Human Rights Conventions

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1. Introduction

Human rights conventions codify a wide range of rights and standards under international law. However, plagued by polarizing disagreements about human rights, views about human rights conventions are equally divided. The main strands of skepticism of human rights conventions are mainly about the pitfalls of the legalization of human rights and ineffectiveness of international instruments and institutions in implementing human rights standards and improving compliance, despite their criticized proliferation. But apart from the skeptical views about what can be more generally described as the praxis of human rights conventions, they also give rise to more fundamental and major philosophical issues. These for example include the ability of human rights conventions to clarify the content of human rights or the point and normative justification of having conventions. After providing an overview of conventions, this paper will engage primarily with the former issue and argue that the conceptual content of human rights can be explained through norm-making and subsequent norm-applying in international legal practice. Normativity of human rights conventions will also be discussed, although it will be treated as an open question. It will conclude with some remarks on the continuous nature and authority

of international legal practice and argues that human rights conventions do not have to conform to any single philosophical account.

2. What are human rights conventions?

Human rights conventions are international treaties that create legally binding obligations for state parties. Referred to, interchangeably, as treaty, convention or covenant, they are an integral part of the international system for the protection and promotion of human rights. Given the lack of a legislative institution at the international level, they have been the most important source of international human rights law (IHRL) as set out in Article 38(1) of the Statute of the International Court of Justice. This, however, means that by their nature as multilateral treaties, they are legally binding only on those States that have subscribed to them by becoming a party.

There are dozens of international human rights conventions, nine of which are recognized as *core*, indicating their special significance:

- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

- Convention on the Rights of the Child (CRC)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)
- International Convention for the Protection of All Persons from Enforced
- Disappearance (CPED)
- Convention on the Rights of Persons with Disabilities (CRPD)

These conventions are the outcome of decades of continuous efforts since the Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly (UNGA) in 1948. The impetus for creating an international system of legally binding human rights protection was created by the horrors of the Second World War which prompted the international community to ensure that such atrocities would never happen again. By then, significant international instruments already contained general expressions on human rights issues. The Covenant of the League of Nations had addressed issues relating to fair and humane labor conditions and just treatment of the native populations (Art. 23). The Charter of the United Nations (UN Charter), more strongly and in more specific terms, had also proclaimed that one of the purposes of the United Nations is to promote and encourage 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion' (Art. 1, para. 3). Nonetheless, the need for additional sources that would elaborate and set clear standards was evident and would eventually lead to the promulgation of an array of further instruments including human rights conventions.

Given the non-binding status of the UDHR, the idea that the rights contained therein should be codified into a legally binding convention was pursued from the early stages of its preparation. During the 'preparation of an international bill of rights', as envisaged by the UNGA (A/Res/43(I)), it was decided that two separate documents should be prepared: one in the form of a declaration, which would set forth general principles or standards of human rights; the other in the form of a treaty, which would elaborate on specific rights and their conditions. Indeed, on the same day that the UDHR was adopted (December 10, 1948), the UNGA requested the Commission on Human Rights to prioritize preparing a draft covenant on human rights (A/Res/217(III) E).

However, alongside procedural and technical difficulties, political differences and divergence of priorities between liberal western states and Soviet communists prevented the rights enshrined in the UDHR from being codified in one comprehensive convention. In February 1952, the UNGA decided (A/Res/543(VI)(1)) that two Covenants on human rights were to be drafted and submitted simultaneously. The rights were accordingly divided into two major categories, each addressed in a separate convention. The ICCPR focused on liberty-oriented rights such as freedom of expression and religion, political participation and freedom from torture and arbitrary detention. The ICESCR concentrated more on welfare rights such as food, housing, education and healthcare. Together with their Optional Protocols and the UDHR, the two Covenants constitute the 'International Bill of Human Rights'.

It must be also noted that, despite the expressions of commitment and enthusiasm in 1948, almost two decades would pass before the two Covenants were adopted (in

1966), and a further decade before they entered into force (in 1976). To date, 173 states have ratified the ICCPR and 171 the ICESCR.

International human rights treaty-making did not stop at the adoption of the two Covenants. The view that prevailed was that further specialized human rights conventions were needed to address certain rights or right holders. CAT and CPED respectively were adopted to address the rights to freedom from torture and enforced disappearance. CEDAW, CRC and CRPD were adopted to deal respectively with the human rights of women, children and persons with disabilities.

These latter conventions were significant, among other reasons, for integrating into single conventions the full range of human rights (civil, political, economic, social and cultural) that were previously covered in the separate Covenants. In addition, as the ratification rate goes, some of these conventions have surpassed the Covenants. The CRC with 196 state parties and CEDAW with 189 are two of the most ratified human rights conventions.

