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Capítulo 5

HUMAN RIGHTS WITHOUT HIERARCHY: WHY THEORIES OF GLOBAL JUSTICE SHOULD EMBRACE THE INDIVISIBILITY PRINCIPLE

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1. INTRODUCTION

Human rights have become the *lingua franca* of global justice. In the words of Florian Hoffmann (2012) “[i]ndividuals and groups across the globe use human rights to articulate their claim for better lives” (p. 83). Human rights have become the “archetypal language” of democracy (Wilson, 2001, p. 1); so much so that Kamari Clarke & Mark Goodale (2010) observe that “[t]ransnational actors often promote justice and human rights as if they were conjoined normative twins” (p. 10).

Within theories of global justice international human rights concepts and documents figure prominently as reference points, framing devices, and substantive bases for evaluating the implications of arguments and prescriptions¹. These invocations of human rights often rely on theories and interpretations that rank human rights in relation to one another,

¹ See for example Buchanan (2002); Caney (2010); Goodhart (2012); Hessler (2008); Orend (2000); and Pogge (2005).

designating some as more important or more crucial than others such that they may or must be given priority. In this paper I argue that hierarchical ranking of human rights is a mistake and should be rejected by theorists of global justice. Hierarchical ordering undermines the effectiveness with which human rights operate as principled constraints on state actors and is inconsistent with the international legal framework and practice from which the human rights concepts and documents draw their rhetorical force. Instead of ranking human rights, theorists of global justice should [end of p 125] accept the indivisibility principle, which states that all human rights are interrelated and interdependent and must be treated on the same footing and given the same emphasis. The attraction of hierarchical ordering rests on misguided concerns about the practicality of indivisibility that fail to properly distinguish between rights and claims and ignore important dimensions of human rights implementation and assessment. In reality, the indivisibility principle is not only pragmatically defensible, it provides a better theoretical grounding for assessment of complaints and compliance and a better basis for understanding the relationship between human rights and legitimacy than can be achieved with hierarchical ordering.

2. HUMAN RIGHTS AND STANDING

Human rights refer to the standing that people have, individually and in groups, to command a minimum level of respect simply in virtue of their humanity². This standing establishes moral and legal duties, duties that are in turn a basis for justified claims by subjects affected by an actor's decision-making and activity. To describe a state actor as failing to respect human rights is to assert that the actor is not adequately responsive to the rightful claims of individuals and groups that the actor's decision-making and activities affect.

² Gibney (2016, pp. 3-11); Perry (2007); and United Nations Office of the High Commissioner for Human Rights [OHCHR] (n.d.). For a critical perspective on this way of characterizing human rights see Mutua (2002) and Slaughter (2007).

The standing that human rights invoke is grounded in a fundamental obligation to respect, protect and promote human dignity³. To invoke a human right is to claim that something of special moral importance is at stake: it is to say, “Whatever else you do, if you purport to respect human dignity you *must not* (or *must*) do this”. Rolf Künneman (1995) describes this as establishing an “existential status” for human beings: as establishing that the fact that a human being is affected constrains the courses of action that may be pursued or declined (p. 325).

The central puzzle of human rights interpretation is how to generate claims to specific goods, protections and performances out of humans’ existential status –how to establish what respect for human dignity implies [end of p 126] must not (or must) be done. Of particular difficulty in this regard is the relationship between specific claims and human dignity. To say that respecting human rights claims is constitutive of human dignity is too strong. That would suggest that in a world where all of my human rights claims are responded to appropriately my life will by definition be dignified. But living a dignified life has more to do with how I live the life that I have than with how other people act towards me. My life may be dignified even though others have consistently failed to treat me as respect for dignity demands; or it may fail to be dignified for reasons that have nothing to do with others’ actions.

Yet although it is too strong to say that appropriate response to the fact of my humanity is constitutive of my dignity, human dignity does seem to be at the core of what explains the obligations to respect my human rights claims. This centrality of human dignity can be captured by noting that responding appropriately to my human rights claims is constitutive of my dignity *having been respected* by the actor to whom those claims are addressed. When I describe my claim against state (or other) actors as a human right, I argue not only that the actors must do (or refrain from doing) something but that failure to do so constitutes a failure to respect my dignity as a human being. The central issue in human rights claims, then, is not how they establish or fail to establish the dignity of claimants but

³ For a discussion of the history and function of “dignity” in human rights law see Beitz (2013); Gilabert (2011, especially pp. 449-452); Masferrer & García-Sánchez (2016); and McCrudden (2008).

what kind of response is required of the actors to whom claims are addressed. Thus, for me to claim immunity from waterboarding as a human right is for me to say to actors that not only ought they to refrain from waterboarding me, but that one of the reasons for refraining is that this is required for them to count themselves as respecting the fact that I am a human being. It is to claim that a world in which these people waterboard me is one in which they and anyone on whose behalf they act fail to accept the fact of humanness as a constraint on their behaviour.

