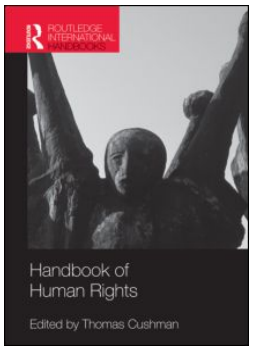

Handbook of Human Rights

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Cosmopolitanism and human rights

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Cosmopolitanism and human rights

Robert Fine

Introduction

My topic is the relation between cosmopolitanism and human rights. Let me begin with a rough-and-ready formulation of this relationship. Cosmopolitanism imagines a world order in which the idea of human rights is a basic principle of justice and mechanisms of global governance are established specifically for their protection. The cosmopolitan imagination is not restricted to this agenda. It incorporates wider issues concerning social solidarity across borders, the legitimacy of international law, the effectiveness of global governance, the role of global civil society, and the establishment of peaceful relations between and within states. It also envisages the reformation of political community at national and transnational levels to render them compatible with and supportive of cosmopolitan values. However, it would be implausible to think of the cosmopolitan imagination apart from some notion of human rights, that is, of rights that belong to all people by virtue of their human status. If the closeness of the relationship between cosmopolitanism and human rights is straightforward enough, it still begs the question of what we mean both by the idea of human rights and by the idea of cosmopolitanism. To explore further this question I shall focus first on the human rights side of this relationship and then on the cosmopolitan.

Human rights

I begin this section by outlining in a condensed form some of the key propositions I wish to make concerning the idea of human rights.

First, the idea of human rights is an *achievement of the modern age* – albeit an achievement that is under threat, may be rolled back, and can never be taken for granted. This broad statement about the modernity of human rights obviously needs further specification, but it underlines the historicity of the concept.

Second, the existence of human rights is, for better or worse, now part of the *social world* we inhabit. It is the task of sociology to understand human rights as a social phenomenon that is external to our own subjective feelings and opinions about it.

Third, the idea of human rights has a legal status within *international law*. There has now arisen a body of law known as "human rights law" that has its own (more or less coercive) means of adjudication and enforcement. This body of law has percolated into other areas of international law (such as international criminal law and humanitarian law) and domestic law (including criminal, welfare, immigration, and family law).

Fourth, the idea of human rights is endowed with a *normative* force that prescribes that human rights ought to be respected by states, corporations, and individuals. It is implicit in the idea of human rights that human rights ought to be made actual in the world, that violations of human rights matter, and that they ought to be prevented by those with the capacity so to do.

Fifth, in a world in which sovereign states have hidden even their most heinous crimes behind national boundaries or insulated them from criticism on the grounds of non-intervention in their internal affairs, the idea of human rights creates a *political* wedge that allows an external standard of justice to enter into what was previously the exclusive terrain of state sovereignty.

Sixth, the idea of human rights means that rulers who commit serious crimes even against their own people should be punished for the crimes they have committed. It *removes the impunity* that rulers once held and exposes them to the same kind of criminal sanctions ordinary people face for the ordinary crimes they commit. This holds whether or not rulers have acted within the bounds of their own domestic laws.

Seventh, the idea of human rights contains within itself a *promise of civil repair* (Alexander 2006) for wrongs committed by the state or more boldly of transforming the existing order of injustice. This promise flows from the conflicts that emerge between the idea of human rights and their violation in practice and can be pushed towards ever more dramatic ways of reimagining self and society.

Eighth, the idea of human rights can be imagined as a transcendent norm or in the Kantian sense as a regulative idea that can never be fully realized either in practice or in principle but that nonetheless provides a necessarily elusive standard against which to measure worldly affairs (Douzinas 2007).

Ninth, the development of human rights is the result both of the struggles of social movements from below and of initiatives of states and groups of states from above. Legal activists and non-governmental organizations have played a crucial role in both kinds of initiative and in mediating between them (Stammers 1999).

