

Towards a Political Philosophy of Human Rights

Annabelle Lever

October, 2017

Sciences Po, Paris

Annabelle.lever@sciencespo.fr

Forthcoming in

Ideas that Matter: Justice, Democracy, Rights (eds. Satz and Lever), OUP, 2018.

Intro

Is there a human right to be governed democratically? And what are the considerations that might ground such a right? These are the questions raised in Joshua Cohen's 2006 article, 'Is There a Human Right to Democracy?' – a paper over which I have agonised since I saw it in draft form, many years ago. I am still uncomfortable with its central claim, that while justice demands democratic government, the proper standard for human rights demands something less. But, as I hope to show, the reasons for that discomfort are occasioned less by the thought that democracy may not be a human right than by the very significant gaps in our understanding of rights which debates about the human rights status of democracy exemplify.

I therefore start by situating Cohen's paper within philosophical debates about the structure and justification of human rights. I then look at the debate about democracy and human rights which it has occasioned, and explain why this debate is not easy to resolve. Finally, I point to difficult issues that arise for a philosophy of human rights if one accepts, as we probably should, that democratic government is not best thought of as a human right, at present. My hope is thereby to contribute to the political philosophy of human rights which, I assume, a commitment to democratic government requires, whether or not democracy is, itself, an object of human rights.

Nothing in the arguments about human rights which I examine presuppose an interest based, as opposed to a choice based theory of rights (Wenar 2008). However, for the sake of simplicity, I will assume that talk of 'a right' presupposes the idea of a human interest of sufficient moral importance to generate duties that limit what other people may morally do. Moreover, I take no stand on how human rights should be enforced, or the degree to which they should be treated as legal rights, with legal penalties attached for their violation. Instead, in this chapter, I examine the content and justification of human rights, understood as a species of moral right, specifying what people are entitled to be, to do and to have.

Raz and the problem of understanding human rights

There is an intuitive, plausible and influential picture of human rights – a picture of human rights which many of us grew up on and affirm – on which human rights are a subset of moral rights characterised by their special urgency, their universality and the fact that they apply to individuals qua individual, regardless of any other characteristics which an individual might have (Tasioulas 2012, 1-30) They apply to humans, in other words, because they are human, and apply to all members of the human species at all times, simply in virtue of the fact that they are human. Their special stringency comes from the fact that violations of these rights throw people’s humanity into question – the humanity of the violator, as well as the humanity of the violated. And so, whatever other moral or legal rights people might have, they will have this set of moral entitlements – human rights – whose protection is urgent and incumbent on all other humans.

This appealing and intuitive picture of human rights appears to suggest that the basis or grounds for attributing human rights to people is our shared nature as humans. However, such a move has, notoriously, led to a bit of a dead-end. It is difficult to see what in our nature justifies ascribing to people a distinctive set of universal and unchanging rights – a problem made all the more difficult once one allows that people’s nature and capacities are fundamentally shaped by their environment. Moreover, as Joseph Raz has argued, even if we had a theory of human nature suitable to an account of human rights, we would still face the problem that human rights, so described, are hard to distinguish from other moral rights (Raz 2010, 321-38). All moral rights, after all, appear to have some grounding in our nature, and the way in which valuable human capacities can be realised, expressed or thwarted by other people’s behaviour. Hence, Raz argued, we should stop trying to locate the content and justification of human rights in a theory of human nature and, instead, look to their *function* as a way of distinguishing them from other moral rights.

Human rights, Raz argued, have the distinctive function of specifying the necessary, if not sufficient, conditions, for one state to be morally justified in interfering in the affairs of another: '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' (Raz 2010, 328). Examples of such international action, Raz explained, can include making conformity to rights a condition of aid, calling on states to report their conduct re protection of human rights, condemning violations, refusing to provide landing or overflight rights, trade boycotts and, of course, military intervention. While Rawls defined human rights narrowly, such that their violation might justify *armed intervention* specifically, the conception of human rights suggested by Raz is broader and likely to be more closely in line with actual political and legal practice (Raz 2010, n. 21).

However, while Raz's focus on the function of human rights is helpful, it appears to suffer from at least three difficulties. The first, and most obvious, is the implausible and unattractive implication that criticism of another state requires us to identify some violation of human rights as the source of our complaint (D. Miller 2015b, 234). While we'd obviously want to complain about violations of human rights – given that they are meant to be especially urgent moral entitlements – the idea that you have to find such violations in order publicly to complain about another state's policy seems to take the bounds of state sovereignty too far.

