

## Joseph Raz on Human Rights: a critical appraisal (revised)<sup>1</sup>

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The current popularity of human rights talk in legal and political circles has generated a higher level debate among philosophers about how the concept itself should be understood. Unlike the much earlier debate about social and economic rights, and whether they should qualify as human rights proper, this is not primarily about the *substance* of human rights – about what should belong on the list of human rights and what should not. Instead the focus is on the kind of claim one is making when one says that such-and-such is a human right, and on how such claims can be justified; although the answer turns out to have implications for what belongs on the list, this is not the main concern. On one side are those who defend ‘humanist’ or ‘naturalistic’ or ‘traditional’ accounts of human rights; on the other side are those who defend ‘political’ or ‘practical’ accounts. Raz places himself, and has been placed by others, in the second camp.<sup>2</sup>

This is how the landscape is usually described, but recently there have been dissenting voices suggesting that the contrast between the two camps is at least overdrawn if not wholly misleading.<sup>3</sup> The dissenters argue that the two perspectives are complementary to one another, and both are necessary for a full understanding of human rights. I am sympathetic to this conciliatory move and will apply it to Raz’s essay in this reply. But first it will be helpful briefly to characterise the two allegedly rival accounts of the nature of human rights.

The first, humanist, view holds that the way to understand human rights is to see them as moral rights justified by the role they play in protecting essential human interests. Proponents of this view differ over how these interests should be characterised: some identify a single feature such as

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<sup>1</sup> I am very grateful to Rowan Cruft and Matthew Liao for their helpful comments on an earlier draft of this chapter.

<sup>2</sup> J. Raz, ‘Human Rights Without Foundations’ in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), and J. Raz, ‘Human Rights in the Emerging World Order’, above.

<sup>3</sup> See especially S. Liao and A. Etinson, ‘Political and Naturalistic Conceptions of Human Rights: A False Polemic?’, *Journal of Moral Philosophy*, 9 (2012), 327–352; P. Gilabert, ‘Humanist and Political Perspectives on Human Rights’, *Political Theory*, 39 (2012), 439–67.

‘personhood’ which is then used to ground all rights; others argue that human beings have several distinct basic interests, each of them playing some role in the justification of human rights.<sup>4</sup> These disagreements are not germane to the discussion of Raz, and I will not pursue them further here. What is more important to notice is that even on the humanist view, the move from essential interests to rights is not straightforward. First, the interest in question has to be one that it makes sense to look to rights to protect. Humanist authors are fully aware that human rights once identified are meant to guide the actions of states. So it would be damagingly pointless to announce rights to have interests fulfilled that states could do nothing to secure – such as the ‘right’ to love, in the sense of the right to find a partner who loves one in return – no matter how important the interest itself. Second, some regard must be had to the potential cost of enacting a proposed right. Rights impose obligations, and discharging the obligations may require sacrifices of resources or of personal freedom; some of these sacrifices may involve encroaching upon other proposed rights. As a result, a feasibility condition of some sort has to be imposed when interests are being used to ground rights. Again the details are not important at this stage. But we should notice that on the humanist view there is always a gap between human rights themselves and the human interests that are used to justify them, a gap created by recognizing, in broad terms, the role that human rights are meant to play in practical discourse.

Raz calls the theories of human rights he is opposing ‘traditional’. This might be misleading if it suggests that modern humanist theories are simply updated versions of the natural rights theories popular in the 17<sup>th</sup> and 18<sup>th</sup> centuries, where rights are attributed to individual persons inhabiting a pre-political state of nature. It is then easy to pillory such theories for their inability to explain many of the rights set out in the leading declarations and charters, rights that make no sense outside the context of the modern state. It is important, therefore, to separate what is essential to humanist theories as a class, namely that human rights are justified by showing how they serve to protect essential interests of one kind or another, from features that particular members of that class might possess, such as identifying only rights that could be exercised in a state of nature. Raz says:

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<sup>4</sup> See the ongoing debate between James Griffin and John Tasioulas on this point: J. Griffin, ‘First Steps in an Account of Human Rights’, *European Journal of Philosophy*, 9 (2001), 306-27; J. Tasioulas, ‘Human Rights, Universality and the Values of Personhood: Retracing Griffin’s Steps’, *European Journal of Philosophy*, 10 (2002), 79-100; J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), esp. ch. 2; J. Tasioulas, ‘Taking Rights out of Human Rights’, *Ethics*, 120 (2009-10), 647-78; J. Griffin, ‘Human Rights: Questions of Aim and Approach’, *Ethics*, 120 (2009-10), 741-60. For my own discussion of Griffin’s personhood theory (and my preferred alternative), see D. Miller, ‘Personhood versus Human Needs as Grounds for Human Rights’ in R. Crisp (ed.), *Griffin on Human Rights* (Oxford: Oxford University Press, forthcoming).