Tenth, the idea of human rights is at once a form of freedom, one of the various forms of freedom that human subjects enjoy in the modern age, and a form of coercion that places limits on the ways we human beings can treat one another.

These propositions are neither self-contained nor mutually incompatible. My claim here is that the idea of human rights is *at once* a historical product of the modern age, a social phenomenon external to our knowledge of it, a component part of our current legal order, a source of moral obligation, a political challenge to the sovereignty of states, a means of breaking down the impunity of rulers, a way of being with others, a resource for civil repair, a transcendent norm of resistance, an effect of power and resistance, and a form of freedom and discipline. The complexity of the idea of human rights is that it can play all these roles.

In speaking of the *idea* of human rights I do not mean to say that it is a "mere idea" in the heads of philosophers with no external existence in the world. I have in mind something more like what Hegel called "objective spirit," that is, something that is both spirit and objective (Fine 2001). The idea of human rights, as I see it, contains both the *category* or *concept* of human rights

and its legal and institutional *existence* in the world. The idea of human rights is, as it were, both ideal and material. Our world contains both the category and the social reality the category refers to but can never quite capture. The shadow that falls between the *concept* of human rights and the *reality* of human beings actually entering into social relations as bearers of rights (though not exclusively as bearers of rights) is an integral aspect of the idea of human rights itself.

The relation between the category and the reality of human rights is, as I see it, dialectical. On the one hand, the category of human rights cannot be understood in isolation from its social existence; on the other, the social existence of human rights cannot be understood independently of the concept. Dialectical thinking is the attempt to hold these two aspects together. Both concept and existence are equally one-sided and false when abstracted from the other. In seeking to understand the idea of human rights we are like a tightrope walker: we can fall one way into what I call conceptual thinking, the other into realism.

The conceptual way of thinking dissolves the laws, institutions, and judgments through which the idea of human rights is actualized into the concept itself. In a conservative mode it endows existing institutions, say the office of the UN High Commissioner for Human Rights, with the authority of the concept of human rights itself. Missing from this framework is the *differentia specifica* that allow us to address the adequacy of this particular form of existence or of the judgments made. It reifies the concept of human rights before deducing from it the mundane institutional forms of international law. It might offer a more or less accurate empirical description of how the idea of human rights currently functions, but its aim is simply to rediscover the concept in every sphere of human rights practice it finds – to fasten on what lies nearest at hand and prove that it is an actual moment of the concept. In this mode it has an affinity with a basically uncritical positivism.

In its more critical mode the conceptual way of thinking strives to elevate laws and institutions up to the level of the concept of human rights. In its wish to evaporate the shadow between the category of human rights and the actuality of human violence, it looks to the construction, say, of an ideal cosmopolitan state in which human rights are for the first time properly legislated (e.g., through a global parliament), properly adjudicated (e.g., through a network of world courts), and properly enforced (e.g., through a UN army and police). It endorses the vision of a wholly legalized international order in which human rights are hegemonic over power. It resolves the political instrumentalization of existing human rights – and the consequent "dressing up of strategic power-plays in a universalistic garb" (Cohen 2004, p. 10) – by accelerating the transition from traditional international law based on state sovereignty to a cosmopolitan legal order based on human rights. The politics of human rights is here conceived as an anticipation of a world in which human rights are firmly embedded within an international legal framework and serious human rights violations are prosecuted as criminal acts within a legal order (Smith 2007).

Realism offers a counterpoint to both these conceptual approaches. The realist way of thinking discounts the concept of human rights as mere froth on the surface of what is real and addresses laws, institutions, and practices from an exclusively non-conceptual point of view. Its focus is on the political and economic interests concealed behind the concept of human rights and on its rhetorical uses and ideological appropriation. It constructs a hermeneutics of suspicion in which human rights are devalued either as a tool for understanding the world or as a standard for judging what goes on in the world. Its instinct is to treat the appeal to human rights as a ploy designed to stigmatize those accused of violating human rights and to put on a pedestal their accusers. It is not to be faulted for addressing the uses and abuses of the idea of human rights, which includes processes of denial on one side and demonization on the other, but for imagining that these uses and abuses exhaust the significance and validity of the concept itself (Zolo 2002).

