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Between God and Democracy

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Abstract

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and

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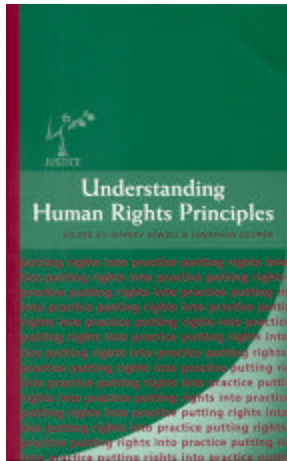
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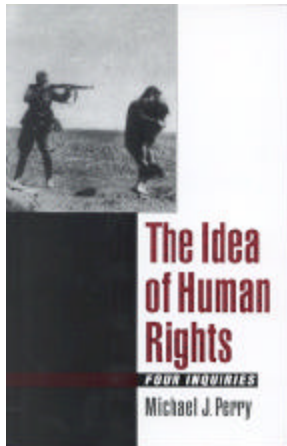


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Introduction

These books provide two opposing poles for anyone seeking to circumnavigate the sphere of legal human rights scholarship. The collection of articles assembled by Jowell and Cooper restrict themselves to an analysis of the effects and principal implications of the assimilation of the European Convention on Human Rights into the domestic law of the United Kingdom, enshrined within the Human Rights Act (1998). The majority of the contributors to this collection are practicing human rights lawyers, taking time out from their role as advocates to reflect upon the significance of specific aspects of the Human Rights Act for the legal and political culture of the United Kingdom. Michael J. Perry's book, on the other hand, plunges into the modern day Sophist-infested waters of the study of the philosophical foundations of the principles of human rights.

The principal object of Perry's book is to raise the question of whether there exists an intelligible secular justification for the cornerstone of all legal human rights conventions: the assumption that human beings possess inherent dignity sufficient to ground our claim to moral inviolability. The doctrine of human rights offers the promise of affording the protective status of moral inviolability

to all human beings qua human beings. Ultimately, Perry argues that the secular realm has proven incapable of providing an intelligible and thus legitimate argument in support of the presumed moral inviolability of human beings. Perry advocates a return to religion and the metaphysical in our quest to provide an adequately authoritative and justifiable foundation for the doctrine of human rights.

On the face of it these are two very different books. Why, then, should they be reviewed together? More to the point—why should one read them together?

These two books might be generally thought of as addressing two very different human rights audiences. One might consider Jowell and Cooper as addressing those with a specialized, possibly purely occupational, interest in the practice of human rights law within the United Kingdom. In contrast, one might restrict one's recommendations of Perry's book to those known to suffer from the philosophical affliction; an interest in purely abstract, even esoteric, matters that typically have no discernible bearing upon the so-called real world. Taking a hypothetical human rights professional as my example, one might, on the above terms, recommend that she take Jowell and Cooper to work with her, while never allowing Perry to stray from her bedside table. When looked at in this way, there may appear to exist at least two communities of human rights professionals; those concerned with the mere study of human rights and those involved in the "real" work of protecting and promoting the actual human rights of actual human beings. The one rarely strays beyond the lecture theatre and seminar room, while the other pursues its trade in the field or courtroom. This distinction does exist and is undeniable. It coincides with a distinction between theory and practice, which is commonplace within academic circles generally. However, one should beware of unduly reifying the theory/practice distinction within human rights. Without resorting to a finer-tuned, epistemological analysis of the theory/practice distinction, it is difficult to see what the protection and promotion of human rights has to gain from "theorists" and "practitioners" intentionally operating in ignorance of one another's work, safely confined within their respective occupational ghettos. Though modest in itself, reading Perry's "theoretical" book and Jowell & Cooper's more "practical" examination of human rights together would help towards the eventual dissolution of such unnecessary barriers between human rights professionals.