3. THE INDIVISIBILITY OF HUMAN RIGHTS

The *Vienna Declaration and Programme of Action* states that all human rights are indivisible, interdependent and interrelated and must be treated on the same footing and with the same emphasis⁴. This [end of p 127] is the indivisibility principle, and it explicitly rules out interpretations that presuppose a hierarchy of importance that gives some rights priority over others. The indivisibility principle is one of the bedrocks of contemporary human rights advocacy and legal interpretation (Cf. Künnemann, 1995; Leckie, 1998, esp. pp. 86-92; Montréal Principles on Women's Economic, Social and Cultural Rights, 2004; Sengupta, 2002). In asserting that human rights are mutually dependent and must be treated on the same footing it proscribes trade-offs, within or across people.

This rejection of hierarchical ordering has been criticized by James Nickel (2008) among others as impractical and insensitive to the challenges of implementation, especially in the face of adverse circumstances. Nickel's concerns about indivisibility are widespread within the philosophical literature and explain the tendency of global justice theorists to rely on hierarchical theories and interpretations of human rights⁵. For example, Pablo Gilabert (2010), while rejecting Nickel's conclusion that indivisibility should play a reduced role in human rights interpretation and in assessments of compliance, accepts that Nickel's concerns about indivisibility are well-motivated and that the indivisibility principle should be rethought.

⁴ See *Vienna Declaration and Programme of Action*, part I, paragraph 5.

⁵ See, for example, Edwards (2006); Griffin (2008); and Rice (2003).

However, the concerns about the practicability that Nickel and others raise are misguided. Rather than reflecting tensions or incoherence among human rights concepts, concerns about competing claims and adverse circumstances reflect a failure to attend to how human rights operate as *rights*. It is true that claims asserted on the basis of human rights sometimes appear to be in tension with one another. But this does not establish incoherence among *rights* but rather incoherence in how the social, legal and economic context structure activities and relationships. In this, tensions between claims may be an indicator of how policies, histories, and social, political and legal arrangements within which people go about their lives accept and even encourage competition and trade-offs between aspects of human dignity –acceptance and encouragement which may count as a human rights failure in its own right.

In fact, and as I explain below, invoking a hierarchy of rights to qualify obligations in the face of adverse circumstances does not simplify assessment of compliance or make compliance more likely. On the contrary, hierarchically ranking rights normalizes failure to live up to human rights obligations and provides a ready tool for obfuscation and argument in bad faith. It is true that conflicts between rights *claims* occur, and these claims require jurists, practitioners, claimants and policy-makers to exercise judgement about what human rights understood holistically require in a specific context. [end of p 128] In such cases accepting that human rights are indivisible does not undermine accountability; on the contrary it promotes accountability by clarifying what is at issue and forcing transparency about empirical and other assumptions underlying claimants' and state actors' reasoning. In forcing transparency about economic, psychological, sociological and anthropological assumptions indivisibility facilitates and supports principled criticism and defence of state actors' choices, both with respect to the claims at hand and with respect to other human rights claims.

4. DIGNITY, CLAIMING AND THE SPECIFICATION OF RIGHTS

In a typical instance of human rights interpretation an individual, a set of individuals or a group identifies a decision, activity or policy as violating

human rights, in contrast to a state actor that denies there is a violation. In another scenario that is very common an NGO or IGO investigates a set of circumstances or a set of policies within a state and issues a report or a set of recommendations regarding actions the state actors can, should or must undertake (or cease) to count as compliant with the obligation to respect human rights. In both these scenarios denial that human rights are violated, and/or contestation of whether respecting human rights requires the specific actions (or restraints) named by claimants or advocates is often indexed to the specific circumstances and details of the claim, and focuses as much on whether *in the case at hand* human rights principles imply what claimants (or their allies) assert as on whether human rights principles are relevant.

For example, consider a complaint that dismantling an informal urban settlement violates the human rights of the people living in it. Residents of the settlement may point to features of the context and facts about their situation that make persistence of the settlement crucial to claimants' personal security. State officials may point to features of the context and facts about the situation that make persistence of the settlement a threat to the personal security of others or of claimants themselves. Ranking rights in relation to one another will not speak to or resolve the core of this disagreement about whether state actors are permitted to dismantle the settlement. At best invoking a hierarchy of rights in this situation will, as indivisibility does, direct attention to the empirical plausibility and good faith basis of the different parties' claims about the threats to personal security and the feasibility of alternatives to dismantling the settlement. At worst, invoking a hierarchy of rights will, as indivisibility does not, encourage [end of p 129] disingenuous and "just-so" arguments. Invoking a hierarchy of rights risks this effect because it creates incentives for parties to re-cast what they believe to be at stake in terms of the rights that rank highest in the schema of their audience and to characterize the arguments of other parties in terms of rights that rank lower in the audience's schema. In this, hierarchical ranking is an invitation to argumentation in bad faith⁶. In addition, and as will be discussed in greater detail below, appealing to a

⁶ For example, government defenses of policy regarding informal settlements in Zimbabwe have been argued to exhibit exactly this dynamic, at least on the part of state actors. See Vasagar (2005).

hierarchy of rights reduces the scope for considering patterns of behaviour across rights as it treats rights (and the obligations they establish) atomistically and susceptible to interpretation in separation from one another.