The theories I will call ‘traditional’ claim that human rights are universal because they are rights every human being has as a human being. That is, being a human being is the ground of possessing those rights. This claim is hard to sustain concerning the rights recognised as human rights in international instruments in the modern UN Charter era....<sup>5</sup>

Three features of this passage are worth our attention. First, although humanist theories do indeed claim that human rights are universal in the sense Raz explains, that by itself does not convey anything distinctive about this class of theories. That is, all theories of human rights assert that they are rights a person has simply by virtue of being a human being, as opposed to rights that one has by virtue of meeting some special qualifying condition, such as being the citizen of a particular state. Second, it is somewhat misleading to say that being human is the *ground* of human rights, according to the theories we are considering. The ground of human rights is rather the feature, universally possessed by human beings, that justifies these rights, by explaining their practical importance (as we saw, different theories dispute precisely what this feature is). Third, as we have seen, establishing that something is a human right involves more than just showing that it can be given the right kind of grounding, even for humanist theories. Argument of a different kind is needed before we approach the rights contained in the modern charters.

Raz goes on to claim that the logic of ‘traditional’ theories forces them to concede that even ‘cave dwellers in the Stone Age’ had human rights such as the right to education. I will return to this claim later. Now I want to introduce the rival, ‘political’ account of human rights. According to this account, we should understand human rights by beginning with their political function – what they are being used to do. Again, there are different ways of setting out this function. According to Raz, what distinguishes human rights from other rights is that they serve to set limits to state sovereignty:

Following Rawls, I will take human rights to be rights which set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena, even when – in cases not involving the violation of either human rights or the commission of other offences – the action would not be permissible, or normatively available on the grounds that it would infringe the sovereignty of the state.<sup>6</sup>

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<sup>5</sup> Raz, ‘Human Rights in the Emerging World Order’, (pp. 39-40).

<sup>6</sup> Raz, ‘Human Rights Without Foundations’, p. 328.

This definition is ambiguous in one respect. Does the criterion being proposed for something's being a human right appeal to what are, as a matter of fact, taken to be reasons for taking action against states that infringe their sovereignty? In other words do we look to the behaviour of members of the international community, and examine when they believe they have reasons to intervene in the internal affairs of states (in ways that violate sovereignty)? Or is the issue a normative one? Is the question when outsiders have a *good* (albeit defeasible) reason to intervene, regardless of whether they currently believe that they do? Neither horn of this dilemma is particularly comfortable, as I shall seek to show.

If we ask first what limits to their sovereignty states currently acknowledge, the answer is that this is a disputed question. In general, liberal states recognize more limits than do authoritarian or dictatorial states, which are likely to insist on virtually untrammelled sovereignty. In international law, the tendency has been gradually to enlarge the grounds of intervention over time, with the development of the idea of 'the responsibility to protect' (against large-scale human rights violations).<sup>7</sup> So the answer to our question about which rights are human rights is also going to be disputed, if we look at existing practice, with a secular trend towards extending the range of rights recognized as human rights (by the proposed criterion). But even if history is moving in the right direction from the point of view of the theory, isn't there something anomalous about leaving our list of (genuine) human rights hostage to what are regarded at any moment to be grounds for violating sovereignty?

This suggests that we should instead treat the criterion as a normative one: human rights are rights violation of which would *justify* interventions that infringe sovereignty according to some principle. But remember what the direction of the argument is supposed to be here. We begin by working out when it is (defeasibly) justifiable to infringe sovereignty, and then we attach the label 'human rights' to the rights that we discover to be the ones in whose name the infringement would be undertaken. Human rights are the conclusion of the argument, not the premise. Now it may be that those who support 'political' theories have the strong independent intuitions about sovereignty and when it may justifiably be infringed that would be needed to make such theories work. But, speaking for myself (and I suspect for many others), I find that when I think about intervention, I begin by considering the harms that it is meant to prevent. That is, I begin by looking at what I would regard as serious violations of human rights – people being driven from their homes, people being deprived of their means of subsistence, people being severely 'punished' on account of their ethnic or