The Two Faces of Legal Scholarship

Jowell and Cooper's book consists of six essays written, for the most part, by practitioners of human rights law within the United Kingdom. The principal objective of the book is to provide an initial evaluation of the significance and specific effects of the Human Rights Act (1998), which finally became fully operative in October 2000. In the United Kingdom, this Act has not been universally greeted with rapturous applause. Indeed, for those who have long made a virtue out of the absence of a written constitution in this country, the Human Rights Act passing into law appeared to mark a veritable year zero for the good subjects of the United Kingdom, whose political and legal culture is expected never to be the same again.

The six essays assembled in this book range over a broad area of legal interests, covering such themes as proportionality; civil rights and civil obligations; lawful interference with fundamental rights; positive obligations towards citizens; and legal relations between private individuals. All of

these are examined through the prism of the Human Rights Act. The contributors themselves appear to be in agreement with the editors' general assessment of the Act. From a purely technical perspective, the Human Rights Act is just another statute. However, this statute is fundamentally unlike all those other forms of legislation that have passed through the Scylla and Charybdis of the two Houses of Parliament in one, all important, respect. The Human Rights Act provides a single, legally authoritative source for determining the limits and scope of lawful relations between individuals and the state. All other laws, it would appear, are now potentially subject to validation by the Human Rights Act. This Act has the means for going further and more boldly than any other Act has ever gone before. In fact, if not in name, the United Kingdom now has a written constitution, or, at least, as close to one as it is likely to get for the foreseeable future. Thus, whilst primarily directed towards legal rights scholars and practitioners, the essays assembled in this book should be read by those with any interest in how they are governed and how abuses of power may be readily identified and held to account. I recommend a copy be deposited and placed on public display in every town hall in the land.

The substantive theme of this book, the intellectual glue that holds its diverse parts together, is that of democracy. Within some of the essays, the implications of the Human Rights Act upon the extension of democracy within the political culture of the United Kingdom figures only tacitly; as a background assumption. Other essays, however, address the issue directly. The best example of this is to be found in Rabinder Singh's concluding chapter.

Singh focuses exclusively upon the theme of the potential democratic benefits to be accrued from the introduction of the Human Rights Act. Democracies, he insists, require a Bill of Rights, a legally authoritative and codified collection of norms that aim to identify the limits and obligations of political authority. A Bill of Rights is considered essential for democracy for the fundamental reason that the enshrined rights serve to protect all citizens, but especially minority groups, against excesses of political power. Singh's philosophical reading of democracy bears a close resemblance to that proposed by the likes of Ronald Dworkin (1978). Democracy does not refer to that process by which political parties achieve a majority in the legislature and proceed to implement policies whose sole intention is to promote the interests of their supporters, at the likely, if not intended, expense of those who do not share such views. For Singh, as for Dworkin, democracy positively requires a set of legal rules and procedures based upon the principle of equality before and after the ballot box. The principal function of a Bill of Rights is to ensure that each citizen enjoys equal legal status, irrespective of their political affiliation or other beliefs. A Bill of Rights provides a legal framework for regulating political and legal relations, irrespective of who occupies the seat of government. It protects democracy by prohibiting anti-democratic political organizations and practices which do not accept that all human beings are worthy of equal respect and that would seek to restrict the "benefits" of the full political franchise only to those identified as belonging to the appropriate "tribe."

Singh concludes his essay with the claim that the Human Rights Act provides the United Kingdom with just such a Bill of Rights and thus should be welcomed by all those committed to enhancing the cause of democracy. Singh's assessment of the likely benefits of the Human Rights Act epitomizes the message one generally takes away from reading this book. Without a single exception, all of the essays imply or state that the incorporation of human rights standards into

domestic UK law should be warmly welcomed by all of us who are subject to the legal authority of the British State. Overall, the book suggests that the Human Rights Act extends the opportunities of “ordinary” people to affect directly the fundamental legal and political procedures that govern their lives. The passing of the Human Rights Act, it would appear, should be considered the most significant political event to have occurred in the recent, thoroughly apolitical, political history of the United Kingdom.

