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# THEORETICAL FOUNDATIONS FOR HUMAN RIGHTS

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ABSTRACT (142): This article explores an alternative to the established dichotomy between philosophical (natural law) accounts of human rights, characterised by a foundationalist tendency, and political (practice-based) accounts of human rights, which aspire to be non-foundationalist. I will argue that in order to justify human rights practice, political accounts of human rights cannot do without the support of theoretical foundations, although not necessarily of the natural law variety.

As an alternative to natural law metaphysics, a deflationary theory of human rights, based on a deflationary account of truth, will be put forward. Starting from a distinction between ‘extreme’ and ‘moderate’ forms of deflationism, this article will defend a constructivist theory of human rights grounded on the Humean notion of conventionalism. This innovative approach to human rights can provide political conceptions of human rights with the foundations (or quasi-foundations) they need, but are currently lacking.

Keywords: human rights; foundations; truth; deflationism; Hume; conventionalism.

The only consensus about human rights is that there is no consensus on the nature and justification of human rights. Some argue that human rights are essentially moral rights, since the idea of human rights denotes a moral concept. Others argue that human rights is a political concept, therefore human rights are primarily legal or

political rights. This underlying rift in theories of human rights is the reason why the literature on this idea is currently divided between those who defend a traditional, ethically driven vision of human rights, which is practice-independent (Gewirth 1982; Griffin 2008; Tasioulas 2009; Buchanan 2010), and those who reject it in favour of a political approach, allegedly free from metaphysics, where human rights are strictly practice-dependent (Rawls 1999; Beitz 2009; Raz 2010).

The aim of this article is to find a synthesis between these two dialectically opposed positions. I will argue that the received view of a dichotomy between political and metaphysical conceptions of human rights is to some degree misleading, and potentially detrimental to the idea and aspirations of a human rights agenda, therefore it should be resisted. Notwithstanding their best efforts, political conceptions of human rights are not immune from metaphysical considerations, and in some cases even draw on natural law arguments whenever questions of a justificatory nature arise. More specifically, I will put forward and defend a different metaphysical approach to the theoretical foundations of human rights, one that is ideally suited to political conceptions of human rights. This approach explores the relationship between ‘human rights’ and ‘truth’.

Part I will compare and contrast the political and metaphysical accounts of human rights; while natural law provides the wrong type of foundations for human rights, the political approach cannot do without foundations. Part II will argue that a robust conception of truth lurks behind natural law accounts of human rights, which suggests that an alternative way to theorise the foundation of human rights is by starting from a different conception of truth, to be precise a deflationary theory of truth. Part III will distinguish between an extreme and a moderate interpretation of deflationism about truth, recommending moderate deflationism as an attractive

proposition for theories of human rights seeking an alternative to the natural law paradigm. Part IV will argue that by abandoning moral foundationalism the political theories of human rights of Charles Beitz and Joseph Raz struggle to give a justification for the practice of human rights, a problem that could be solved with the help of a moderate deflationary view about truth. Part V will put forward the backbone of a deflationary theory of human rights; this theory is constructivist but not Kantian, instead it appeals to David Hume's conventionalism.

## HUMAN RIGHTS: WITH OR WITHOUT FOUNDATIONS

The tide is turning against traditional, metaphysical accounts of human rights. The sharp distinction between 'political' and 'metaphysical' justifications in political philosophy has a long history, although in recent years this division bares the mark of John Rawls (1985, p.223), who maintained that it is possible, indeed desirable, to promote a conception of justice as fairness without needing to refer to philosophical or metaphysical claims 'to universal truth, or claims about the essential nature and identity of persons'. While Rawls' concerns were directed towards issues of social justice, since then his vision regarding the task of political philosophy has been adopted more widely, including matters regarding human rights. In the last analysis the disagreement between 'political' and 'metaphysical' theories of human rights rests on the question whether human rights necessitate a foundational basis or not.

There are many reasons why an account of human rights is said to need foundations, but two in particular stand out: for the sake of 'deep understanding' and/or 'justification'. First, foundations provide us with what Jeremy Waldron (2015) calls 'deep understanding'. Foundational inquiries help to deepen and enrich our

understanding of human rights. There are always going to be aspects of international human rights law that remain obscure, and ambivalent; when faced with uncertainty over the correct interpretation of human rights law the only way forward is by inspecting the philosophies that shaped the law in the first place. Secondly, foundations offer a justification for human rights in general, and human rights law in particular. Without foundations, human rights lack authority, or as Jerome Shestack (1998, p.202) says: ‘one furthers fidelity to human rights law by understanding the moral justifications that underlie that law’.<sup>1</sup>

Seeking foundations for human rights may be desirable, perhaps even necessary, but there is no guarantee that everyone will be convinced. The prevailing or orthodox type of philosophical foundations of human rights remains highly problematic, still being dominated by the logic of natural law theory. In particular, the natural law approach to human rights is vulnerable to three lines of attack: for lacking universality; for being overly conservative; and for lacking political expediency.

