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The Human Rights agenda and its limitations

1. In contrast to contractual, statutory, and constitutional rights, human rights and the regimes governing them seem *deficient* in two respects. First, as to their mode of *coming into being*, they are neither based upon a consensus of partners nor on properly mandated legislative bodies nor on constitution-making procedures. Second, as to their *mode of enforcement* or implementation, it is partly different from those other rights and generally much less effective. Let me begin by discussing these two apparent deficiencies in turn.

First, how is the *normative validity* of human rights established? Among possible and often tried answers to this thorny question, there are several non-starters. For one, we might claim that such content is globally agreed upon, which is empirically not the case. Moreover, if we were to base moral principles and value commitments of what conforms best with empirically given "raw" preferences of global majorities, we probably would create massive reasons for regret. Second, we might claim that human rights' normative force derives from the fact that they serve superior values such as the *autonomy* of agents, or their human *dignity*. This answer presupposes that these reference values are sufficently clear and universally uncontroversial, which is also not the case; also, it implies that human rights would lose their validity in case it could be shown that they can fail to promote those ultimate vaulues in whose service, in a consequentialist perpsective, they are supposed to work. Furthermore, we might claim that human rights derive from a meta-positive source of normativity, such as natural law, be it in its religious (e. g., Roman Catholic) or be it in its "rational" Lockean version. Still another approach is to look at the his-

torical formation of human rights doctrines and the social and political forces, their contexts, and related ideas that have contributed to the accumulation of human rights claims across time; this approach would provide us with a rich picture of historical causation (Ishay 2004), yet not necessarily also with an answer to the issue of the *continuing* normative validity "now" of human rights, an issue to which at least cynics would respond by saying "times have changed", and the dreams of our ancestors must be forgotten. Finally, there is the option to stay away from an attempt to *derive* human rights and their normative power, their content and validity, from *any* kind of higher-order premise, be it history, God's will, ultimate values, etc. This option, as Etzioni (2010) has argued, would amount to the claim that human rights and their normativity are simply "*self-evident*". "Human rights stand tall on their own" (188) and hence do not require supporting reasons.

I consider this an attractive move. One objection, however, would be that if a proposition is held to be "self-evident", it is pointless to state it, as the statement would make itself redundant. To which the author replies that the quality of self-evidence does not apply to *all* people in *all* situations. One feature of the attractiveness of the argument is that it allows us to get rid of the implication (as it is associated with all the other approaches mentioned above) of "the more reasons given, the more reasons to object." To support the self-evidence proposition, the author makes two empirical claims. First, authoritarian regimes that do not (fully) recognize and implement human rights tend to be *apologetic* when asked concerning this failure; they typically argue that (and why) they cannot "yet", under present risks and challenges, afford to grant those rights, but intend to do so at some later point (194). If regimes and their representatives are thus challenged, they are brought under pressure to "improve their human rights record out of self-interest." (195)

To be sure, this self-interestedness will only be triggered if by-standing observers, belonging to an (international) public sphere, will take notice and blame violators for having a less than perfect human rights record. The second empirical claim anount to what I would call the claim of "asymmetrical persuasiveness". That is to say: when a reasonably open-minded person (who is unfamiliar with or at least uncommitted to human rights claims) talks (in a minimally liberal setting) to a proponent of human rights, then she is more likely to be persuaded by the latter than, conversily, the proponent is likely to change her position in the opposite direction. Again, this highly optimistic view of the "self-evident" foundation of human rights and their moral validity is contingent upon the sensitivity of regimes to their international human rights *reputation*, as well as of what we may mean by the qualifiers "reasonably" open-minded and "minimally" liberal.

2. Apart from the issue of normative validity, how does the *content* of human rights catalogues come into being? Osiatynski (2009) and others answer this question by relying on a model in which four factors play a role. First, there are people who *suffer* from unfulfilled need or from being defeated in conflicts. Second, there are *other* people who respond to the narrative of suffering with ethical impulses of compassion, solidarity, benevolent paternalism, charity, or repugnance; they act as advocates and proponents of the cause of those who suffer or are victimized, using movement tactics of mobilization and making appeals to the wider public's humanitarian moral responsibilities. "Human rights have always emerged from resistance against arbitrary rule, repression, and humiliation. .. The experience of violation of dignity is the context of discovery of human rights." (Hbs. 44f., my transl.) Third, there is a political and ultimately legal process in which remedial legislation is proposed, adopted, and adjudicated within a framework

of orderly legal formalisms; this process, in which human rights are being defined and adopted, needs not to be driven exclusively or even predominantly by authentic moral commitments (as distinct from strategic interests). Fourth, there is a present historical context (or a recent past) such as WWII, the Holocaust, the process of decolonization, civil rights, anti-racist and feminist protest movements) which has given rise to the suffering, the mobilization, and formal-legal responses. (Ishay 2010)

It is the second of these four components of the human rights process (alliances of "civil society amplifiers"), the phase of protest, mobilization, the expression of moral indignation, the call for boykots etc. in which a sense of self-confident moral enthusiasm is present that is rarely to be encountered in the context of ordinary law-making. An example is the language of a "Proclamation" that was issued by the International Conference on Human Rights in Teheran in 1968. The conference "solemnly proclaims" and assigns a "solemn obligation", states "the inalienable and inviolable rights of all members of the human family" in order to achieve the "maximum freedom and dignity" for "each individual"; it appeals to states to "affirm their determination", among other things their determination to "eradicate [the] evil of apartheit", an evil of which "peoples of the world must be made fully aware"; in addition, "obligations of the international community" and "imperatives for every nation" are claimed to "make the maximum possible effort" and to "dedicate themselves to the principles…" etc. This strongly aspirational, maximalist, and somewhat overheated preceptorial rhetoric seems to be a distinctive feature of discourses on human rights.

