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# Rights of culture, rights of conscience

Chandran Kukathas

In this contribution I take up a particularly troubling issue in the theory of human rights. It is the issue of intervention to defend or uphold – or re-assert and re-establish – human rights. The issue is a troubling one because intervention in the affairs of others is always something we should be wary of, not least because history is full of unhappy episodes of intervention, from the Spanish in the Americas to the Chinese in Tibet. Indeed, so difficult and complex are the issues raised that one might be tempted in a discussion of human rights simply to separate the two matters – intervention and rights – and deal with them as distinct problems. To the extent that we deal with both, it might be argued, we should first work out what human rights are, and then turn to the very separate question of when and how we might intervene to support them. My contention in this contribution, however, is that the theory of human rights ought to incorporate a theory of intervention; and a part of the purpose of this contribution is to explain how this should be done.

Yet here one of the problems confronting the would-be defender of human rights is the cultural challenge posed by those who claim that human rights are a western construction that provides no warrant for questioning, let alone intervening in, societies with very different ethical and political traditions. An important task for the human rights advocate, then, is to explain why human rights cannot so easily be dismissed or ignored. The argument put in this chapter is that human rights have their source in the good of liberty of conscience – which is a good that transcends cultural boundaries. Claims of culture cannot be invoked to deny persons such rights. Furthermore, the existence of such rights provides a warrant for interventions to uphold such rights. However, there are important limits to the scope for intervention – limits defined by the theory of human rights.

What I present here, it should be noted, is an argument that has a distinctly liberal pedigree. Liberalism is often presented as a doctrine of individual rights. But within liberal theory, particularly as it has attempted to address the question of what should be the proper framework for a cross-cultural

engagement between liberal and non-liberal groups and societies, there have been some important disagreements. Some theorists have argued that liberalism mandates toleration, and perhaps even protection, of culturally different people, but that toleration has its limits. When groups cease to respect the freedom or autonomy of individuals in their midst, toleration is no longer warranted. Indeed, intervention may be necessary. Theorists such as Will Kymlicka have defended this view, though, typically, all have cautioned against intervening too readily in societies with illiberal customs since it may not always be prudent to try to impose liberal values by force.<sup>1</sup> In these debates, I have generally taken the view that toleration of illiberal practices is warranted not merely as a matter of prudence but as a matter of principle. What is distinctive about liberalism, I have argued, is not its commitment to autonomy and its promotion but its reluctance to condone the use of force to promote values that some peoples or communities reject. What liberalism tries to uphold is not culture but the principle of non-intervention (Kukathas, 2003).

Does this mean, however, that liberals have to forswear intervention in illiberal societies or communities whatever the situation? Or is there a point at which intervention becomes permissible? My concern in this chapter is to explain when intervention is ethically defensible from a liberal point of view, and specifically from the viewpoint of a liberal view of rights.

The argument will be developed in six steps. The first section begins by explicating the concept of a right, and outlining what are human rights. The second outlines the challenge to human rights doctrines posed by cultural relativists, and explains why it is important – even though there are reasons also to be sceptical about the cultural challenge. The third section then goes on to explain how the cultural relativist can be accommodated, if not answered, by an appropriate conception of the foundations of human rights. This conception gives special weight to rights of conscience. The fourth section then turns to explain how and why rights imply the justifiability of intervention, although section five tries to account for the limits of this intervention. The final section concludes with an assessment of the relative merits of the claims of culture and the claims of conscience.

### **10.1. What are human rights?**

A right, to put it most simply, is an enforceable moral claim. If I have a right to something, I have an entitlement which may justifiably be enforced – that is to say, it would be justified to exercise force to uphold that claim. (It is not to say that I may necessarily use force myself, only that, in the end, force may be used to uphold the claim of a right-holder when claims are in dispute.) Rights claims are thus very powerful claims. To have a right is to have an entitlement whose fulfilment one can insist upon, and whose pursuit imposes obligations upon others.