First, any reference to a basic moral concept or principle is inevitably going to have a narrow appeal, undermining the universal reach of human rights. This is in part why Rawls was sceptical of political theories grounded on a comprehensive moral doctrine: they will only convince those who already buy into the doctrine, but will not make any difference to those who don’t. Secondly, foundational theories can have conservative tendencies; this is certainly the case with natural law theories, particularly the non-secular interpretation within this tradition.<sup>2</sup> Thirdly, foundational theories fail to bridge the gap between moral ideals and political reality; issuing recommendations that the global political order should be reformed so that it falls in line with certain philosophical views is, at best, a long term strategy, and at worse an intellectual pastime with no political impact of any substance.

For all these reasons over the last few decades the political approach to human rights has gained momentum, at the detriment of the more traditional, philosophical approach. By focussing on human rights ‘practice’, and therefore distancing itself from the metaphysical quagmire that inevitably comes with foundational debates, the political approach to human rights claims the advantage of presenting an alternative to the ‘natural-law’ approach, while fulfilling a role in real-world politics. There are, however, some problems intrinsic to this political approach.

First, the line between political and metaphysical conceptions of human rights is more blurry than often assumed. As Laura Valentini (2012, p.181) rightly points out, endorsing the ‘political view’ is no guarantee that we do so without metaphysics, since the political view of human rights still needs to engage in the sort of abstract moral reasoning that one associates with the natural-law approach: ‘the most plausible political approach to human rights is closer to natural-law theories than proponents of the political view typically acknowledge’.

Secondly, strictly political accounts of human rights can be more politically conservative than its advocates like to admit, and conservatism is precisely what we don’t want from a theory of human rights. Invoking the value of stability (as Rawls did) only legitimises the status quo. Making human rights contingent on the current system of international relations makes it possible to understand human rights as political notions, but once again as Valentini (2012, p.189) rightly points out, ‘at the cost of depriving them of much of their critical capacity’.

Thirdly, while political views attempt to replace metaphysics with pragmatic practice, no justification for the practice itself is given. Political theories of human rights seem to work on the assumption that the practice justifies itself, although this is logically and politically problematic, as I will argue in more detail in Part IV. There is

a lot that we can take from human rights practice, but we also need to have reasons for engaging in the practice, for keeping the practice going, and for participating in human rights activism, especially when operating in contexts where human rights are not welcomed. For these reasons perhaps human rights practice is not immune from foundational issues.<sup>3</sup>

In what follows I will put forward a solution to this impasse facing human right theory, with political and metaphysical accounts pulling in opposite directions. While the limits of natural law theories of human rights are incontestable, raising serious questions for the traditional metaphysical approach, the alternative ‘political’ approach is not always convincing, since contrary to what its advocates suggest even a practice-based approach to human rights may not succeed in divesting itself from questions of a foundational nature. The solution is to show that there is scope for metaphysics in human rights theory, although it doesn’t have to be of the natural law variety. The alternative to natural law theory is not to give up on metaphysics *tout court*, as political accounts of human rights encourage us to do, but to look for a different type of metaphysics. In other words what is needed is not a metaphysical theory imbued in ethical or metaethical principles and concept, but one that asks a different set of questions, namely: if we truly believe in human rights, and we believe that human rights truly exist (especially when confronted with situations where there is no legislation to enforce human rights), what is the nature of the truth behind our convictions regarding human rights? What can theories of truth tell us about human rights?

## HUMAN RIGHTS AND THE METAPHYSICS OF TRUTH

For a long time there was an assumption, immortalized in the American Declaration of Independence of 1776, drafted by Thomas Jefferson, that the validity of human rights is a self-evident truth: ‘We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness’.<sup>4</sup> Contemporary philosophers are understandably ill-at-ease with promoting a justification of human rights based on claims of ‘self-evidence’, for obvious reasons; and yet there is still a widespread belief that the notion of human rights encapsulates a fundamental truth, or that truth is on the side of human rights.

Since its philosophical conception many centuries before the formal endorsement it received in 1948, the concept of human rights has been subject to an ambitious metaphysical project, with the aim of uncovering the timeless, universal nature of human rights, and in particular the belief that a ‘human right’ is a substantive property, waiting to be discovered.<sup>5</sup> Natural law theory has been, and to some extents still is, the dominant philosophical approach to human rights. At the core of natural-law theory is a certain normative view about our status as human beings reflecting an objective truth.

The relationship between human rights, natural rights, and truth is complex. There are two ways to interpret this affiliation. One approach is more crude and unsophisticated, betraying dogmatic natural law enthusiasm. It suggests that the concept of human rights is doomed to remain unintelligible unless the person is understood to exist in relation to an objective truth transcending humanity itself. This position, advocated by Janet Madigan (2007), predictably looks at Christianity and St. Thomas Aquinas for guidance. Madigan argues that truth should have priority over individual happiness, even personal freedom, in fact according to Madigan (2007,

p.165) ‘a natural law defense of human rights necessarily begins with the protection of life itself’. Madigan appeals to this truth not only to reject claims of a human right to abortion, but also to lament the fact that in modern human rights discourse life itself is now thought to be at the service of personal freedom, when instead life should be law’s chief occupation.

A much more sophisticated analysis of the relationship between human rights, natural rights, and truth can be found in the work of James Griffin (2012, p.45), who argues that human rights should be grounded on a theory of personhood, in particular normative agency, which he defines as ‘our capacity to choose and to pursue our conception of a worthwhile life’. What often goes unnoticed, but ought to be exposed, is the fact that behind philosophical theories of human nature a robust theory of truth is forever lurking. Griffin’s theory of human rights as normative agency is a case in point.