Both conceptual and realist ways of thinking about human rights are one-sided. As a specific legal form of right, the idea of human rights should be understood developmentally, that is, as part of the dynamics of modern capitalist society. T. H. Marshall (1950) wrote famously of a movement from civil rights to political rights to social rights that has characterized modern constitutional states. Hegel (1991) wrote of a complex movement from rights of personality to rights of property, moral conscience, civil association, political participation, and national self-determination. Based on either way of thinking we can represent the emergence of the idea of *human* rights as a stage in the development of the idea of right itself – one that Hegel and Marshall prefigured but remained at the margins of their thinking. In this sense, the idea of human rights may be viewed as an emergent property of the system of rights as a whole. It should not be viewed, however, as the telos of an evolutionary process.

Most legal textbooks link the idea of human rights to major changes that have occurred in international law since the Second World War: the creation of the Nuremberg Tribunal and "crimes against humanity" (1945), an all-inclusive United Nations (1945), the International Court of Justice (1946), the Universal Declaration of Human Rights (1948), Convention on the Prevention and Punishment of the Crime of Genocide (1948), the European Convention on Human Rights (1950), the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (created 1966, came into force 1976), a variety of other human rights conventions, declarations, and instruments at regional and global levels, the Vienna Convention on the Law of Treaties (1969), the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987, adopted by the UN Assembly 2002), ad hoc tribunals to try war crimes in the former Yugoslavia (1993) and Rwanda (1994), the International Criminal Court (excluding the USA, China, and India, 2002), and so on. We might also refer to the development of *ius cogens* (the idea of a higher and compelling law) in international law, the transition from the sovereignty of states to sovereign equality under international law, the inclusion of individual human beings as subjects of international law, and the transformation of human rights from a moral declaration to an enforceable legal system.

If it no longer sounds completely hyperbolic to speak of an international human rights revolution since 1945, the strength of cosmopolitanism is to recognize its existence. If it is recognized that all the legal norms associated with the idea of human rights are frequently violated, what is new is that they exist as legal norms. From 1989 onwards the idea of human rights has also become increasingly central to political argument in contrast to its relative invisibility in the post-1945 period when human rights "law" was widely regarded as ineffective and both states and citizens were inclined to rely on the resources of domestic legal systems. Today, appeal is often made to the idea of human rights to decide on the legitimacy of acts of state: whether, for example, such acts constitute disproportionate responses or collective punishment or ethnic cleansing or even genocide. The enhanced role of the idea of human rights in political argument is reflected in legal theory, where from a surprising number of different theoretical and political perspectives the idea of human rights in determining the legitimacy of state action is invoked – so much so that it has almost come to function like a universal law of nature against which the positive actions of nation-states should be critically assessed.

The emergence and development of the idea of human rights should not be understood as making obsolescent older or less-developed legal forms. The idea of human rights does not supplant the civil, political, and social rights associated with the nation-state; rather, it supplements them. When Marshall analyzed the development of citizenship as a development of *civil*, then *political*, then *social* rights, he assigned them broadly to the eighteenth, nineteenth, and twentieth centuries respectively. His distinctive contribution, however, was to argue that

modern citizens are only full citizens if they possess all three kinds of right and that this possession of full rights is linked to *social class*. Analogously, the idea of human rights should be understood as a finite achievement alongside other rights – be they rights of property, conscience, association, participation, welfare, sovereignty, etc.