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<sup>7</sup> This development is traced in A. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge: Polity 2009).

religious identities, etc. Where it looks as though some form of intervention, whether undertaken directly through military action, or indirectly by applying pressure to the rulers of the regime that is carrying out the violations, is likely to curb these harms, I conclude that we have (defeasible) reason to waive sovereignty for the duration of the intervention. The argument moves in the opposite direction. It *begins* with human rights violations, and *ends* with reasons to infringe sovereignty. So to make it, we need to know which rights qualify as human rights in the first place. Admittedly, there are some intermediate steps. Not just any human rights violation is going to count. For instance, restrictions on free speech, or inadequate provision of education, may violate human rights without being sufficiently grave to justify forms of intervention that impinge on sovereignty. But even here, it looks as though drawing the line will call on the resources of a humanist account. We will be asking how severely essential human interests are being sacrificed, whether the damage that is being done is permanent or capable of being reversed, and so forth. The grounds we appeal to will be those that figure in our general theory of human rights.

The challenge, then, for those who want to sit on the second horn of the dilemma is to provide an account of justifiable infringements of state sovereignty that does not already presuppose a theory of human rights.<sup>8</sup> I do not find such an account in Raz. Some of his remarks suggest that he thinks that the moral limits to sovereignty will vary over time, depending not only on the character of the state whose sovereignty is at issue, but also on the likelihood that those that could feasibly intervene will be guided by morally sound principles.<sup>9</sup> This has the implication that human rights will expand and contract as the configuration of the international system changes. Evidently, this goes against the idea of formulating a fixed set of human rights that could be codified in a charter. I do not say that a purely political theory of human rights is an impossibility, but it seems to take us far away both from the substance of human rights as they are set down in the main charters, and from the way they are usually understood as bastions that stand firm against the rise and fall of different political regimes. The second horn of the dilemma proves to be no more comfortable than the first.

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<sup>8</sup> This would not necessarily have to be a complete account of when sovereignty may justifiably be infringed. For instance we might think that a state that continued to pour out large quantities of greenhouse gases in defiance of an international agreement restricting emissions would be liable to have its sovereignty restricted, even though it was not putting basic human interests *directly* at risk. So a complete account might also introduce issues of fairness between states, breaches of international law, and so forth. The point remains, however, that the political account as I am reading it here needs to be able to tell us which instances of states behaving badly towards their citizens can justify outside intervention without openly or tacitly relying on an independent theory of human rights.

<sup>9</sup> Raz, 'Human Rights Without Foundations', p. 331.

The obvious way to avoid it is to allow some version of the humanist theory to fill the gap left by the political conception. In other words, we first develop a provisional account of human rights by appealing to essential human interests and specifying the set of rights that would protect these interests most effectively. But then, following Raz's political approach, we identify the sub-set of these rights that are sufficiently important that their violation would give us a (defeasible) reason to intervene in the state responsible for the violation; these are the ones to which we attach the label 'human rights'. This, then, involves treating humanist and political approaches to human rights as to some degree complementary to one another. They are not, however, interchangeable because the political approach is likely to yield a narrower set of rights. How narrow will depend on the meaning we attach to 'intervention'. If we were to restrict it to armed military intervention, we would almost certainly arrive at a very short list indeed; at the other extreme, if we include robust criticism from outsiders as a form of sovereignty-limiting intervention, then there will be no substantive difference between the two approaches, since anyone who adopts a humanist approach will think that a state that violates human rights as she understands them opens itself to robust criticism at the very least.

Interestingly Raz sometimes suggests a different way of distinguishing human rights from other moral rights. He says 'of all our moral rights only rights that should be respected and enforced by law are identified as human rights'.<sup>10</sup> I take him to be giving a necessary rather than a sufficient condition here, since there are moral rights such as the rights that stem from ordinary contracts that should be legally enforced but are not plausibly counted as human rights. But is it true that it is a mark of a human right that it should be enforced by law, or does this narrow the class of human rights too far?