In contrast, the indivisibility principle commits theorists to the assumption that although there may be competing interests and/or competing claims, it is possible to resolve this competition without ranking people or aspects of them vis a vis one another and without allowing that people or aspects of them may be weighted or traded off with respect to one another. Confronted with the appearance of a tragic and unavoidable conflict between rights across or within people, the indivisibility of human rights presents theorists and policymakers with a simple and implacable direction: "Think harder". If it appears that the right to culture and the right to physical integrity are in competition with one another, the indivisibility principle pushes theorists to more closely examine the context, the theoretical assumptions, and the conceptions of various rights that are at work. The assumption in cases of conflict is that the apparent necessity of ranking or trading off rights must be arising from context, assumptions and concepts, and not from the human condition itself.

Critics of indivisibility argue that this way of conceiving of human rights cannot successfully resolve the problem of rights conflicts because the prescriptions it generates are not sufficiently determinate to actually guide action or to serve as a standard against which action may be evaluated (Cf. Nickel, 2008, 2011). For example, Nickel (2007) argues that it is not possible to eliminate conflicts between rights by redrawing boundaries of rights or re-examining conceptual frameworks and arguments because it is not possible to anticipate the full range of potential conflicts between rights; and that attempts to incorporate the qualifications we can anticipate would produce specifications that are too complex to be generally understood. Nickel further argues that addressing conflicts by reconceptualization [end of p 130] wrongly implies that claims excluded by redrawing boundaries or re-examining implications do not really apply and/or that such claims' rejection is not to be regretted.

In these arguments, Nickel poses the problem to be solved as identifying which circumstances in the world limit the application of a human right and when circumstances negate the obligation to respect a human rights

claim. In contrast, indivisibility pushes theorists to pose the problem differently. If the indivisibility principle is accepted then this is a misidentification of what is required for human rights to be practicable. If the indivisibility of human rights is accepted, then making human rights practicable is not about identifying the circumstances that limit the application of rights and negate obligations that would otherwise obtain, but rather identifying what it looks like for a person to enjoy human rights and determining when the absence of human rights enjoyment grounds a claim to change in behavior⁷. The indivisibility of human rights implies that qualifications on when a human rights claim is justified and/or must be embedded within and proceed from an argument that accepts that all people have the whole set of human rights. The indivisibility principle presents human rights as a set of mutually limiting concepts that, taken as a whole, establish what may be claimed on the basis of humanity. From within this framework, arguments from and with respect to the requirements of one human right, even if it is the most immediately salient to assessment of the claim, is not sufficient to qualify or disqualify a claim⁸. So, for example, activity to secure rights to food does not count as rights-respecting if it is undertaken in a way that violates rights to physical security, political participation and family relationships. In this the indivisibility principle is analogous to the unity of the virtues thesis in ancient ethics, whereby it was argued that to fully understand and act out one virtue requires us to understand and act out the other virtues at the same time; for a behavior to count as respecting one human right it must be consistent with respect for the whole set (Cf. Annas, 1993; Irwin, 1995; Vlastos, 1985)⁹.

The concern of critics is that when confronted with a case in which rights claims appear to conflict or in which a claim is contested, the indivisibility principle offers no principled basis on which to accept or [end of p 131] defend some claims or, perhaps more significantly, not to accept or not to defend others. However, the indivisibility principle is entirely

⁷ On human rights enjoyment see Ackerly (2011).

⁸ For example, Arjun Sengupta (2002) suggests the model of a “vector” of rights and freedoms.

⁹ I am grateful to Catherine Wilson for drawing my attention to the unity of the virtues analogy.

compatible with offering and insisting upon principled justifications for accepting some human rights claims and rejecting others. In fact acceptance of the indivisibility principle contributes to the defensibility of such judgements by forcing greater transparency about the empirical basis of necessity claims, clarifying the relevance of patterns of behaviour to assessments of human rights compliance, and establishing an explicit basis for using the entire canon of human rights documents as interpretive resources in determining obligations and assessing compliance.

5. INDIVISIBILITY, DIGNITY AND CLAIMING

A key to understanding why indivisibility is compatible with principled defence of human rights judgements is understanding the difference between an interest (or a good, or a performance) being *constitutive* of human dignity versus its being *required* if an actor is to count as showing respect for the dignity of the person claiming it. When I say that a state actor's behaviour violates my human rights, I am arguing that the requirement to respect human dignity establishes an obligation to act (or refrain from acting) in a specific manner with respect to me. The charge is two-fold: that the actor is required to do something; and that the explanation of this requirement is the connection between what is required and showing respect for human dignity. In this, I am asserting that it is a condition of showing respect for human dignity that the actor(s) in question (for example, a government official) behave as I demand. To respond to this argument the actor has to show that it is possible to respect human dignity without behaving in this way.

Differentiating between that in which human dignity consists and that which is required because of human dignity is made easier by the distinction between *primary rights*, *secondary rights*, and *particular claims*. At its heart this is a distinction between asserting a right and asserting a claim. It departs from the observation that what a person can claim as a matter of human dignity may include things which, taken on their own (i.e., apart from the context or their relationship to other aspects

of the person), are not so required¹⁰. *Primary* rights generate claims regardless of their instrumental [end of p 132] value for securing or realizing other rights. *Secondary* rights generate claims because they contribute to or are preconditions for securing or realizing primary rights. *Particular claims* name specific goods, performances and states of affairs that respect for human rights is supposed to entail in a particular circumstance. Primary rights and secondary rights differ in the role they play in the justification of claims about what is required to respect human rights. Particular claims identify specific institutional arrangements, ranges of services or performances that persons (or peoples) must be able to command or enjoy for the actor whose behaviour is in question to count as respecting human rights.