Secondly, what the lower limits of 'intervention' are matters to the plausibility of Raz's theory, and its ability to meet Raz's sensible concern that philosophical theories of human rights should have some bearing on what people engaged in the practice of human rights actually do and demand (Waldron 2013, 16). But there seems no philosophically satisfactory way of specifying what that lower limit should be: indeed, as David Miller has argued, there is something counterintuitive in thinking that we need a theory of sovereignty and its limits in order to decide what is or isn't a violation of human rights (D. Miller 2015b, 235). Raz's conception of human rights makes human

rights 'the conclusion of the argument [about legitimate state intervention], not the premise', whereas '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 religious identities, etc.' (D. Miller 2015b, 235). Finally, and relatedly, Raz's approach to human rights seemed too thin to capture common intuitions about the special badness of violating human rights, compared to the other bad things we might do to each other – whether they involve rights-violations or not. The appropriateness of an international response seems, in principle, a poor test of the gravity of an action – both because morally trivial violations of international trading regimes may require international responses whereas there are many horrible things which we might do to each other for which international interventions seem too clumsy and indirect a remedy. Hence, even those who sympathised with Raz's impatience with traditional approaches to human rights believe that his own approach is not obviously better.

Keeping the attractions and difficulties of Raz's paper in mind helps us to see the significance of Cohen's paper.¹ While Cohen agrees with Raz that the function of human rights is to explain the limits within which one state can intervene in the affairs of another, he insists that this is only because human rights violations undermine people's duties to obey their government; that is, such rights describe the minimal set of duties that governments owe to those they govern. 'Human rights are not rights that people are endowed with independent of the conditions of social and political life, but rights that are owed by all political societies in light of basic human interests and the characteristic threats and opportunities that political societies present for

¹ Cohen's paper was only published in 2006, although he had presented it to audiences for a couple of years, as an extension of the 'justificatory minimalism' about human rights for which he advocated in 'Minimalism About Human Rights' (Cohen 2004, 190 -213). Both papers are now available in Cohen (2011). However, all references in this paper are to its original appearance in a collection of essays in honour of G.A. Cohen, edited by C. Sypnowich (2006, 226-48).

those interests' (Cohen 2006, 232). Specifying the minimum requirements of political obligation, the protection of human rights therefore marks the point at which states can rightfully insist on the political obligation of their members, and on the legitimacy of their rule in their dealings with other states. As Cohen puts it, if human rights mark the point at which individuals have a duty to obey, we can see why it would be morally unacceptable for outsiders to intervene militarily in their affairs if such rights are upheld (Cohen 2006, 234). And if human rights are sufficiently urgent moral demands such that their violation justifies intervention by other states, we have a way of thinking about their importance that includes, but is not reducible to, their political function (Cohen 2006, 234).

The content of a theory of human rights, according to Cohen, can be explained in terms of two different groups of moral entitlements that all individuals have, namely a set of basic rights which reflect 'the demands of basic humanity'² whether or not we are members of a particular society (Cohen 2006, 238), and a broader set of rights which can be thought of as rights that reflect a normatively appealing and suitably global conception of social inclusion or membership. The first set include traditional human rights to life, bodily integrity, personal security and the like; the second set reflect the broader set of human rights recognised by the Covenant and its successors, such as rights to education, work, cultural inclusion, assembly, expression and participation (Cohen 2006, 238). Whereas the first set of rights are the *sin qua non* of human rights protection, so paradigmatic of human rights that they must be given a central place in any theory of human rights, the content and justification of the latter

² 'To be sure, some human rights (e.g. right to life and to personal security) are not tied only to membership but are also more plausibly associated with demands of basic humanity, irrespective of membership in an organized political society. But the guiding thought behind the more capacious lists in the principal human rights instruments seems to be that an acceptable political society – one that is above reproach in its treatment of individuals – must attend to the common good of those who are subject to its regulations...and ensure the goods and opportunities that people in the territory and those subject to political rule need in order to take part in the political society' (Cohen 2006, 238).

is more controversial. Cohen's idea is that if we think of this broader list as a specification of what it takes to see someone as a member of society – rather than an outsider, whose wellbeing is of no special concern to members or to their government (Cohen 2006, 239) – we can formulate an account of human rights that is philosophically compelling and capable of illuminating and guiding human rights practice.

Specifically, Cohen suggests, understanding the point of human rights as the specification of internationally compelling moral norms of membership enables us to acknowledge that human rights are merely *a part* of any account of justice, albeit an important part. He thereby hopes to avoid both over-expansive conceptions of human rights, which lose sight of their politically important function, and a too minimal list of human rights focused on the right of bodily integrity. The point of human rights, as Cohen sees it, is to mark globally relevant claims of political obligation, such that any reasonable person will, on reflection, be able to agree that states which protect these two sets of human rights are 'decent', albeit unjust in various ways. Therefore, Cohen argues, we should think of human rights as those rights that are necessary for us to see a society *as ours*, as demonstrably reflecting our wellbeing and, therefore, entitled to our obedience.³

The importance and challenge of Cohen's argument, I hope, are reasonably plain. For example, if we take the critique by Tasioulas of all 'political' theories of human rights, on the grounds that these seem to apply only to an international system of states (Tasioulas 2012, 26–27), we can note that whatever may be the case for Raz, Cohen

