

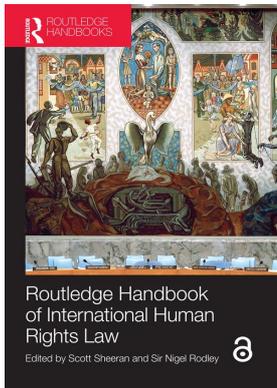
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Routledge Handbook of International Human Rights Law

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Human rights in political and legal theory

Publication details

<https://www.routledgehandbooks.com/doi/10.4324/9780203481417.ch3>

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Published online on: 13 Dec 2013

How to cite :- Guglielmo Verdirame. 13 Dec 2013, *Human rights in political and legal theory from:* Routledge Handbook of International Human Rights Law Routledge

Accessed on: 27 Sep 2020

<https://www.routledgehandbooks.com/doi/10.4324/9780203481417.ch3>

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Human rights in political and legal theory

*Guglielmo Verdirame**

1 Introduction

Contemporary academia generates vast amounts of human rights theory. Lawyers and anthropologists, philosophers and political scientists, historians and even natural scientists have contributed, and are contributing, to it. This chapter focuses on debates about human rights in legal and political theory. Providing a comprehensive exposition of theoretical argument in these two fields is still no easy task, particularly if one aims to offer an account that is not confined to the province of the present and includes a broader temporal dimension.

To navigate these challenges I have chosen four avenues of inquiry. The first one concerns the relationship between the idea of human rights and the natural rights tradition: are human rights a restatement or an evolution of natural rights? Or do they represent a genuine novelty? Secondly, the debate on foundations is examined, distinguishing between those who argue that foundational inquiries should be at the centre of theorising about human rights and those who consider argument about foundations to be inconclusive and even counterproductive. The last two avenues of inquiry focus on the two terms that shape any dialectics on human rights: the individual and power. Every theory of human rights will rest on, and in some cases openly advance, a conception of the individual and a phenomenology of power.

These four avenues do not purport to be exhaustive of the debates in legal and political theory about human rights. The goal is to offer an analytical discussion that conveys a range of philosophical arguments about human rights in some depth.

2 The relationship with the natural rights tradition

Inquiry into the intellectual origins of the idea of human rights is laden with a political anxiety. This anxiety is prompted by the frequent criticism that human rights are a ‘Western’

* I am grateful to the Templeton Foundation for its support, via the Freedom Rights Project, for my research on the philosophy of human rights. I am also indebted to the comments I received from the editors of the *Handbook*, and from Vidya Kumar, Ned Lebow, Larry Siedentop, John Tasioulas and Leif Wenar.

idea.¹ Insofar as theoretical argument takes the idea of human rights back to one or more of the Western philosophical traditions whence it might have sprung – medieval scholastics, natural law, the Enlightenment, or liberalism – it is viewed with suspicion and apprehension by those keen to defuse this political attack and avoid the association of human rights with the West.

Were it not for its political significance, the criticism of human rights based on their intellectual origins would deserve no attention. It is just an *ad hominem* fallacy on a civilisational scale which, curiously, is often advanced by individuals who are themselves part of the West. Its dubious logic notwithstanding, this argument recurs in discussions about international human rights. One explanation for its success is that the international arena in which the human rights project is situated is defined by peculiar forms of legitimation and de-legitimation. In that universe the geopolitical labelling of a project and an idea matters a great deal.

Among the contemporary thinkers who see clear continuity between the natural rights tradition and the modern idea of human rights is James Griffin.² He has developed a theory of human rights, centred on the notion of personhood combined and on certain practical considerations, which purports to build on what he calls the ‘Enlightenment Project on Human Rights’. ‘There has been no theoretical development of the idea itself since then’, he maintains, but the term human rights is ‘nearly criterionless’ and suffers from an indeterminateness which must be remedied: here lies, in his view, the challenge for present-day theorists.³ John Tasioulas has similarly argued that there is ‘a vital commonality between the discourses of human rights and natural rights’.⁴

Others argue that the origins of the idea of human rights go back to the time before the Enlightenment, in particular – as explained by Larry Siedentop – ‘to innovations in canon law of the twelfth and thirteenth century’ with Christian moral intuitions playing such ‘a pivotal role in shaping the discourse that gave rise to modern liberalism and secularism’ that ‘the pattern by which liberalism and secularism developed from the sixteenth to the nineteenth century resembles nothing so much as the stages through which canon law developed from the twelfth to the fifteenth century’.⁵ ‘Rather than entering ‘Western political thought with a clatter of drums and trumpets in some resounding pronouncement like the American Declaration of Independence or the French Declaration of the Rights of Man’, this account of the origins of human rights sees them first coming into existence ‘almost imperceptibly in the obscure glosses of the medieval jurists’.⁶

1 Although this criticism has been almost a cliché, it has also been articulated in an intellectually more refined way. See, for example, Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia, Pennsylvania University Press, 2002). For a response to these criticisms, see Michael Freeman’s chapter on universalism and cultural relativism in this collection.

2 J. Griffin, *On Human Rights* (Oxford, OUP, 2008).

3 Ibid. at 13, 14 and ff. On the natural law tradition see B. Tierney, *The Idea of Natural Rights* (Michigan, Eerdmans Publishing, 1997) and, for a more Thomistic account, H. Rommen, *Die Ewige Wiederkehr des Naturrechts* (Vienna, Verlag Jakob Hegner, 1936), translated as *The Natural Law: A Study in Legal and Social History of Philosophy* (Indianapolis, Liberty Fund, 1998).

4 J. Tasioulas, ‘Towards a Philosophy of Human Rights’, 65 *Current Legal Problems* (2012) 26.

5 L. Siedentop, *Inventing the Individual* (London, Allen Lane, forthcoming 2013) 212 (manuscript with the author).

6 Tierney (n. 3) at 344. In contrast with Tierney’s account, the great French intellectual historian, Michel Villey, saw William of Ockham as the critical figure in the development of the modern idea of natural rights. For Villey this idea rests on a nominalist philosophy and should be abandoned in favour of a return to an Aristotelian idea of natural law. See M. Villey, *La formation de la pensée juridique moderne* (Paris, PUF, 2003) 220–76.

Whether the Enlightenment repackaged these earlier intuitions and ideas for modern consumption, or whether it made an original contribution, is open to debate. Griffin is certainly not the only thinker to situate the modern human rights project principally in the later natural rights tradition of the Enlightenment.⁷ Also firmly of this view was Ernst Cassirer, whose book on the Enlightenment has had great influence.⁸ Even so, an important question remains: *which* Enlightenment? For the German jurist Georg Jellinek, who inaugurated the twentieth century's interest in bills of rights with a famous book published in 1901, the French Declaration shared the same intellectual matrix as the American bill of rights.⁹ For others, the French Declaration owes 'something to the American example but most to radical *philosophique* literature'.¹⁰ Differently put, the issue is the extent of Jean-Jacques Rousseau's influence on the development of the two main bills of rights bequeathed to us by the eighteenth century.¹¹

Crediting the Enlightenment, rather than the medieval natural law tradition, with the invention of human rights may assuage political anxiety in one crucial respect: the secular credentials of the Enlightenment reassure that wide spectrum of modern opinion which tends to think of the Middle Ages as a dark time when people in the West were oppressed by religious beliefs and institutions. But anxiety often diverts from the truth. The Whiggish idea of the Enlightenment as the time when progress and liberty triumphed over superstition and bigotry is problematic for at least three reasons: it underestimates the importance that the idea of liberty had already acquired in the Middle Ages;¹² it downplays the role still played by

7 Griffin does recognise the importance of the pre-Enlightenment natural law tradition for the emergence of the idea of right emphasising the importance of William of Ockham (Griffin (n. 2) at 30ff.). An important role in the development of the idea of human rights was also played by the Spanish Scholastics in the sixteenth century. See A. Pagden, *Spanish Imperialism and the Political Imagination* (New Haven, Yale University Press, 1990).

8 E. Cassirer, *The Philosophy of the Enlightenment* (Princeton, Princeton University Press, 1951) 248–53.

9 G. Jellinek, *The Declaration of the Rights of Man and the Citizen* (New York, Henry Holt, 1901). See also: D. Kelly, 'Revisiting the Rights of Man: Georg Jellinek on Rights and the State', 22 *Law and History Review* (2004) 493.

10 J. Israel, *Democratic Enlightenment: Philosophy, Revolution, and Human Rights 1750–1790* (Oxford, OUP, 2011) 908.

11 Rousseau's influence on the revolutionary generation in America was very marginal. Gertrude Himmelfarb writes: 'Rousseau became known in America only after the Revolution, and even then it was *Emile*, not the *Social Contract*, that was generally read (and not always in approval).' *The Roads to Modernity: The British, French and American Enlightenment* (New York, Knopf, 2004) 217).