It is obviously a feature of a morally defensible legal system that it should *respect* human rights, in the sense that it should not require those subject to it to perform actions that violate the human rights of others. It is also true that there are many human rights, such as the right to physical security, to political participation, to non-discrimination, and so forth, that should be legally enforced. But if we think of socio-economic rights, such as the right to subsistence or the right to basic health care, it is much less clear that legal entrenchment, even if it could be made meaningful, is the best approach to securing them. What a state needs to do to fulfil these rights is to make effective public policy; it needs to avoid economic disasters like Mao Tse-Tung's Great Leap Forward, and ensure that sufficient resources are devoted to health care, education and so forth. It is an open question whether the best way to achieve this is to give people legally enforceable rights to receive

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<sup>10</sup> Raz, 'Human Rights in the Emerging World Order', (p. 43).

these goods. Perhaps there will still be some role for the law to allow individual people to take action if they believe they are being unjustly discriminated against when the goods are allocated. But equally there is a danger that the law will intrude upon decisions that are properly political because they involve weighing the most effective use of scarce resources.<sup>11</sup>

A further implication of tying human rights to legal enforceability is explicitly recognized by Raz. Enforceable human rights need appropriate institutions to implement them. But what if such institutions do not currently exist? According to Raz, 'if, given the prevailing circumstances, there is no possibility that impartial, efficient and reliable institutions may come into existence regarding a certain right, then that right is not a human right'.<sup>12</sup>

This implication is surely troubling. Some of the worst human rights violations (as human rights are normally understood) occur in circumstances of political collapse when the institutions of the state largely cease to function, and there are no formal mechanisms available to provide basic physical security, food, shelter etc. to perhaps millions of people. The natural response is to say that the human rights of the people affected demand a response, which is likely to take the form of ad hoc provision by outside security forces, aid agencies and so forth. At this time and place, there is no possibility that impartial, efficient and reliable institutions will emerge. Of course, taking a much longer perspective, one can hope for a political transformation that would allow this to happen. So the question is how Raz understands 'possibility' in the passage quoted above. On a generous interpretation, which accommodates political change, it will always be possible for suitable institutions to come into existence, even in the most inhospitable places, and so the proposed criterion does not rule anything out. On a narrower interpretation, it seems that in circumstances where human rights most need to be protected (such as those outlined above), they lose their status as human rights because legal enforcement is no longer possible. Raz is candid about this: 'If enforcement – fair, efficient and reliable enforcement – is impossible, we should recognize that the right is not a human right, and refrain from calling for its enforcement.'<sup>13</sup>

I hazard that Raz holds this view because of a legitimate worry (which I share) about the unfettered proliferation of human rights. Our theory of human rights must ensure that only a subset of moral rights (and for that matter only a subset of justice claims) qualify for that status. But I am not

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<sup>11</sup> For a fuller discussion of the enforceability question, see J. Tasioulas, 'The Moral Reality of Human Rights' in T. Pogge (ed.), *Freedom for Poverty as a Human Right* (Oxford: Oxford University Press, 2007).

<sup>12</sup> Raz, 'Human Rights in the Emerging World Order', (p. 44).

<sup>13</sup> Raz, 'Human Rights in the Emerging World Order', (p. 44).

convinced that the way to control proliferation is to insist that human rights must be suitable for legal enforcement. Indeed that insistence seems somewhat at odds with another aspect of Raz's account, his claim that the importance of human rights lies 'in affirming the worth of all human beings, and in distributing power away from the powerful to everyone, including any group or association willing to advocate and promote the interests of ordinary people'.<sup>14</sup> What Raz sees here, correctly, is that the language of human rights has proved to be an effective vehicle for various civil society groups to press their claims *against* the institutions of the state, in other words to demand policy changes that would better protect the human rights of those they represent. Human rights here serve as political weapons. But what is being demanded is not necessarily that the rights in question should become legally enforceable. Consider an advocacy group speaking on behalf of the homeless. It invokes the human right to shelter and demands that government should make available more homes that poor people can afford to rent, meanwhile perhaps providing temporary accommodation. But it is unlikely to argue that there should be an enforceable legal right to a home: it is not clear what this would mean, or who the right should be claimed from. Nor, to revert to the point made earlier, would such a group suggest that the human right it was advocating was grounds for infringing the sovereignty of the state. One can think that a human right represents an important moral claim that all governments including one's own are obliged to respect without holding any particular view about how this right should be implemented, or whether failure to respect it gives grounds for intervention by outside agencies.

This, however, is to revert to a humanist approach to human rights, so it is time to examine Raz's critique of the approach he calls 'traditional'. Perhaps it suffers from flaws that are more serious still than those we have detected in a (purely) political approach. Raz lays two main charges at its door. One is that it makes human rights 'universal' in an implausible way. The other is that it expands the content of human rights excessively, without paying due attention to how they can be secured. I will consider these in turn.