³ 'Regulations cannot impose obligations of compliance on those who are subject to them unless the regulations reflect a concern with their good. If an account of political obligation along these lines is correct – and it is more plausible than a theory of obligation that makes the justness of processes and outcomes a necessary condition for political obligations – the rights that are required if individuals are to be treated as members would be identical to those that are required if the requirements imposed by law and other regulations are to be genuine obligations' (Cohen 2006, 239).

has a natural and persuasive response. Cohen's theory of human rights is a theory of the necessary moral conditions of political obligation, and not a theory that assumes modern states are – or ought to be – the sole bearers of political obligation.⁴ Any body – whether a family, tribe, a pre-modern state or a post-modern state – that claims our obedience, and a right to rule over us, is to that extent the object of human rights evaluation. Cohen's article provides a political approach to human rights – an approach based on their political function – which is consistent with the universality of human rights. As Catherine MacKinnon has argued, drawing inspiration from Eleanor Roosevelt, judgements of human rights should be as much at home in domestic politics as in international relations (Catherine MacKinnon, 1993, 83 -110.) For example, rape is a violation of human rights whether or not it occurs in a war zone or in a shopping centre, and states have duties to prevent its occurrence, adequately to identify and punish its perpetrators, and to support and aid its victims, as part of their ordinary domestic politics, as well as their relations with other states.

Likewise, Cohen's conception of human rights appears helpfully to combine 'political' and more 'traditional' approaches to human rights. For example, it gets the direction of argument right, in the sense that it is the importance of the interests which human rights articulate and protect that explains the ability of human rights to function as markers of the limits of sovereignty, rather than the other way around, as with Raz. And, the idea of human rights as membership rights provides a natural interpretation of their *moral* importance, independent of their *political* function, and provides a regulative ideal with which to evaluate competing claims about what should count as a human right.

Still, it should be noted that on Cohen's theory, it is possible that we do not have a human right *to be* a member of a political society. How troubling that is – if it's true – depends on what we would lose (conceptually, morally or politically) by insisting on a

⁴ This also strikes me as the appropriate way to read Rawls' *Law of Peoples*. If so, Rawls is also immune to this objection by Tasioulas.

right to *be a member of some society*, as opposed to a right *against wrongful deprivation* of membership from a *particular* society. However, while we may want to return to the question of whether there is a human right to be a member of society – that most Arendtian of rights- I will turn to the other challenges that come with Cohen's picture of human rights, and the controversies about democracy and equality which they have occasioned. According to Cohen, there is no human right to be governed democratically although, as Rawls argued, we have human rights to be consulted by our government, (at least in some form) and to criticise it.⁵

No Human Right to Democracy?

According to Cohen, democracy is a demand of justice, but it is not therefore required by a theory of human rights (Cohen 2006, 233ff). Not everything that justice requires is a human right and the bounds between the two are set, on Cohen's view, by the best interpretation of what it is to be a member of a society, according to a global conception of public reason. We are concerned with a global, rather than a domestic, conception of public reason, according to Cohen, because the point of human rights is global and not purely domestic: namely to determine the moral requirements that states must meet to be able justifiably to demand the obedience of their members, and the recognition/acceptance of their legitimacy internationally. What is at issue are *internationally binding* norms of (political) morality (Cohen 2006, 243).

In short, global public reason, according to Cohen, will not always treat democratic government as a norm of justice – although one day, perhaps, this will turn out to be the case. Global public reason, for Cohen, refers to the terms of argument and justification used in discussing the conduct of different political societies, and is therefore meant to function as a common moral and political resource with which

⁵ According to Cohen (2006, 233), human rights include 'a requirement of collective self-determination', which requires a political process that represents the diverse interests and opinions of those bound by collective decisions; rights to dissent and appeal those decisions; and a government that normally justifies and explains decisions to people and does so with reference to their collective good. However, diverse political interests may not be equally represented politically.

peoples 'in a deeply pluralistic world', can determine their collective life and rules of conduct (Cohen 2006, 236). At least at present, Cohen thinks, people who are reasonable and willing to live in peace with others may simply not hold the full set of moral and political views that are necessary to see democratic government as a requirement of justice. While able to recognise and affirm rights freely to worship, to form consensual family arrangements, to give one's input into the way that one is governed and to criticise governments who ignore that input, people may nonetheless reasonably deny that being a full member of society requires something more (Cohen 2006, 244). Indeed, they may insist that *they* feel themselves to be full members of their society even though they are governed by a hereditary monarch; suffer from some disabilities because of their sex, race, ethnicity and/or religion; and even if they accept that such disabilities *would* be threats to their sense of belonging, or of membership, if they lived in some other type of society.⁶

Moreover, Cohen argues, it is a mistake to suppose that democratic *political* institutions can be sharply distinguished from democratic *social* ones – from forms of sociability, ways of organising work, family life, leisure, for example, which depend on distinctive views about the moral freedom and equality of human beings (Cohen 2006, 240–42). To suppose that democracy is a human right *means* that people have an especially urgent duty to organise their basic institutions, not just their narrowly

