

Michael Rosen

A Comment on Noel Malcolm, *Human Rights*

It is always instructive to read Noel Malcolm: his learning is deep and his observations shrewd. In this case, it was a particular pleasure for me, however, since I agree with him on almost all points. I shall use these remarks to outline what I take to be the structure of his argument and amplify it with some brief thoughts of my own before suggesting that his alternative departs rather less from the mainstream of contemporary philosophy than he believes.

The fulcrum of Malcolm's argument is opposition to what he calls the 'Moral-Philosophical Approach' to human rights. This approach has three main features. First, the view that human rights are that subset of moral rights that are the most basic. Secondly, that human rights are universal: they apply to human beings at all places and at all times. Finally, it is the objective of the moral-philosophical approach to identify human rights and to give them normative foundations.

Malcolm is unpersuaded by any of these three features. It is certainly strange to think that human rights were virtually present thousands of years ago in societies whose own concepts were not even remotely connected with them, in the way that you might just about think that the facts of modern physics – quantum entanglement or the existence of black holes – were waiting to be discovered by bronze age warriors. But 'strange' is not a decisive objection to a philosophical position. It is, furthermore, undoubtedly true that human rights, as found in law and international politics, do not directly track what would normally be considered to be basic moral rights. But again that is not decisive – perhaps there is some derivation via a further argument. In fact, Malcolm himself notes one that is widely recognized in the literature – that human rights are rights that have a particular connection with state power. A murder, awful though it is, does not count as a violation of human rights, while death squads murdering the critics of a regime with impunity do.

It is Malcolm's third issue – that efforts at providing the basic normative foundations for human rights have been unsuccessful – that is most significant, I think. I want to dwell on this for a minute. Is it true and does it matter? My answer is: yes, but not that much.

One very striking thing about the human rights that are elaborated in various conventions, declarations, treaties and constitutions is that they are of very different kinds. Some do look like basic moral rights (rights to life, rights against torture or enslavement, for example). Some are more of a procedural-institutional kind (various freedoms necessary to equal political participation, for example). What are often called ‘social rights’, on the other hand, involve claims to resources (the right to work, right to leisure, healthcare, education and so on). So it seems unlikely that a single theory will give normative foundations for all of them.

Following Rawls, contemporary philosophers standardly divide moral theories into two families: teleological theories and deontological ones. Teleological theories identify what is good in terms of some end or ends. The model teleological theory is utilitarianism, although not all teleological theories have to be so simple. Thus a ‘capabilities’ approach of the sort advocated by Amartya Sen and Martha Nussbaum has a much more complicated account of human well-being, but, in the end, it is a teleological theory.

Now, obviously, teleological theories are well suited to justifying the claims to resources involved in rights of the third kind, since it is possible to show that resources promote the ends in question. What is less easy to explain is why such claims constitute *rights*. Culture, education, health and so on are obviously parts of human flourishing, and so it is good that people have them, but what amount of them – and, hence, what level of resources – are we entitled to claim as of right?

On the other hand, what about deontological theories? Rawls, rather unhelpfully, tells us simply that deontological theories are non-teleological and that they do not define ‘the right’ in terms of ‘the good’. Now, literally, a ‘deontology’ is a doctrine of duties, but modern philosophers are, almost without exception, sceptical of the idea that a moral theory could start with the idea of duty. The assumption is that we have moral duties to others only because of the moral claims that they have on us: it is the latter that are primary. From which it follows that deontological theories are rights theories, understanding by ‘rights’ moral reasons that override what would otherwise be the reason-giving force of certain ends. This corresponds to the intuitive idea that we have of some of the most characteristic human rights (states simply *must not* torture, whether that would produce greater overall happiness or not).

Thus there is a problem of circularity. If deontological theories are rights theories, how can they *ground* rights?

At the very beginning of *A Theory of Justice*, Rawls remarks that human beings have ‘an inviolability based on justice’. But that is very puzzling, for Rawls will spend the next 500 pages or so articulating a theory of justice that embodies that deontological starting point. So how can justice be its ‘base’?

Something like this problem is a severe (if not, perhaps, completely insuperable) difficulty for any attempt to give deontological theories a normative foundation, I think. Let us say that the claim is that there is some essential normative feature that all human beings have in common – human rights declarations commonly refer to ‘dignity’. What follows from that? If human dignity is ‘inviolable’ (*unantastbar*, as the German *Grundgesetz* has it) then, of course we should not violate it. But, the sceptic might ask, what *counts* as violating this presumed inner transcendental kernel of moral value? After all, if you lock me up, I still *have* my dignity – if I really were to lose it, there would be nothing for me to found further rights claims on any more.

But does this matter very much? I don’t think so. And here I part company with Malcolm somewhat.

As Malcolm presents it, the idea of finding normative foundations for human rights is characteristic of ‘the philosopher’s’ approach to human rights. Now, certainly, he has indeed identified one or two contemporary and recent philosophical authors who have attempted the task (as well as Nussbaum, he mentions Alan Gewirth, James Griffin and Griffin’s student, John Tasioulas; I would add Jürgen Habermas and his student, Rainer Forst). But these authors are in the minority. The overwhelming majority of contemporary philosophers who write on human rights are liberals for whom the ‘fact of pluralism’ (Rawls’s phrase again) is fundamental. Like Rawls, they are content to practice ‘reflective equilibrium’ – work outwards to articulate the structure of normative intuitions and commitments, rather than purporting to give them foundations. And the fact that the principles that they come to are compatible with more than one moral system is an advantage, not an objection.

So I think that Malcolm’s position is less challenging to liberal, human rights orthodoxy than he believes. In fact – and I must confess that I find it slightly surprising that such a historically sophisticated author does not mention this – foundationalism in contemporary human rights debates is much more the enterprise of religious thinkers (in particular, Catholic ‘natural law’ advocates) than secular philosophers. In my opinion, they have had as little success as their more liberal counterparts in giving human rights objective foundations. But the reasons for their failure and – to the political theorist and

historian just as significant – the zombie-like persistence of their claims to have succeeded are part of another story.

Michael Rosen
Senator Joseph S. Clark Professor of Ethics
in Politics and Government
Department of Government
Harvard University
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