3. Equally distinctive are the modes of *enforcing* human rights against states that violate them or tolerate their violation through non-state actors. This can best be understood if we realize the various limitations of international courts such as the ICC. First, its jurisdiction is limited to the very worst human rights violations that states can commit, namely genocide, crimes against humanity, and war crimes (with acts of aggression still awaiting the inclusion here). Also, the ICC is a subsidiary body, being allowed by its statutes to become active only after states have turned out to be unable or unwilling to prosecute alleged violations. Finally, states can unilaterally withdraw from the territorial reach of the court (Israel, Sudan, the US) or fail to join in the first place. All the rest of the enforcement, as it were, must be performed by either national and supranational *courts* (such as the European Court of Human Rights), *political decision* on economic and military sanctions, and agents coming from NGOs or other civil society activities such as the monitoring initiatives of Human Rights Watch or Amnesty International.

Thus, we must conclude that both on the norm-*building* side and the norm-*implementation* side, the lions share of human rights activities fall on civil society, the public sphere in which normative sensitivities are being cultivated, and prospects of naming/blaming/shaming activities that depend on it. As it is states who commit human rights violations (or fail to effectively prevent such violations to the extent they come from third parties), and as most other states lack the will and/or the ability to impose sanctions on state violators, it is only from within civil society that effective guarantees can originate.

There are two directions in which the failure of states to enforce human rights are stated and scandalized. First, complaints come from victims (and actors advocating their cause and speak-

ing in their name, such as national and international NGOs) and are *vertically* addressed to governments and international actors who supposedly are able to remedy human rights violations. The other dimension in which human rights discourses are carried out is the horizontal one: states, as well as supranational organizations (such as the UN Committee on Human Rights) monitor and issue complaints, make demands, and threaten sanctions concerning the human rights performance of other states. Human rights as an arena of international politics is typically fraught with power interests states pursue against other states. As far as poor and powerless countries are concerned, humanitarian intervention trumps state sovereignty; in contrast, state sovereignty trumps humanitarian intervention in the cases of US, also Russia and PR China.

That is to say, by way of an understatement: If state officials complain about human rights violations taking place in other states, their concern for ending these violations is often not the only motivation for doing so. Human rights concerns are by no means strategy-proof, and the same applies to the lack of concern where there is manifest cause for it. An example are human rights crusades during the Cold War. Behavioral indicators suggesting that states use human rights arguments as a pretense for strategic motivations include the following: State A threatens or actually conducts sanctions against state B, allegedly for the sake of restoring or protecting human rights in B, while at the same time itself violating human rights domestically or elsewhere. Complaints about human rights violations are selectively voiced against some states, while others with comparable reasons for complaint remain exempt from critique. Massive violations are evident in one state, yet human rights enforcement or even media attention does not come forth because the country in question is otherwise of no strategic interest. Human rights violations are used as a pretext for strategies designed to trigger the breakdown of a regime with which inter-

vening powers are unhappy for entirely different reasons, e. g. security related ones. Moreover, the defense and protection of one human right (say, the right of young girls to school education) is enforced (and perhaps even *can only* be enforced) by measures that deprive others in the target population of very basic human rights, such as the right to life - an aspect of the current realities of the war in Afghanistan.

5. Three families: (1) liberal - *negative* duties; first is genocide convention; non-discrimination; also "self-determination" (1951)? key term is "undue intrusion of the state" -> self-restraint of state power; "rights from" -> freedoms; can be realized *on the spot* through retreat/*in*action of the state.

(2) social - *positive* duties, "rights to" protection from 3rd party externalities through *intervention* (through regulation), and (3) *provision* of goods and services, e. g., access to drinking water, sanitation as a HR; contested and unstable standards of quantity and quality; reconciled in a *time*-consuming process.

two problems with (3): how much is enough (implying how much can be expected to be done through self-provision)? how do we get hold of the *resources* needed to actually provide what is enough?

conventions for the protection of vulnerable groups:

racial discrimination 69

women 81

torture 84

children 89

disabilities 08

migrant workers 03

Lesbian/gay (pending)

positive duties against *all*: collective/aspirational (climate, future generations)

6. Finally, the prevalence of human rights concerns seems to fluctuate over time, even within political elites of consolidated liberal democracies; at times these concerns are paramount, while at others they become subordinate to issues of "terrorism" or, for that matter, irregular migration. An analogous unevenness of effective human rights coverage can be observed in space. While only the Universal *Declaration* of Human Rights (1948) claims validity for all human beings, its concretization in the two *Covenants* of 1966 bind only those states who have ratified or acceeded to them to the extent they have not stated specific reservations at the point of doing so. Yet a large number of states has chosen not to acceed. Given the fact that "in liberal democracies with a well functioning constitution, there is no need for human rights" (Limbach, Grimm), as national, EU-wide and European civil rights regimes provide far more than equivalent guarantees, the fact that all EU member states are also signatories of the two Covenants seems rather inconsequential. On the other hand, and where accession would really make a difference, we find, for instance, that the PR China and the US are missing from the list of signatories of the Second Optional Protocol (1989) which aims at the abolition of the death penalty. The issue of state sover-

eignty trumps international human rights regime. Suspicions of strategic use, opportunism, hypocrisy undermines credibility of HR regime.

7. Inconsistency, conflict between HR? (Danish cartoon case)

no freedom without bread (soc); no bread without freedom (lib)

rhetoric: inalienable, inviolable, indivisible, inextricably linked, interdependent, interconnected

8. Issue of cultural relativism: "Asian values" (cf. discussion in Osiatynski)