12 See for example the 1315 ordinance on serfdom issued by King Louis X which is, in many ways, as good as any of the eighteenth-century proclamations. It reads: 'As, according to the law of nature each must be born free, and that by some usages or customs . . . many of our common people have fallen into servitude and divers conditions which very much displease us; we, considering that our kingdom is called and named *the kingdom of the Franks* (free men) and wishing that the thing should truly be accordant with the name, and that the condition of the people should improve on the advent of our new government, upon deliberation with our great council, have ordered, and order, that, generally throughout our kingdom, so far as may belong to us and our successors, such servitudes be brought back to freedom, and that all those who from origin or antiquity or recently from marriage or from residence in places of servile condition, are fallen, or may fall, into bonds of servitude, freedom be given upon good and fitting conditions. . . . we . . . command you . . . that . . . with all such our men treat and grant them . . . general and perpetual liberty' (original emphasis). F. Guizot, *The History of Civilisation* (London, Bohn, 1856, trans. by W. Hazlitt) Vol. III at 149–150. On this, see Siedentop (n. 5) at Ch. XII. As Guizot observes, '[i]n our days [i.e. the nineteenth century] emperor Alexander would not have dared to publish in Russian such an ukase' (ibid.).

religious belief in the eighteenth century;¹³ and it rests on a mistaken assumption about the origins of secularism – an idea for which Christianity itself deserves at least some credit, if not more than the Enlightenment.¹⁴

It is however true that changes in the nature of religious belief would, with time, have an impact on the idea of natural rights. In its earlier version the concept of natural rights had been of the order of natural law. It was also integrated into a system of belief centred on the doctrine of sin and the idea of salvation. Natural rights protected man from certain external constraints, while the doctrine of sin focused on self-restraint. A liberated man was one whose natural rights were upheld but also one who, as far as humanly possible, held sin at bay. With the repudiation of religious doctrines of self-restraint, the concept of emancipation changed fundamentally. Much conservative thought of the nineteenth century, beginning with Burke, is a response to these developments: it does not object to the idea of natural rights per se, but rather to a broader political doctrine that affirms natural rights on the one hand, but entirely rejects traditional authority.¹⁵ For Burke, rights, abstracted from any tradition and juxtaposed to all authority, become mere desires. The liberal-conservative Burke would have agreed with the radical Marx on this: the human rights that had emerged from the French revolution represented the freedom of ‘egotistic man’, of ‘man as a monad isolated and withdrawn into himself’.¹⁶

An eighteenth-century concept which has received considerable attention in contemporary human rights literature is dignity.¹⁷ All dignity-based accounts of human rights are inspired in one way or another by Immanuel Kant. Kant introduced the idea of dignity in his discussion of the implications of the categorical imperative. In one of the principal formulations of the categorical imperative found in the *Grundlegung*, Kant writes that we must always ‘act in such a way as to treat humanity, both in one’s own person and in the person of others, never as a means but always as an end’.¹⁸ Kant calls the unique moral sphere that emerges from

13 On religion and the Enlightenment see: C. Becker, *The Heavenly City of Eighteenth Century Philosophers* (New Haven, Yale University Press, 1932) and Cassirer (n. 8) at 134ff.

14 Siedentop (n. 5).

15 On this see Russell Kirk, *The Conservative Mind: From Burke to Eliot*, 7th edn (Washington, Regnery Publishing, 1985) 47ff. (on Burke).

16 K. Marx, ‘On the Jewish Question’ in J. O’Malley (ed. and transl.) *Early Political Writings* (Cambridge, CUP, 1994) 44 and 45.

17 R. Dworkin, *Justice for Hedgehogs* (Cambridge MA, Belknap, 2011) 191ff.; M. Rosen, *Dignity*, (Cambridge MA, Harvard University Press, 2012); J. Waldron, ‘Is Dignity the Foundation of Human Rights?’, NYU School of Law, Public Law and Legal Theory Research Paper Series, Working Paper No. 12–73 (January 2013). Modern interest in the idea of dignity goes back at least a generation, prompted by the prominence of this term in such fundamental documents as the Universal Declaration of Human Rights and the German Constitution (see for example: O. Schachter, ‘Human Dignity as a Normative Concept’, 77 *American Journal of International Law* (1983) 848; C. McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’, 19 *European Journal of International Law* (2008) 655).

18 The translation above is my own. The *Cambridge Edition* translates the German *brauchen* in the sentence above with the verb *to use* (‘So act that you *use* humanity . . .’), which obviously indicates instrumentality. While this might be correct in relation to the negative part of the precept (i.e. do not treat people as a means), it is clearly wrong in relation to the positive one (i.e. treat them as ends). Kant, ‘Groundwork of the Metaphysics of Morals’ (hereinafter *Groundwork*) in P. Guyer and A.W. Wood (eds) *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* (Cambridge, CUP, 1996) 80 (German standard edition: *Kant: Gesammelte Schriften – Akademieausgabe* (Berlin, Georg Reimer, 1900–) Vol. IV at 429, available at: <http://www.korpora.org/kant/verzeichnisse-gesamt.html> (hereinafter *KGS-AA*)). On the idea of dignity before Kant, see Rosen (n. 17) at 11–19.

this obligation as ‘the kingdom of ends’.¹⁹ A fundamental distinction must be drawn in the kingdom of ends between what has price and what has dignity. Anything that has price can be replaced with something else, while ‘what on the other hand is raised above all price and therefore admits of no equivalent has a dignity’.²⁰ Nearly everything has a price according to Kant, including important and distinctively human traits like ‘wit, lively imagination and humour’.²¹ What however can have no price, and must therefore have dignity, is morality, understood by Kant as ‘the condition under which alone a rational being can be an end in itself, since only through this is it possible to be a lawgiving member in the kingdom of ends’.²² Unlike everything else, morality is irreplaceable and incommensurable. In a Kantian sense, therefore, human dignity pertains to human beings because they are the only creatures capable of moral self-legislation *in accordance with universal reason*.²³ Humanity has dignity only ‘insofar as it is capable of morality’ in this universal sense.²⁴

If one follows Kant’s argument closely, it is not clear, therefore, whether dignity, as he understood it, can really provide a foundation for human rights.²⁵ Modern theories of human rights centred on dignity tend to neglect the link between the self-legislating moment and universal reason that is analytically central to Kant’s argument. Dignity is instead derived from conceptions of normative agency as process²⁶ or as potentiality,²⁷ which, on close analysis, may not be as Kantian as they sound.

Some contemporary writers on human rights have proposed an account that differs from all of the above in that it rejects any meaningful link between the idea of human rights and any of the philosophical traditions of the past. Among them is Samuel Moyn. He argues that the idea of human rights emerged as a result of events that ‘occurred only a generation ago’. The key to its emergence was ‘the move from the politics of the state to the morality of the globe’,²⁸ after the failure of other ideologies, from nationalism to communism, had created an

19 *Groundwork* at 83; *KGS-AA* Vol. IV at 433.

20 *Groundwork* at 84; *KGS-AA* Vol. IV at 434.

21 *Groundwork* at 84; *KGS-AA* Vol. IV at 435.

22 *Ibid.*

23 This explains the sentence on the following page: ‘Autonomy is therefore the ground of the dignity of human nature and of every rational nature’ (*Groundwork* at 85; *KGS-AA* Vol. IV at 436), although the purpose of the addition of ‘every rational nature’ (*jeder vernünftigen Natur*) in that sentence is unclear. See also: *Groundwork* at 88–89; *KGS-AA* Vol. IV at 439–440. On these passages, see Rosen (n. 17) at 20–31). Elizabeth Anscombe famously dismissed the whole of idea of morally legislating for oneself as ‘absurd’ (in ‘Modern Moral Philosophy’, 33 *Philosophy* (1958) 2).

24 Above n. 21. Michael Rosen rightly emphasises the importance of this passage (Rosen (n. 17) at 144).

25 An author who would agree with my assessment is B. Ladwig, ‘Menschenwürde als Grund der Menschenrechte? Eine Kritik an Kant und über Kant hinaus’, *Zeitschrift für Politische Theorie* 1 (2010) 51.

26 This is the case of Dworkin, although he maintains his account of moral responsibility (Dworkin (n. 17) at 266). Dworkin’s moral responsibility is, however, defined mainly as process (*ibid.* at 113ff.).

27 Griffin, for example, defines autonomy as ‘a capacity to recognise good-making features of human life, both prudential and moral, which can lead to the appropriate motivation and action’ (n. 2 at 156). This idea of autonomy as a capacity to recognise captures only one aspect of Kant’s idea of autonomy. For Kant, autonomy is not defined exclusively by capacity, but also by will. The concept of the will (*Wille*), which Kant developed in the *Metaphysics of Morals* (*Cambridge Edition* (n. 18) at 375; *KGS-AA*, Vol. VI at 213), encompassed the idea of reason, in contrast with what Kant calls choice (*Willkür*). On this point, see Rosen’s criticism of certain voluntarist readings of Kant (n. 17) at 145ff.