Jowell and Cooper’s book makes an important contribution to understanding the significance of the Human Rights Act for all of us, lawyers and non-lawyers alike. Overall, it is a well-written book which generally succeeds in negotiating the difficult task of addressing a relatively specialist audience in a readily comprehensible tone. I suspect that it will become a core source for those especially interested in assessing the development of human rights law in the United Kingdom. It certainly deserves such status. There are some themes and relevant questions, however, which are not considered by any of the contributors. In some cases the editors may be excused on grounds of the necessary limitations of scope and space. In other cases, the omissions are less readily explicable.

In this latter category, I would like to have seen the inclusion of an essay further exploring the implications of the Human Rights Act for the principle of equality and, in particular, for freedom of religious affiliation and expression within the United Kingdom. It has, for example, been widely recognized for some time that the English laws on blasphemy manifestly fail to accord equal respect and protection to all individuals and groups within England. On the face of it, the blasphemy laws would appear to be inconsistent with the spirit and the letter of the Human Rights Act. Have there been no legal challenges to the blasphemy laws on the grounds that these constitute a violation of the human rights of non-Christians in this country? Even if no such cases exist, the topic itself warrants close attention.

In regard to the former category, the book’s scope and remit exclude the possibility of including any detailed investigation into the philosophically normative question of the ultimate justifiability of human rights principles. Singh comes closest to this issue in his discussion of democracy as a legitimizing basis for the extension of human rights standards into legal statute. What is not addressed, however, is precisely how, ultimately, the fundamental principles of human rights standards may be defended when confronted by those who, irrespective of motive, challenge the presumed hegemonic status of the discourse of human rights. While this question could not be adequately addressed by Jowell and Cooper, given their concern to address the more practical aspects of current human rights legislation, no one for whom the subject of human rights is important and relevant can legitimately exclude a detailed consideration of the issue. Hence the need to engage with the book written by Michael J. Perry.

Human Rights and Philosophical Secularism

Perry is a legal scholar who should be commended for extending his own intellectual inquiries beyond positive, existing human rights legislation to the philosophically antecedent question of how human rights can be intelligibly justified as a moral doctrine. The object of Perry’s book is an examination of human rights as a moral doctrine. What distinguishes his examination from so many

other contributions to the field is both the question he raises and the, albeit somewhat tentative, answer he provides.

Perry asks whether the moral doctrine of human rights can be intelligibly justified on purely secular, philosophical grounds. On the face of it, this is an unusual question. For many, the doctrine of human rights is considered to be the quintessential manifestation of those secularizing forces that have been traversing the globe for the past three centuries or so. The intellectual and artistic forces of the Renaissance that placed “man,” rather than god at the center of man’s attention, were complemented by the political revolutions of the 18th Century which attempted to do the very same thing (although in some cases by appeal to the authority of god). The story is a familiar one. For better or worse, many of us now perceive the ultimate source of moral and political authority as originating from our will and from our interests alone, without any divine or metaphysical underpinning. The doctrine of human rights would appear to be the covenant we have given unto ourselves: the expression of those moral aspirations that, if fully realized, would enable each human life to flourish. From this perspective, human rights appears to be an inherently secular moral doctrine, the authority of which is necessarily grounded in human reasoning and human interests, and not the will of god.

To anyone enthralled to the thoroughly secularized story of the development of human rights Perry’s question is likely to appear somewhat anachronistic. Concerns such as these appear to be lent even further credence by the answer Perry proceeds to provide to his question. He argues that there exists no secular moral theory capable of intelligibly justifying the doctrine of human rights – the covenant we have given to ourselves is philosophically insupportable so long as we insist on excluding god. While Perry’s approach may appear somewhat eccentric to those untroubled by the philosophical foundations of human rights, those of us who do concern ourselves with such matters should engage with Perry’s argument. Intellectual complacency has little to be said for it. This is especially true for the philosophical foundations of human rights. Perry’s question, certainly, has merit. That the answer he provides must be evaluated more circumspectly provides an additional insight into the profound problems surrounding contemporary attempts to identify a fully coherent moral foundation for the doctrine of human rights.