The concept of a right in modern times has been most helpfully expounded by Wesley Hohfeld (2001), whose *Fundamental Legal Conceptions as Applied in Judicial Reasoning* distinguishes four kinds of legal rights. Individual rights in law might be liberty rights, claim rights, powers, or immunities. In brief, I have a liberty right to do X if I have no duty (to a particular person, or to persons in general) not to do X. Thus, if I have a right to park my car here in the general car park, it means I have no duty to refrain from doing so – though it does not mean I have a right to exclude someone else from doing so if he gets there first. I have a claim right to X, however, if someone else has a duty to let me do X. If I own this property, I have a right to park my car here, and others have a duty not to stop me, and also to relinquish that space to me upon request. Some claim rights are held against particular persons (rights *in personam*), say as a result of a contract made; while other claim rights impose duties against all persons (rights *in rem*), as is the case with rights of property. I have a power if I have an ability under the law to change existing legal arrangements, and thus change the liabilities under which others operate. If I own a car-parking space I may have the power to sell it, thus transferring the rights that go with it. I have an immunity if particular persons, or perhaps even everyone, lacks the power to change my legal position. If I own a property jointly with a second party, I may have an immunity against the property being sold without my agreement, though I may have no immunity against his using it for purposes which restrict my own use of it (say, to park my car).

Hohfeld's analysis helps us to clarify the concept of a right, not only as it is used in law but also as it is used in ethics – though there has also been much debate about whether or not this analysis is sufficient to explain fully the character of claims of entitlement and the duties they impose. But one thing this account of rights does not do is explain the content of rights persons in fact possess. This is not simply because most of our rights happen to be mixtures of liberties, claims, immunities and powers – imposing different duties and liabilities on various others. It is because it is not itself a theory of rights. It tells us what it means for us if we have certain rights; but it does not tell us what kinds of rights we actually have under the law, or, more importantly, what rights we ought to be recognized as having.

Theories of human rights are theories about what kinds of rights we should all be held to possess. These are rights we all have, not because we are members of particular legal jurisdictions or states but simply in virtue of the fact that we are human beings. Over the past three centuries, as rights-talk has come to dominate moral, legal and political discussion in the American, the European, and eventually the entire, world, the number of theories of human rights has also multiplied. For some, human rights encompass little more than an entitlement to acquire and hold property, and to enjoy security of one's person and property against the depredation of others. For others, human rights must include entitlements not only to the forbearance of others

but also to positive support to protect interests considered common to all human beings. A particularly striking, and important, statement of what rights all human beings must enjoy is provided by resolution 217 A (III) of the United Nations on 10 December 1948: the Universal Declaration of Human Rights. This document proclaims that all persons, regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is entitled to certain rights and freedoms.

This list of rights specifies the liberties, claims, powers and immunities to which all human beings should be entitled. In so doing, it in effect identifies duties and liabilities which fall not only upon individual persons but also upon states to ensure that human entitlements are properly met. Yet even as it reveals, through its comprehensiveness, the possible scope of a doctrine of human rights, the UN declaration makes apparent the difficulty of specifying a conception of universal rights that is likely to command universal assent. This is not only because many rights presuppose a level of wealth, or a social structure, which simply does not exist in many societies – how, for example, could an entitlement to periodic holidays with pay be upheld for peasant farmers in a predominantly agrarian society – but also because many rights either demand some, or call into question other, fundamental ethical commitments. The right to change one's religion runs up against those religions which view apostasy as a sin; the right to take part in government runs up against those states which have remained kingdoms or principalities (even if not dictatorships); and the right to an education directed to the full development of the human personality runs up against the problem that, even were there any settled consensus on what the human personality in its fullest development should be, many traditions see the purpose of education very differently.

It is scarcely surprising, then, that the UN Declaration is marked by a number of incompatible or inconsistent claims about human rights. For example, it specifies that education should be free, and directed to the development of the human personality, with higher education available to all, while at the same time stating that 'parents have a prior right to choose the kind of education that shall be given their children'. It is no less surprising that, over the years not only the UN Declaration but also the very idea of human rights has been called into question. Indeed, according to some, human rights seldom pick out universal human interests but merely betray the political dominance of certain cultural traditions.

