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The Existence of Human Rights*

Human rights are understood, worldwide, to be the basis of society. This broad agreement is found not only in philosophical circles but also in politics and law. Numerous human rights covenants as well as the incorporation of human rights into a great many constitutions can be read as an expression of the triumphant march of human rights in the period after the Second World War. In a word, their existence seems to be beyond question.

Still, there are doubts about whether the belief in the existence of human rights amounts to anything more than a collective error or illusion. Fundamental criticism, directed to the assumption that human rights exist, is found not only in the dark regions of political, ideological, and religious extremism but also in highly respectable philosophical writings. Alasdair MacIntyre's claim that 'there are no such rights, and belief in them is one with belief in witches and in unicorns'[1] is an example. This – along with the fact, often corroborated in the history of ideas, that widespread consensus is by no means a guarantee of truth – is reason enough to raise the question of the existence of human rights, in short, the existence question.

I. The Theoretical and Practical Significance of the Existence Question

The question of whether human rights exist has far-reaching consequences for legal philosophy, for the theory of constitutional rights, and for politics.

In legal philosophy, the answer to the question of what law is, that is, to the question of the concept and the nature of law, essentially depends on whether human rights exist. Hans Kelsen has adduced an argument against the non-positivistic thesis of a necessary connection between law and morality, namely, the argument that 'an absolute moral order excluding the possibility of the validity of another moral order does not exist'.[2] One might call this the 'argument from relativism'.[3] Human rights are the core of justice. Every violation of human rights is unjust, even if not every injustice is a violation of human rights. The core thesis implies that if human rights do not exist, then additional absolute, universal, or necessary criteria of justice do not exist either. Neither the Radbruch formula,[4] which in its shortest form says that extreme injustice is not law,[5] nor the thesis that law necessarily raises a

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1 Alasdair MacIntyre, *After Virtue*, 2nd ed. (London: Duckworth, 1985), 69.

2 Hans Kelsen, *Pure Theory of Law*, trans. (from the 2nd German edn.) Max Knight (Berkeley and Los Angeles: University of California Press, 1967), 63.

3 Robert Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (first publ. 1992), trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 2002), 53–5.

4 Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (first publ. 1946), trans. Bonnie Litschewski Paulson and Stanley L. Paulson, *Oxford Journal of Legal Studies*, 26 (2006), 1–11, at 7.

5 Robert Alexy, 'The Dual Nature of Law', *Ratio Juris* 23 (2010), 167–82, at 175.

claim to correctness, essentially a claim to justice,[6] would any longer make sense. Non-positivism would have to yield to positivism.

The consequences of the existence question for the theory of constitutional rights concern the basic understanding of constitutional rights as well as the basic understanding of constitutional review. If human rights did not exist, constitutional rights would amount to nothing more than what has been recorded, written down, in the constitution. In that case, everything might have been different, for constitutional rights would have an exclusively positivistic character. Originalism and textualism would be the only promising candidates for a theory of constitutional interpretation. If, however, it should be the case that human rights exist, then the picture changes fundamentally. Constitutional rights could then be understood as an effort to positivize human rights. This, in turn, would imply that the ideal character of human rights remains present in the interpretation of constitutional rights. The domain of general practical argumentation in constitutional interpretation would have to be extended accordingly. Originalism and textualism would be confronted with a rationalism in law that is based on human rights.

Finally, with respect to politics the main consequence of the existence question concerns the problem of cultural relativism. If human rights did not exist, that would count as a strong argument for strong forms of cultural relativism. By the same token, the existence of human rights would count as a good reason against strong forms of cultural relativism. Should human rights exist, a common basis of law would then exist that, as the concept of a basis implies, might well be compatible with a considerable scope accorded to cultural diversity. A common basis along these lines seems to be indispensible for a global legal order of whatever kind. All of this shows that the question of the existence of human rights has real theoretical and practical significance.

II. The Concept of Human Rights

The answer to the question of whether human rights exist depends on what human rights are. To begin with, human rights are rights. With respect to their structure, rights in general can be divided into, first, claim rights, second, liberties, and, third, immunities as well as powers.[7] Here, only human rights as claim rights shall be of interest. Claim rights are three-place relations of which the first element is the beneficiary or *holder* of the right (*a*), the second is the *addressee* of the right (*b*), and the third is the *subject-matter* of the right (*S*).[8] If *a* has against *b* a right to *S*, *b* has a duty to *a* with respect to *S*, and vice versa.[9] This implies that the concept of a right is intrinsically connected with the concept of the 'ought'.

Human rights, as rights, are characterized by five properties. The first is *universality*. The beneficiary or holder of human rights is every human being *qua* human being. Universality on the side of the addressees is more complex. Some human rights as, for instance, the right to life are addressed to all who can be addressees of duties, that is, to all human beings but also against all states and organisations. Other human

6 Ibid., 171.

7 See on this Robert Alexy, *A Theory of Constitutional Rights* (first publ. 1985), trans. Julian Rivers (Oxford: Oxford University Press, 2002), 120–159.

8 Ibid., 120–1.

9 Ibid., 131–2.

rights such as the right to participate in the process of political will-formation, especially the right to vote, are addressed only to the state to which the holder enjoys citizenship or in which he resides.