Raz argues that if human rights are taken to be moral rights that human beings have simply by virtue of their humanity, it would follow that people must have possessed these rights throughout history, going back as far as the Stone Age. Taking the example of the right to education in the form in which it appears in the UN Declaration, he suggests this is implausible.<sup>15</sup> Instead, the human rights we

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<sup>14</sup> Raz, 'Human Rights in the Emerging World Order', (p. 41).

<sup>15</sup> The clause reads: 'Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.'



recognize today are a response to the particular conditions of life in modern societies governed by states.

There are two ways to respond to Raz's argument here. The first is to accept that the idea of human rights, like the idea of rights themselves, is relatively modern.<sup>16</sup> The latter idea is generally thought to have emerged in the late Middle Ages. The concepts used in earlier societies were different. So it would be anachronistic to attribute human rights to Stone Age cave dwellers, given that this is not an idea that was available to them. They would of course have had the same essential interests that ground rights in us – they would have needs for food, shelter, protection against bodily assault, and so forth. However it would be possible to devise an ethics for cave dwellers that responded to these needs without referring to rights, and this, presumably, is what they did themselves. But this possibility is not an embarrassment for humanist theories, since they do not set out to explain or justify the very idea of rights. What they do is to explain is why certain rights should be singled out as human rights, and provide a way of settling disagreements about their content. In other words, if we are going to play the rights game, these are the rights that we should recognize as having the special status of human rights. So according to this first response, asking whether Stone Age cave dwellers had human rights is like asking whether the present King of France is bald: the question simply does not arise.

A different response, more congenial to those who think that if human rights are universal we must be willing to attribute them to every human who has ever lived, is to say that cave dwellers did indeed have human rights, but the form that these rights took is different from the form they take with us. Raz considers such a possibility, but in slightly distorted form. He asks whether there might be universal 'ur-rights' from which contemporary rights such as the right to education could be derived. However I think that the picture here of deriving one right from another right is misleading. It would be better to think in terms of *specification*.<sup>17</sup> We have a general right to education, meaning the right, while growing up, to be equipped with the various intellectual and practical skills that we need to flourish as human beings in whatever social context we find ourselves in, and then

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<sup>16</sup> This is the position taken by Tasioulas in 'Human Rights, Universality and the Values of Personhood' and 'Taking Rights out of Human Rights'.

<sup>17</sup> Variations on this theme can be found in a number of authors. Griffin speaks of different levels of abstraction: see Griffin, *On Human Rights*, p. 50. Gilabert likewise distinguishes between abstract and specific rights, and suggests that the humanist focus on the former complements the political focus on the latter: see Gilabert, 'Humanist and Political Perspectives', pp. 442-6. Liao and Etinson distinguish between the aim of a right – the underlying purpose for which a right is instituted – and the object of a right – the institution or policy which achieves that aim in a particular setting: see Liao and Etinson, 'Political and Naturalistic Conceptions of Human Rights', p. 339-41.

this right will be specified in particular ways, depending on what that context is.<sup>18</sup> The degree of specification can vary. The clause from the UN Declaration that Raz cites represents an intermediate level of specification, because it lays out in brief the form that the right to education will take in modern states, states that are sufficiently alike that the various types of education (elementary, professional etc.) it refers to must be provided in each of them. This is appropriate, since it is modern states that are the primary addressees of the Declaration. In any particular state, the right can be specified more precisely.

In fact, the explanation of the right to education as set out in the Declaration that Raz proceeds to give runs along exactly the lines of a humanist theory: a common human interest is invoked ('the opportunity to have a rewarding life', which 'depend[s] on possessing skills to tap the opportunities available in one's place and time'<sup>19</sup>), and this is shown to require, in the circumstances of contemporary life, the right to state-provided formal schooling, and so forth. This comes as something of a surprise since, as we have seen, Raz's stated view is that the mark of a human right is that that it is a right whose violation removes the shield of sovereignty and opens the offending state to outside interference. Do we believe this about the right to education? Suppose a state failed to make publicly-funded technical or professional education available to women. This would be gravely unjust, and grounds for criticism and protest both inside and outside the state. But would it constitute grounds for interference, if interference is understood to mean coercive interference with the state's exercise of sovereignty? This, at any rate is what Raz needs to show if he is to keep to his 'political' understanding of human rights. But here he seems to proceed just as a humanist would.