## **10.2. The cultural relativist challenge**

A complaint often made by those who are wary of human rights is that rights are a Western concept that is of little relevance in non-Western societies or cultures. What rights, by their very nature, do is individuate: they identify and separate individuals as persons, and grant them liberties or claims or

powers or immunities as against others within the community, or against the community (if not the world) as a whole. A right is a highly individualistic notion. Yet many cultural traditions do not view the world in this way. For some traditions it is not individuality or autonomy which is of especial importance but community; and the freedom of individuals to question or dissent from established authority is not highly prized. Moreover, these traditions often regard the advocates of human rights, and the states they sometimes represent, as essentially coercive, and argue that any change or reform within their own communities ought to be a matter for them to manage without the intervention of rights-wielding critics from outside.

We see this resistance to human rights in a variety of situations. It is evident, for example, in India where the debate on the question of Islamic traditions has resulted in the granting to Muslims of their own unreformed personal laws – laws which are in many respects illiberal in their treatment of women. It is evident in the United States where some groups, such as the Pueblo Indians, have resisted the demand that they recognize the right to religious freedom of their own members. But it is especially evident in the pronouncements of some national governments that they are unwilling to go along with the international emphasis on the importance of human rights. A number of Asian governments in particular have argued that the notion of individual human rights is alien to Asian cultures, while also maintaining that their societies' 'collective' right to development requires a very different approach to government from that which prevails in the west.

This attitude was very clearly expressed in the 'Bangkok Declaration' of the Ministers and representatives of Asian states, meeting at Bangkok from 29 March to 2 April 1993, pursuant to General Assembly resolution 46/116 of 17 December 1991 in preparation for the World Conference on Human Rights. While 'welcoming' the attention paid to human rights in the international community, the Declaration's evident concern was to downplay the relevance of human rights by asserting – and re-asserting – the 'principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of States'. This concern is especially apparent in the Declaration's wish to 'discourage any attempt to use human rights as conditionality for extending development assistance', to emphasize the importance of 'the non-use of human rights as an instrument of political pressure', and to reiterate 'that all countries ... have the right to determine their political systems, control and freely utilize their resources, and freely pursue their economic, social and cultural development'. Human rights, it seems, are very important – important enough to justify the spending of increasing sums of money to promote 'awareness of human rights'. But not important enough to justify others invoking them to scrutinize or criticize the workings of states.

There is good reason to be sceptical about such declarations, and about those who make them. In part this is because the strategy of the Bangkok

Declaration reveals quite clearly the interest of its proponents in deflecting attention from their own human rights records, and in weakening the critical power of human rights. For example, the Declaration repeatedly emphasizes that human rights should be ‘encouraged by cooperation and consensus, and not through confrontation and the imposition of incompatible values’; that they should be ‘addressed in an integrated and balanced manner’; and that primary responsibility for the promotion and protection of rights rests with the state. When one imagines such sentiments coming out of the mouth of a Mahathir Mohammad, or a Jiang Zemin, it becomes plain that reasonable sounding pleas for moderation can be entirely self-serving. They serve – because they aim – to distract us from recognizing the essentially immoderate nature of rights.

Human rights claims are immoderate because they are claims devised to assert the basic interests of human beings against people – usually rulers – who are not moderate or considerate in their behaviour. They are claims they can invoke not with the assistance or cooperation of their rulers but when they are denied that assistance. Rights express entitlements human beings have irrespective of citizenship or of the states in which they find themselves. More importantly still, human rights ‘express the principle that when the governed are oppressed beyond hope of remedy, they have a right to defend themselves’. This, as Michael Ignatieff explains, ‘justifies the most radical step human beings can ever embark upon: taking the law into their own hands’ (2000: 36). It need not, however, mean taking up arms or going to war but simply appealing for help beyond one’s borders. ‘Human rights create extraterritorial relationships between people who can’t protect themselves and people who have the resources to assist them’ (2000: 36).