28 S. Moyn, *The Last Utopia: Human Rights in History* (Cambridge MA, Harvard University Press, 2010) 41 and 43.

opportunity for alternatives. It was Hannah Arendt, according to Moyn, who saw the novelty of human rights ‘most clearly’, as is evidenced from her discussion of human rights in *Origins of Totalitarianism*.²⁹ But Moyn misreads Arendt. It is true that Arendt sees an unsettling novelty in the idea that a person deprived of citizenship and severed from any political community could still bear rights, in what with a powerful image she calls the ‘abstract nakedness’ of being nothing else but man.³⁰ But Arendt was examining the concept of human rights in the Enlightenment declarations of human rights: whatever novelty she may have ascribed to the idea of human rights originated in the eighteenth century and not the twentieth. Although Arendt does not elaborate on the connection between human rights and natural rights, it is clear from various passages that she sees the two concepts as almost interchangeable.³¹ Crucially, the conclusion of her reflection is the ‘ironical, bitter and belated confirmation’ that Burke’s criticism of the French Declaration had been right.³² Arendt is defending an organic conception of liberty. For her, the individual and the political community are so deeply interconnected that there cannot be a theory of individual liberty that is abstracted from the political community. This is the sense of her ‘abstract nakedness’ comment.

It would be wrong to dismiss these disputes on the origins of the idea of human rights, and on its relationship with political theories of the past, as relevant to no one other than intellectual historians. As discussed, the issue of intellectual origins has political relevance. Even more importantly, it is intertwined with the philosophical debates surrounding the foundations of the idea of human rights. It is now time to turn to them.

3 Foundationalism and non-foundationalism

3.1 Foundations and beginnings

The international human rights regime began with an argument about foundations. In 1947, the year which preceded the adoption of the Universal Declaration of Human Rights, UNESCO invited the French philosopher Jacques Maritain ‘to consult philosophers and assemble their replies’ on the question of the philosophical foundations of human rights.³³ Various thinkers took part, including E.H. Carr, Benedetto Croce, Mahatma Gandhi, Aldous Huxley, Harold Laski and Quincy Wright.

By far the most thoughtful contribution came from Jacques Maritain himself. He offered a clear and succinct account of his natural law theory, but preceded it with a series of observations which are worth reproducing in full:

The effects of the historic evolution of humanity and of the ever more universal crises of the modern world, coupled with the advance – be it never too precarious – of moral consciousness and reflection, have resulted in men apprehending today more clearly than heretofore, though still very imperfectly, a certain number of practical truths about their

29 Ibid. at 12; H. Arendt, *The Origins of Totalitarianism* (Harcourt, New York, 1966).

30 Arendt (n. 29) at 300.

31 H. Arendt, *Origins of Totalitarianism* (San Diego, Harcourt, 1973) 297–98.

32 Ibid. at 299.

33 UNESCO, ‘Human Rights: Comments and Interpretations’, UNESCO/PHS/3 (Paris, 25 July 1948) i. The story is also told in Mary Ann Glendon’s book on the UDHR: *A World Made New* (New York, Random House, 2002) 73ff.

life together, on which they can reach agreement, but which, in the thought of the different groups, derive, according to types of mind, philosophic and religious traditions, areas of civilisation and historical experience, from widely different, and even absolutely opposed, theoretical concepts. Though it would probably not be easy, it would be possible to arrive at a joint statement of these practical conclusions, or in other words, of the various rights recognised as pertaining to the individual as an individual and a social animal. But it would be quite useless to seek for a common *rational justification* of those practical conclusions and rights. That way lies the danger either of seeking to impose an arbitrary dogmatism, or of finding the way barred at once by irreconcilable divisions. While it seems eminently desirable to formulate a universal Declaration of Human Rights which might be, as it were, the preface to a moral Charter of the civilised world, it appears obvious that, for the purposes of the Declaration, *practical* agreement is possible, but *theoretical* agreement impossible.³⁴

These difficulties were summarised in the comment of one of the delegates relayed by Maritain: ‘Yes we agree about the rights but on condition that no one asks us why.’³⁵ Maritain did not dismiss the philosophical importance of arguments about foundations. On the contrary, this kind of argument – he wrote – ‘matters essentially’.³⁶ But he had doubts about the usefulness of engaging in it as part of an attempt to reach international consensus on a universal instrument on human rights.

The subsequent adoption of the many treaties and resolutions which make up the international human rights regime was not accompanied by philosophical consultations similar to the one organised by UNESCO in the run-up to the Universal Declaration. If it is not so surprising that diplomats chose to avoid a speculative approach, it is more surprising that, in the decades that followed the Universal Declaration, human rights were the object of at best scant theoretical attention from scholars. Until well into the 1980s it was mainly international lawyers who showed interest in the phenomenon of international human rights. However, with the exception of the first generation of international lawyers who wrote about human rights and, in some cases, helped develop them,³⁷ international lawyers generally disposed of foundational issues with the question-begging line that human rights are rights held by human beings simply by virtue of being human beings.³⁸ For at least a generation, therefore, human rights expanded as political and legal praxis with very little theory behind it – whether with a view to establishing foundations or to examining the phenomenon.

This is not to say that the question of individual liberty and, more generally, that of the relationship between the individual and the state was ignored. On the contrary, those questions received sustained attention in philosophy departments with the revival in political theory which is generally believed to have been triggered by the publication in 1971 of

34 J. Maritain, ‘Philosophical Examination of Human Rights’ in UNESCO (n. 33) at 59 (emphasis in the text).

35 Ibid. at i.

36 Ibid. at iii. Maritain goes on to explain that the ‘irreducible ideological contrast’ on foundations is between supporters of natural law and their opponents (at v).

37 See especially H. Lauterpacht, *An International Bill of the Rights of Man* (New York, Columbia, 1945).

38 On this point I agree with Charles Beitz, *The Idea of Human Rights* (Oxford, OUP, 2009).

Rawls's *A Theory of Justice*. But, initially at least, this revival of political thought took little notice of the development of international human rights.³⁹

By the time, philosophers, as well as the more philosophically informed among the jurists and the political scientists, turned their attention to international human rights, they came across a phenomenon which had by then reached a certain level of complexity. As James Nickel put it, the international system of human rights was 'not part of a political philosophy with an accompanying epistemology',⁴⁰ but was instead 'an international political movement with aspirations to create international law' and, as such, 'did not place great emphasis on identifying the normative foundations of human rights'.⁴¹

3.2 'Human rights without foundations'⁴²

Should it matter to our philosophical enquiry that the phenomenon of international human rights seems to have grown regardless of agreement on its foundations? Isn't it still essential to the idea of human rights that it should rest on solid philosophical foundations? In Richard Bernstein's suggestive analysis, our attraction to foundational argument is motivated by 'Cartesian anxiety'. This is an intellectual numbing malaise which he explains as follows: 'The spectre that hovers in the background of this journey [i.e. the journey of the soul undertaken by Descartes in the *Meditations*] is not just radical epistemological skepticism but the dread of madness and chaos where nothing is fixed, where we can neither touch bottom nor support ourselves on the surface.'⁴³ According to Bernstein, Descartes put us in front of a 'grand and seductive *Either/Or*[:] [e]ither there is some support for our being, a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos'.⁴⁴

Bernstein's analysis is part of a broader revolt, championed mainly by pragmatist philosophers, against foundational argument. Pragmatists think we should rise above Cartesian anxiety and 'simply give up the philosophical search for commonality'.⁴⁵ We should instead 'think of moral progress as more like sewing together a very large, elaborate, polychrome quilt, than like getting a clearer vision of something true and deep'.⁴⁶ To investigate the foundations of human rights 'presupposes that moral progress is at least in part a matter of increasing moral knowledge, knowledge about something independent of our social practices: something like the will of God or the nature of humanity'.⁴⁷ All of that – say pragmatists – is metaphysical nonsense.⁴⁸

39 An exception was Allan Gewirth, who openly put human rights at the centre of his moral and political theory. See A. Gewirth, *Reason and Morality* (Chicago, University of Chicago Press, 1978) 64–104 (where he refers to them as 'generic rights'). Gewirth's theory of human rights was expounded in *Human Rights* (Chicago, University of Chicago Press, 1982) and in *The Community of Rights* (Chicago, University of Chicago Press, 1996).

40 J. Nickel, *Making Sense of Human Rights* (Oxford, Blackwell, 2007) 7.

41 *Ibid.*

42 This is the title of an essay by Joseph Raz, discussed below (see Raz n. 54).

43 R. Bernstein, *Objectivism and Relativism: Science, Hermeneutics and Praxis* (Philadelphia, University of Pennsylvania Press, 1983) 17.

44 *Ibid.*

45 R. Rorty, *Philosophy and Social Hope* (London, Penguin, 1999) 86.

46 *Ibid.*

47 *Ibid.* at 84.

48 Alasdair MacIntyre famously described belief in human rights as 'one with belief in witches and unicorns' – see *After Virtue*, 3rd edn (London) 90. His criticism has however nothing in common with Rorty's. MacIntyre rejects human rights on an Aristotelian basis that the key to morality is not to be found in notions of autonomy or moral agency, but in the concept of virtue.