A key step in his elaborate metaphysical argument is that as normative agents we have non-biological human interest. These include what Griffin calls ‘accomplishments’, which we are told are not merely subjective but have an objective nature. Accomplishments are what gives life meaning, in fact Griffin (2008, p.118) explains that accomplishments are not merely those things that give us a psychological feeling of fulfilment, instead ‘it is a matter of life’s not being empty or futile or wasted’. Griffin (2008, p.114) justifies the objectivity of our basic interest in being accomplished as follows: ‘For me to see anything as enhancing my life, I must see it as enhancing life in a generally intelligible way, in a way that pertains to human life and not just to my particular life’. He returns on this idea in the next paragraph: ‘to see anything as making life better, we must see it as an instance of something

generally intelligible as valuable and, furthermore, as valuable for any normal human being' (Griffin 2008, p.115).

It is in order to justify the claim that there are things in our life that are 'objectionably valuable' that Griffin introduces the concept of truth.<sup>6</sup> Griffin (2008, p.121) starts from the assumption that we possess a sensitivity to certain values, and we recognize a value 'by recognizing certain things that characteristically go on in human life'. In other words, we reflect on key shared elements of the human experience, and we converge on certain beliefs. What makes something 'objectively valuable' for Griffin is related to a certain view about natural facts and especially the metaphysics of truth. As Griffin (2008, p.122) explains, we may regard statements about human interests as statements of natural fact, which enjoy a truth-value: 'nature consists of objects, properties, and events that are independent of our ideas and beliefs about them ... And we confirm our beliefs against nature – that is the truistic version of the correspondence theory of truth. We look more closely; we collect evidence; we find counter-examples. These are the ordinary ways in which we establish the truth of a claim'.

This passage is crucial, as it vindicates a possible reading of Griffin's general theory of human rights, one revealing a strong affinity between the natural-law approach to human rights and a certain (robust) metaphysical theory of truth. Metaphysically speaking, if you scratch a theory of human rights you will expose a theory of truth.<sup>7</sup> Robust theorists of human rights are characterized by two basic assumptions: first, that belief in human rights is similar to belief in truth, and secondly, that the truth in question has objective, factual properties.

One of the most distinctive features of Griffin's (2008, pp.36-37) work is his attempt to argue that what is evaluative can also be objective and factual: 'It is,

though, much too quick to think that what is evaluative cannot also be objective. It is too quick to think that it cannot also be natural....But if this expansive naturalism is, as I think, borne out, it gives hope of restoring a form of that central feature of the human rights tradition: namely, that these rights are grounded in natural facts about human beings'; yet Griffin never explains what he means by a 'fact', nor what makes a fact 'natural'.<sup>8</sup>

The fundamental problem with robust theories of truth is that truth cannot perform the required and desired function. To claim that a certain assertion 'is true' adds nothing to the initial assertion, which suggests that perhaps truth is overrated, and possibly even redundant. Similarly there is nothing behind a claim about human rights that makes it true. Just as it is problematic to assume that truth is an essential property, defined by an underlying nature, so human rights are also not a genuine property. It follows that the 'robust' way of thinking about human rights may be intrinsically flawed, and should be reconsidered.

Although most philosophical inquiries on human rights almost inevitably start by asking the preliminary question 'What is the nature of human rights?', this may be the wrong question to ask, for this question is based on the premise that human rights have a nature, and our job is to discover what that is. We need to consider the possibility that perhaps there is no underlying nature to rights waiting to be unearthed, since rights may not be a property that is bestowed on human beings.<sup>9</sup> Abandoning that assumption as the starting point of a different philosophical reflection on human rights can be both illuminating and liberating.

This article defends a theory of human rights grounded on a different conception of truth: not the *robust* truth we find in naturalistic approaches to human rights, but a *deflationary* truth. Instead of searching for foundations of human rights in

accounts of human nature, I suggest we look elsewhere, at our understanding of what type of truth stands behind the presumed validity of human rights. The reason for looking at notions of truth rather than human nature is that it may suggest an alternative to the kind of metaphysics that ‘political’ accounts of human nature reluctantly are forced to accept: a metaphysics of the natural law variety. If this is successful, we will have the advantage of securing political conceptions of human rights on metaphysical foundations, without endorsing justifications that are potentially divisive (not everyone will agree on a certain view of human nature), or speculative (the assumption that natural rights exist independently of positive law, that they are ‘out there’ waiting to be discovered).

## TWO TYPES OF DEFLATIONISM

What applies to truth also applies to human rights – if the alternative to a robust theory of truth is a deflationary theory of truth, it stands to reason that the alternative to a robust theory of human rights is a deflationary theory of human rights. The term ‘deflationism’ is to be understood as a generic drift or trend rather than a precise position, or as Crispin Wright (1999, p.209) says: ‘deflationism is more of a ‘tendency’ than a definite philosophical position, and different deflationists display differences of formulation and emphasis which make it hard to see what may be essential and what optional in this view’. With this in mind, we can start with a generic account of deflationism before distinguishing between two positions: extreme deflationism and moderate deflationism.