Perry’s question should be seriously engaged by all of those who support further enhancing the international authority of human rights precisely because the ultimate foundations of this particular moral doctrine have been consistently called into question from would-be supporters and opponents alike. The source of the problem is the status of human rights as a moral doctrine. The ultimate authority of human rights principles is typically thought to derive from their status as moral principles, principles capable of being equally applied to all human beings everywhere, irrespective of race, creed, gender, religious or political beliefs and affiliation. The doctrine of human rights is the covenant we give unto ourselves as human beings and not as members of any particular community of interests. It would be accurate to say that some now conceive of the doctrine of human rights as the centerpiece of a “new philosophy of man”; that the doctrine of human rights is the expression of our essence.

The legal philosopher Joel Feinberg clearly expresses this connection when he writes, “respect for persons...may simply be respect for their rights, so that there cannot be one without the other;

and what is called “human dignity” may simply be the recognizable capacity to assert claims.” (Feinberg 1973:151) To be a human being is to be the possessor of rights. The veracity of human rights would appear to be guaranteed by a mere appeal to the nature of what we are. I will resist the urge to accuse and convict such arguments for being guilty of the heinous philosophical crime of the willful dissemination of tautological arguments. The philosophical bases of human rights are exposed to far more potentially threatening forces. It is the existence of these that make Perry’s question such a pertinent one.

Perry argues that the doctrine of human rights fundamentally rests upon a belief in the moral inviolability of human beings. Perry consistently refers to this alleged quality as the “sacredness” of human beings. Whether inviolable or sacred, the doctrine of human rights clearly rests upon the notion that each individual human being is intrinsically valuable, by virtue of being human. He argues that it is precisely this belief that cannot be intelligibly defended by secular moral reasoning. He insists that moral philosophy has proven incapable of providing adequate support for a belief that human beings are intrinsically valuable.

Even the most minimal familiarity with human history will be sufficient to provide *prima facie* support for Perry’s claim. Perry himself frequently includes summary accounts of the most recent human atrocities perpetrated in the Balkans and Central America to underscore his premise. Human beings continue to systematically violate one another’s fundamental human rights with little regard for philosophical and theological exhortations towards the presumed sanctity of human life. Perry’s claim appears to be lent even further credence by contemporary moral philosophy itself.

Perry characterizes contemporary moral philosophy as essentially laboring under the shadow of nihilism. The combination of anthropologists’ discovery of the sheer diversity of human moral beliefs and the epistemological prioritization of scientific reasoning appear to have fundamentally undercut the belief that there exists universally valid moral principles ascertainable through the correct exercise of human reasoning. Some moral philosophers do continue to argue that moral philosophy is capable of yielding principles and maxims capable of sustaining a belief in the validity and intelligibility of a universal moral doctrine, such as that of human rights. However, there is at least as large a constituency who counsel against attempting to extract from morality what it is deemed incapable of providing.

In recent years, moral philosophers such as Bernard Williams (1985), Alisdair MacIntyre (1984) and Richard Rorty (1993) have argued the fundamental basis of the universal doctrine of human rights is philosophically unsustainable. The general tone of this brand of contemporary moral philosophy has clearly had some effect upon Perry’s assessment. His diagnosis of the problem is not restricted to those who deny the possibility of founding human rights principles upon secure, universal foundations. He proceeds to analyze secular forms of moral philosophy that positively do attempt to defend human rights principles as universally valid. He argues, however, that even the philosophical supporters of human rights have proven incapable of providing an intelligible justification for the initial and necessary premise: that human beings are inherently valuable moral entities. Perry concludes that secular moral reasoning is incapable of justifying our acceptance of the universal validity of the doctrine of human rights. Secular moral reasoning is proven incapable of demonstrating why we should ultimately act in accordance with the principles of human rights.

