity, as well as ultimate sacred commitments not readily given up. Learning to tolerate and respect without violence these inescapable differences, by upholding the right to freedom of conscience, religion, or belief, appears to be critical to achieving peace, as is conclusively shown in the recent book by Grim and Finke on the connection between violence and violations of religious freedom.⁴

Religious and other forms of second-tier justification are undoubtedly indispensable for mobilizing adherents to the cause of human rights. It is also clear that whether it supports or challenges human rights language, sustained attention to that language by different communities of conscience, religious or not, can help identify lacunae or blind spots in the human rights instruments, can assist in finding, where necessary, colloquially acceptable substitutes for human rights

⁴ Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (New York: Cambridge University Press, 2011).

language, and can even bring about significant change, for example, in interpreting and applying religious freedom, as has happened as the result of litigation by minority religions in the United States and elsewhere.

Engagement with human rights matters in these ways illustrates the importance of the second tier in the ongoing, often complicated, and sometimes testy negotiations between the two tiers. One additional function of particular significance, performed by the second tier, is the process of appealing for conscientious exemptions from general and neutral laws permitted by human rights jurisprudence.⁵ Of special note is the requirement that in imposing restrictions on conscientious belief and practice, the state bears the burden of proof in demonstrating both that there is a compelling state interest at stake, and that the restriction is as unintrusive as possible. In that way tier two serves to limit the reach of tier one, and to remind it of its obligation of special deference to tier two.

At the same time, we must remember that all these second tier undertakings are themselves constrained by the first tier, in accord with the underlying assumptions of human rights language. Tier-two justifications must yield to the inviolability of the “natural” prohibitions against arbitrary force, as well as of the state’s responsibility, “as prescribed by law in a democratic society” and as is “necessary,” for protecting the public goods of safety, health, order, and morals, and the “fundamental rights and freedoms of others” (Art. 18, para. 3, ICCPR).

My proposal, in sum, is that human rights language rests on a natural rights understanding that prescribes a two-tier theory of justification. Accordingly, the first tier protects, encourages, and is limited by the second tier, but it also constrains it in very important ways.

⁵ Human Rights Committee, General Comment No. 22, para. 8.