For example, the right to due process is usually treated as important in and of itself, regardless of its contribution to protecting or promoting other rights like the right to free expression. In this, the right to due process is treated as primary. Consequently, it is enough to show that a state has not observed due process in its treatment of me to show that it has violated my human rights. In contrast, the right to an interpreter during legal proceedings is usually treated as a right people have because it is entailed by the right to due process: the capacity of the person subject to a process to understand what is happening appears to be pragmatically required for that process to be considered fair. In this, the right to an interpreter falls out of the right to due process. However, if and insofar as a state actor can establish that in a particular set of circumstances it was not necessary for me to have an interpreter in order to understand what was going on, then it may be able to show that in the instance an interpreter was not pragmatically required by the right to due process, and so to show that refusing to provide me with an interpreter did not violate human rights responsibilities in the specific instance, even though in other circumstances and/or for someone else failing to provide an interpreter would be rights-violating.

¹⁰ For a discussion of the role of claiming in distinguishing rights concepts from other moral concepts, and of the difference between asserting a right and asserting a claim, see Feinberg (1970, esp. pp. 251-253).

Both of these (the primary right to due process and the secondary, or derivative, right to an interpreter) can further be distinguished from *particular claims* to which those rights are argued to give rise. For example, the right to an interpreter *of my own choosing* would be neither a primary nor a secondary right, but a particular claim: in some circumstances it may not be plausible for a state actor to claim that it has secured due process unless it has provided me access not only to an interpreter, but to an interpreter I have chosen¹¹. [end of p 133]

Primary rights are assertions about human rights that hold universally in the sense that they hold in all circumstances and are not sensitive to empirical conditions. Secondary rights are assertions about human rights that hold in general because of empirical conditions or relationships that are so widespread or common that instances in which the assertion does not hold will be exceptional. Both Nickel and Gilibert would characterize the relationship between secondary rights and primary rights as a “supporting relations”: secondary rights are “indispensable or necessary” to primary rights (cf. Gilibert, 2010; Nickel, 2008). However, it is important to note that the difference between a secondary and a primary right is not in the type or extent of normative pull, but rather *the circumstances under which that normative pull appears*. What a secondary right commands has normative pull only when certain (very common) conditions hold; when those conditions are not present, it ceases to compel¹².

Thus, primary human rights and secondary human rights are not distinguished by their *type* or *degree* of normative force but rather by the conditions under which that force kicks in. Primary rights are always normatively active –their normative pull, or claim to compel conformity

¹¹ For example, the significance of translators’ mediation of testimony in international criminal processes raises important issue of procedural fairness from the perspectives

¹² of both the accused and from the perspectives of victims. For a discussion of this in the context of Rwanda see Doughty (2016).

In this, the relationship between primary rights and secondary rights is similar to the relationship between Joseph Raz’s (1989) core rights and derivative rights: some rights ground duties and are not themselves grounded in another right while others ground duties while being themselves grounded in another right.

regardless of our inclinations, always falls out of the requirement to respect human dignity. Secondary rights are normatively active by virtue of their being pragmatically entailed by one or more primary rights. Secondary rights may fail to apply because the empirical situation renders them unnecessary for realization of the right(s) that ordinarily require them. In such cases, it is not that they are overridden or disappear; it is rather that they fail to be relevant. The normative force and the standing that secondary rights confer on their subjects, and so the compellingness of what is commanded or forbidden, is no different than the force and the standing conferred in a primary right. Failing to respect a secondary right is of the same moral seriousness and constitutes the same order of wrong as failing to respect a primary one. [end of p 134]

6. RIGHTS, CLAIMS AND SPECIFIC CONTEXTS

Distinguishing primary rights, secondary rights and particular claims is especially useful in marking moves from (abstract) rights to (specific) activities and policies as distinct argumentative steps. The high level of abstraction of phrases such as “political participation” and “voting” is useful for getting at what is supposed to be important for human beings in the abstract. But people do not live their lives in the abstract. They live their lives as embodied, and embedded, individuals whose day-to-day circumstances must be related to abstract descriptions by an argument. Attempts to identify the obligations that human rights pose and to assess compliance with those obligations typically require engagement with concrete questions about what human rights imply for a specific actor in a specific set of circumstances. Even assuming agreement about what the primary human rights are, and what secondary rights fall out of these, it will still be necessary to answer questions about what specific subjects may demand *as a matter of human right*, from specific governments, from specific international actors, from specific businesses, and from one another. Identifying obligations and assessing compliance is about whether in *this* situation, *this* actor must *as a matter of human right* provide a specific good, refrain from a specific action, repeal a specific piece of legislation, etc. Questions about obligations and compliance are questions about *particular claims*.