⁶ I put the point this way because it is an implication of Cohen's paper, I assume, that it is not just ignorance of the relevant alternatives that explains people's beliefs about their situation and society. Moreover, some position like this seems necessary to counter the claims of those, like Gilabert or Christiano, who appear to suppose that people must *first* be members of a democratic society before we can reasonably ascribe to them a legitimising belief that some non-democratic but 'decent' society *is* morally compelling for them. (Christiano 2015, 466–68; Gilabert 2012, 12–13). It's true that philosophers can't grant people's current beliefs and desires unquestioned normative status. But it's one thing to insist that people should be aware of the alternatives and have the freedom openly to discuss them (and their personal and collective relevance) and another to insist that they must do so from *within* a *democratic* political set up – as though the latter were magically free of all the epistemic or deliberative failings of liberal but undemocratic regimes, or unlikely to suffer from their own specific problems (Lever and Chin 2017; Peter 2015, 487–89).

political ones, along the lines implied by a democratic view of personal and collective choice; and that we owe particularly urgent duties of aid to all those who are not yet members of such a society, regardless of their situation.

But do we have such duties? As David Miller has argued, it's not clear how morally urgent it is to make the transition from being a decent but undemocratic society – along the lines, perhaps, of England before the First World War - to being both decent and democratic (D. Miller 2015a, 179–80, 188–89).⁷ Indeed, Cohen worries that the only way to make a human right to democracy anything other than a sectarian and intolerant vision of global justice, and to motivate its urgency, is to use so thin a conception of 'democracy' that we lose much of its moral and political appeal.⁸

The importance of democracy?

Two main arguments have been raised against Cohen's claim that democracy isn't a human right. The first is that even if democracy is not justified *directly* by a political conception of human rights, we should consider it to be justified *indirectly* or instrumentally, on the grounds that democratic government is necessary to the secure enjoyment of one's human rights or, at least, probably the best way to secure them (Christiano 2015, 2011; Gilibert 2012). The second argument is that given the non-instrumental value of democracy, we have reasons to suppose that it should figure on the list of human rights directly – although Tom Christiano suggests that respect for self-government means that people's may, with universal consent, decide in favour of something less than democratic governance as *an exercise* of their human rights, rather than as a *derogation* from them (Christiano 2015, 468–79, 2013, 318–20).

⁷ Miller notes that '[i]t is important to distinguish the position of someone deprived of democratic rights in a society that otherwise extends these rights to all citizens, from the position of someone who lives in an undemocratic society' (D. Miller 2015a, n. 10).

⁸ '[D]emocracy is a demanding political ideal. The thesis that there is a human right to democracy – while it may seem to elevate democracy – threatens to strip away its demanding substance' (Cohen 2006, 227).

I'm sympathetic to both these arguments. However, they share a difficulty (which Cohen noted in his original paper): that for these arguments to work, we must be able to distinguish the value of democracy (instrumentally and non-instrumentally) from the value of constitutional government, rule of law, and some non-democratic forms of collective decision-making (see also Peter 2015, 485–87). Many of the alleged reasons to instrumentally value democratic government are reasons to want our governments to be constitutional and to protect freedom of movement, association and expression. They do not seem to point to any special virtue of *democratic* government, over and above these features. For example, Amartya Sen is famous for noting that democracies do not have famines (Sen 1999, chap. 7), and he notes the dreadful famine that took place under Mao, after the Great Leap Forward. However, 'in the period after the Great Leap Forward, China also lacked collective self-determination, the rule of law, and (as Sen emphasizes) protections of speech, press and assembly. It is hard to know whether to lay the responsibility [for avoiding famine] specifically on the doorstep of democracy' (Cohen 2006, 245; see also D. Miller 2015a, 181).⁹

The question of how to distinguish democratic from undemocratic, but constitutional, government is a matter which has received relatively little philosophical reflection and, such attention as it has received, has reflected questionable assumptions about the *liberal* character of constitutional government, and its status as *legal* rather than a *political* arrangement.¹⁰ Yet resolving disagreement on the human rights status of democracy depends on developing a philosophically satisfactory conception of

⁹ Miller (2015a, 181–83) quotes from, and discusses, Sen's claims.

¹⁰ See Richard Bellamy's interesting discussion of the differences between legal and political constitutionalism in Bellamy (2007) and, on the reasons why we cannot distinguish constitutional from democratic government simply by identifying universal suffrage and the right to vote with the latter, see Cohen (1996) and Lever & Chin (2017). David Miller (2015a, 184) also notes the problems of legalism that may arise if we see democracy as a human right, rather than thinking of the solutions to social conflict in terms of 'political sociology' and the virtues of power-sharing arrangements 'in which leaders drawn from different factions have an incentive to reach compromises and to promote moderate solutions among their followers. Such regimes usually require quite elaborate constitutional engineering...Electoral mechanisms may be part of the set up, but they are by no means the most important part'.

constitutional government - one that enables us to distinguish the rights, duties and status protected by constitutional, as opposed to democratic, government on a variety of plausible conceptions of constitutional government and democracy.