In legal terms some human rights are considered "absolute." These include the prohibition on torture in the UN Convention Against Torture and the European Convention of Human Rights. In reality, states can circumvent this absolute prohibition by redefining either what counts as torture or what their responsibilities are in cases of torture. The existence of absolute human rights should not be confused with the doctrine that treats the idea of human rights itself as absolute in the same way some neoliberal thinkers have considered as absolute rights of private property or some *étatist* thinkers have made absolute the sovereignty of the state. Human rights do not substitute for civil, political, and social rights; they exist alongside them, they depend on them, and they impact upon them. If we can speak of there being a *system* of rights in the modern world, human rights are not the *telos* of this system, not the final result of the idea of right. However, they can deeply affect the civil, political, and social rights that arise in the context of the nation-state. This is evident in the fact that nearly all national constitutions now nominally guarantee basic human rights – even if many do so more in word than deed.

Cosmopolitanism

In its modern guise, cosmopolitanism was born out of the endeavor to realize the universalistic potential inherent in the idea of the "rights of man." This product of eighteenth-century revolutions announced that every man should be conceived as a bearer of rights simply by virtue of the fact that he is a man. It contrasted the modern notion of subjectivity to ancient societies in which the possession of rights – personality in the language of Roman law – was a privileged status distinct from the mass of slaves and other dependants. Although the idea of the rights of man was for the most part restricted to certain sections of the male adult citizen population and undercut by the growth of regressive nationalisms (Kristeva 1991), the universality implicit in this idea provided the framework in which struggles for the rights of women, slaves, servants, wage laborers, the colonized, and the racialized were added to the original conception of bourgeois man (cf. Dubois 2000). Class struggles from below combined with state-formation from above to construct a power able to guarantee civil rights, extend political participation, and provide access to social welfare and mass education. The success of the modern state was to yield rights of religious freedom while keeping religious fervor and fanaticism under strict control, rights of political participation while transforming political resistance into agonistic competition between political parties, and rights of social inclusion that tempered the destructive force of free markets as well as the revolutionary momentum of class struggle (Brunkhorst 2008).

The expansion of the rights of man, however, came at a price. No sooner were the rights of man articulated than they entered into conflict with the organization of political community that underwrote their existence. The revolutions that declared the rights of man and citizen also designated that nation-states are the power that grants these rights and in its radical form declared there could be no rights the nation did not grant. The contradiction between the universalism of the concept and its particular national existence was expressed in the lawlessness apparent in relations between states, the colonization of non-European states, and the stigmatization of foreigners within nation-states. It was under the heading of the cosmopolitan point of view that Kant (1991) addressed these contradictions.

Kant argued first that republican government had to be extended across all political communities if the rights of man were to belong to all men in practice and not merely in

theory; second, a League or Federation of Nations had to be conceived and established with the capacity to enforce genuinely legal relations between states and put an end to aggressive wars, military conquests, and the barbarities of colonization; third, cosmopolitan rights in the strict sense of the term had to be recognized so as to guarantee *inter alia* the right to hospitality for strangers landing on foreign shores. For Kant, this visionary agenda – the extension of republicanism to all states, the formation of an international legal authority, and the endorsement of cosmopolitan rights – provided the foundations on which to translate the formal universality implicit in the concept of the rights of man into a concrete universal (Chernilo 2007).

These moves proved more problematic, even in conception, than Kant envisaged. The idea of the rights of man was inverted into a duty of unconditional obedience to the state, which grants these rights, and an internal dynamic was set in motion toward legal authoritarianism on the part of the state and militant patriotism on the part of citizens. The extension of republicanism across Europe and the globe was undertaken through wars of liberation and conquest, the brutalities of which run roughshod over the rights of everyone (we might think, for example, of Goya's representations of the "disasters of war" consequent upon the French effort to make Spain into a republic). The establishment of a League of Nations could not provide the alchemy Kant envisaged: that of turning perpetual war into perpetual peace. An alliance of powerful states, committed to republicanism, could find itself in a stronger position than individual states to destroy their enemies, subdue their subjects, and acquire new territories. The idea of cosmopolitan rights, though restrictive in scope, was to be sure a harbinger of human rights to come, but it also continued to serve powerful states as a pretext for the conquest of "barbarous" peoples who declined to provide the required hospitality (Fine 2007, p. 25).