The role of facts and context in vindicating or undermining human rights claims is sometimes argued to be grounds for understanding human rights to be institutionally defined¹³. If all that is meant by this is that the moral demands posed by human rights, like those posed by any right (and indeed, by any moral concept) can only be elucidated by reference to facts about the concrete circumstances within which they are supposed to exert a pull (including facts about the institutions), then recognition of the difference between primary and secondary rights on one hand, and particular claims on the other, is compatible with treating human rights as institutionally defined. However, it is important to note that the relevance of institutions to human rights specification does not line up with the distinction between primary and secondary rights, on one hand, and particular claims, on the other. For example, an institutional arrangement (such as the centralized political authority and control of coercive force characteristic of a modern state) may be so prevalent as to establish certain (secondary) rights as functionally necessary for respect for human dignity [end of p 135] to obtain. Those (institutionally defined) secondary rights may then be the basis for justified claims to specific performances from specific actors for specific people within a territory.

Recognizing the difference between primary and secondary rights, on one hand, and particular claims on the other, helps clarify what is actually at issue in disagreements about whether policies or actions are rights-violating because it separates out the *grounds* on which an action is argued to be rights-violating from the *outcome* this argument aims most immediately to secure. Imagine, for example, a case in which an individual or group of individuals assert that denying them the ability to vote is rights-violating. In response to this, a state actor may distinguish the right to *vote* from the right to *political participation* and argue that voting is not necessary for persons to enjoy their right to political participation, perhaps on the grounds that the (primary) right to political participation does not entail a (secondary) right to a political system that includes voting¹⁴. In this

¹³ See, for example, Buchanan (2013, pp. 51-84); Pogge (2000); and Reidy (2008).

¹⁴ This position was at the heart of a dissenting view in the Canadian Supreme Court in a case regarding the inclusion of ballots by voters who did not meet administrative criteria for eligibility in a contested election result. See *Optiz v. Wrzesnewskyj* (SCC, 2012).

the state actor would be denying that the role of voting in its political system is a matter of human rights at all.

Alternately, a state actor may accept that there is a (secondary) right to a political system that includes voting, but deny that respect for this right requires that the particular person(s) in question be allowed to vote in the specific process to which they seek access¹⁵. In this case, the state actor would be denying that the specific actions or activities that are a source of complaint (e.g., striking individuals from the voters list) fail to respect human rights. In one case there is denial that the category of behaviour subject to complaint falls under the rubric of human rights. In the other case there is acceptance that the behaviour subject to complaint is a matter of human rights but denial that what was done is rights-violating. Being clear about the basis on which the state actor is defending its behaviour clarifies what is at issue and is key to assessing compliance.

7. INDIVISIBILITY, UNDER ADVERSE CIRCUMSTANCES

In this context, it is important to recall the role of the indivisibility principle in the larger project of developing an interpretive foundation for [end of p 136] human rights that can withstand shifts in the political tides and entrench human rights obligations as foundational to the international legal system (Cf. Buergenthal, 2005; Simma & Alston, 1992; Tomuschat, 2014, esp. pp 30-46). Hierarchical theories and interpretations of human rights depart from the assumption that, in at least some cases, it is not possible for actors to live up to all of their human rights obligations. This is an assumption not that actors may sometimes fail *as a matter of fact* to live up to their responsibilities, but that actors will sometimes fail because full compliance is not possible. Since actors in these cases will have no option but to fail the test of full compliance, the real standard to which they are held accountable cannot be respect for human rights full stop, it must instead be something more limited, accompanied by a theory of when and why it is okay to apply this lower bar.

¹⁵ For example, this position was successfully argued by the government of Canada in a case about voter eligibility rules. See *Henry v. Canada* (BCCA, 2014).

Although establishing a lower standard for some actors by allowing that in some circumstances rights may be triaged is often presented as advisable for prudential reasons, in fact it is highly imprudent and politically naïve. The state-centric system within which human rights law is interpreted and enforced not only permits but presupposes, and in many ways requires, states to be maximally interested in maintaining the scope of their jurisdiction (Cf. Hannum, 1996; Kingsbury, 1998; Raz, 2010). States are under pressure to exploit the openings available to them to the greatest degree possible; and so, an effective regulatory regime must be wary of providing additional resources to limit accountability for compliance. Dealing with state actors is a bit like dealing with The Cat in the Hat: the most effective way to limit their mischief is to give them no opening at all. Hierarchical theories and interpretations of human rights give states all kinds of openings, with the practical effect of undermining the capacity of the international human rights system to limit state actors' ability to explain away abuse.

For example, distinguishing between what human rights requires in adverse *versus* other circumstances allows state actors to justify failures to respect the rights of some individuals within a population by appealing to the contribution those failures make to raising everyone up to a minimum level of enjoyment. Thus, a state actor may argue that dismantling an informal urban settlement (with the concomitant destruction of specific individuals' dwellings) is empirically necessary to ensure adequate housing for everyone whose dwellings are unhealthy or unsafe (both those within the settlement that is to be dismantled and those outside of it)¹⁶. Under normal [end of p 137] circumstances, the argument would go, the rights to housing and personal property of those whose dwellings are destroyed would have to be respected. However, in the adverse circumstances of a state with limited financial resources or institutional capacity, state actors must choose between the (short-term) rights to housing of those whose dwellings are destroyed and the (long-term) rights to personal security of all those who do not have adequate housing.

¹⁶ For an example of such an argument, see Totaro (2017). In fact, government justification of forced eviction and the destruction of domiciles on grounds of concern

The prospect of allowing such lines of argument from state actors is deeply troubling, especially given that populations with fewer political, social and economic resources to resist encroachment by not only state actors but also powerful private actors are precisely the groups who are most vulnerable to state-based abuse and least well-equipped with political, economic and legal resources to contest narratives and arguments that cast their claims as too expensive to address in the existing (adverse) circumstances.