Deflationism stands for the general propensity to reverse the tendency whereby a concept becomes over-inflated, in the sense that it is required to do more

than it can reasonably be expected. Inflating the notion of truth gives truth a substantive view, when instead it stands for nothing more than a truism. To deflate is also to demystify, to the extent that what appeared at first as a great metaphysical puzzle is now dismissed as a non-problem that should not concern us. Regarding truth, deflationism suggests that we should not bother with questions concerning the nature of truth (notwithstanding the fact that this has been a central question for philosophers over many centuries), since the property of truth has no underlying nature.

Apart from truth, one can also have a deflationary attitude towards human rights. Human rights cannot be justified on ontological grounds, they are not a property, or at least not an essential property: there is no ‘underlying essence’ of human rights waiting to be discovered or revealed by philosophical analysis. The deflationary conception of human rights fundamentally opposes Alan Gewirth’s (1984, p.4) claims that ‘the existence of human rights depends on the existence of certain moral justificatory reasons ..... [which are] something that is discovered rather than invented. The failure of this or that attempt at discovery does not, of itself, entail that there is nothing there *to be* discovered’. *Contra* Gewirth, deflationism states that human rights are constructed, or invented, not discovered. I will return to constructivism about human rights in Part V below.

Deflationism is a broad church. It is possible to distinguish between two types of deflationism, one more extreme and the other more moderate. The more familiar type of deflationism is also the most extreme, as championed by Paul Horwich (1990, p.2), who holds that truth is not ‘an ingredient of reality whose underlying essence will, it is hoped, one day be revealed by philosophical or scientific analysis’. Horwich (1999, p.239), explains his own brand of deflationism about truth in the following

terms: ‘The deflationary attitude about truth – and the particular variant of it that I call minimalism – is a reaction against the natural and widespread idea that the property of truth has some sort of underlying nature and that our problem as philosophers is to say what that nature is, to analyse truth either conceptually or substantively, to specify, at least roughly, the conditions necessary and sufficient for something to be true’.

Horwich’s deflationism is famously dismissive of truth, rejecting the substantive appeal of this notion, and limiting its property to a mere formal or logical quality. But this is not the only way to be deflationist about truth. If Horwich represents the more extreme form of deflationism, Mark Richard stands for a more moderate approach. According to Richard (2008, p.6), it is simply a question of being guilty of making inappropriate references to ‘truth’ when it is not required or necessary, being the wrong dimension of evaluation for our claims, arguments, or evidence: ‘As I see it, we – mistakenly or simply out of convenience – use ‘true’ in cases in which we shouldn’t; we act as if there is a single dimension of evaluation for all our discourse when, in fact, there is not’.

Richard’s deflationism denotes a simple but powerful idea: relying on truth has made us intellectually lazy, since we end up appealing to this notion in every occurrence, even when it is not called for. We deflate truth simply by acknowledging that it is not the only meter we should use to measure things, which does not take away from its importance in any way. Although Richard does not make any reference to human rights in his work, his interpretation of deflationism could be applied to human rights, indeed it may help us rethink the project of what it means to ground human rights on metaphysical foundations. What we can take from Richard’s account of truth is that truth is not the only game in town. There are many contexts where truth and falsity are not the appropriate dimensions of evaluation; the discourse of human

right is one of those contexts where truth does not apply. We can give more or less good arguments on human rights, offer more or less conclusive evidence, express our thoughts and feelings, and have genuine disagreements, without any of this having anything to do with evaluations of truth or falsity. In the last analysis there is a great deal we can say about human rights, and its justification, without appealing to metaphysically robust claims about truth.

Deflationism about human rights fundamentally disagrees with Jefferson's famous claim that human rights are a self-evident truth, since the idea of human rights has nothing to do with truth, self-evident or otherwise. Similarly, deflationism about human rights disagrees with Griffin's appeal to the correspondence theory of truth in order to justify his claim that statements about human interests are statements of natural fact, which enjoy a truth-value. *Contra* Jefferson and Griffin (and many others), to be deflationist about human rights is to believe that human rights are artificial constructs, or to be more precise a convention that fosters social cooperation. Truth is not on the side of human rights, nor against human rights. The closest we come to truth starting from this deflationary idea is along the lines of Simon Blackburn's (1993, p.15) quasi-realism: 'a quasi-realist is a person who, starting from a recognizably anti-realist-position, finds himself progressively able to mimic the intellectual practices supposedly definitive of realism'.

The idea of a deflationary theory of human rights, encompassing constructivism and conventionalism, will be the subject of Part V, but first we need to consider why political conceptions of human rights should be concerned about providing some foundations for their human rights, and how the deflationary approach could help ease such concerns.

## HUMAN RIGHTS: POLITICAL AND METAPHYSICAL

In an effort to break away from the dominant paradigm in human rights scholarship, which favours a natural law approach, there has been a tendency in recent years to divorce human rights from metaphysical concerns, and prioritise instead a more pragmatic, practice-based approach. This ‘political turn’ in human rights scholarship invokes the appeal of public reason while allegedly not straining in the murky waters of metaphysics. John Rawls is, not surprisingly, the reference point for this school of thought, and his approach has influenced the recent works on human rights by Charles Beitz and Joseph Raz. This part of the paper will argue that a moderate deflationary approach to truth is not only compatible with the political view of human rights advocated by Beitz and Raz, but it can also contribute something important to it.