Pragmatism is particularly important in this context because of its dominance – both directly through legal pragmatism and indirectly as a result of its role in shaping academic fields like political science and economics – over American legal academia. The two main schools of legal thought to emerge from the US over the last 30–40 years – law and economics, and critical legal studies (CLS) – rest on pragmatic assumptions.⁴⁹ They follow pragmatism in either neglecting or dismissing foundational argument. Applied to the human rights field, this approach has led to outcome-focused critiques of the international human rights system, attempting to show for example that it does not influence state behaviour.⁵⁰ Others, especially among CLS scholars, have sought to expose the political bias or inconclusiveness of human rights theory and practice, but generally avoided engaging in any reconstructive theory. Duncan Kennedy, for example, dismisses ‘the project of reconstructing outside rights through political philosophy’, with what he calls ‘fancy theories’, as ‘another context for loss of faith’ in rights.⁵¹

A recent non-foundationalist contribution to human rights theory has come from Charles Beitz. Charles Beitz proposes an account of human rights as a ‘global practice’ which is ‘both discursive and political’ and ‘consists of a set of norms for the regulation of the behaviour of states together with a set of modes or strategies of action for which violations of the norms may count as reason’.⁵²

Joseph Raz has also advanced a theory of international human rights based on political practice. Human rights – he argues – are ‘rights which are assertible in the international arena’ and ‘need not be universal or foundational’.⁵³ Their main characteristic is that they ‘disable a certain argument against interference by outsiders in the affairs of a state’.⁵⁴ Raz’s account of international human rights law is explanatory. His previous work, in particular the *Morality of Freedom*, places him in the camp of those who believe that there are specific liberal human rights (as opposed to international human rights as legal rights) which are founded on morality.⁵⁵

As Rawls did in *The Law of Peoples*,⁵⁶ Beitz and Raz also situate their respective theories of international human rights firmly in *international* political theory rather than general political theory. Human rights are conceived mainly as limits to the sovereignty of states which can be

49 G. Verdirame, ‘The “Divided West”: International Lawyers in Europe and America’ 18 *European Journal of International Law* (2007) 558ff.

50 See, for example, J. Goldsmith and E. Posner, *The Limits of International Law* (Oxford, OUP, 2005) 108ff.

51 D. Kennedy, *A Critique of Adjudication* (Cambridge MA, Harvard University Press, 1997) 333. Kennedy rejects the argument that such openly unconstructive criticism might be dangerous with some curious remarks: ‘My own experience has been that some people who lose faith in rights become more politically committed, some become less, and some stay the same . . . But there is an aspect of the sense of danger that I want to acknowledge as rationally grounded. Undermining faith in rights threatens to undermine the unity of the left’ (at 337–38).

52 Beitz (n. 38) at 8.

53 Ibid.

54 J. Raz, ‘Human Rights Without Foundations’ in S. Besson and J. Tasioulas (eds) *The Philosophy of International Law* (Oxford, OUP, 2010) 332.

55 J. Raz, *The Morality of Freedom* (Oxford, Clarendon, 1986) esp. 245ff.

56 Both Raz and Beitz claim at least some affinity with Rawls’s theory. See Raz (n. 54) at 328ff.; Beitz (n. 38) at 96ff.

enforced by other states. Their violation is a matter of ‘international concern’⁵⁷ and a potential basis for interference.⁵⁸

Non-foundationalists like Beitz firmly reject the criticism that their views lead to scepticism. On the contrary, they maintain, it is ‘theoretical defence [which] invites philosophical scepticism’,⁵⁹ whereas a practical conception of human rights can provide an effective answer to the sceptical challenge. In this vein, Beitz argues that ‘once we have on hand a practical conception, what began as a temptation to generalised scepticism resolves into one or another more specific concern about matters such as the importance of the interests protected by a right, the nature of the historical and contemporary relationship of the victims and the potential agents, and the propriety of protecting the threatened interest by the means likely to be within it.’⁶⁰ In this way, ‘[w]hat began as a problem about the practice becomes a problem within it.’⁶¹ This is because the practical conception leaves no room for grand scepticism; it dissects it into discrete and narrower sceptical claims each of which can be addressed on its own merits.⁶²

If we can even rout the sceptics with non-foundationalism, should we continue to concern ourselves about the foundations of the idea of human rights? There are two reasons why the answer to this question should be affirmative.

First, foundational argument may matter regardless of its practical applications. As Jeremy Waldron has explained, theorists pursue foundational inquiries not ‘in order to equip their more practical-minded colleagues with impressive sounding arguments that will work in the courtroom’, but because ‘it is intrinsically important to have a deep and abstract as well as surface-level and practical understanding of these rights we claim to take so seriously’.⁶³

Secondly, and more importantly, it is fair to ask whether non-foundationalist accounts of human rights add very much to what we already know about human rights from law or political science without the aid of philosophical enquiry. In most cases, these practical conceptions provide analytical accounts of the features of the human rights system as it is, which, while perhaps conceptually quite sophisticated, do not essentially depart from the approach of doctrinal jurists. In other words, they may have some explanatory power, but do they have any evaluative power?⁶⁴ Moreover, if it is true, as some have argued, that participation in human rights treaties seldom reveals genuine commitment,⁶⁵ a practical conception of human rights may commit the further error of taking a rather narrow view of what practice

57 Beitz (n. 38) at 137.

58 Raz (n. 54) at 328 and 332; J. Rawls, *The Law of Peoples* (Cambridge MA, Harvard University Press, 1999) 80.

59 G. Kateb, *Human Dignity* (Cambridge MA, Belknap Press, 2011) at 2. Kateb summarises this position in the quotation above, but does not agree with it.

60 Beitz (n. 38) at 201.

61 Ibid.

62 In Jürgen Habermas, one finds an attempt to develop a philosophy which is significantly influenced by pragmatism, rejects any charge of scepticism and even proposes a reconstruction of a discursive idea of reason that can survive the demise of metaphysics. Habermas applied his theory of communicative action to the law in *Between Facts and Norms* (London, Policy Press, 1996, trans. by William Rehg) and deals with human rights in Chapter 3 of that work.

63 Waldron (n. 17) at 10.

64 Griffin denies they even have sufficient explanatory power. See J Griffin, ‘Human Rights and the Autonomy of International Law’ in Besson and Tasioulas (n. 54) at 351.

65 Oona Hathaway, ‘Do Human Rights Treaties Make a Difference?’ 111 *Yale Law Journal* (2002) 1935.

is.⁶⁶ Its explanatory power may be skewed in favour of extrapolating ideas from a practice that, if comprehensively examined, does not yet quite support them.

If human rights practice had already crystallised into a global tradition, then one might rely on it to justify human rights with a Burkean argument. In the same way as the idea of ‘ancient liberties’ has traditionally been understood in England to require no further justification, one could say that international human rights, once they are supported by the weight of substantial common historical experience, will in practice need no other grounding than what that tradition accords. However, quite aside from the problem that the question of justification or foundation might exist independently of its practical convenience, international human rights are nowhere near this heightened stage of acceptance.

Practical theories are no better at providing guidance for assessing claims to human rights. Beitz suggests ‘a schema for justifying claims about the content of human rights doctrine’,⁶⁷ which is centred on the notion of sufficiently important interests, without however identifying either ‘a single master value’ (in which he does not in any event believe) or even a ‘list of relatively specific interests or values to serve’ as grounds.⁶⁸ Beitz’s proposed schema can work as a ‘framework or outline of the reasoning that would be necessary to arrive at judgments about the protections that should make up a public doctrine of human rights’, but ‘the details of this reasoning will vary with the nature of the protection in question’.⁶⁹ As Beitz himself admits, in other words, ‘[b]y itself a schema does not settle anything’.⁷⁰ In particular, it does not tell us why some interests, but not others, should be singled out as sufficiently important to generate human rights.

It may be that the best a philosophy of human rights can do is to provide such analytical frameworks to help us understand a certain praxis, or guide us through the process of making normative claims. But it is difficult to escape the sense that crucial questions are missing from a philosophical investigation thus conceived. To put it somewhat ungenerously perhaps, one is left with the impression that the accomplishments of this type of philosophical inquiry into human rights are rather modest.

This impression is rendered more vivid by the observation that, in spite of the undeniable success represented by the emergence of a global system of human rights, disagreement on fundamentals persists. The answer to the very basic question ‘Should we have human rights?’ may seem incontrovertible to the point that it deserves no theoretical engagement in Boston or New Haven. But it is not so elsewhere.

To illustrate this point one example, an arena where foundational argument still clearly matters, is the Egyptian Parliament, which has been discussing a new constitution and new bill of rights. The female member of parliament who wishes to see strong constitutional protection for human rights will need arguments to contrast the belief-based refutations of human rights which her Salafist or Muslim Brotherhood colleagues will deploy. Like a novel Grotius, she will need to persuade her contemporaries that a set of fundamental rights must

66 On the meaning of ‘human rights practice’ in the practical conceptions of human rights, see also Griffin in Besson and Tasioulas (n. 54) at 344.

67 Beitz (n. 38) at 137. Beitz’s theory is thus in the camp of interest-based theories of rights. On the distinction between will and interest theories of rights, which I have not explored in this chapter, see: L. Wenar, ‘The Nature of Rights’, 33 *Philosophy and Public Affairs* (2005) 223.