The adoption of conventions like the CRC and CEDAW have raised questions about the conception of the rights they contain as human rights, for they could be possessed not by all and every human being, but only by specific groups of right holders. The said conventions also became subjects of skepticism for a more practical reason. CEDAW, for instance, has received the largest number of reservations, with more than 50 States having made such reservations, some of which are very wide, or go to the heart of the state's obligation to eliminate discrimination against women, which would question the ratification rate as a criterion for compliance or effectiveness.

Similarly, Iran, which has one of the worst track records of violating children's rights, has been a state party to the CRC since 1994; however, upon ratification, it made the following reservation which defeats the object and purpose of the convention: 'The Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic laws and the international legislation in effect'.

The above is also a reality check and a reminder that signing up to a human rights convention is only the first step and is by no means sufficient to guarantee that the rights recognized on paper will be enjoyed in practice. That is the reason human rights conventions are accompanied by specialized committees (generally known as treaty bodies) to oversee the implementation of the legal obligations made by the state parties. Their work is carried out mostly through a system of monitoring, where States must report on their human rights situation. Together with the information received from other sources (e.g. UN agencies and NGOs), the treaty bodies publish their evaluations and recommendations.

In addition to the reporting procedure, some of the treaty bodies are equipped with additional monitoring mechanisms including the examination of individual complaints. For instance, the Human Rights Committee (HRCttee) can, under certain conditions – most importantly provided that the state in question has recognized the competence of the committee by ratifying the relevant Optional Protocol – receive petitions from individuals who claim that their rights under the ICCPR have been violated. This is, however, hardly comparable to the European Convention of Human Rights (ECHR) which was signed only two years after the UDHR and entered into

force in 1953. To date, the ECHR with its judicial institution (the European Court of Human Rights) arguably constitutes the most advanced and effective example of a human rights protection system.

Finally, a charge frequently laid by some critics against human rights conventions is that of proliferation. Without getting into the merits of the claim, it is now more than a decade since the latest core convention (CRPD) was adopted, which makes it seem like the heyday of creating human rights conventions is over. It is not quite so though; the machinery of creating human rights conventions has slowed down, but it has not fully stopped. Some are still in the process of ratification; others, such as a treaty on business and human rights, are presently being drafted.

3. What are human rights conventions *about*?

Human rights conventions are bound to attract a seemingly simple question about what it is that they are conventions *of*. This may not seem to many as presenting much of a problem. Aren't they about human rights, one might say, the rights recognized as such in those conventions? Besides, 'human rights' is a phenomenon that is said to have become the *lingua franca* of our time (e.g. Buchanan 2013). So, surely most people know what they are and share the same concept when they talk about it. Despite appearances, however, this is one of the most fundamental, yet strikingly under-theorized questions about human rights. The way we answer it (i.e. how we conceive of human rights) has profound implications for our approach to the theory and practice of human rights.

Answering this question should therefore take precedence in theoretical discussions about human rights conventions which can be examined by their relation to the concept of human rights. The basic question is whether human rights conventions in any way and to any extent contribute to the determination of the content of that concept, or whether they are mere reflections of a concept separately determined by philosophers. This also raises further questions about the semantic and epistemological status and significance of human rights conventions. Are they the manifestation of the social dimension of human rights, and should we take that dimension seriously? If so, how and to what extent, and what can be achieved by doing so?

Let us begin by emphasizing that the codification of human rights in international conventions did not start the philosophical debates. Prior to the codification, the concept of human rights had long been discussed although little agreement was achieved as to their content and foundation. However, when the early human rights conventions (and international instruments such as UDHR) were adopted, the political aspirations of the international community were translated into the language of international law, and human rights were conceptualized into a set of legal rights and duties. This kick-started a process where the conceptual content of human rights could be progressively determined through the authoritative international legal practice formed around the conventions.

On the question of how the conceptual content of human rights is determined and whether human rights conventions and legal practice play any role in determining that content, the literature shows two competing approaches: moral and political (or

practical). The so-called moral or orthodox approaches attempt to explain human rights from a purely normative perspective claiming that human rights exist independently of social facts. That a human right is recognized as such in a human rights convention, or that it has been further interpreted or implemented by an international court, such theories might say, plays no role in the existence and content of the putative human right, for they are determined exclusively and ultimately by natural moral reasoning, not at all by social facts like adoption of a convention or a court ruling. The practical approach, on the other hand, seems to be more inclined to take into account the practice of international human rights at the political and (to some extent) legal level. Nonetheless, many of those who are sympathetic to the political approach may point out that however intricate the international practice is, it is not capable (yet) of helping with the determination of the content of the concept of human rights (Raz 2010).