Yet even while there is reason to be sceptical about the declarations of those who would distract us from recognizing the interests of people who are seeking remedies to protect their most basic interests, this does not mean that no argument is needed to explain why rights-talk is not merely western meddling. For the challenge to the defender of rights is to say why rights do not simply impose alien values on cultures which have no need for them – indeed must repudiate them if they are to preserve their integrity as traditions with important values of their own.

### **10.3. Rights of conscience**

The question then comes down to a matter of the values that rights uphold or protect. If rights are universal, the values they defend must be values that all societies or cultures hold in high regard. If not, rights could quite correctly be seen as coercive by those who do not recognize the values being promoted by the critic standing on a doctrine of human rights. If he is not to be coercive such a critic must be able to appeal to values or reasons which are internal to a community, rather than simply to ideals which are external or alien. Is there any such value?

The most likely candidate, I suggest, is a value which holds an important place in the history of the struggle for human rights, and in particular for the right to religious liberty – freedom of conscience. The significance of conscience is clearly recognized in Article 1 of the Universal Declaration of 1948, which observes that all human beings are endowed with reason and conscience. And the Human Rights Declaration by the ASEAN Inter-Parliamentary Organization at its 14th General Assembly in Kuala Lumpur specifies in Article 8 that everyone has the right to freedom of conscience. But it is not because it is recognized in these documents that freedom of conscience is significant. It is important because it embraces a number of critical ideas. First, implicit in the notion of freedom of conscience is a recognition of the importance to a person or persons of acting rightly. To require a person to act in a way he considers wrong is to impose a very serious demand. A right to freedom of conscience recognizes that people should not be required to act in ways they consider wrong. The right to religious freedom is grounded in this idea: freedom of worship must be upheld because it is wrong to require people to worship gods they consider false, or worship in a manner they regard as profane. Second, freedom of conscience recognizes that people's ideas of right and wrong differ. Finally, central to the notion of freedom of conscience is a commitment not to use force to compel belief.

Yet all this said, why should freedom of conscience be regarded as a universal value rather than merely as a particular, historically and culturally specific one? After all, the Islamic tradition, for one, seems not to recognize it inasmuch as it denies its faithful the right to abjure and considers apostasy a punishable crime. The answer lies in the fact that even those who do not always accept the significance of freedom of conscience invoke their freedom to go their own way. Indeed, in challenging any imposition of doctrines of rights upon their communities or traditions on the grounds that it would be coercive, such persons or groups are implicitly asserting the wrongness of forcing people to live by standards or values they cannot accept. (Significantly, Islam, while it forbids apostasy, is equally insistent in forbidding forced conversion to the faith.) The human rights declarations coming out of the Asia Intergovernmental meeting in Bangkok, and the ASEAN Inter-parliamentary organization in Kuala Lumpur, even as they proclaimed that 'human rights exist in a dynamic and evolving context and that each country has inherent historical experiences, and changing economic, social, political and cultural realities and value systems which should be taken into account',<sup>2</sup> nonetheless maintained that the signatory states had a 'right' to go their own ways, and to non-interference in their internal affairs.

Freedom of conscience, I suggest, lies at the core of the appeal to be allowed to go one's separate way. It is the basis for a very important freedom: to dissociate from people or communities or traditions or standards one cannot abide. Now it might be thought that, in fact, it is not conscience that is being invoked in these cases but the value of non-coercion. Yet it is not coercion



itself that is the issue in disputes over the import of cultural differences. It is coercion to enforce standards one party cannot accept.<sup>3</sup>

If there are any universal human rights, then, those rights have their basis in the value of freedom of conscience. Those who claim the right to respect for their separate cultural traditions, and to the freedom to live by their differing ways have a case, in the end, because freedom of conscience is a value we should all embrace.