One key issue about the political view on human rights is how it positions itself on the question of foundationalism. On this issue there is some disagreement between advocates of the political view. For example, Beitz is very critical of a certain type of foundationalism. According to Beitz (2009, p.7), we should not think of human rights ‘as if they had an existence in the moral order that can be grasped independently of their embodiment in international doctrine and practice’; international human rights do not ‘express and derive their authority from some such deeper order of value’; the task of a theorist of international human rights should not be ‘to discover and describe the deeper order of values and judge the extent to which international doctrine conforms to it’. At the same time Beitz (2009, p.103) also says that a practice-based approach is not non-foundationalist: ‘One need not say, however, that practical views are nonfoundationalist, if by this is meant that such views deny that there are reasons to adhere to and support international human rights’.

The difference between naturalistic and agreement theories of human rights on one side, and Beitz's practical conception on the other, is not that the former are foundationalist while the latter is nonfoundationalist; the difference instead is that only the former two positions seek to establish the *nature* of human rights: 'The contrast of interest is this. Naturalistic and agreement theories treat the question of the authority of human rights as internal to the question of their nature.....By contrast, because a practical approach prescind from taking any philosophical view about the nature or basis of human rights, it can distinguish between the problem of conceptualizing human rights and that of understanding their authority' (Beitz 2009, p.103)

Beitz's practical conception of human rights is not non-foundationalist, nor anti-foundationalist, yet it is also not foundationalist the way that naturalist and agreement theories of human rights are. So what is it then? According to Beitz (2009, p.102) the human rights enterprise is nothing more than a global practice: 'A practical conception takes the doctrine and practice of human rights as we find them in international political life as the source materials for constructing a conception of human rights'. This is intriguing, but not totally convincing, since we still need to know what justifies a practice; we need reasons that are or can be publicly endorsed for accepting a practice, since practice does not (and logically cannot) justify itself. There are good reasons why practice cannot be self-justifying. If that was the case, the practice of female genital mutilation would justify female genital mutilation, the practice of colonialism would justify colonialism, or the practice of pervasive corruption would justify pervasive corruption. There has to be something else, a foundation of some sort, that justifies the practice. Without foundations, a practice can

only justify the status quo, which risks making political views of human rights conservative.

Raz seems to take a much harder line, suggesting that a practice-based political approach to human rights can do without foundations. Raz surprised many readers familiar with his previous body of work in law and ethics when in 2010 he came out in support of Rawls's account of human rights. In this piece Raz is highly critical of what he refers to as the 'traditional doctrine' of human rights, grounded on our humanity, where the only facts that are taken into consideration are laws of nature, the nature of humanity and that the right-holder is a human being. Raz (2010, pp.323-4) highlight three major problems with those theories: 'they misconceive the relations between value and rights. They overreach, trying to derive rights which they cannot derive. And they fail either to illuminate or to criticize the existing human rights practice'. Alan Gewirth and James Griffin are at the receiving end of Raz's sharp critique, and it is hard to disagree with much of what Raz says here.<sup>10</sup>

According to Raz the problem with those theories is that they fail to appreciate the practice of human rights, since the validity of human rights is being established without taking into account any 'contingent' facts. It is precisely for this reason that Raz (2010, p.328) favours the political account of human rights championed by Rawls: 'This is Rawls's and my answer ..... while human rights are invoked in various contexts, and for a variety of purposes, the dominant trend in human rights practice is to take the fact that a right is a human right as a defeasibly sufficient ground for taking action against violators in the international arena, that is to take its violation as a reason for such action'.

Raz wants to shift the discourse on human rights away from the metaphysical concerns about human nature in general and personhood in particular, to a more

political debate on the limits of state sovereignty. This is not because Raz has anything against the philosophical pursuits of the tradition doctrine, in fact he agrees with Griffin that the capacity of personhood is ethically significant, but according to Raz (2010, pp.327-8) this does not help us with a fundamental problem: 'The problem is the absence of a convincing argument as to why human rights practice should conform to their theories. There is no point in criticizing current human rights practice on the ground that it does not fit the traditional human rights ethical doctrine. Why should it?'. Raz is right on this point, yet the shift from the metaphysical to the political has its perils, principally the fact that human rights practice lacks foundational justifications.

As the politics of international human rights drifts towards becoming just the politics of international relations, human rights may end up without foundations, but that's not something that worries Raz. In fact according to Raz this is something we just have to get used to. Be that as it may, and notwithstanding the title of his important article, he has very little to say about what it means for human rights to be without foundations. Raz (2010, p.336) clearly states that human rights can do without metaphysics: '[human rights] lack a foundation in not being grounded in a fundamental moral concern but depending on the contingencies of the current system of international relations', but he fails to address the question of justification for human rights practice. Furthermore adhering to the contingencies of international law could make human rights practice very conservative, as it deprives human rights discourse the means to challenge the current system of international relations.

The fact that human rights can do without the natural law approach doesn't mean that it can do away with foundations; instead it only means that we need a different type of foundation. The practice of human rights needs some justificatory

base, since the justification of the practice cannot come from the practice itself (Beitz), nor from international law (Raz), especially since the latter has more affinity with bargaining-power determined justice as mutual advantage than with justice as impartiality.