Discussion of theories of either sort is well beyond the scope of this entry. However, it is important to stress that many such philosophical approaches to human rights tend to perceive international legal practice as less advanced than it really is, and underestimate how much it has progressed. They also fail to conduct the (prior) task of explaining their conception of human rights and how the content of that conception is determined. This is perhaps because they seem to take it for granted that their conception is true and that they (i.e. philosophers) determine the content of human rights.

The above discussion further highlights a key issue here, which is how to identify the semantic community and where it gets its semantic authority from. The challenge for

legal-practical theorists is to explain why the legal practice and international community are elevated to a level of authority to create the semantic material required for determining the content of the concept of human rights, as opposed to philosophers, whom some may want to portray as forming the required semantic community either horizontally now or vertically throughout history (e.g. Griffin 2008).

It must be noted, however, that human rights are practical concepts, that is to say they are not purely ideal or speculative concepts. They set the boundaries and evaluate certain areas of the treatment of individuals within the state's territory, such as permissible use of force and regulation of personal freedoms by the state. As such, they cannot have a conceptual content that is fixed and independent from their implementation over time. Thus, social facts, e.g. agreement on a text and application of the norms of human rights conventions, play a role in determining their content. Take, for example, slavery or the inequality of women which were widely acceptable moral norms until some decades ago but are considered violations of human rights under international law. The same can be said about the criminalization of homosexuality and discrimination on the basis of sexual orientation and gender identity. Thus, it can be argued that the concept of human rights rests on a social practice: the practice of participants in the international legal practice of human rights. This is what makes them, and not philosophers, the relevant semantic community whose convergence matters, i.e. has the semantic authority. Philosophers who engage in armchair philosophical investigations on human rights are not the ones who *use* human rights; they have therefore to defer to the concept of those who use human rights in practice for they are the holders of the relevant semantic authority.

This is in sharp contrast to orthodox and moral realist theories that tend to locate human rights outside social dimensions. Such theorists may want to counter the above by claiming that social facts and their historical developments only reflect our previous expeditions in search of *true* moral human rights. That slavery or inequality of women or criminalization of homosexuality were acceptable moral norms and are now considered reprehensible and violations of human rights, they may claim, only goes to show that we are now discovering deeper layers of our morality. It is not the social facts that progressively make the concept more determinate; it is perfectly determinate already and all we can do is to find out more about it and adjust our imperfect grasp and compliance accordingly (Tasioulas 2019). Similarly, they may claim that over time we will know more about human rights and their inner meaning, thus objecting that legal-practical approaches take the social dimension too seriously. Some may also want to offer a reconciliatory view and suggest that the legal-practical approach may need not deny the moral realist approach, as it can be argued that the outcome of both approaches is the same: either way the concept of human rights is increasingly becoming more determinate.

But appearance is deceptive and the gap could not be wider. Whereas the practical approach places the authority (and responsibility) in the activities and deliberations of participants in practice to determine the content of human rights, the moral realist approach places the same on a belief in the truth of an existing content that we can only attempt to discover. According to the latter, the legal-practical deliberations such as adoption and implementation of human rights conventions make no difference whatsoever regarding the content of the true concept of human rights. But the

question is, how we can evaluate the truth of a philosophical concept so suggested? More generally, can the philosophical discourse *ever* determine the content of human rights or for that matter any practical concept? We are yet to be told whether and how we may know a certain content corresponds to the said true content of human rights and whether we now know more (or less) about human rights compared to what we knew previously. Theorists have failed to give a convincing answer to how we can measure whether we are in (or out of) tune with the said human rights morality and proximity of our understanding of it to the alleged inner meaning of human rights. In other words, it is unclear how we can determine whether by protecting a certain human right (e.g. the recognition of the human rights of people in homosexual relations), we have moved towards, or away from, the said inner meaning.

4. What are human rights conventions *for*?

What is the point of having human rights conventions and what purpose do they (or are they supposed to) serve? The way this question is answered can have significant implications and is often influenced by how human rights have traditionally been theorized. For political theorists the answer lies in the main functions of human rights conventions in the political arena and international relations. They can be said to have codified the standards of political legitimacy, or criteria for international intervention or subjects of concern for the international community (Rawls 1999; Raz 2010; Beitz 2011).

Some theorists might also be prepared to look for those aims within the practice by casting the overarching point of human rights conventions in discursive terms. They

may thus attempt to locate the normativity of human rights conventions in the context in which the relevant actors (e.g. states and international courts) are committed to implement their norms. Their actions, it might be argued, would have a normative hold on all those who participate in the deliberative arena within which human rights conventions are used.