To this point Perry treads the path that many skeptics or opponents of human rights have pursued. However, his aim is to defend human rights. By process of elimination, he argues that only religion is capable of rectifying the moral vacuum created by the failure of secular moral philosophy within the doctrine of human rights. Perry defends an ecumenical conception of religion that is not explicitly associated with any particular religious tradition. Rather, he views religion as providing an existential framework within which human life is understood to possess ultimate meaning and in accordance with which we can orient our lives.

For Perry, religion enables us to identify the limits of human moral action as being determined by god's paternity. Conceiving of ourselves as being all, equally, children of the one god, establishes certain, fundamental moral principles and precepts, foremost of which, he claims, is the belief in the inviolable nature of human beings. We should respect the principles of human rights because, ultimately, they are a manifestation of a force far greater than ourselves and to which we are all answerable, at the risk of speaking in overly Old Testament terms. This is the basic core of Perry's answer to the question he raises concerning the foundations of human rights. How then may Perry's overall position be assessed?

It must be said that he is far more circumspect in his discussion of the apparent necessity of a religious basis to human rights than in his discussion of the problems surrounding secular accounts of human rights. The principal aim of his book is to establish the inadequacies of a sole reliance upon secular reasoning in articulating the foundations of human rights. He is careful to avoid putting too much flesh upon the bones of a possible, alternative religious defense of human rights. His caution here is, I believe, well advised.

Perry has written an interesting book, which raises some highly pertinent questions. It deserves to be widely read. Many will sympathize with his frustration at the apparent failure of the secular world to deliver the kind of moral imperatives necessary to fully realize the promise of an order based upon the protection and promotion of human rights. However, the central weakness of his argument lies in his appeal to an other-worldly basis for human rights.

Appeals to the pristine authority of religion as the means for authorizing human relations are often motivated by a desire to rise above the interminable dispute and discord one finds in the secular domain of morality and politics. One does not have to be a Marxist, however, in order to identify the central flaw in any such attempt. Religion is political. Indeed, one might say that there really is no such thing as "religion," rather there are any number of separate and competing religious belief systems found throughout the world. Perry, unfortunately, fails to address the fact that much human conflict continues to be perpetrated in the name of religion. Religion is a symptom, if not a cause, of much human conflict and not a remedy. I would have liked to see Perry address this point.

Conclusion

Human rights are here to stay, but much remains to be done to realize the promise of human rights adequately. These two books deserve to be read as widely as possible and thereby, it is hoped, make their own small contribution to furthering this particular cause. It only remains for me to make

a final observation concerning the distinction between theory and practice in the study of human rights.

Perry's book is motivated by a desire one finds throughout the human rights community. For many, human rights offers the promise of rising above politics and ideology, of providing a set of commandments by which the excesses of human political action can be constrained, condemned and, if necessary, held to account. His own inclination towards seeking a religious basis for the doctrine is most likely born out of a frustration with the secular world for apparently failing to deliver the kind of moral certainties capable of constraining the forces of politics. Interestingly, the principal substantive theme of Jowell and Cooper's book is the importance of human rights for democracy and political participation. This tension is a central feature of the doctrine of human rights and these two books, when taken together, provoke the fundamental question of the nature of human rights. Do human rights provide the necessary framework for genuinely democratic political participation, or do they provide a set of unquestionable moral imperatives whose principal function is to protect human beings from politics and political leaders? Adequately addressing this question positively requires human rights "theorists" and "practitioners" thinking together and acting together in a manner that transcends the restrictive parameters of an adherence to a strict theory-practice based division of labor. Reading these books together enables one to see how overcoming this distinction can enhance both our understanding of human rights and our appreciation of what remains to be done to realize their promise.

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