This is where the moderate deflationary account of truth can do some work for the political view of human rights. As the analysis of Griffin's metaphysics of human rights in Part II shows, the natural law foundationalist approach assumes a robust (correspondence) theory of truth. The alternative is an alternative theory of truth, along deflationist lines, which would have the advantage of providing political theories of human rights with a justification for human rights practice which could be described as 'quasi-foundationalist'.

## HOW TO BE DEFLATIONIST ABOUT HUMAN RIGHTS

This is a large thesis, and I do not propose to argue for it fully. Instead, I will concentrate on only one way to be deflationary about human rights. According to the moderate deflationary approach, human rights are artificial rights, not natural rights, and following Hobbes and Hume we know that what is artificial is not necessarily inferior to what is natural; on the contrary a natural condition or virtue can be inferior and less desirable than an artificial one.

A moderate deflationary account of human rights looks at moral constructivism for an alternative to the established, and in many ways still dominant, natural law paradigm. Constructivism is widely endorsed in moral and political theory. In normative ethics constructivism holds that principles within a given normative domain are justified because they pass some procedural test. Similarly a

constructivist theory of justice suggests that what comes out of a certain kind of situation or procedure is to count as just;<sup>11</sup> if we can be constructivists about ethics and justice, we can also be constructivists about human rights.<sup>12</sup>

There is a tendency in contemporary political philosophy to associate constructivism with Kantian ethics in general, and the social contract tradition in particular, so much so that in the literature on human rights it is now standard practice to compare and contrast ‘naturalistic’ and ‘agreement’ theories’ of human rights.<sup>13</sup> But there is another direction in which we can take constructivism about human rights: not Kantian constructivism, nor agreement theories, but conventionalism. The moderate deflationary view of human rights has strong affinities with David Hume’s moral theory, in particular his views on conventionalism.

It should not come as a surprise that a deflationary account of Human Rights looks to Hume’s conventionalism for philosophical support. After all, Hume gives one of the most forceful and influential accounts of why there is no truth of moral content, or to put it differently, why moral principles have no truth value. As Russell Hardin (2007, p.28) explains: ‘In Hume’s view, however, true is not a term that can apply to moral belief. You may say it is right or wrong to do X or that it would be good or bad to cause Y, but those claims are only expressions of your views or approbations, they are not proofs of or inferences from the truth of the content of your views’. Hume clearly belongs in the deflationary camp.

Being Humean about morality doesn’t mean giving up on human rights, but it does require recalibrating the moral compass. Hume was disinclined to use the terms ‘rights’, and he objected to attempts to derive rights from either intrinsic qualities of the person as a moral agent, or alternatively from Christian natural law.<sup>14</sup> Nevertheless it is possible to construct a theory of human rights, inspired by Hume,

characterised by a deflationary stance. According to this approach, human rights are institutional schemes of cooperation advantageous to the whole of society, furthermore human rights are artificial in the sense that they arise from human convention.<sup>15</sup>

We know that the political approach to human rights emphasizes the idea of human rights ‘practice’, yet as indicated above, this is unsatisfactory on at least two fronts. First, as pointed out in Part I, while the political approach claims to be an alternative to the natural-law approach, it still requires philosophical or metaphysical foundations, in fact something like a natural law supposition is often lurking behind the façade of the practice. Secondly, as emphasized in Part IV, by turning their back on foundationalism but at the same time failing to give a convincing account of what justifies a certain practice, strictly political accounts of human rights run the risk of being excessively conservative. On both accounts a deflationary human rights approach, which is both constructivist and conventionalist, can provide a solution.

My interpretation of conventionalism closely follows that by David Gauthier (1979, pp.5-6), which in turn owes much to the analysis offered by David Lewis: ‘I propose to regard a convention as a regularity R in the behaviour of persons P in situations S, such that part of the reason that most of these persons conform to R in S is that it is common knowledge (among P) that most persons conform to R in S and that most persons expect most (other) persons to conform to R in S’.

There are two important aspects of Gauthier’s useful definition worth pointing out. First, the epistemological dimension: it is *common knowledge* that people conform to a regularity of behaviour. Secondly, the prudential dimension: most people *expect* most other persons to conform. On the basis of this account of conventionalism, a deflationary theory of human rights can be defined in the

following terms: *Human rights are not defined by their truth, but by the generally recognized and accepted convention of Human Rights Practice (HRP). This practice produces regularity in the behaviour of persons in certain situations, such that part of the reason that persons conform to HRP is that it is common knowledge that most other persons conform to HRP in certain situations, and that most persons expect most other persons also to conform to HRP.*

As with conventionality more generally, there is an element of common knowledge, and general expectation, when it comes to the practice of human rights. To the extent that there is a truth to human rights it is nothing more than the fact that we have reached a level of coordination, or an equilibrium point, whereby the belief in human right becomes common knowledge, and is generally expected to be acknowledged.

The role of conventions in this deflationary theory of human rights is crucial. A convention is not a one-time interaction; instead it plays out over repeated interactions. In other words, we are looking at an iterated coordination game. Human rights are an artificial social structure created by our repeated actions, or as advocates of the political conception of human rights would say, by our practice over time. The political human rights practice is crucial because it creates coordination, and establishes human rights as a legitimate social structure. Hume considers a whole range of social conventions, from traffic rules (for wagons and pedestrians) to rules of property, justice, war, and international relations. He does not discuss or consider human rights, but there is no reason why human rights should not be another set of rules that gains legitimacy, and brings stability, emerging from iterated practice.