Alternatively, the point of human rights conventions can be said to set the basic conditions of membership of the international community. Of course, states might decide to accede to one or more sets of commitments, or opt out from them (for example, Belarus has not ratified the ECHR and Iran refuses to ratify the CEDAW), but that comes with a clear message to the community at large. By not signing one of the conventions, one state is still liable to explain the reasons for lack of adoption to maintain its status as a trustworthy member of the international community.

In the same vein, the point of human rights conventions can also be determined by the difference they make. Such a difference can be considered from various points and at multiple levels. For instance, it can be viewed as protecting certain interests of individuals against their governments and other agents within their territory. But at a higher level this may be seen as serving a greater goal, such as preventing atrocities and suppression and by doing so ensuring peace and security in the world. Whether and how effectively the existing practice achieves these aims would require empirical research rather than intuitional statements.

For orthodox moral theorists, however, the question is exclusively normative and constitutes an enquiry about why it is morally justified to have human rights

conventions or why their norms ought to be observed based on the moral good they produce. From their point of view, it will be good to have human rights conventions because (and if) they give effect to a certain moral theory or serve to protect some ethical value and normative function that the theorists consider important, e.g. the values of 'personhood' (Griffin 2008) or 'basic forms of human good' (Finnis 2011). Allan Buchanan has also set out to evaluate and demonstrate the moral value and justifiability of human rights law and the international legal system. He first asks what the international legal system of protecting human rights is for, by which he intends to identify the functions of that system; but then he seeks to justify it normatively by appealing to various moral good and values (Buchanan 2013).

However, attempts to justify human rights conventions on fixed moral values is a mistaken approach that contrasts how international human rights law has developed. Human rights conventions do not need this type of justification, for the same reason that the drafters of the UDHR pursued an approach that would be appropriate for a diverse world and could be maximally endorsed from various types of perspectives. The widely quoted phrase from Jacques Maritain suggesting that 'we agree about the rights but on condition no one asks why' (Maritain 1949) is an example of when the above-mentioned strategy was employed in order to have maximum convergence about human rights instruments. In the face of divergence and diversity, people can agree on the rules contained in human rights conventions without uniformly subscribing to the same or any supporting abstract theories.

Thus, from a practical perspective, perhaps normative justification of human rights conventions can be treated as an open question which can be answered from many

perspectives. It may seem to be a big deal if we have no adequate account of the moral justification of having human rights conventions. But this is not something that the drafters of human rights conventions considered to be essential or existential. There are too many justifications out there and participants in the international legal practice of human rights consider the conventions adequately justified without agreeing on their moral justifications.

5. Conclusion

The codification of human rights in international conventions has neither started nor ended the philosophical debates about human rights. They have instead given rise to further philosophical questions including the semantic and epistemological status and significance of the conventions.

The view set out above takes seriously the semantics of the concept of human rights and suggests that they are dependent on social facts such as ratification and implementation of human rights conventions. It was also argued that norm creation, institutionalization and legal interpretation and implementation of such norms contained in the conventions, play a significant role in determining the content of the concept of human rights. The practical record of human rights conventions, particularly of those with authoritative supervising and adjudicating bodies, have helped enormously at the conceptual level, making the content of human rights more explicit.

International conventions are useful starting points to set out what the human rights are and how they ought to be protected. They also provide a legal ground for criticizing or challenging the actions of states (and some other actors) for their non-compliance. But conventions cannot implement their rules and settle disputes by themselves. That is where an institutional system of human rights brings in the relevant actors to implement the norms and promote compliance and protection of human rights.

Philosophers who engage in armchair philosophical investigations about human rights do not possess the relevant semantic authority to determine their conceptual content. Not only is there no agreement among those philosophers, but even if they all agreed on one concept that was derived independently of the practice, it could not be imposed on a practical understanding of human rights. The concept of human rights rests on a social practice: the practice of participants in the international community and human rights institutions when engaging in deliberations about human rights. This is what has made possible the emergence of the language of human rights despite the indeterminacy of its concept, and what continuously permeates and shapes the human rights discourse.

By adopting a philosophical approach that is sensitive to international legal practice, this article also departs from approaches that claim human rights conventions have to conform to any philosophical account in order to be justified. To focus on the practice rather than on the grounds of human rights makes the path towards the recognition and protection of human rights maximally agreeable in the modern world. We do not have to subscribe to human rights on some speculative grounds that nobody is

agreeing on. We can instead agree on the norms that are contained in, among others, human rights conventions and which are further developed in international legal practice.

Cross-references

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