Related to this concern is the role that adversity plays in generating permission for ignoring rights lower in the hierarchy for the sake of more significant or foundational rights. Invoking conditions of adversity as a justification for failing to respect rights that would otherwise be compelling indexes what is required to count as respecting human rights to the subject's antecedent circumstances and prospects. In this, the fact that people live in materially inadequate or unsafe circumstances becomes a reason to accept a lower standard for what constitutes respect for human rights than would be accepted if they lived in conditions of material and physical security. In the face of claims from those in inadequate circumstances, state actors may (perversely) invoke the magnitude of the inadequacy that must be remedied and/or the number of people with similar claims as grounds for concluding that meeting the full range of obligations is too costly¹⁷. Thus, in the example given above, state actors may argue that to set the baseline for what counts as adequate respect for personal security, legal protection from displacement and compensation for dwellings destroyed for the sake of the public interest for people living in informal urban settlements at the same level as would be imposed were they living in formal settlements would make it too costly and slow to undertake the projects necessary for [end of p 138] securing a minimum

¹⁷ for physical well-being and security is so prevalent that the Office of the U.N. Special Rapporteur on adequate housing has explicitly addressed it in *Basic Principles and Guidelines on Development-Based Evictions And Displacement Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*. For a discussion of the perils of "hierarchy of needs" approaches to thinking about oppression see Ginzberg (1991).

level of housing and personal security for everyone. The distance of people living in informal settlements from full respect for their human rights perversely becomes an argument for reducing the baseline of constraint and responsiveness that applies to decisions and activities aimed at meeting rights obligations.

The alternative to indexing the demands of humanity to antecedent circumstances is to appeal to the idea of a natural or objective threshold that marks the point at which respect for dignity ceases to operate as a constraint, or at least, ceases to operate as a constraint in the same way (Cf. Arneson, 2005). When left vague, the idea of a natural threshold marking obligations or constraints of a different order has intuitive plausibility. However, that plausibility relies heavily on the details of where and how to mark that threshold remaining unspecified (Cf. Buchanan, 2013, pp. 5084; Casal, 2007). Moreover, several authors have pointed out that what is accepted as a need that must be addressed (and so as part of what specifies the threshold) is subject to cultural variation, especially as this regards social connection and spirituality (Cf. Bouzenita & Boulanouar, 2016; Goodale, 2013, esp. pp 427-429; Zhao, 2015, esp. pp 32-39, 51-52).

In fact, the capacity to promote and assess compliance with all human rights is not an independent variable but is affected by decisions that some rights are more important. For example, the historical designation of some rights as having greater priority has resulted in differences in the attention given to developing and refining the conceptual and institutional apparatuses by which rights violations are identified and their impacts assessed and remedied (Cf. Chapman, 1996; Jensen, Kelly, Andersen, Christiansen & Sharma, 2017). Such differences in attention create a vicious circle in which less attention produces greater vagueness in specification and more difficulty in monitoring compliance, which differences reinforce perceptions of lower urgency and greater difficulty in securing compliance as compared to other rights. This suggests that far from being a solution to difficulties in securing full compliance, accepting a hierarchy of rights exacerbates the challenges.

8. INDIVISIBILITY AND PRINCIPLE-BASED INTERPRETATION

Insensitivity to the political implications of creating a permission structure for trade-offs regarding politically, socially and economically vulnerable populations is a powerful reason for theorists of global justice not to rely [end of p 139] on hierarchical theories and interpretations of human rights. Moreover, this indifference to the implications of hierarchical ranking is not just a pragmatic worry about how priority ordering will be used but reflects a problem in the conceptual underpinnings of such theories and interpretations. The principles of lexical ordering that are most often used to cut between tiers of rights, or to explain when and why some must give way to others, encourage interpretations that distinguish between “uncontroversial” or “foundational” documents such as the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, on the one hand, and “contested” or “special” documents such as the *International Covenant on the Elimination of All Forms of Racial Discrimination*, and the *Convention on the Elimination of All Forms of Discrimination against Women*, on the other¹⁸. The documents labelled “special” or “contested” tend to be those that are most recent, and those that have emerged in response to problems and gaps in protection experienced by populations that have historically experienced discrimination and systematic refusals of protection within international institutions.

Elevating older documents arbitrarily privileges historical understandings of who and how human rights protect over current understandings and limits the impact of experience and the inclusion of a greater range of voices on articulation and assessment of what human rights imply. Elevating older documents also minimizes the relevance of activism by and on behalf of historically marginalized populations to the project of improving and deepening human rights interpretation. In this, hierarchies among human rights accept and perpetuate historical hierarchies among human rights claimants.

¹⁸ See, for example, Griffin (2008, pp 57-81, 191-211); Rawls (1999, esp. pp 60-88); and Talbott (2007).