So to conclude on Raz's first objection to humanism, holding human rights to be universal does not mean attributing modern-style rights to Stone Age cave dwellers. Either we can say that the question of human rights does not arise for pre-modern humans – they neither have them nor lack them – or we can attribute to them generic rights which would need to be variably specified according to local circumstances. What about the second objection, that a humanist approach will allow human rights to proliferate unjustifiably?

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<sup>18</sup> As this example shows, the aim is not to boil human rights down to a small number of very abstract rights, but to have a fairly extensive list of freedoms, resources, procedural rights and so forth, that is still general enough in content to allow for contextual specification.

<sup>19</sup> Raz, 'Human Rights in the Emerging World Order', (p. 40-1).

Raz's argument here, which he applies for example to the theory of human rights developed by Griffin, is that if we start with some feature of human beings as the basis of their rights – say their personhood – then whatever turns out to be necessary to protect that feature will turn into a right. If personhood involves autonomy, for example, and autonomy requires having a sufficiently wide range of options to choose between, then human rights will have to expand to cover all of these options. Without denying that some theories of human rights have been tempted down this primrose path, it is by no means an inevitable consequence of humanist theories. Here we have to pay closer attention to how such theories move from their grounding feature to the resulting set of rights.

The essential starting point here is that although humanist theories do not construe the point of human rights as narrowly as political theories – they do not see their purpose merely as one of setting limits to state sovereignty – they nonetheless want human rights to be rights proper, that is powerful demands that can only be overridden in exceptional circumstances. If they are to retain this force, they must be quite narrowly construed. So to begin with, when a particular right is specified, it needs to be shown that the exercise of that right is normally compatible with other members of the set of human rights.<sup>20</sup> The right must not impose obligations that would infringe the human rights of those who bore them. Next, the right that is specified must represent the *least demanding* way of protecting the essential interest that grounds it. Demandingness here is a matter of the general social costs imposed by different versions of a particular right. To illustrate, the right to shelter may require the government to provide adequate housing to all who need it, but the form that the housing takes can be the cheapest possible that does the job. Anything more than this takes us beyond the *human right* to shelter. And third, in the case of rights that serve a primarily protective function – rights whose purpose is to ensure that other rights can be enjoyed in relative security from interference – a judgement must be made about what counts as an adequate level of security, and how accordingly the right should be defined. My human rights include the right to legal counsel if I am charged with a crime, but not the right to the services of the highest-paid barrister in the land.

This does, however, suggest a point of convergence between humanist and political theories. If a humanist theory is to deliver a defensible account of the scope of human rights, it has to take

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<sup>20</sup> 'Normally' has to be inserted here, because a plausible theory of human rights will not entail that they are strictly compossible under all circumstances. So, for example, if an epidemic with potentially many fatalities breaks out, it may be justifiable to restrict the right to free movement in order to protect the rights to life and health. But such cases will be rare, if the rights have been properly specified. I have addressed this issue more fully in D. Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), ch. 7 and in 'Grounding Human Rights', *Critical Review of International Social and Political Philosophy*, 15 (2012), 407-27.

cognisance of the forces that are liable to threaten these rights. Attention to this dimension is a feature of political theories, though it is less prominent in Raz's work than, for example, in the work of Charles Beitz. According to Beitz, 'human rights are requirements whose object is to protect urgent individual interests against certain predictable dangers ("standard threats") to which they are vulnerable under typical circumstances of life in a modern world order composed of states'.<sup>21</sup> This notion of a 'standard threat' is a helpful complement to the approach to human rights sketched above, which aims to develop a list of rights that is just sufficient to protect essential interests, and is therefore wary about expanding rights unduly. It might not be obvious why access to legal counsel should count as a human right, until we reflect on the fact that over-zealous police forces are always in danger of bringing prosecutions against innocent people. Being falsely accused of a crime is just the sort of standard threat against which human rights are intended to protect us. So here introducing 'political' elements into our theory of human rights might encourage us to expand the list somewhat, by adding more protective rights, or by extending the scope of some substantive rights on the basis that a narrower scope would allow states to target vulnerable groups.

In short, deciding on the proper scope of human rights always involves a balancing act: on the one side, only listing rights that are essential to protect basic interests, and ensuring that the interests of the right-holder are properly weighed against the interests of others whose freedom and opportunities would be restricted by recognizing the right; on the other side, ensuring that the protection offered is adequate to protect the right-holder from various likely threats that the modern state order creates. Achieving this balance may require drawing upon both the resources found in humanist and those found in political theories.

