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On Waldron's Critique of Raz on Human Rights

Had Prof. Waldron's paper not been entitled '... a critique of the Raz ... approach' I would not have known that it is. Much of what he says seems sensible, and some of it supports, mostly indirectly, my views. To give just two examples: Prof. Waldron correctly observes that (a) the importance of a right (and I should add: of a right violation – the two should not be confused) is typically determined by a variety of considerations, stemming from different sources of moral concern (he declines to consider any view about the importance of rights – fn. 16), and that (b) the case for taking action to protect a right or to remedy its violation is affected by matters other than the importance of the right or its violation. I am making these observations in my own way, and they differ in detail, but are consonant in the main with Waldron's remarks in section III(1). He also observes (in the same section) that acts that are sometimes undertaken, or should be undertaken, to protect a right or to remedy its violation, can also be taken for other reasons (e.g. I may owe you money to make good wrongful damage to your property, or because it is the price of a property that I am buying from you). What is puzzling is why Waldron should think that any of this constitutes a difficulty for any view about human rights, or indeed for any view about rights, including the crazy 'armed intervention view', which by his own account no one holds, and to which he dedicates the larger part of his article.

Another helpful observation is offered by Waldron when considering the implications of the view (held by me) that human rights are individual rights that set limits to sovereignty, and that means that their violation can be a reason for action that would otherwise be blocked by sovereignty. He wonders how it can be that any right is not a human right: would not the violation of any right count in favour of overriding sovereignty at least in some circumstances? He writes: 'Perhaps we should set a threshold that reflects at least the nominal significance of infringing another country's sovereignty, so that R would count as a human right only if its importance were sufficient to override at least the normal considerations that weigh in favour of sovereignty. It would have to have enough importance to outweigh what we might think of as the standard costs of infringing the sovereignty of a violator-state. I worry,

however, that if we go down this road, it may be very hard to disentangle these standing costs from the pragmatic considerations that argue against humanitarian intervention in particular cases.' (III(2)) And he proceeds to outline one difficulty. But the easy life is not a recognised aspiration of political theory, and the fact that theoretical distinctions are sometimes difficult to apply has always been recognised. Note that Waldron's worries do not show that the distinction will be difficult to apply to all rights.

There are other sensible observations in the article that would be of interest to students of human rights. I mentioned the two above because they help with my puzzle: why does Prof. Waldron think that his article raises serious objections to my views about human rights?¹ Part of the explanation is: because he thinks that the two observations present serious objections to a type of human rights theory that he takes my view to belong with. If they are, as I suggested, observations about some elementary features of any remotely plausible account of rights then obviously they are no objection to any theory of human rights, unless it is inconsistent with human rights being rights. I do not think that mine is so inconsistent, and there is no sign that Waldron thinks so either.

The more fundamental explanation of the puzzle is that Prof. Waldron gives me a compliment that I do not deserve. His comments on my views are generally expressed in a moderate and thoughtful way throughout. But the undeserved compliment is that he takes me to be engaged in the same enterprise that he himself undertakes, and which he thinks is the right enterprise to pursue. He writes: 'The question is not: What does the "human" in "human rights" really mean? The question is: what is the more convenient and illuminating use to make of the term in this context?' (section V). That is not what I was doing when writing on human rights, nor is it a question that I would recommend to others. I will briefly explain what I was trying to do, and how Waldron's misunderstanding of my aim undermines the relevance of his comments on my work.

¹ For the reader less interested than I am in my own views the article poses a more serious puzzle: Why does Prof. Waldron think that his article supports his conclusion that the best theory of human rights would understand them as rights that belong to all human beings in virtue of their humanity alone? He starts with listing some of the many arguments that have been leveled against that view, and concludes that since the view is right we had better work hard to answer the criticism. That conclusion is based on the fact that he identified, as he thinks, some serious difficulties with a few alternative views, difficulties that he correctly observed are not conclusive objections to these alternatives. There seems to be something missing in this argument.