68 Ibid. at 138–39.

69 Ibid.

70 Ibid. at 141.

be recognised by people with different beliefs, as well as by believers and non-believers alike. This is not just any foundational claim: it is a foundational claim that must be strong enough to allow her to prevail in public argument against opponents armed with belief. Of course, even assuming that we can equip her with the best of all foundational arguments, it is not certain that she will prevail. She will need to articulate that foundational argument in terms that are attuned to her society. She will, in other words, need a strategy of persuasion. Such a strategy may involve, for example, advancing foundational claims which evoke one of the 'visions of freedom' found in classical Islamic political thought.⁷¹

When a number of liberal democracies are undermined by populism and apathy; when the promises of liberty of the Arab Spring are being disavowed; when for the first time in at least half a century liberal democracies appear to be economically less successful than their competitors (in particular autocratic state capitalism, e.g. China, and rentier state capitalism, e.g. the Gulf states, both associated with a poor record on human rights) – to think that we have reached the stage where we can put foundational argument on human rights behind us and simply explain the practice seems, to say the least, wishful. The sense of urgency about strong justifications for human rights is, in other terms, a very real and practical need which a self-avowed practical conception should not ignore. There is no Cartesian anxiety here, rather an attempt to draw attention to the fact that postmodern anxiety about foundational inquiry may also have its numbing effect on the intellect. Perhaps, borrowing from T.S. Eliot, it is time we faced up to our illusion of being disillusioned.⁷²

3.3 Types of foundationalism

What are exactly foundations? Waldron has identified 'four possible accounts of what it might mean to say that one concept, α , is the foundation of another concept, β ': origins and genealogy; source and legitimacy; a genuine basis for derivation; and a key to interpretative understanding.⁷³ It is the third account – the basis for derivation – that offers the greatest theoretical promise. There are, in turn, different ways of theorising foundations as bases for deriving human rights. An important distinction – it has been suggested – is between naturalistic foundationalism and agreement foundationalism.⁷⁴ An example of the former is Griffin's theory of human rights:⁷⁵ from the ideas of personhood and dignity, combined with a set of practical considerations, he derives a catalogue of fundamental rights. An example of the latter would be the attempt to derive a catalogue of human rights from the Rawlsian idea of overlapping consensus.⁷⁶

71 On this see Patricia Crone's work on Islamic Political thought: *God's Rule, Government and Islam: Six Centuries of Medieval Islamic Political Thought* (New York, Columbia University Press, 2004) 315ff.

72 To the critic who wrote that with *The Waste Land* he had expressed the 'disillusionment of a generation', Eliot responded that this was 'nonsense'. He wrote: 'I may have expressed for them their own illusion of being disillusioned, but that did not form part of my intention' (T.S. Eliot, *Thoughts After Lambeth* (London, Faber & Faber, 1931) 10).

73 Ibid. at 12 and ff.

74 Beitz (n. 38) at 49ff. and 74ff. respectively.

75 Griffin (n. 2).

76 As Beitz explains (n. 38) at 76, Rawls did not use overlapping consensus to derive human rights, but others have done so. An example of a human rights theory based on overlapping consensus which is cited by Beitz is M. Nussbaum, 'Human, Rights Theory: Capabilities and Human Rights', 66 *Fordham Law Review* (1997) 286. However, Amartya Sen's account of the theory of capabilities does not deal with overlapping consensus (*The Idea of Justice* (London, Allen Lane, 2010)).

The distinction between naturalistic foundationalism and agreement foundationalism in contemporary thought mirrors that between rationalistic accounts of natural rights and contractarian ones in classical political thought. The main example of rationalistic accounts is Kant's universal principle of right: 'Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law', with the corollary that, if an individual action or situation can coexist with the freedom of everyone, 'whoever hinders me in it does me *wrong*.'⁷⁷ In John Locke's version of the social contract, human beings quit the perfect freedom of the state of nature because that condition 'is full of fears and continual dangers' and they become 'willing to join in Society with others who are already united, or have in mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates'.⁷⁸ On the Lockean account the triad – Life, Liberty and Property – comprises the fundamental ends of political society and the inalienable rights of its individual members.

Utilitarianism is another traditional type of foundationalist argument which might be seen as a sub-species of rationalist theory or as a third genus. Classification aside, the main feature of utilitarian theories of human rights is that rights exist as means for advancing utility. The classical account of a utilitarian theory of fundamental liberty is found in John Stuart Mill. His harm principle states that 'the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection' and 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others'.⁷⁹ While still avowedly utilitarian, Mill's theory of liberty is at the less instrumental end of utilitarian theories of rights.⁸⁰ A modern utilitarian theory of human rights has been advanced by William Talbott who argues that universal rights are justified by the good consequences they produce, in particular their being a necessary condition for a political system to be 'self-improving and self-regulating'.⁸¹

Another strand of foundationalist argument has sought to ground human rights in basic human needs.⁸² The trigger for this approach has been the work of developmental psychologists, such as Abraham Maslow,⁸³ on the physical and psychological needs of human beings. The appeal of basic needs theories is that they seem to solve the problem of universality by grounding human rights in a scientifically based theory of human nature. In reality, however, science is still a long way away from providing uncontested accounts of the fundamentals of human nature. Moreover, the problem with basic needs theory is not just insufficient

77 Kant, *Metaphysics of Morals* in *Cambridge Edition* (n. 18) at 387 and *KGS-AA* Vol. VI at 231. On the relationship between Kant's moral thought and the natural rights tradition see: T.J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge, CUP, 2000) 197ff.; J.B. Schneewind, 'Kant and Natural Law Ethics', 104 *Ethics* (1993) 53.

78 J. Locke, *Second Treatise of Government*, Ch. IX para. 123.

79 J.S. Mill, *On Liberty* (Oxford, OUP, 1991) 14.

80 On one reading of *On Liberty*, Mill pre-empts a purely instrumental reading of liberty when he explains that, although he regards utility 'as the ultimate appeal on all ethical questions', 'it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being' (ibid. at 15).

81 W. Talbott, *Which Rights Should Be Universal?* (Oxford, OUP, 2005) 37.

82 E.g.: P. Streeten, 'Human Rights and Basic Needs: Theory and Practice', 8 *World Development* (1980) 107.

83 See A.H. Maslow, 'A Theory of Human Motivation', 50 *Psychological Review* (1943) 370.

information. In *Brave New World*, Aldous Huxley imagined a society that kept everyone happy through both genetic manipulation and a pervasive system of nudging. As no one has unsatisfied needs and everyone is happy, this society could on the surface appear to be ideal. But in reality it would be the worst of all dystopias – one where human beings have satisfied all their needs but they have ‘no imagination and hence no aspirations’, and where ‘the immemorial pathologies of tyranny and despotism have been transmuted into a dreadful kindness’.⁸⁴

Some contemporary theorists argue that a foundationalist position can coexist with a pluralist outlook.⁸⁵ They contend that human rights need *some* foundations, but not necessarily one foundation. A plurality of justificatory arguments may ground human rights in a way that is more effective and also takes into account individual, cultural and legal differences.⁸⁶ This is not tantamount to relativism, for the simple reason that the proposition ‘ ω may be founded on α and/or β and/or γ ’ is analytically different from the propositions ‘ ω is founded on nothing at all’ or ‘all talk of ω being founded on anything is meaningless’.

One general problem with foundations as bases for deriving rights is that at some point in this reverse process of justification we may have to introduce postulates, i.e. principles which are not derivable from another principle. As one theorist put it, the foundationalist is faced with a dilemma: ‘whether to disappear down a road of infinite regress or to stand firm on a dogma’.⁸⁷ If it is so, the non-foundationalist (sceptics and non-sceptics alike) will object that the whole foundationalist exercise becomes futile.

In response, it must be emphasised that not all foundationalism rests on a series of non-demonstrable postulates. A purely Kantian foundationalist account, for example, does not: indeed, for Kant, liberty and fundamental rights are derived entirely by reason. But it is true that contemporary foundationalist theories do not normally make such a comprehensive claim to theoretical justification and are comfortable with making some minimal assumptions. For example, in James Nickel’s approach, the unifying idea is ‘a life that is decent or minimally good’.⁸⁸ From this idea he then derives four core claims which make up his proposed framework for human rights. Even if these theories do not have an answer to all first principles questions, they have a good claim to be preferable to those that answer none.

84 Kateb (n. 59) at 41. In the final pages of *Democracy in America*, de Tocqueville imagines a similar dystopia (A. de Tocqueville, *Democracy in America* (University of Chicago Press, 2000, ed. and transl. by H. Mansfield and D. Winthrop) 662–63, Part IV Ch. 6).

85 See for example: Nickel (n. 40) at (inter alia) 53 and J. Tasioulas, ‘Human Rights, Universality and the Values of Personhood: Retracing Griffin’s Steps’, 10 *European Journal of Philosophy* (2002) 79 at 88ff. Tasioulas, however, rejects foundationalism on the grounds that it constrains the ‘the values that ground human rights’ (Tasioulas (n. 4) at 25), but his rejection is based on normative reasons. He objects to the kind of foundationalism that precludes the recognition that ‘a plurality of values plays a role in grounding human rights’ (ibid. at 26).