Now, it might be argued, despite my claims to the contrary, that conscience is not either a universal value, or the best candidate for the value that rights uphold or protect. Surely not all traditions accept the primacy of conscience, and historically the idea seems to have its roots in early Protestant thought in Europe. Indeed, it seems to be a notion that is more thoroughly individualistic than many traditions could accept. What I wish to argue here is that, even if the historical origins of the term are European, the notion picks out something of universal significance. It picks out the idea that people ought not to be compelled to live according to values they consider wrong. This idea is indeed individualistic, but the theory of the significance of conscience offered here relies on individualism to a very limited degree. Respecting freedom of conscience demands not only that the conscience of the dissenting individual be respected but also that the conscience of the dominant majority be respected. There can be no suggestion that the view of the majority as to what is right carries no weight. The dissenting individual may invoke reasons of conscience for his dissent from the majority; but they cannot supply a reason to force the majority to conform to his conscience. The most the dissenting individual can demand is a right not to be forced to make his conscience conform to the majority, if necessary by his being permitted to exit from the community.

To be sure, there will be some members of some traditions for whom even this is asking too much, and who will demand the right of the group to live by their own traditions to the extent of enforcing not only standards of right but also obligations of membership. Islam, for example, will not tolerate apostasy. The view of conscience presented here, however, suggested that apostasy must be tolerated, even by those who condemn their dissenters. Dissenters may be criticized, shunned, excommunicated; but they cannot be forced to conform. At the same time, however, outsiders have no warrant for demanding that communities or societies facilitate dissent or encourage their members to examine their consciences and consider alternative ways of life. They should be at liberty to preach faithfulness to the community's traditions, even if they have no rights over the minds or souls of those who repudiate those ideas.

#### **10.4. Rights imply intervention**

Does this then mean, however, that regimes or communities have the right to rule as they please, to govern without fear that outsiders might intervene

in their internal affairs? Is this the upshot of liberty of conscience and the human rights it creates? I don't think so. There are other implications of human rights which are not less important and have to be recognized. Most significantly, rights imply intervention.

The reasoning behind this assertion goes like this. If individuals have rights, they also have the right to protect or defend their rights. (It does not mean, I hasten to add, that they have the right to do *anything* they wish to protect their rights; and how far they may go to defend their rights will depend very much on the circumstances, and on the extent to which their rights are threatened.) However, not all right-holders are capable of defending their rights themselves. Yet the doctrine of human rights cannot plausibly be understood to mean that only those who are able to defend their rights can enjoy human rights. On the contrary, any rights-holder, like any principal, is entitled to appoint an agent to act on his behalf to serve or protect his interests. What this means is that rights-bearers can call upon others to assist them – to act as agents enabling them to exercise their rights, or to defend themselves in their efforts to do so. Because human rights are not dependent on political boundaries, since they are claims people possess in virtue of their humanity, there is no reason to think that rights-holders can only call upon those within their borders or communities to help them. They can call upon anyone – and will most likely call upon those who are most capable of helping them. Of course, there may be cases in which right-holders need help to exercise or protect rights but are unable even to request that help – perhaps because they lack the resources to do even that, or because they have been kept in ignorance of the very fact that they have particular rights. But it would go against the spirit, or simply the point, of human rights to say that poverty or ignorance could justify some human beings being unable to enjoy their rights. In these cases it would be defensible for agents to intercede, and to offer to act for the principal rights-holders – even if this were to run counter to the wishes of those who feel that this amounts to meddling in the affairs of others. Rights bring with them the entitlement to invite others to intervene on one's behalf; and they are also quite consistent with an entitlement to accept offers of intervention to help one acquire or retain what is properly one's own. In this respect, rights imply intervention.

Now, a great deal more remains to be said on this subject. For even if rights carry with them an entitlement to have someone intervene on one's behalf, that does little to establish when, how, or to what extent such intervention is permissible. There are all kinds of ways in which outsiders can intervene in other societies or communities on behalf of rights-holders. They can offer escapees refuge or asylum: in the ante-bellum American south any refusal of non-slave states to abide by the fugitive slave laws was regarded as an intervention. But outsiders can go further still to intervene, by expressing their disapproval of rights violations, or imposing sanctions on rights-violating states – whether simply by restricting official engagement, or by forbidding

trade with them. Outsiders can impose blockades on states that do not respect human rights, or fund resistance groups within them or at the extreme, go to war. Establishing that having a right entitles one to have others intervene on one's behalf does not establish what degree of intervention is justifiable – or, for that matter, prudent. But all I have sought to establish up to this point is not a case for intervention to protect human rights, but the principle that to have a right is to have something which cannot be diminished because one is powerless on one's own, or in one's community. Moreover, those wielders of power in their states or communities who assert that outsiders have no right to intervene in their societies are mistaken as a matter of principle. Outsiders do have that right. They have that right when they are empowered by those within those societies to act as their agents for the defence and exercise of their rights.