Conventionalism can provide human rights with a quasi-foundation. The practice of human rights is important, as political accounts of human rights stress. In

fact we can even agree with Beitz that the practice of human rights is the ‘source material’ for constructing a conception of human rights, but we also need an account of the justification behind the practice. It is only when the practice becomes seen and acknowledged as accepted convention, through repeated praxis, that it becomes justified, at least temporarily.

The conventionalist account of human rights being put forward strongly resonates with Beitz’s own views. In defending his account of human rights practice Beitz (2009, p.104 emphasis added) says that ‘According to a practical view, however, to say there is a human right to X is simply shorthand for a complex description of *regularities in behaviour* and belief observed among the members of some group’. This idea of ‘regularities of behaviour’ plays a crucial role in both Beitz’s account of human rights practice, and Gauthier’s (Hume’s) conventionalism; this suggests that the political approach to human rights, and the deflationist approach to human rights, have a great deal in common.

Deflating human rights is also something that Raz (2010, p.337 emphasis added), seems not to be adverse to, at least on the basis of what he says: ‘A right’s being a human right does not entail it is either basic or very important. To that degree this approach *deflates* the rhetoric of human rights’. Perhaps Raz’s own approach would benefit from openly endorsing a conventionalist (deflationist) approach to human rights. As we have seen one potential problem with Raz’s theory is that relying on the contingencies of the current system of international relations is far from reassuring, being restrictively conservative.<sup>16</sup> Even though the deflationary, conventionalist approach to human rights is heavily indebted to David Hume, and Hume is often attacked for his conservatism, this theory of human rights is not conservative. On the contrary, because conventions change, and we are not tied to one

truth, human rights are fundamentally evolutionary, not static. The benefits of this theory can be seen both in places where human rights are established, but also where a culture of human rights is lagging behind.

In places where human right's practice is established and generally accepted, conventionalism facilitates the advance of new human rights, since the validity and justification of human rights is reduced to the ability to construct a new convention, grounded on the belief that people conform to a regularity of behaviour.<sup>17</sup> The development of LGBT rights is a case in point. There is nothing in the 1948 declaration of human rights to suggest that Eleanor Roosevelt and the other members of the drafting committee of the UDHR at the time could have anticipated the recent development and general endorsement of LGBT rights,<sup>18</sup> and yet through the continual efforts of human rights practitioners and activists over a period of time a new equilibrium has been secured, which endorses LGBT rights as the new accepted convention. The same logic applies in places where human right's practice is not yet established, or where there isn't a strong tradition or culture of human rights. Through the process of iterated practice, it is possible to gradually introduce new concepts such as LGBT rights by appealing to and extending those widely held beliefs that are already in place. While there is still a lot of work to be done on this front, today sexual rights have been recognized not only in Europe, but also in Latin America and the Caribbean, Asia and the Pacific, and in Africa.

A similar argument could be made for the human right to health. This is a recent development in the rapidly expanding human rights family, and more time (and work) is needed before this idea enjoys widespread consensus. To clarify, the human right to health is not a right to be healthy, which would be impossible to achieve, nor a right to medical care, since there is much more to health than medical care.

Nevertheless the idea of a human right to health, which merely highlights a standard threat against which everyone should be guaranteed protection, has been gaining traction, culminating in General Comment 14 on the International Covenant on Economic, Social, and Cultural Rights (ICESCR) issued in 2000.

What is particularly interesting about the idea of the human right to health is the way it came into prominence. As Jonathan Wolff (2012, p.39) points out ‘The story of activism about the human right to health is inextricably linked with the HIV/AIDS crisis. This is not to say that only HIV/AIDS engages the human right to health – far from it – or even that every aspect of HIV/AIDS is a matter of human rights. But nevertheless the narrative ... of HIV/AIDS brings to light human rights issues at every turn’. Wolff’s emphasis on activism is important here: it was the practice of human rights activists that not only made it possible for those affected with HIV/AIDS to be recognized as victims of human rights abuse, but to broach the larger issues of a human right to health.

As the examples of LGBT rights and the human right to health indicate, human rights practice can be very progressive. This suggests that the political view of human right can also be progressive. But these developments in human rights discourse were the result of a long process of activism that gradually established a new convention about our human rights. What is doing the philosophical heavy lifting here is not a view about the truth of human nature, but conventionalism, an idea that finds support in the deflationary theory of truth.

## CONCLUSION

This article wants to transcend a dichotomy that has emerged in the literature on human rights between two opposing camps: on one side the traditional (naturalist) approach, characterized by foundationalist metaphysics, and on the other side political conceptions of human rights, which shun any reference to metaphysics, replacing it with the language of ‘practice’. Both approaches have distinctive advantages, but also some drawbacks: while naturalistic theories appeal to ‘comprehensive’ moral traditions, which are sectarian in their justification, political views of human rights are more conservative than they want to be, being conformist to current international law when instead there is greater scope (and need) for being progressive, and even rebellious. Furthermore the suspicion remains that even political theories of human rights require metaphysical foundations to justify human rights practice.