86 Foundationalism pluralism is theoretically linked to ethical pluralism. An example of this position is K.A. Appiah, *The Ethics of Identity* (Princeton, Princeton University Press, 2005) 73–83. In international legal and political theory, the term pluralism also denotes the existence of multiple legal orders which are not structured hierarchically. See J. Cohen, *Globalisation and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge, CUP, 2012); N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford, OUP, 2010); N. Walker, ‘The Idea of Constitutional Pluralism’, 65 *Modern Law Review* 317 (2002). See also my ‘A Normative Theory of Sovereignty Transfers’, 49 *Stanford Journal of International Law* (forthcoming 2013).

87 M. Freeman, ‘The Philosophical Foundations of Human Rights’, 16 *Human Rights Quarterly* (1994) 491 at 496.

88 Nickel (n. 40) at 62.

3.4 The 'international' factor

Should a theory about *international* human rights differ from a general theory of human rights? For most of the classical political theorists, the key frame of reference was the individual and the state, and the political space in which this relationship was defined was entirely domestic. The international nature of human rights was the main reason for John Rawls's minimalist conception in the *Law of Peoples*.⁸⁹ A further consequence, on which both Rawls and Raz agree, is that international human rights norms should be viewed essentially as standards for interference by one state in the affairs of another or even for the use of force.⁹⁰ Among the critics of this idea is John Tasioulas who observes that the discourse of human rights is 'difficult and contested enough' and wonders what there is to be gained by taking 'the further step of linking the very idea of human rights to the existence of a state system and to the *pro tanto* justifiability of international intervention against states that commit rights violations'.⁹¹

At this point it may be helpful to leave political and legal theory, and consider how the question of intervention would be dealt with under a doctrinal account of international law. The international law of state responsibility authorises states, in certain circumstances, to take countermeasures against a state which is responsible for an internationally wrongful act. Countermeasures are defined as 'measures which would otherwise be contrary to the international obligations of the injured state vis-à-vis the responsible state if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation'.⁹² The breach of any rule of international law can thus potentially create an entitlement on an injured state to adopt countermeasures, including non-forcible interventions such as diplomatic protest or trade sanctions.⁹³ The key point is that international law treats the countermeasure, which might follow from the breach of a rule, as analytically distinct from the rule itself.

It is a distinction that seems entirely appropriate and defensible even beyond the positive law. The breach of positive rules generally has consequences. Yet, we would not normally explain the basis or content of a rule on the basis of the consequences that follow from its breach. We would not, for example, think of the prohibition on murder as a standard for the deprivation of liberty. True, upon a conviction for murder, imprisonment is almost certain to follow. But, if we want to understand the criminal law of murder even if in a purely functionalist or descriptive sense, we would have to look beyond the consequences that follow from the violation of that law. The point can also be illustrated with an example closer to human rights: it is a feature of the constitutional law of most countries that a statutory provision found to be inconsistent with the bill of rights will be invalidated. Yet, a conception of constitutional rights which sees them as standards of invalidation would strike us as narrowly and perhaps mistakenly focused. The principles (or the rules) and the consequences that follow from their violation pertain to separate categories: not much is gained, descriptively or prescriptively, by defining the ones on the basis of the others.

89 Rawls (n. 58) at 78ff. Nickel speaks of 'Rawlsian ultra-minimalism' (n. 40 at 98).

90 See discussion of Raz and Beitz in the main text, and Rawls (n. 58) at 79.

91 J. Tasioulas, 'Are Human Rights Essentially Triggers for Intervention', 4/6 *Philosophy Compass* (2009) 938 at 947.

92 J. Crawford, *The International Law Commission's Article on State Responsibility* (Cambridge, CUP, 2002) 281. See Articles 49–54, International Law Commission Articles on the Law of State Responsibility.

93 The law of countermeasures expressly excludes the obligation to refrain from the threat or use of force. See Article 50(a), International Law Commission Articles on the Law of State Responsibility.

Conceptualising international human rights as standards for intervention does not therefore take us very far. Other reasons, which have nothing to do with intervention, may however justify distinguishing a conception of international human rights from a conception of non-international human rights (for example, constitutional rights). Rawls maintained that there should be such a distinction: human rights are different ‘from constitutional rights, or from the rights of liberal democratic citizenship, or from other rights that belong to certain kinds of political institutions, both individualist and associationist’.⁹⁴

Would such a differential approach be irreconcilable with a foundationalist account of human rights? Or, at least, does it not lead us away from the kind of foundationalist account that grounds human rights in some genuinely universal principle? It may be, of course, that what that universal principle can justify is only a minimum of rights on the international plane, and that states and societies will then bear additional obligations which have arisen in a different way – through, for example, a Burkean idea of ‘ancient liberties’ which is contingent on a particular history and tradition, or a Rawlsian overlapping consensus. It is entirely plausible, in other words, to come up with a foundational theory that justifies a core minimum on a universal basis, but also admits of the possibility of constitutional supererogation: international minimalism but constitutional maximalism. Interestingly, however, the current legal position is the exact reverse: international human rights law in its current form is far from minimalist and tends to protect a wider range of human rights than the constitutions of most liberal democratic states.⁹⁵

3.5 Beliefs and assumptions

A radical criticism of all non-theistic attempts to ground human rights has been advanced by Nicholas Wolterstorff. In a series of compelling and elegant essays on human rights, he has sought to show that all secular foundational theories of human rights fail, and that the only solid foundation for human rights is theistic.⁹⁶ In particular, Wolterstorff argues that both the capacity for rational agency and the idea of personhood fail to provide a strong enough grounding for human rights, since they exclude those human beings who lack these attributes, for example, because of severe impairment.⁹⁷

By contrast, if, to cite Wolterstorff’s conclusion in one of his essays, one really believes that through incarnation God gave human beings ‘the extraordinary honor’ of assuming human nature, the dignity that derives from that belief is unassailable: ‘[t]o torture a human being is to torture a creature whose nature has been assumed by the second person of the Trinity.’⁹⁸ This justification has the psychological motivating force of beliefs, as well as the epistemic force of a proposition which derives directly from an *a priori*.

But the epistemic value of beliefs is not always so straightforward. It depends on what it is that we believe. In principle, we could devise a set of clearly formulated beliefs which would

⁹⁴ Rawls (n. 58) at 79–80.

⁹⁵ A normative conception of human rights that differentiates between international and non-international human rights may also be consistent with a pluralist approach of the kind advanced by John Tasioulas (n. 4).

⁹⁶ The two most important of these essays are now collected in N. Wolterstorff, *Understanding Liberal Democracy* (Oxford, OUP, 2012) Chs 7 and 8. Similar arguments have been made by Michael Perry in *The Idea of Human Rights: Four Enquiries* (Oxford, OUP, 1998).

⁹⁷ See Wolterstorff (n. 96) at 186–93.

⁹⁸ *Ibid.* at 200.

allow us to derive human rights through a series of cogent inferences. But real beliefs are more complicated than that. For example, someone may believe at the same time that all humans were made in the image of God, and that God made men and women different. One of those beliefs may form the epistemic foundation for gender equality, the other for gender inequality.

The other problem with theistic justifications is that they only succeed insofar as we share belief, whereas it is clearly the case that we do not. Even if we look at the history of humanity as a whole, we obviously never really did. Outside religion, there is no comprehensive theory that tells us what we *must* believe. There is, however, a tradition of political thought, principally represented by Alexis de Tocqueville, which has explained the importance of belief in the development of social and political institutions. This tradition can help us address a series of important questions for our era: what happens once belief is replaced by disbelief? Will the *good* assumptions (for instance, in the case of Christian belief, about human equality, about the inviolability of the person and the sacredness of life) that are generated by religious belief survive its demise?⁹⁹

Articulating the case for human rights in religious terms may still have an important practical advantage in some situations. In the contest with the belief-based opposition to rights – such as in the situation discussed above of a pro human rights member of parliament in Egypt having to make the case for human rights to colleagues holding fundamentalist beliefs – a series of belief-based arguments for human rights may prove an effective rejoinder.

The other, and to some extent alternative, route we should explore builds on Jacques Maritain's remarks during the UNESCO consultation. It might help, for example, to speak of assumptions rather than foundations. The difference between the two is this: foundations entail a claim to truth (and invite counterclaims to a different truth or, simply, to the falsification of the proposed truth); the term assumption does not come laden with the baggage of 'truth'.

Naturally, even if we agreed that we need common assumptions, we may continue to disagree on what those assumptions should be. A fundamentalist might, for example, argue that a proper assumption is inequality of men and women. The assumptions themselves will be contingent on some other principle on which, since we posited fundamental disagreement, we cannot agree, e.g. do we need to share assumptions in order to guarantee minimal social interactions? Or in order to thrive as human beings? Or to pursue the good life?