Here is the task: there is what I call 'a human rights practice', comprising ratifying conventions, enacting legislation and adopting other measures in the name of human rights; litigating, implementing, applying and so on, those so-called human rights measures; advocating observance and incorporation into law of other so-called human rights, and more. The practice has gathered ever-increasing pace since the end of the Second World War, so that the role and significance of the rights identified in common discourse as 'human rights' in the political life of many countries and in international relations have been transformed. As a result, those engaged with the practice have mostly failed to notice the way it can no longer be normatively justified in terms of the ideas that dominated thought about human rights before the War, and that (the need for different justifications), it seem to me, turns out to be not a bad thing. The absence of a coherent body of doctrine underpinning the practice makes little difference to those involved in it. In the hands of pressure groups, NGOs, litigators, advocacy groups and others, its evolution has the characteristics of the evolution of the common law. One thing leads to another, governed by analogical reasoning, and some vague sense of moral orientation. The theoretical-normative task is to establish what normative considerations govern the practice, namely what considerations determine which of the measures included in it should be there, and which should not, how it should be developed, how it should be applied, and the like.

You may say that the correct doctrine of human rights, i.e. of the rights that all people have in virtue of their humanity, sets out the considerations that normatively govern the practice. That is the view of several, perhaps most, of the theorists who are engaged with it. I think that their theories are mistaken. In my article that Waldron discusses I criticised two contemporary accounts, and some of my arguments apply to other accounts as well. More generally the disagreement has to do with a broader understanding of the place of rights in the normative domain. I am with those who think that for the most part rights play a local, derivative role, that their existence depends on values and their applications to particular historic circumstances. That rights are historically conditioned, is consistent with the possibility that there are rights held by all human beings in virtue of their humanity, but the historical dependence of rights implies

that most of the rights that are taken to be human rights are not of that kind. More importantly, the truth or falsity of philosophical human rights theories (including all those that I criticise) is irrelevant to the general doctrine about the right way to assess the human rights practice. Even true human rights theories should not be the standards by which to judge human rights practice.

Imagine that various legal provisions giving legal effect to certain rights because they are thought, by the authorities adopting those legal provisions, to be human rights are not in fact human rights. Various theorists conclude that because those rights are not human rights, their legal implementation should be repealed. I argued that this is a non-sequitur. Suppose, for example, that there is no human right to adequate housing.² It does not follow that the legal right to adequate housing should be repealed. It may be a very good right based on considerations that have nothing to do with human rights. Approving of that right in that way means approving of it for reasons different from those that led to its adoption, reasons different from those of many of its defenders. Of course, if it is in fact a right held by all people in virtue of their humanity alone, if cave dwellers in the Stone Age had a right to decent housing that is fine, and the legal implementation of the right can be defended on those grounds as well. My point is merely that if it is not a human right it may still be a right that it is justified to implement or protect by legal means. Similarly, it does not follow from the fact that a right is a human right that it should be protected by legal means. There are numerous legal norms defended today on grounds different from those that led to their adoption. For example, possibly the law against murder was adopted because it was believed that human life was made sacred by God. That should not lead atheists to call for the repeal of the law. It is justified even though its originators, and many of its current defenders, are mistaken (according to the atheists) about the reasons that justify it.

For the task that I explained, the important point is not to expose the mistakes about traditionally conceived human rights, even though they should be exposed. The important point is to understand that the task is to strive to find a comprehensive

² It is legally recognized as a human right in article 11 (1) of the Covenant for Economic, Social and Cultural Rights. See for its meaning Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991).

normative perspective from which to evaluate human rights practice as it is and as it should become. The task is mishandled when it is assumed that it consists in developing the correct account of human rights (meaning the rights held by all people in virtue of their humanity) and judging the practice by it.

I then suggested that the distinctive element of human rights practice is its role in international relations. Why so? Not because the rights with which human rights practice concerned itself do not apply between individuals or between individuals and corporations, or individuals and the state. They do. It was partly because it seemed that international relations were more radically changed by the practice than the moral understanding of relations among individuals or among them and corporations or the states they are found in. But there is another more theoretical reason for focussing on international relations: In international relations those rights were orphans in a way that they were not in domestic relations. Our understanding of the standards we apply to interpersonal conduct has evolved, and hopefully deepened, but it has not been indebted to ideas about human rights. Similarly constitutional rights emerged through improved understanding of the role and function and limits of government, again largely independently of ideas about human rights. If you believe in some traditional human rights ideas you may think that they support all those standards and rights. But loss of confidence in human rights ideas is unlikely to shake your confidence in those standards and rights, nor should it. There are other familiar ways of arguing for them. Not so with the rights emerging in international law and applying to the relations between individuals and states and other international bodies.