But progress on this philosophical debate, I believe, also depends on what we can learn from empirical cases that mark the theoretical differences between decent but hierarchical societies, as Cohen understands them, and their democratic equivalents. We may therefore learn something from cases such as Britain, before 1918 and the extension of votes to all men over the age of 21 and to women over the age of 30, and on equal terms in 1928; or Switzerland before and after universal suffrage in 1971, (although some cantons had already granted women the vote, and Appenzell only did so in 1991). We might also consider the Nordic countries and Liechtenstein, which finally granted women the vote in 1984. Careful study of these cases might help to clarify how far – or in what circumstances – democratic rights are necessary to combat abuses of human rights that are not adequately prevented by constitutional means alone; and might also help to clarify conceptual, as well as normative and social-theoretic, questions about the differences between constitutional government as a democratic, and as an undemocratic, ideal.¹¹

Sadly, it is too late to be able to ask the men and women who lived through the transition to universal suffrage in Britain to reflect on the instrumental and non-instrumental value of the vote – though doing so would provide helpful insight into the way that class, ethnicity and national identity affected one's experience of constitutional as well as democratic government. However, it is not too late to use survey research, as well as other means, to investigate the Swiss case. Granted, that the Swiss case is rather special, given that by the 1970s Switzerland was a fairly egalitarian

¹¹ Grant Miller (2008) is an ingenious approach to the question, using the different points at which American states granted women the vote to investigate questions about women's voting rights and child survival. Many thanks to Simon Wigley for bringing this to my attention. See Simon Wigley and Arzu Akkoyunlu-Wigley (2017) for an excellent discussion of the most recent literature on democracy and this aspect of human rights, and an attempt to control for the different aspects of democracy, and to distinguish democracy from 'good government'.

and consensual society, (certainly as compared to nineteenth century Britain, let alone the Empire), and its justification of 'hierarchy' was, to that extent, rather limited. However, it is one of the few examples we have of a 'decent but hierarchical' society in which there was subsequently a peaceful transition to democratic government. It therefore merits attention by philosophers, as well as more empirical social scientists, for the light it sheds on the differences between democratic and undemocratic constitutionalism, and the significance of those differences for the protection of human rights.

That's not to say that 'decent but hierarchical' societies must be constitutional governments in the ways typical of European countries, with a formal separation of law and politics, and a specialised legal apparatus employing people with specialised legal knowledge, training and careers. Even if one believes that human rights include a right to be governed democratically, it is unclear how far 'the separation of powers' and the development of specialised legal institutions are required for a society to be human rights-protecting. However, because the relative causal importance of constitutional government and democratic government are at issue in instrumental and non-instrumental claims about the human-rights status of democracy, it can be helpful to use actual cases to test and refine our conceptual, normative and factual assumptions.

Democracy of What?

In addition to the difficulty of distinguishing democratic from constitutional government there is a second difficulty with current debate on democracy and human rights – a difficulty to which Cohen's reference to a 'democratic society' points, but does not resolve (Cohen 2006, 240–41). The working assumption of the current debate – though largely implicit – has been that democracy is identified with the right to vote and, to a lesser extent, the right to stand as an elected representative.¹² But there appear to be many different ways in which our relations with one another might be

¹² Ludvig Beckman (2017, 7) aptly notes the equivocation between *having* a right to vote and *exercising* that right in arguments for the instrumental importance of democracy to the protection of human rights.

conducted democratically, and it is uncertain that voting for political representatives to a national legislature every few years is the most important form of democracy, if we care about human rights. 'Workplace democracy', 'village democracy', or the chance to participate in the determination of water and land rights in one's region, or in the policing of one's locality, may be much more important to how one's life goes, to one's bodily integrity and to one's sense of being a full member of society than the right to elect a *representative* to a legislative body which may be as psychologically remote as it is geographically distant. Beyond this, there are many important social positions that influence one's human rights, including serving on the police force and teaching.

Perhaps, then, access to key jobs is, in some circumstances, more important than a right to vote on instrumental grounds? Or perhaps the form of democracy that best makes sense within a theory of human rights is some form of local, regional, even pan-national democracy, rather than democracy at the level of national government? Put simply, then, further progress in this debate clearly depends on the ability to determine what a human right to democracy is a right to do or decide, given that there seem to be many forms of democratic organisation and decision-making, of which representative democracy, as currently conceived, is only one. In short, whether or not we agree with Cohen, his conclusions remind us how little we know about the relationship between constitutionalism and democracy, on the one hand, and the varieties of democratic government, on the other.

Some final points about the importance and challenges of Cohen's paper

It is an unfortunate feature of the interest about human rights and democracy, which Cohen's paper has caused, that other aspects of his theory of human rights have been neglected. I close this chapter by pointing to some of these issues and their significance for an account of human rights that takes seriously the ubiquity, complexity and moral significance of our capacities for collective association and of coercion.