Kant's observation that every right is a right of coercion was a reminder that every *expansion* of rights is also a *re-invention* of new forms of coercion. This was apparent not least in the imperialist presuppositions of the European division of the world. From the first European divisions of the world in the Treaties of Tordesillas (1494) and Saragossa (1529) between Spain and Portugal, from the Christian missionaries and inquisitors of the sixteenth century, through expansionist ideologies of "civilizing the heart of darkness" in the nineteenth century (Koskenniemi 2001), to movements for decolonization and nation-building in the twentieth, and finally to the "war on terror" and the exclusion of outlaw states in our own times, imperialism has not ceased to appear and reappear under various guises – some of them "anti-imperialist" (Brunkhorst 2008; Anghie 2004).

For all its conceptual shortcomings, Kant's cosmopolitan vision of generalizing the "rights of man" through a reformation of the system of nation-states provides a continuing resource in the face of the escalating violence of the modern world. Let me offer two examples. In his study of *The Germans* (1998), the sociologist Norbert Elias identified the absence of external legal authority at the international level as a key source of violence in the modern age:

> There is no monopoly of force on the international level. On this level we are basically still living exactly as our forefathers did in the period of their so-called "barbarism" … In interstate relations people today do not find themselves on a lower rung of the civilising process because they are naturally evil or because they have inborn aggressive urges, but rather because specific social institutions have been formed which can more or less effectively impose a check on every state-authorised act of violence in relations within the state, while such institutions are completely lacking in relations between states.
>
> *(Elias 1998, pp. 176–177)*

The political theorist Hannah Arendt argued along similar lines in her analysis of the lesson to be drawn from her study *The Origins of Totalitarianism*:

> Anti-Semitism, imperialism and totalitarianism … demonstrated that human dignity needs a *new guarantee* which can be found only in a *new political principle*, a *new law on earth*, whose validity this time must comprehend the whole of humanity, while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities.
>
> *(Arendt 1979, p. ix; my emphasis)*

What was needed, she argued, was not world government, which could still act on the basis of "the essentially barbaric idea that 'right' is what is good for the whole," but a *philosophy of right* whose principle was that "the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself" (Arendt 1979, p. 298). The Kantian inspiration behind these words is palpable.

At the time of Arendt's writing, norms of international law still operated largely in terms of treaties and agreements between sovereign states. New declarations of human rights lacked means of enforcement. The modern nation-state was still largely restricted to Europe, America, Russia, and Japan while the rest of the world was either under their imperialist control or outside world society. Equality still meant internal equality for citizens of a state and external inequality for those who did not belong. And the UN claim to universal authority at the global level still had the vulnerability of an infant faced with heavily armed parents: the Western and Eastern blocs.

Between Arendt, Elias, and the present day much has changed. Classical imperialism has vanished, Eurocentrism has been radically fractured, equal sovereignty under law has become a universal principle, individuals have become subjects of international law, and human rights have become a subdiscipline within the study of international law. Social exclusion and social inequalities are no longer perceived exclusively as "our own" problems, not only because we need each other to solve our particular problems (Beck 2006) but also because we now have various legally binding claims in relation to others. To be sure, these legal norms are frequently broken by nation-states, but what is new is that they exist.

In response to restraints imposed by international law, nation-states respond with a variety of strategies: they instrumentalize existing international law to suit their own interests, reshape the rules of international law to exempt themselves from its provisions, create zones of exclusion where the norms of international law have no purchase (as in Guantánamo Bay), substitute domestic law over which they retain control for the less certain authority of international law, or simply withdraw from international law and bring their military superiority to bear. However, nation-states have their own interests in supporting international law for reasons to do with regulation (it sets rules), pacification (it reduces resistance), stabilization (it preserves the current order), and legitimation (it justifies power). Even the most hegemonic of states may have a long-term rational interest in "binding emerging major powers to the rules of a politically constituted international community" (Habermas 2006, p. 150).