Raz seems to think that if we begin with the 'traditional' approach, there is no non-arbitrary way to control the expansion of rights. His practical concern is that 'in the existing climate [human rights] lend themselves to reckless activism, which ignores the fact that rights impose duties and that the case for the existence of the duties has to be established beyond pointing to the value of the right to the right-holder'.<sup>22</sup> As I have signalled already, I share this concern, but do not see it as an

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<sup>21</sup> C. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), p. 109. Note that picking out states in this way as the main source of the threats against which human rights are meant to guard us does not entail that *only* states are capable of violating them. Although it may at first seem linguistically odd to speak about human rights being violated when one individual person murders or rapes another, this is partly I think because positive legal rights are also being violated, and so we can describe these events in different, but equally valid, ways. And when thinking about what can justifiably be done to individual rights-violators, it may be important to recognize when human rights are at stake and when they are not. I have explored this latter question in 'Are Human Rights Conditional?', *Archiv für Rechts und Sozialphilosophie*, forthcoming.

<sup>22</sup> Raz, 'Human Rights in the Emerging World Order', (p. 47).

unavoidable consequence of the humanist approach. In his critique of Griffin, Raz argues that if we take 'personhood' to be the ground of human rights, it will be impossible to draw a non-arbitrary line to prevent rights expanding to include 'all the conditions of a good life which one person can secure for another'.<sup>23</sup> (For some reason, Raz chooses to ignore Griffin's appeal to 'practicalities' which Griffin intends to serve as a means of restricting this expansionary tendency.<sup>24</sup>) I have tried to show why this does not follow once we see what is involved in moving from the feature that humanist theories light on to ground human rights to the list of rights that eventually emerges. Along the way, I have suggested, these theories can be improved by reflecting on the practical function of human rights in the existing world order, and to that extent drawing inspiration from the initially rival political approach.

Another concern that I share with Raz is the worry that a rigid interpretation of human rights would license international bodies to begin interfering with decisions about priorities that are properly taken at domestic level. He instances the human right to health. But again this is not an unavoidable corollary of a humanist approach. The balancing of interests, referred to above, that has to go on before rights are defined, has no one 'correct' answer. There is no canonical way of deciding how many resources should be devoted to health care compared to other social objectives. Instead there is a range of solutions all of which remain compatible with meeting the underlying human need for a healthy life. So the human right to health, as it occurs in the international documents, must be given only a modest degree of specification to allow room for higher levels of specification in particular societies.

Raz's worry here is intensified by his belief, critically discussed above, that human rights must be capable of legal enforcement. So he thinks in terms of authoritative international institutions attempting to enforce rights like the right to health in the face of local cultural variation. But I believe this presents the wrong picture. Human rights set standards that states must achieve as far as they are capable (and if they are not, other states may have obligations to offer help), but in the

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<sup>23</sup> Raz, 'Human Rights Without Foundations', p. 326.

<sup>24</sup> See Raz, 'Human Rights Without Foundations', p. 324, f.n. 12. I conjecture that Raz may have been misled here by Griffin's description of practicalities as a second *ground* of human rights. Their role according to Griffin is not to ground rights in the sense of justifying them, but to make rights more determinate by considering the practical constraints imposed by familiar features of human life on their content. Although I do not think that Griffin's appeal to practicalities is the best way to accomplish this (see my discussion in 'Personhood versus Human Needs as Grounds for Human Rights'), it is clear that he is alive to the danger that Raz is pointing to. As he says, 'if we had rights to all that is needed for a good or happy life, then the language of rights would become redundant. We already have a perfectly adequate way of speaking about individual well-being and any obligations there might be to promote it.' (Griffin, *On Human Rights*, p. 34)

interpretation of these standards they should be allowed a 'margin of appreciation', the term adopted by the European Court of Human Rights to acknowledge justifiable variation in the way that member states interpret the Convention under which it operates. This is true regardless of who is applying the standards. As Raz sometimes acknowledges, human rights have many uses. They can be appealed to by citizens challenging the policies of their own states, by civil society groups targeting abuses abroad, by states applying pressure to other states, by international organizations criticizing the behaviour of their members, and so forth. The forms of action involved are equally varied. Legal enforcement is neither the only vehicle for promoting human rights, nor necessarily the most important.