1) *The relationship amongst the claims of humanity and membership*

Recall that on Cohen's theory, global public reason determines what claims to membership make up a conception of human rights. As he sees it, it would be sectarian and, possibly, authoritarian and paternalistic, to insist on the correctness of incorporating 'our' core convictions about justice into an account of human rights that is meant to bind everyone. However, it is unclear that we can sharply distinguish between those 'basic' human rights, which Cohen takes to be uncontroversial elements of global public reason, and 'democratic government', with its attendant, and controversial, forms of social equality.

All societies, as Stuart Hampshire has claimed, condemn murder, rape and theft (Hampshire 1991). However, their reasons for doing so are often fundamentally at odds with basic ideas of human rights. (Hampshire, 1991, 142-6, 187; and Hampshire 1993). Unfortunately, many people, and many societies, condemn rape, murder and theft because of the harms that they do to people *other than the victim*. They may see murder as form of theft of the property of a king or a lord; or condemn rape because it disgraces husbands, fathers and brothers. They may deny that forced unremunerated labour (*corvée*) is a form of theft, and see wives as the property of their husbands. So, the idea that harms caused to the victim are a *sufficient reason* to condemn murder, rape and theft may be quite alien even in societies that actively condemn these activities, and punish them, (when recognised) very severely. Such societies will actively deny that governments have a duty to consider the wellbeing of all the individuals on their territory, or to take their good into account.

Those who deny that everyone's life has non-instrumental value will not count as reasonable, on Cohen's view of global public reason. But many of the people who find democratic social and political equality morally unacceptable, despite apparently condemning murder, rape and theft, may hold unreasonable views of this kind. That is, they believe that the lives and bodily integrity of people who are of the 'wrong' sort

do not generate the sort of moral claims of those who are of the 'right' kind. Moreover, even if they agree that the wellbeing of all human beings counts morally, they may deny that they should do so equally, even in the case of basic rights of bodily integrity and security. So it is necessary to understand how the rights demanded by 'humanity', on Cohen's account of human rights, are to be described and justified consistent with global public reason; and how these are to be justified and maintained in societies which accept and, even, require departures from equality on paternalistic grounds, or based on claims of tradition, harmony, community, faith and/or reason.

Unfortunately, Cohen's article is unhelpful here, because in it, he never states explicitly that decent hierarchical societies must accord women's lives and bodily integrity *the same* importance as those of men. Cohen appears to believe that equal rights to bodily integrity are a necessary part of a theory of human rights, although equal political rights are not – that the former are necessary for us to suppose that our personal good *does* figure in some reasonable, but hierarchical, conception of a common good. However, Cohen says nothing explicitly on the subject, nor is it clear what personal or civil inequalities he would consider to be unjust, but consistent with seeing oneself as a full member of one's society. It seems fair to suppose that the sorts of decent but hierarchical relations he has in mind are ones in which marriages may be arranged by parents, but with children's good in mind and subject to their agreement; in which women's claims to bodily integrity are recognised by courts and their testimony against men is taken seriously, although women are assumed to have distinctive rights and duties as compared to men. But as these examples reveal, we cannot sharply distinguish people's claims to bodily integrity from their claims to a say in parental and marital relationships, or their ability successfully to defend their interests in a court – or its equivalent.

It is therefore hard to decide what forms of inequality are violations of human rights, from those which – however unjust – do not threaten either our humanity or a globally

satisfactory ideal of social membership. There may be relatively few ways to justify political inequality, consistent with global public reason, once one accepts universal (and, especially, equal) rights of bodily integrity, and their implications for fair trials, freedom from torture, wrongful imprisonment and the like. If so, human-rights protecting societies will protect *substantively* more or less the same set of rights, regardless of a person's sex, gender, religion or ethnicity even if the *form* those rights take, and the way that they are *justified*, are communal or communitarian, rather than general or universalistic. On the other hand – and more troublingly – perhaps it is reasonable to see a society as 'ours' even if our wellbeing counts less, (while still counting), than that of other members of our society? If so, 'decent but hierarchical' societies could be caste societies which, while insisting that governments owe duties of care and consultation to all members, deny that people's bodily integrity, dignity and well-being are of equal importance.¹³

It might seem that we can avoid these difficulties by abandoning the idea of a *political* approach to human rights – one which tries to read important elements of their content and justification off their *function*, rather than off alleged claims about human nature. Instead, we may want to insist that these problems in determining the content and justification of human rights, and the extent to which they require personal, civil and political equality, are simply artefacts of a mistaken way of thinking about them (Tasioulas 2012).

Basing human rights on nature, rather than politics, on this view, inevitably precludes questions about the relative strength of people's claims to bodily integrity; the implications for civil and political equality of their right to practice a religion; or the

¹³ Rawls, 1999, para9, pp.71-72 develops the idea of a consultation hierarchy and, p. 77 clarifies the idea that 'each groups must be represented by a body that contains at least some of the group's own members who know and share the fundamental interests of the group'. So while it is possible that decent hierarchical societies might be caste societies, in the sense that people are born into different positions on a social hierarchy, with little if any mobility, they are nonetheless entitled to some forms of representation and self-representation.

relationship between people's instrumental and non-instrumental interests in basic rights.