Emphasizing different articles of a human rights document in separation from one another and elevating different documents in relation to one another is also inadequate as a way of describing rights-violating behaviour as a phenomenon. Human rights violations, as actions and as events, have multiple dimensions and affect those subjects to them in multiple and intersecting ways. Consider, for example, Canada's forcible relocation of indigenous children from their homes to residential schools. Depending on which feature of the forcible removals is emphasized, the residential schools may be described as violating the rights of all community members not to be subject to genocide; the rights of the children to language, to physical integrity, to religion, to family, to freedom of movement, to [end of p 140] acquire and practice a livelihood, to freedom of conscience, to freedom of expression, and to health; or the rights of parents to family, to language, to practice a livelihood, and to religion (Cf. Fournier & Crey, 1997; Millroy, 2017; Truth and Reconciliation Commission of Canada, 2015). All of these descriptions capture essential features of the rights-violating activities. Moreover, all these descriptions are crucial to understanding what makes the policy a human rights violation. The forcible relocation of aboriginal children to residential schools was an assault on the whole being of those targeted. Singling out some aspects of the assault as more central to what made it a human rights violation or focusing on one element of the violation in separation from other elements mischaracterizes the wrong.

In fact, the extent to which one right rather than another captures the central features of rights-violating behaviour often depends on whether the focus is the goal and motivations of the perpetrator, the mechanics of the behaviour, or the experiences of the people whose rights are violated. For example, in a human rights complaint filed against Colombia by José Vicente Villafañe Chaparro and Amado Villafañe Chaparro soldiers had "disappeared" leaders of an indigenous community who were perceived as troublemakers (*José Vicente Villafañe Chaparro and Amado Villafañe Chaparro et al v. Colombia*, UNHRC, 1997). It is clear that the soldiers' actions violated the rights to due process, to freedom from torture, and to freedom of conscience of those who were taken; but the complainants argued that the soldiers' actions also violated the rights of the rest of the community because the *point* of the action was not just to silence the

individuals, but to terrorize the rest of the community and undermine its internal structures, so as to reduce the capacity for further political mobilization. In this example, if the *goal* of the behaviour is the focus, it is a violation of the rights to political participation, and due process of all members of the community. If the *actual behaviour* is the focus, it is a violation of the rights to political participation, due process, physical integrity, freedom of movement, and life of the individuals who were disappeared. If the *experience* of those targeted is the focus, then in addition to violation of the rights of those disappeared the actions also violate the rights of political participation, personal security and rights to family and to culture of all members of the community.

When human rights tribunals generate judgements as to whether a rights violation has occurred, they limit themselves to examining actual behaviour or policy and immediate effects. Thus in the Chaparros' complaint the Committee ruled that the complaint was admissible under treaty provisions relating to the rights of the disappeared individuals, but [end of p 141] that it was not admissible under treaty provisions relating to rights of the community (*José Vicente Villafañe Chaparro and Amado Villafañe Chaparro et al v. Colombia*, UNHRC, 1997, p. 7 at 5.3). When the entire international canon of human rights documents can be drawn upon in the interpretation of a single article, the dangers of limiting assessment to actual behaviour and immediate effects –its inherent conservatism and risk of offering only a minimal check on state behaviour– can be countered by flexibility and openness about the kinds of actions and effects that may count as violating a particular article¹⁹. Such flexibility and openness is difficult to maintain under the interpretive assumptions of hierarchical approaches. In their judgements, tribunals use other of a treaty's articles not only to justify their identification of a behaviour as rights-violating but also to impose principled constraints on

¹⁹ An example of such flexibility can be seen in a human rights complaint brought against France in which the Human Rights Committee (HRC) rejected the state party's argument that the definition of "family" in the right to family is limited to immediate relations (as in a nuclear family) and accepted the complainant's wider definition of family. The HRC accepted the wider definition on the grounds that even though the right to culture as specified in Article 27 of the ICCPR was not the basis of complaint, the importance of culture is such that variations in cultural understandings of concepts such as "family" must be taken into account (*Hopu and Bessert v. France*, UNHRC, 1993).

which aspects of behaviour are assessed. This is one of the features that makes international human rights law a fruitful resource for theorists of global justice. Treating rights as separately articulated and ranked with respect to one another tells against such a strategy, as there would be no principled grounds on which to accept or limit the relevance of rights named in other articles and other treaties as relevant to the rights named in a specific article of a specific treaty.

The alternative to using other rights as interpretive resources in specifying and limiting the content a right is to appeal to prior definitions. So, for example, in deciding whether considerations of language are relevant to rights of political participation, or considerations of culture are relevant to rights of family, theories and interpretations would look to how each of these rights are defined independently of one another, and how or whether these definitions intersect. Relying on prior definitions reifies conceptual distinctions between aspects of humanity and emphasizes abstract descriptions of how these aspects of humanity are experienced. The effect is to mistakenly treat the conceptual apparatus that has been developed to make sense of rights violations as a faithful reflection of the phenomenon itself. [end of p 142]

9. INDIVISIBILITY AND INTERNATIONAL LEGITIMACY

The foregoing analysis is relevant not only to assessing human rights compliance, but to discussing an issue that appears frequently in global justice issues: international legitimacy. If the foregoing analysis is correct, then discussions of legitimacy should focus not on behaviour with respect to a minimal list of human rights, but on patterns of behaviour and whether those patterns exhibit the requisite respect for human rights as a whole. A government shows the requisite respect for human rights as a whole by (for example) accepting human rights, both primary and secondary, as constraints on public policy; changing policies and behaviour by government agents when these are shown to be inconsistent with human rights; and adequately responding to legitimate particular claims. A legitimate state is one in which state actors' pattern of behaviour is such that there is a plausible claim that there is a general commitment across state actors to respect human dignity for all those subject to the state's

decision-making and apparatus. This is a matter of showing that policies and practices are subject to modification and constraint in response to human rights claims, rather than a matter of showing that the government accepts the right list. Legitimacy will be undermined by rights violations not only when these touch on those high up on the list of priorities but also by patterns that evidence not mistakes or disagreement about whether and at what level specific performances are required but lack of concern, either generally or with respect to specific populations, with whether human dignity establishes claims.