The second property of human rights is the *fundamental* character of their subject-matter. Human rights do not protect all conceivable sources and conditions of well-being but only fundamental capacities, interests, and needs. The question of which capacities, interests, and needs are fundamental determines the content of human rights. Nevertheless, this question will not be discussed here. The solution to the problem of the content of human rights presupposes that they exist, and an answer to the question of existence requires nothing more than the assumption that human beings have at least some fundamental needs, interests, or capacities such as, for instance, life, including good health, freedom, and self-determination.

The third property, too, concerns the subject-matter of human rights. This property is their *abstractness*. The right to good health is an example of an abstract right. It is easy to agree that all have a right to good health, but on the question of what that means in a concrete case, protracted controversy is possible. The distinction between human rights as abstract rights and their application in concrete cases will be of overriding significance for the question of their existence.

The fourth and the fifth properties concern neither the holder nor the addressees nor the subject-matter of human rights but rather their validity. Human rights as such have only moral validity. For that reason the fourth property of human rights is their *morality*. A right is morally valid if it can be justified against each and everyone who is willing to take part in a rational discourse. In this sense, moral validity is universal validity. The universality of the structure of human rights as rights of all against, in principle, all is thus complemented by a universality of validity. A right that is valid is a right that exists. This implies the basic thesis of the theory of the existence of human rights presented here. It runs as follows:

> The existence of human rights consists in their justifiability, and in nothing else.

To be sure, the moral validity of human rights can be accompanied by positive validity consisting in due enactment and social efficacy. Examples are the International Covenant on Civil and Political Rights from December 19, 1966, the European Convention on Human Rights and Fundamental Freedoms from November 4, 1950, the Charter of Fundamental Rights of the European Union from December 7, 2000 and December 12, 2007, and the Basic Law of the Federal Republic of Germany from May 23, 1949. But such transformations of human rights into positive law never count as ultimate solutions. They are attempts to give institutional shape, secured by positive law, to what is valid solely owing to its correctness. For that reason, constitutional rights have to be defined as rights that have been recorded in a constitution with the intention of transforming human rights into positive law – the intention, in other words, of positivizing human rights.[10]

This leads to the fifth property of human rights, their *priority*. Human rights *qua* moral rights cannot be invalidated by rules of positive law. On the contrary, human rights are standards for the assessment of positive law. This is to say that human rights conventions and catalogues of constitutional rights as well as decisions of hu-

10 Robert Alexy, 'Discourse Theory and Fundamental Rights', in *Arguing Fundamental Rights*, ed. Agustín José Menéndez and Erik Oddvar Eriksen (Dordrecht: Springer, 2006), 15–29, at 17.

man rights courts and decisions of constitutional courts can violate human rights. With this, the list of the five properties that distinguish human rights from all other rights is complete. Human rights are, first, universal, second, fundamental, third, abstract, and, fourth, moral rights that, fifth, take priority over all other norms.

For the question of the existence of human rights, the third defining element, the morality of human rights, is of special importance. Rights exist if they are valid. Human rights *qua* moral rights are valid if they are justifiable. Thus, the question of the existence of human rights turns out to be the question of their justifiability.

III. The Justification of Human Rights

1. The Principles Structure of Human Rights

Human Rights are abstract rights. They refer *simpliciter*, for example, to freedom and equality, life and property, and free speech and protection of personality. As abstract rights, human rights inevitably collide with other human rights and with collective goods such as protection of the environment and public safety. Human rights, therefore, stand in need of balancing. Balancing is the central dimension of proportionality analysis. Proportionality analysis presupposes that the rights involved have the structure of principles. This, in turn, implies that human rights have the structure of principles.[11]

The principles structure of human rights has far-reaching consequences for their justifiability. A justification of human rights does not require that an answer be given to all human rights questions. It only requires that sufficient reasons be given for what has to be balanced, that is, for human rights *qua* principles. This reduces the burden of justification considerably. If all questions about the assessment of claims respecting human rights had to be resolved in order to justify human rights, a justification of human rights could never be achieved. It could never be achieved for in many cases balancing leads to 'reasonable disagreement'.[12] This is a central theme in the theory of discretion as a part of the theory of proportionality.[13] Here, a single point is of interest. The restriction of the justification to human rights *qua* principles implies, indeed, considerable flexibility with respect to what, in the justification of human rights, is justified. It allows even for a certain degree of cultural discretion.[14] This is not to say, however, that flexibility or variability is unlimited. The most important limitation stems from a fundamental rule of balancing, namely, that the power of rights increases overproportionally with an increasing intensity of interference.[15] In cases that concern the core of human rights, this has the consequence that only one solution is compatible with human rights. For this reason, flexibility is by no means to be equated with arbitrariness. This suffices to qualify human rights *qua* principles as objects of justification.

11 On the concept of principle see Alexy, *A Theory of Constitutional Rights* (note 7, above), 47–8.

12 See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 55.

13 Alexy, *A Theory of Constitutional Rights* (note 7, above), 414–25.

14 Julian Rivers, 'Proportionality, Discretion and the Second Law of Balancing', in *Law, Rights and Discourse*, ed. George Pavlakos (Oxford: Hart, 2007), 167–88, at 178–80.

15 Alexy, *A Theory of Constitutional Rights* (note 7, above), 103; Alexy, 'On Balancing and Subsumption', *Ratio Juris* 16 (2003), 433–49, at 446.