While natural, such a position is mistaken. The problem of determining which injustices are violations of human rights and which are not is not an artefact of the political conception of human rights, but of the discourse of human rights itself. Assuming that we are equally human, and therefore equally deserving of human rights, leaves open the question of what protections for our bodily integrity, freedom and dignity we are entitled to, and how these are to be distinguished from those forms of equal protection which justice requires morally and politically.

For example, what rights against discrimination in job opportunities, promotion and pay are required by human rights? As Miller notes (2015a, 186), laws that prevent discrimination at work and in education plausibly have a protective function – making it more difficult to deprive minorities of the ability to meet their basic needs, and to participate in the social, cultural and political life of their society. However, it is unclear what forms of equality would be justified by commitment to human rights – what forms of equal access to education and jobs, for example; what forms of equal pay and promotion? As Miller also notes, a purely protective case for antidiscrimination laws is unlikely to condemn those forms of discrimination that affect the relatively wealthy, well-educated and well-connected; on the other hand, it is unclear whether there is a convincing non-instrumental case for insisting on formal equality in all cases, let alone something more substantive (D. Miller 2015a, 186–87). Thus, whatever perspective on the philosophy of human rights one adopts, philosophical progress now requires the careful presentation and comparison of those injustices that do, and those that do not, violate human rights on competing conceptions of their content and justification.

2. The problem of suboptimal equilibria, dynamics and undemocratic governments

Cohen's theory of human rights, of course, is consistent with democratic government as an element of human rights, depending on how global public reason evolves. But as it is, as it has been and, perhaps, as it is likely to be in future, it looks as though

global public reason precludes a human right to democracy. If we see democracy as necessary for justice, however – and as an important, not a trivial element, of a theory of justice – it would be odd to conclude that a commitment to human rights should leave us *indifferent* between democratic and undemocratic government.

If that's so, then the differences amongst human rights-respecting governments merits further attention in a political approach to human rights. In particular, there are two reasons. First, because if justice requires democracy, we cannot be indifferent to the differences between democratic and undemocratic government, even if both are consistent with human rights. Within 'our' conception of human rights, therefore, there should be room for a story about the instrumental and non-instrumental value of democracy as, in some way, a more perfect expression of the moral and political commitments that underpin human rights (even if they exclude a right to democracy). Rawls (1999, 70, 84) persuasively argues that all human-rights protecting regimes must be treated as equally satisfactory for many practical purposes, and as having each cleared a morally significant hurdle. Hence, as he says, it would be wrong for democratic, but human rights-protecting, states to gang up on those which are human-rights protecting but undemocratic, or to offer the latter a lesser voice in collectively binding deliberations, or less consideration for their interests. Yet, on the other hand, Rawls clearly assumes that democracies might help human rights-protecting, but undemocratic societies to become democratic (84-5, though he emphasises that while private groups may offer subsidies and incentives, democratic states themselves may not) thereby begging the question of what undemocratic societies might do consistent with the law of peoples to promote transitions from democracy towards their favoured form of government. In short, how we should think about the moral and political differences amongst human-rights protecting regimes bears careful consideration whatever one's view on the human rights status of democracy, given the differences between the demands of human rights and other essential requirements of justice. The issue is likely to have real practical importance,

once one considers the familiar problem of ‘suboptimal equilibria’ or the reasons why human-rights protecting governments may be unable peacefully to ‘transition’ to democracy, or to other criteria we hold to be fundamental for social justice.

Just because different countries are equally good at protecting human rights, it does not follow that they are equally good from the perspective of ‘justice’ more generally. In particular, it surely should matter to us, if we believe democracy necessary for justice, that some countries that protect human rights may have a more difficult time peacefully transitioning to democratic government than others – because of the incentives on which they depend, for example, or the implicit and explicit rewards and penalties with which they operate.¹⁴ As democrats, we might want to be able to argue in favour of the latter type of regime, as compared to the former, even though they are both human-rights protecting – and to do so not merely in philosophical discussions with the like-minded, but as parts of ordinary politics. In short, as democrats we may want our philosophy of human rights to mark the morally and politically significant differences between democratic and undemocratic governments, even if democracy is not *required* for human rights; and we may want to mark the differences amongst types of undemocratic government that *are* human-rights protecting depending on whether or not they are likely to trap people in what we can only regard as a suboptimal equilibrium. (Rawls tends to overlook this possibility, as he seems to suppose that decent societies will have a fairly smooth path to democracy, even if they may want to ask already democratic societies for help and advice. The possibility that a decent society might create desires, expectations and disabilities that block peaceful transitions to democracy is not seriously considered). A more explicit