This understanding of the relationship between human rights and legitimacy accommodates the intuition that rights to political and social participation occupy a special role in establishing a state's legitimacy, without claiming that some rights take moral priority over others. Rights to political and social participation play a special role because when there is universal respect for these rights, states may more plausibly claim that behaviour for which they are criticized reflects a different interpretation of what respect for human rights implies, and not a failure to respect human rights at all. When there is respect for rights to social and political participation, state actors have a more plausible claim to be executing their constituents' decisions about how political life will be conducted: they have a more plausible claim to be wielding their constituents' collective rights to self-determination.

Thinking about states' defences of their behaviour in the context of the plausibility (or implausibility) of claims to be exercising self- [end of p 143] determination makes one of the crucial questions in assessing complaints whether the decisions that state actors claim to be making as a matter of self-determination are in fact entailed by their constituency's rights. The relevant issues become not only whether state actors are legitimate but also what powers legitimacy confers and which community –national, international, subnational or transnational– ought to have final say when judgements about what respecting human rights requires differ²⁰.

²⁰ For an extensive discussion of the concept of legitimacy and the role of human rights in establishing legitimacy in international law and international relations see Buchanan (2013, pp. 173-223).

10. CONCLUSION

Joseph Raz (2010) has argued that individuals have human rights only when the value of having such rights make it appropriate to ascribe duties to protect the underlying interests to those individuals' governments. In this argument, Raz attributes conceptual confusions such as conflating what is valuable to humans with what is essential to living a human life to mistakenly treating human rights as minimum standards on the basis of which claims may be asserted by all humans. In contrast, I have argued that conceptual confusions such as those identified by Raz arise from relying on hierarchical ordering when identifying what human rights standards imply in a particular circumstance. If I am correct, the conceptual confusions that Raz notes arise not from the attempt to establish a minimum standard of treatment that all people everywhere may insist upon, but from failure to fully investigate and articulate the relationship between the aspects of humanity that human rights name and the claims that these rights establish for specific subjects²¹. If reliance on hierarchical ordering, rather than treating rights as a minimum standard is the source of the problems Raz sees, then the remedy is not to limit the circumstances under which people may be described as having human rights, but to examine the assumptions and conceptual frameworks that make ranking and trade-offs appear unavoidable.

For theorists such as James Griffin (2001), accepting and spelling out trade-offs and ranking between rights is necessary in order to enable state actors to recognize what is permitted and what is forbidden and [end of p 144] for individuals to identify which state-based actions may legitimately be challenged and which must be accepted (pp. 314-315). Without hierarchical ranking, these theorists worry, human rights cannot operate as regulative principles in international politics and law. Articulating and defending a hierarchy of rights is consequently taken to be an essential component of human rights theory and interpretation.

Indivisibility rejects the assumption that conflict between *human rights* is inevitable and can be resolved only by principles that rank or otherwise

²¹ Raz himself is guilty of failing to make this distinction to a lesser degree, as his "political" account of rights elides claims to specific institutional arrangements or policy regimes, and claims to specific performances or decisions from government officials.

assign priority among them. This is not to say that indivisibility denies the possibility of conflicts between human rights *claims*. Accepting indivisibility commits theorists to denying that conflicts between human rights arise because of the structure or implications of human rights or the aspects of human dignity that these rights name. Instead, theorists are committed to treating conflicts between human rights claims as arising from histories, policies, practices and structures or from theorists' assumptions about the situation or standing of various rights claimants. Indivisibility rejects the naturalness or inevitability of tragic choices between people or between aspects of a person's dignity.

Indivisibility is a crucial interpretive tool and important bulwark against state actors' attempts to limit their responsibilities with respect to human rights. Indivisibility closes the door to arguments that non-compliance with some human rights responsibilities can be justified by the demands of other human rights and forces the examination of the context and assumptions that make ranking and trade-offs appear to be inevitable or unavoidable. The indivisibility principle's holism better captures the phenomena that human rights seek to name and address, and establishes a principled basis for interpretive practices that promote reflection on and improvement of human rights' inclusivity and responsiveness to vulnerable populations. Careful attention to the difference between primary and secondary rights on one hand, and particular claims on the other, neutralizes worries about the practicability of indivisibility under adverse circumstances, and clarifies the relationship between human rights and state legitimacy.

Ultimately, indivisibility provides a better conceptual foundation for assessing and promoting compliance with what human rights require. And it provides a better set of conceptual tools for identifying and articulating what is wrong with failures to comply. For all these reasons, theorists of global justice should rely on theories and interpretations of human rights that accept and insist upon the indivisibility of human rights. [end of p 145]

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