Nevertheless, speaking of assumptions rather than foundations offers, at the very least, the presentational advantage of avoiding a truth-based claim. This may just be enough to persuade some to set aside strongly held beliefs not with a view to replacing them (which a believer will not be prepared to do) but as part of a dialogue on how best to coexist with others and to organise society. If human rights are presented as a mutually convenient way of organising society rather than as a set of legal principles derived from a common moral truth, they will not be measured against the standard of religious belief (where they may fail or succeed, depending on the belief). And it is not inconceivable that a person who has accepted to agree on the need to agree on *something* might then be prepared to accept a further step: that the process of generating certain assumptions necessary even for minimal social interactions is best approached as a normative exercise. I do not for a second foresee fundamentalists jumping on a Kantian bandwagon, but we may at least spark a disposition to question in a precious few,

⁹⁹ The most comprehensive philosophical investigation of this question by a contemporary theorist is C. Taylor, *A Secular Age* (Cambridge MA, Belknap Press, 2007).

particularly if we bear in mind that beliefs, powerful though they are, also have a certain malleability and do not provide clear and coherent answers to all social and political questions.

4 The conception of the individual

A theory of human rights is as much a theory of the *human* as it is a theory of *rights*. Not every human rights theory will openly advance a theory of the self or – to borrow from the title of a complex and elegant book by the Italian Catholic existentialist Luigi Pareyson – an ontology of liberty.¹⁰⁰ But every theory of human rights will rest on a set of assumptions, whether stated or not, about the individual. The political anxiety, discussed in the first section of this chapter, plays a role in contemporary inquiries into the ontological dimension of human rights. The fear is that a Western conception of the individual, or even more so a whole philosophy of individualism, will be transposed onto the idea of human rights.

An analysis of the ontological dimension of human rights theory would require a very extensive investigation, which cannot be undertaken here.¹⁰¹ But one general observation should be made. Rather than determining whether there is a conception of the self which we must adopt in full in order to justify human rights, we may instead try to identify conceptions of the self that are irreconcilable with the idea of human rights. I can think of at least four.

First, human rights cannot exist without a conception of the individual. This may seem obvious but, as Larry Siedentop has explained, the Western idea of the individual is an invention that has taken centuries to develop.¹⁰² This idea of the individual, which we are now inclined to take entirely for granted, would have been almost incomprehensible to the Greeks and the Romans. For that reason, the idea of human rights would have also been incomprehensible to them.

It seems incontrovertible that individuality, rather than individualism, is a necessary condition for human rights *as we generally understand them*. Individuality need not entail the idea of a unitary and consistent self, and can accommodate a vision of the self as ‘multiple, inconsistent, labile and evolutionary’, such as the one advanced by Lebow.¹⁰³ The qualification

100 L. Pareyson, *L' Ontologia della Libertà* (Turin, Einaudi, 1995).

101 In the vast literature on these issues, there are three recent works which, albeit not specifically on human rights, in my view stand out and also offer great potential for application to the theory of human rights: R.N. Lebow, *Politics and Ethics of Identity* (Cambridge, CUP, 2012); J. Seigel, *The Idea of the Self* (Cambridge, CUP, 2005); Siedentop (n. 5).

102 Siedentop (n. 5).

103 Lebow (n. 101) at 321. Lebow discusses four strategies for constructing identity. The first one ‘seeks to recreate a world dominated by a religious-based cosmic order in which there was little tension between individuals and their society’ (4–5). It is typical of millennial movements like Dispensationalism. The second one ‘attempts to do away with interiority and reflexivity as far as possible’ as its proponents ‘want to create a largely secular society that removes all distinctions of wealth and honour and deprives people of privacy, free time and all forms of individual differentiation’ (5). The third one understands ‘interiority and reflexivity as compatible with the social order’ and considers ‘society a source of diverse role models that people can emulate, even mix and match and transform in the process of working out identities of their own’ (ibid.). The fourth one condemns ‘society as oppressive, and encourages people to turn inwards, or to nature, to discover and develop authentic, autonomous identities’ (ibid.).

Of these four strategies, the first two seem to me to be clearly incompatible with any meaningful concept of human rights, while the last two can sustain, and perhaps to a significant extent even require, human rights.

'as we generally understand them' is meant to address the objection that even non-human beings may have some rights. Wolterstorff mentions, for example, the right not to be mutilated for no reason other than the pleasure of the person inflicting the mutilation.¹⁰⁴ This is an example of a right which many of us (myself included) are prepared to accord to animals and cannot, therefore, be predicated on individuality. But human rights as we generally understand them include claims, such as to the right to bodily integrity or freedom of conscience, that are predicated on individuality.

Secondly, human rights are incompatible with theories that see the individual as entirely subordinate to communal interests. Conceivably even a strong form of communitarianism can accommodate some fundamental individual rights.¹⁰⁵ But, for any meaningful idea of human rights to exist, we must accept some area where individual claims will defeat communal ones.

Thirdly, although a reductionist conception of the individual may accommodate some human rights, the human rights that will attach to individuals thus conceived will be, at best, very sparse. The main example of the kind of human rights that a reductionist account of human nature produces is found in Hobbes. In *De Cive* Hobbes had accepted the view, which was prevalent in his time, that power over a person, even when not exercised, is a constraint on liberty.¹⁰⁶ At that point he therefore accepted a conception of liberty capable of accommodating even potential interference. In *Leviathan*, however, Hobbes abandons that view for a much narrower and materialistic conception of liberty as absence of physical impediments ('externall Impediments of motion') reflecting the mechanistic conception of human nature which he had by then fully embraced.¹⁰⁷ Accordingly, the natural liberty which Hobbes recognises in *Leviathan* is only deceptively generous; in practice, it stands ready to be sacrificed to the higher cause which the sovereign embodies. A reductionist ontology leads to an idea of liberty that is so shorn of meaningful content or of purposive protection as to be devoid of any real quality. After all, if man is no more than a complicated machine, why should he deserve to be free?¹⁰⁸

Ontological reductionism has far from lost its appeal. It survives, and thrives, for example, in behaviouralist accounts of human nature. It is certainly no coincidence that the founder of behaviouralist psychology, when he applied his theory to the concepts of freedom and dignity, argued that these should be set aside.¹⁰⁹ A theory that sees fundamental similarities between human beings and Pavlov's dog, that speaks of behaviour rather than action, that thinks of the will as completely susceptible to manipulation, will not be able to sustain a meaningful idea of human rights. If there is one threat to human rights coming from Western academia

104 Wolterstorff (n. 96) at 188.

105 On liberalism and communitarianism, see S. Mulhall and A. Swift, *Liberals and Communitarians* (London, Blackwell, 1992).

106 See Q. Skinner, *Hobbes and Republic Liberty* (Cambridge, CUP, 2008) esp. 124ff.

107 Hobbes, *Leviathan*, esp. Ch. XXI.

108 Humean reductionism, while not as mechanistic as Hobbesian reductionism, is also problematic. The reductionist tendency of much empiricism is the reason why I am more hesitant to link British empiricism with liberalism (Lebow (n. 101) at 5). With De Ruggiero (*Storia del Liberalismo Europeo* (Bari, Laterza, 1925) 15–24) I also tend to think of liberalism as influenced by, and in many ways dependent on, certain 'spiritual forces' (at 15) more than an empirical disposition. When empiricism leads to reductionism and utilitarianism, as was often the case in British political thought, the liberal tradition may have maintained itself in that country in spite of, rather than thanks to, empiricism.

109 B.F. Skinner, *Beyond Freedom and Dignity* (Indianapolis, Hackett, 1971).

nowadays, it is the firm grip of neo-positivism in the political and social sciences.¹¹⁰ When neo-positivism joins forces with utilitarianism (as it almost inevitably tends to do), then the battle for human rights is all but lost.

Fourthly, a conception of human beings that refuses to accept any universal commonality also makes human rights impossible. There are two versions of this denial of a universal commonality: one derives from an extreme form of epistemological subjectivism; the other from what, with an ugly word, we might call hard ‘identitarianism’ – the view that certain collective identities (gender, sexual orientation, race, class etc.) define us so fundamentally that we can dispense with even a minimal sense of human commonality.¹¹¹ By contrast, soft ‘identitarianism’, while emphasising the role of collective identities, does not dispense with the idea of minimal human commonality.

Soft identitarianism has gained considerable force in public argument in recent decades. It has yielded an ever expanding catalogue of rights which vests exclusively in individuals defined by their possession of certain collective traits. Although soft identitarianism is not prima facie incompatible with human rights, it does risk undermining them to the extent that it grounds them ever more in the particular rather than the general. The particular should feed and enrich our concept of the general. The fact that we accept, recognise and protect human conditions which were previously ignored or neglected should lead us to deepen our appreciation of the human, and to *expand our imagination* – for, ultimately, one of our most formidable traits as a species is that we can imagine to be what we are not. But if we are not careful, this particularistic drive could push us all into ‘little platoons’ without any sense of connection to the general condition of being human,¹¹² with the consequence that an identitarian ‘rights tribalism’ would replace human rights as a general category.

5 The phenomenology of power

In liberal accounts of human rights, the individual is the main bearer of rights.¹¹³ But on whom should the corresponding obligations fall? In terms of positive international law, the answer is straightforward: the state is the main duty holder. The apparent reason for treating the state differently from other entities is that it wields a unique power, in both a qualitative and quantitative sense. But does that justify making the state the sole duty holder?