¹⁴ Miller (2015a, 183–84) has an excellent discussion of the problem of transition as part of a reason for thinking that democracy may not be a human right – or, indeed, the best way to protect even the most urgent human rights. As he notes, ethnic and religious minorities may be better protected by some form of consociational arrangement that falls short of democracy than by democratic government in its majoritarian forms. The worry, in particular, is that democratic elections mean that ‘Rulers who can mobilize electoral majorities and thereby gain legitimacy are able to sweep away balancing institutions that beforehand had held them in check’ (2015a, 183). However, the problem of transition matters, as long as we think democracy necessary for justice, even if we doubt that it is a human right.

commitment to democratic government, therefore, may need to be part of *our* philosophy of human rights – even if it cannot be part of the philosophical justification of human rights to every human-rights-respecting country – and the same may perhaps be true for some socio-economic rights that are not plausibly thought of as human rights, such as the Difference Principle or Fair Equality of Opportunity, and their equivalents.

Concluding questions

I close with 3 questions raised by Cohen's account of human rights.

1) Is democracy merely an 'optional extra' or a matter of indifference, from the perspective of human rights and, if not, how do those of us who think about democracy as a requirement of justice incorporate our sense of its importance into our accounts of human rights?

2) How should we incorporate the dynamic, as opposed to static, elements of a theory of human rights, such that it is possible to capture, from within a theory of human rights, the concerns for justice that motivate a concern for human rights, even if human rights are only one element (albeit important) of a theory of justice?

3) How are we to make sense of the special urgency of human rights, relative to other moral concerns, whether rights-based or not? In particular, how are we to do so while acknowledging that people may reasonably disagree about the relative importance and justification of different human rights, even when they agree upon the content of the (provisional) set of human rights? It is often unclear what 'urgency' means in the case of *other* moral rights, given their heterogeneous character, internal complexity and so forth. (Waldron, 1993, chs 1 and 2, in particular). We therefore lack a clear sense of the 'urgency' of rights in general that we can adapt to the case of human rights in particular.¹⁵ The importance of gaining greater clarity on the urgency

¹⁵ Gilibert (2012, 27) is helpful here – though brief. Urgency should be judged in terms of three criteria: (a) the moral importance of the interests at stake; (b) the likelihood and severity of the threats or

of *human* rights, however, is philosophical as well as practical. The Rawls/Razian challenge to the traditional view of human rights made clear that the political function of human rights in international relations can illuminate their distinctive content and justification. But it also exposes how uncertain philosophers are about what counts as 'normal' practice and, more troublingly, what *should* count as an appropriate response to violations of human rights. Without greater clarity on the special urgency of human rights, relative to other rights and relative to non-rights-based reasons for action, it will be hard to make much progress on these matters.

Critics of the 'political turn' in human rights theory, such as John Tasioulas, complain that these theories fail adequately to reflect human rights practice, and that they challenge accepted and intuitively appealing ideas of human rights. These critics, however, appear to identify human rights practice in an unduly optimistic way – ignoring widespread failures to protect human rights *and* the recognised doubts and quandaries which a commitment to human rights poses for human rights practitioners, as for politicians and citizens. Perhaps philosophy cannot help much with the former and, as Rawls argued, philosophy is no substitute for political courage, knowledge and luck (Rawls 1999, 93, 97). Nonetheless, I suspect, that it is only by integrating our theories of human rights into political philosophy and, specifically, into *democratic* political philosophy, that we will be able to make progress in answering the difficult questions about human rights to which Cohen's important, and provocative, article points.

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obstacles to their fulfilment; and (c) the feasibility of removing or substantially mitigating those threats by political action.

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Acknowledgements

This article was originally written for a conference in honour of Joshua Cohen, held at the University of Stanford in January 20–22, 2017. I am very grateful to Debra Satz for organising this conference, for her help in arranging the publication and editing of this book, and for her excellent editorial advice on my chapter. Josh was my teacher and doctoral supervisor at MIT. His research and teaching are a big influence on my own, and I am profoundly grateful for his support and encouragement through bad times,

as well as good. John Tasioulas kindly sent me copies of his articles when I needed them, as did David Miller, who also read a previous version of this paper. At I was preparing a revised version for publication, I was able to present it to the 'Workshop on Rights', Department of Philosophy, University of Berne, 29 -30 September, 2017. I am particularly grateful to Rowan Cruft, Pablo Gilabert, Anna Goppel, David Lyons, Peter Schaber and Markus Stepanians for their encouragement and critical comments. I would also like to thank Simon Wigley for an email discussion of the conceptual and empirical issues raised in this article, and for sending me his paper on democracy and child mortality, although I was unable fully to take them into account in this paper. Ludvig Beckman kindly sent me a copy of his paper, 'Is There a Moral Right to Vote?' and then discussed this chapter by email. This article was drafted while I was still at the University of Geneva, and was finished at Sciences Po. Throughout this time the Fonds National Suisse helped to fund me, as part of a project on 'A Democratic Conception of Ethics'. I am very grateful for their financial support, and to Domink Gerber, who helped to prepare this article for publication.