### **10.5. The limits of intervention**

Nonetheless, there are important limits to intervention, some of which stem from the very nature and basis of human rights. The mere fact of a request for intervention to protect or restore human rights does not establish even a *prima facie* case for intervention. The Soviet intervention in Afghanistan in 1979 was nothing less than an invasion in spite of the 'request' from the Afghan government, since that government was nothing other than a puppet regime established after years of Soviet interference to create the conditions suitable to its own strategic interests. A similar point might be made about Hitler's intervention in the Sudetenland, which purported to protect the claims of Sudeten Germans in Czechoslovakia, when in fact it served only the Nazis' territorial aims.

But even genuine requests for intervention do not establish a case for interference in the affairs of another community. Even if those calling for assistance are correct in thinking that their rights have been violated, their societies may well have the institutions of justice necessary to address their grievances. Sometimes unaddressed rights violations are simply yet to be addressed violations.

Yet there are principled limits to intervention more fundamental still. Although rights carry with them an entitlement to empower agents to uphold the rights of principals, they do not entitle those agents to violate the rights of third parties. Thus any intervention must consider not only the rights of those on whose behalf the action is taken but also the rights of those whom such action might adversely affect. The point here is not simply that interveners must be cautious because intervention is a clumsy tool, difficult to use with precision. The point is that there are limits to the kinds of intervention permissible given the nature of human rights. One of the reasons some people do not enjoy certain rights within their own communities or states is that the society does not recognize the rights in question as rights

at all, even if they respect a range of other rights. For example, a Muslim state may not respect the freedom of Muslims to abjure Islam, since that is not a freedom that Muslims recognize. If the basis of human rights is a respect for freedom of conscience, the defenders of human rights here would have to consider the conscientious beliefs not only of the dissenting apostates but also the no less conscientious convictions of the Muslim majority for whom apostasy is a crime. In such circumstances it would be hard to justify intervention to force the majority to change its convictions; though not difficult to justify intervention in the form of offering dissenters asylum.

Indeed, in most cases intervention may be justified only to the extent of rescuing those whose rights are violated to enable them to live according to their own convictions in freedom. Rights may seldom provide a sufficient basis for invasion of another society to alter its fundamental legal and political structure. Such a case would only arise when the request for aid comes from a majority or the whole of a society whose members have had their rights traduced.

## 10.6. Culture and conscience

What is the place of human rights in a world in which cultures and cultural values often come into conflict? According to some, rights have a limited place because they must, in the end, be subordinated to cultural concerns – concerns which are best protected not by human rights but by a very different moral idea: the doctrine of sovereignty. Unsurprisingly, it is those nation states with uninspiring human rights credentials which are usually quickest to invoke the importance of sovereignty, as the Bangkok and Kuala Lumpur declarations reveal. It is the argument of this chapter, however, that while sovereignty may have its uses, it is on the whole a notion which should not be overrated. Human rights have an important role to play in protecting people from the ravages of culture and its demands for conformity. But rights are no less capable of drawing the boundaries defining the proper scope of intervention in the cultural life of others. Rights of conscience form the basis of human rights, and in so doing also supply culture and community with as much protection as they deserve.

## Notes

1. See Kymlicka (1995). For a less cautious view, see Barry (2001).
2. Preamble to the Human Rights Declaration by the ASEAN Inter-parliamentary Organization.
3. Of course, it goes without saying that it would be a mistake to assume that those invoking freedom of conscience are never disingenuous – particularly when those doing the invoking are repressive nation-states.