Hauke Brunkhorst (2008) has argued in a very compelling way that the current legitimacy crisis of nation-states may be understood to derive from their relatively recent incapacity to harmonize positive with negative freedoms – freedom of markets with freedom from the negative effects of markets, freedom of religion with freedom from the negative effects of religion, freedom of identity with freedom from the negative effects of identity. We may think of growing social inequalities even within the privileged Organization for Economic

Cooperation and Development (OECD) world, the expansion of religious communities beyond controls exercised by nation-states (as in the case of American Evangelists or Islamic fundamentalists), and the rebirth of ethnic forms of nationalism. In the face of such societal changes the expansion has occurred of regional and global institutions from the European Union (EU) to the World Trade Organization (WTO), associations of global civil society from Amnesty International to the International Chamber of Commerce, and the global public sphere where matters as far apart as the Iraq war and Princess Diana's death are debated all over the world.

The legitimacy of this global sphere lies in supplementing the declining functional capacities of nation-states. However, the normative equivocations of this development in the system of right are also visible. On the one hand, the constitutionalization of international law has given new impetus to the Kantian project of constructing a cosmopolitan condition. On the other hand, it is creating its own distinctive legitimacy problems (Sands 2006). They are apparent, for example, in the incapacity of supranational institutions and laws to address social inequalities, or apply human rights impartially, or match the democratic requirements of the modern nation-state. These legitimacy problems give rise to the perception that the idea of human rights functions to obscure global inequalities or is used as a political rhetoric to vilify one's enemies (Habibi 2007).

Within the cosmopolitan literature much effort has gone into confronting such legitimacy problems. For example, in relation to the democratic shortfall apparent in international law, Jürgen Habermas has argued that supranational constitutions receive backing from processes of democratic legitimation institutionalized within nation-states, the normative substance of human rights rests on legal principles tried and tested within democratic constitutions, and global civil society confers a supplementary level of democratic legitimacy on the decisions of global organizations. Habermas in any event justifies the restricted democratic legitimacy of international institutions by virtue of the relatively limited functions they serve compared with nation-states. Nonetheless, the political costs are involved in the evolution of postnational regimes and the mediations involved in the interpretation and application of human rights. Hauke Brunkhorst (2008) writes of the "latent legitimation crisis of world society" brought about by the coexistence at the global level of the abstract idea of human rights and concrete norms of social and legal exclusion.

If a crisis of the idea of human rights is in the air, it does not bode well for democratic thought. Hatred of the idea of human rights remains what hatred of law was for Hegel, "the shibboleth whereby fanaticism, imbecility and hypocritical good intentions manifestly and infallibly reveal themselves for what they are, no matter what disguise they may adopt" (1991, p. 258n). Sheer negativity opens the way for unholy political alliances.

Conclusion

Cosmopolitanism offers a generally critical outlook on human rights. It embraces the idea of human rights – not just in the juridical sense but in the wider political sense of the right of all human beings to have rights – and at the same time recognizes that the human rights revolution has taken off in a radically asymmetrical political–economic order (Toscano 2008, p. 134). Recognizing the equivocations present in the human rights revolution, cosmopolitans link to another Kantian thematic: not just the constitutional law of his political writings but also the role of judgment as "the faculty for thinking the particular" (Kant 1987, p. 18; Ferrara 2007).

Hannah Arendt picks up this dimension of the issue when in her lectures on Kant's *Philosophy of Judgment* she comments:

> One judges always as a member of a community, guided by one's community sense, one's *sensus communis*. But in the last analysis, one is a member of a world community by the sheer fact of being human; this is one's "cosmopolitan existence." When one judges and when one acts in political matters, one is supposed to take one's bearings from the idea, not the actuality, of being a world citizen.
>
> *(Arendt 1992, pp. 75–76)*

Arendt's call to fashion a space for cosmopolitan judgment out of the equivocation of human rights is the note on which I end. For as of now it is safe to say that the development of what we might call a "human rights culture" lags behind the institutionalization of human rights, and this is one of the most important observations on which to proceed in the future study of human rights (Fine 2009).

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