Perhaps there is a third way; it may be possible for political conceptions of human rights to have philosophical foundations (or quasi-foundations), and even appeal to the metaphysics of truth, just not the metaphysics of natural law theories. The assumption by natural law theorists that human rights are the rights we have by virtue of being humans is based on an underlying belief that the validity of human rights is an objective truth, since human rights are an essential property attached to human being. It is the rejection of this assumption that is the starting point for a deflationary theory of human rights.

Deflationary theories of human rights are informed by deflationary theories of truth, which can be either extreme or moderate. When applied to human rights, extreme deflationism takes us to the position defended by Alistair MacIntyre (1985), who suggests that human rights cannot be justified, that perhaps human rights don’t even exist, or if they exist their existence is on a par with that of witches and unicorns. In this article I have argued for an account of truth which is only moderately

deflationist. To be moderately deflationary about human rights means that when we use the term ‘human rights’ we are not making any postulations that there is one fundamental truth that justifies all human rights. Truth is not the only game in town, not the only meter to measure things, therefore a justification for our belief and commitment in human rights does not have to be dressed-up in the language of a universal, self-evident, incontestable truth. Our tendency to rely on truth when it is not required or necessary has made us intellectually lazy; the same could be said for our commitment to human rights.

The practice of human rights should not be restricted by the demands of stability, grounded on the status quo, or by the uncritical tracking of the current system of international relations. By shedding the language of a universal, self-evident, incontestable truth, we become open to the possibility of untested, unmapped ways to promote human rights, by constructing new conventions about human rights practice. The current system of international law is no longer the anchor that provides a valid justification for human rights. A deflationary approach to human rights, grounded on a conventionalist approach, gives human rights the elasticity required for it to become a powerfully progressive, and even transgressive, concept.

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## NOTES

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<sup>1</sup> See also Freeman (1994).

<sup>2</sup> Clarke (1982) argues that the conservative nature and interpretation of the Irish constitution can be traced back to Natural Law reasoning.

<sup>3</sup> See also R.G.Wright (2010, p.440): 'In the long run, metaphysics—the deeper “why” questions and their answers—may also be necessary to motivate the sacrifices sometimes called for by human rights, as human rights are commonly understood’.

<sup>4</sup> On the notion of self-evident truth, human rights and the Enlightenment, see Tunstall (2012) and Hunt (2007).

<sup>5</sup> On the idea of a 'substantive property', see Edwards (2013).

<sup>6</sup> It is not clear why Griffin decides to introduce the concept of truth in his analysis, and perhaps it wasn't necessary to do so, nevertheless it is part of his influential text on human rights, so it deserves our attention.

<sup>7</sup> In Bufacchi (2008) I argue for a correlation between three theories of truth (correspondence, coherence and pragmatist) and three theories of rights (will, interest and pragmatist).

<sup>8</sup> Perhaps what makes a fact 'natural' for Griffin (2008, p.121) has something to do with what he refers to as the 'phenomenon of convergence of beliefs between several persons'. Griffin recognizes that this is a complicated empirical issue, and he does not

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provide a comprehensive account of this phenomenon. I will return to Griffin's idea of convergence in Part V below.

<sup>9</sup> To be clear, the issue here is not that rights may not be bestowed on all individuals; instead the issue is whether rights are 'properties', or attributes.

<sup>10</sup> For Griffin responded to Raz's critique, see Griffin (2010, p.350).

<sup>11</sup> On constructivism about justice see Brian Barry (1989; 1995) and Andrew Williams (2009).

<sup>12</sup> As Attracta Ingram (1994, p.17) points out: 'we must be constructivists about rights themselves.....If rights cannot be seen as given they must be made and the job of a constructivist political morality is to show them in the making'.

<sup>13</sup> For an overview and critique of Agreement Theories of human rights, see Beitz (2009), Ch.4.

<sup>14</sup> On this issue see Haakonssen (1993).

<sup>15</sup> Reconciling Hume's moral and political theory with human rights may appear to be counterintuitive, which in part explains why not many have attempted it, with the exception of Sharon Krause (2010) who offers a theory of human rights based on Hume's moral sentiments theory. See also Krause (2008). I'm suggesting a different strategy, where human rights are grounded on Hume's theory of convention, not moral sentiments.

<sup>16</sup> Katrin Flikschuh (2011) puts forwards a critique of Beitz along similar lines, suggesting that while Beitz's characterisation of human rights reasoning as a global discursive practice is coherent, it lacks cogency when considered in the context of the post-colonial state system.

<sup>17</sup> The emergence of conventionalism could be interpreted in terms of what Griffin calls the phenomenon of convergence, although Griffin is critical of a Humean 'taste

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model' of value judgment so he may not be happy to be associated with Humean conventionalism, furthermore conventionalism is used here merely to highlight the outcome of reiterated interactions.

<sup>18</sup> The WHO defends the position that there is a growing consensus that sexual health cannot be achieved and maintained without respect for, and protection of, certain human rights, including the rights to equality and non-discrimination, the right to be free from torture or to cruel, inhumane or degrading treatment or punishment, the right to privacy, and the rights to the highest attainable standard of health (including sexual health) and social security.