110 See Verdirame (n. 49).

111 This would not be the position of the greatest representative of radical feminism, Catherine MacKinnon. In one of her essays on human rights, she attacks postmodernism precisely because of the postmodernist attempt to dismantle any of universality (*Are Women Human?* (Cambridge MA, Belknap, 2006) 53).

112 ‘Little platoon’ is an expression used by Edmund Burke which I am here citing out of context. The citation of the passage where Burke introduces this expression reads: ‘[t]o be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link of the series by which we proceed towards a love for our country and to mankind.’ (*Reflections on the Revolution in France* (London, Penguin, 1982, C. Cruise O’ Brien ed.) 135). Unlike my use of ‘little platoons’ in the text above, therefore, for Burke the ‘little platoons’, albeit particular rather than universal, are not defined by a particular collective identity but essentially by proximity.

113 This is not to say that human rights may not be born by collective entities, or that human rights which have traditionally vested in individuals are not also susceptible of vesting in collective entities. See, for example, Leif Wenar’s work on the extension of the right to property to natural resources (‘Property Rights and the Resource Curse’, 36 *Philosophy and Public Affairs* (2008) 2).

At the outset it should be noted that the idea of the state as sole duty holder is not a requisite of the main classical theories of human rights. Locke, for example, did not seem to have any doubt about the fact that natural rights created juridical relationships between individuals (rather than just between the individual and the state). Natural rights originate in the state of nature, where there is no political society and where the only duty holders are other human beings. As Locke explains, the right to life, liberty and property is held 'against the Injuries and Attempts of other Men'.¹¹⁴ Similarly, Kant's universal principle of freedom generates moral and legal relationships between private individuals.¹¹⁵ The particular obligations of the state vis-à-vis the natural rights or the human rights of individuals derive from the state's ability not only to respect these rights but also to ensure that others under its control do so. The state is thus singled out as a key duty holder (but, analytically, not the sole one), not so much because of its unique capacity to commit fundamental wrongs (although this might also be a consideration) but because it alone has the power to enforce rights and punish wrongs.¹¹⁶

The idea of the state as sole duty holder has been the object of severe criticism from feminist legal theorists. The starting point in the argument is the criticism of the public/private distinction, which Nicola Lacey summarises as follows:

Typically, liberal political thought assumes the world to be divided into public and private spaces and issues: governmental action, and hence liberal principles, apply primarily to the public world, while private lives and private spheres are properly subject to the regime of individual autonomy and negative freedom. This distinction is, of course, reflected in many codes of human rights such as the US Bill of Rights or the European Convention on Human Rights, which concern themselves exclusively with state or public actions.¹¹⁷

The principle of the state as sole duty holder is seen by these feminist thinkers as a way of shielding power in the private sphere from scrutiny and sanction. Yet, as mentioned before, on at least two of the traditional liberal accounts, natural rights were considered perfectly capable of generating obligations incumbent upon private individuals. To paraphrase Rawls, if the so-called private sphere is alleged to be a space exempt from the application of the law of the state, then there is no such thing in liberal thought.¹¹⁸

114 Locke (n. 78) at Ch. VII para. 87.

115 See for example this statement of that principle of freedom found in Kant's essay 'On the Common Saying': 'No one can coerce me to be happy in his way . . . ; instead, each may seek his happiness in the way that seems good to him, provided he does not infringe upon that freedom of others' (Kant, 'On the Common Saying: This May Be Correct In Theory, But It Is of No Use In Practice', in Gruyer and Wood (eds) (n. 18) at 291).

116 As I have argued elsewhere, from a liberal perspective, the role of the state as protector of human rights imposes limits on the transfer of sovereign powers to international organisations. See G. Verdrame, 'A Normative Theory of Sovereignty Transfers', 49(2) *Stanford Journal of International Law* (2013).

117 N. Lacey, 'Feminist Legal Theory and the Rights of Women', in K. Knop, *Gender and Human Rights* (Oxford, OUP, 2004) 21–22.

118 Rawls's comment was on justice, but it was also in response to the public/private critique. It reads: 'The spheres of the political and the public, of the non-public and the private, fall out from the content and application of the conception of justice and its principles. If the so-called private sphere is alleged to be a space exempt from justice, then there is no such thing.' (J. Rawls, *Justice as Fairness: A Restatement* (Cambridge MA, Belknap Press, 2001) 166).

Yet, modern legal systems do differentiate between the individual–state relationship and individual–individual relationships, with human rights being generally reserved to the former. An example where the public or private nature of the conduct changes the legal characterisation is the infliction of severe pain on an individual for the purposes of extracting a confession. If this conduct is imputable to a public official, it will be considered torture or, at the very least, cruel or inhuman treatment. If a treatment of the same severity is inflicted on a woman by a partner who is seeking to extort a confession of an imagined or real ‘betrayal’, the law does not regard that as torture. It will still, of course, be regarded as an offence, but it will not carry the stigma of torture because, in law, torture can only be committed ‘by a public official or a person acting in a public capacity’ (Article 1, Convention Against Torture).¹¹⁹ Some theorists see in this, and in other examples that could be offered, a demonstration of the enduring force of the public–private divide.¹²⁰ Yet, in a Kantian or Lockean perspective, it is difficult to find a basis for distinguishing the two moral wrongs in the examples above.

So why did the eighteenth-century bills of rights legislate in individual–state terms? The reason has nothing to do with the intention to allow powers, the exercise of which by the state was now being subject to limitations, to continue to be exercised without any limitations in the private sphere. More likely explanations have to do with the fact that these were revolutionary enactments adopted at the end of a prolonged struggle with public power. This is not of course to detract from the fact that, until very recently, the power of the male head of the family was far from adequately constrained and that the law had systemic gendered ‘blind spots’. But this was neither the cause nor the consequence of the framing of those bills of rights in individual–state terms.

The feminist attack on the public/private distinction is not the only critique of human rights which begins with a claim to uncover the true face of power. All radical criticism of human rights follows a similar pattern. The blueprint was set out by Marx in his essay *On the Jewish Question*.¹²¹ As mentioned before, Marx argued that the human rights guaranteed in the eighteenth-century bills of rights were premised on an egotistic conception of man. Not only do they pay no regard to the social nature of man, they actually estrange man from any such inclination. Marx is generally more positive about political rights, and concentrates his criticism on freedom of religion and on the right to property. Both of these rights – Marx argues – end up protecting traditional and social practices which hinder human emancipation, or facilitate exploitation.¹²²

How one should react to the flaws of the idea and practice of human rights remains contested among neo-Marxist scholars – a dispute which has taken place against the background of a broader argument on the relevance of international law. One reading of Marx’s criticism of human rights would suggest disengagement as the appropriate strategy. Insofar as human rights perform a function of legitimation for forms of social and economic

119 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

120 The fact that ‘private torture’ is not characterised as ‘torture’ under human rights law does not mean that states are at liberty to tolerate it. If, for example, the domestic legislation of a state permitted the infliction of physical pain by men on women as a form of private punishment, that state would still find itself in breach of a number of human rights obligations.

121 See n. 16.

122 On exploitation see: S. Marks, ‘Exploitation as an International Legal Concept’ in S. Marks (ed.) *International Law on the Left* (Cambridge, CUP, 2008) 281.

exploitation, they will be inimical to a Marxist project of emancipation. On a different reading – and one that many neo-Marxist scholars of international law seem to favour – human rights have an emancipatory potential, and their limits and disadvantages can be addressed, if not completely rectified, by a practice that takes Marx's criticisms into account and refocuses the project accordingly.¹²³

Other radical theorists, for whom Marx has been an influence, take the main lesson of the Marxist critique to be an invitation to be constantly alert to the way in which power manifests itself and reinvents itself in each society and in the world. Human rights theory thus ends up overlapping almost perfectly with a theory of power. This is the case, for example, with Catherine MacKinnon's approach to human rights. For MacKinnon, with all their limits and biases, international human rights can still fulfil an emancipatory role as long as the practice of human rights is embedded in a truthful narrative of power (particularly its gendered dimension).¹²⁴

6 Conclusion

Contemporary theoretical argument tends to take place within distinct disciplinary boundaries. There may sometimes be good reasons for this. If the assumptions and the questions differ completely, dialogue is difficult or even frustrating. But the point and the beauty of philosophical investigation is that it should invite us to challenge the assumptions and to rethink the questions.

With the proliferation of human rights, the growth in the number of human rights institutions and expansion of human rights jurisprudence, the attraction of 'current developments' scholarship and of specialisation has also increased. It is probably fair to say that most human rights scholarship these days is informed by one or both of these trends. Yet, the importance of questions about the first principles of human rights cannot be escaped. If human rights, as a legal and institutional phenomenon, become too far removed from a discernible moral and political idea, they will in the long run become indefensible . . .

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123 Among the international law and human rights sceptics is China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Leiden, Brill, 2005). Among those who think that Marxism does not entail rejection of human rights (and of the international law project) see: B. Roth, 'Retrieving Marx for the Human Rights Project', 17 *Leiden Journal of International Law* (2004) 31; R. Knox, 'Marxism, International Law and Political Strategy', 22 *Leiden Journal of International Law* (2009) 413; and Marks (n. 122).

124 See MacKinnon (n. 111).

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