Many people would say that the same rights apply for the same reasons in international relations. The problem is that in international law they were unenforceable because they used to be blocked by the doctrine of state sovereignty, as it emerged with the European settlement in the wake of the religious wars, usually dated to the Peace of Westphalia. There are various highly important features to the development of human rights practice beyond the gradual growing respect for important moral standards. One of them is that human rights practice is one, though not the only, development exerting pressure towards giving individuals independent standing in international law. But in both practice and theory the more radical development the

practice of human rights heralded was the erosion of the previously accepted ideas about the scope of sovereignty. Again, it is not alone. The growth of functional organisations (like the WTO) and of regional ones (like the EU) with powers to develop new law binding states independently of their consent also erodes sovereignty. But that does not diminish the importance of the role of human rights practice in the process, given that it is a feature of international human rights that their violation within a state is a reason for actors, states and others, outside that state to intervene, including in ways that would have been previously considered an inappropriate interference in the internal affairs of the offending state.

As Waldron remarked the limits of sovereignty are disputed, and in fact have always been. My suggestion about the normative principles that govern human rights practice was that their understanding goes hand in hand with a better understanding of the normative grounds of state sovereignty, and its scope. I have myself contributed little, perhaps nothing, to that task. My contribution was to point to the inter-relations between the two and to the need for a theory that will deal with both issues together.

I will not detain you with other matters dealt with in my writing about the human rights practice. Waldron rightly identifies my claims about the relations between human rights (or rather the human rights practice) and sovereignty as central to my account, and that is what I was trying to clarify here. It follows that, contrary to his understanding of my article, I do not take fidelity to the practice to be a desirable feature of an account of human rights, let alone as relevant to deciding in what sense it is desirable to attribute to 'human' in that context. Rather, human rights practice is what the theoretical account is about.³ To repeat what I suggested as the task for a normative theory of the practice: it is to establish the criteria by which the practice should be judged. They may lead to the conclusion that it should be abandoned, not a conclusion that can be justified by fidelity to the practice. Of course, the task assumes that possibly

³ For example, he misunderstands my point in the following observation: 'proponents of views of this kind often say they don't want their understanding of the "human" in human rights to be divorced too much from actual practice in international affairs. Raz says, for example, it is "observation of human rights practice" that shows that human rights are taken to be "rights which ... set limits to the sovereignty of states."' As a result he thinks that the logic of my view requires fidelity to some other aspects of practice. But it requires no fidelity to any aspect of international practice. It just has to be about that practice, and in my view that means that it should be about a practice which takes certain rights to set limits to sovereignty.

different practices are governed by different normative criteria, and that presupposes that we can distinguish between them, that they have characteristics that possibly subject them to different normative criteria. And my reflections on the practice of international human rights were partly aimed at identifying features of the practice that affect the considerations by which it should be judged.

Prof. Waldron both regards my views as a version of what he calls the human concern approach and claims that I made some observations about the human concern approach (e.g. fn. 22, but it is not the only place). The second is simply mistaken. I never said anything about it, if only for the simple reason that I did not know of such an approach. My own approach is not an instance of that approach, for reasons that should by now be clear. In a way, it is not about human rights at all. It is about the practice of human rights. In my mind this is partly because theories of human rights are faulty, and in any case largely irrelevant to a normative assessment of the very important practice of human rights. Of course, we would expect the normative theory of human rights practice to determine which normative considerations are relevant to the evaluation of the practice and its desirable development, and if there are rights that all humans have in virtue of their humanity alone they will feature in the theory, along with other normative considerations. But they are not in themselves such a theory.

Therefore, the task I undertook assumed from the beginning the possibility, and according to my understanding of morality, the inevitability, that the normative standards that govern human rights practice are not the ones that many human rights theorists share, and indeed my understanding diverges from the official rhetoric that pervades human rights practice, and the views of a number of its activists. As a result it is, on the one hand, no criticism of my view that it does not conform to aspects of the common ideology and rhetoric surrounding the practice, parts of which are suffused with the thought that the practice deals with the rights of all humans held in virtue of being human. But, on the other hand, some may think that that speaks against my understanding of my task. And if I thought that there is some hope for theories of rights of that kind, in a way that would qualify them to govern the practice of human rights, I would have agreed.