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Human Rights and Justification

A Reply to Mattias Kumm

Samantha Besson

In his interesting and elegant piece "The Turn to Justification", Mattias Kumm claims that the current global human rights (legal) practice has three structural features: it is inflationary; it allows for routine overrides; and it is variable.[1] While those features may at first be perceived as problematic, and have actually been deemed as such by some human rights theorists in the past,[2] Kumm claims that they are not. Not only are they morally justified, but they actually correspond to what he refers to as "a non-domination-oriented liberal conception of law and justice" (p. 239).

What underpins the chapter's argument is the claim that human rights have an inherently justificatory structure (e.g. pp. 239, 251, and 256) and that such rights are, as a result, "constitutive" of law and "liberal democratic politics" qua processes of mutual justification (p. 260, Section IV). Because human rights reasoning is justificatory in itself, human rights are to be found everywhere in the legal order (hence their seeming inflation; Section I); they trigger constant justified restrictions (hence the seeming casualty of their override; Section II); and their specifications can only occur in a specific context (hence their seeming variance; Section III).

In this short commentary, I would like to argue that this claim about the justificatory structure of human rights is not only quite common, but that it is trickier than it is made to seem in Chapter 7. Moreover, as I plan to explain, it does not account for any of the three features identified by the author, both because it simply does not and because those features cannot be observed in the practice of human rights in the first place. I will first address the main justificatory claim (Section 1), and will then turn to each of the three structural features of human rights identified in the chapter (Sections 2, 3, and 4).

[1] Numbers in brackets refer to the respective pages in Mattias Kumm's chapter.

[2] On human rights inflation, see e.g. the discussion in Nickel 2007, ch. 6; on casual override, see e.g. the discussion in Griffin 2008, ch. 3; and on variance, see e.g. the discussion in Buchanan 2013, chs. 6 and 7.

1. Human Rights as Justification and the Justification of Human Rights

Like Kumm, I understand legal human rights as moral rights and, as such, as grounds for moral duties. Rights protect interests that are recognized as sufficiently important to give rise to duties. In other words, they are grounds for reasons for action and are in themselves justifications as a result. Every time a right gives rise to specific duties in concrete circumstances, a ground and hence a justification for those specific duties is provided. As I have argued elsewhere, this turns human rights law, and human rights reasoning and adjudication in particular, into a (legally formalized and constrained) forum of justification for human rights duties and, in turn, of justification for potential restrictions to those duties.[3]

To this extent, Kumm is right about the inherently justificatory structure of human rights. Where he errs is the extent to which this accounts for the three structural features he identifies in the practice of human rights, as I will explain next.

What the author also underestimates is the extent to which this inherent justificatory structure of human rights is at odds with many of the distinct moral justifications *of* human rights (albeit pluralistic ones) proposed by current human rights theorists.[4] Although Kumm is careful not to articulate what his exact position is with respect to those distinct moral justification(s) of human rights (e.g. note 4), and rightly so given that those justifications are not what his chapter is about, his argument about the justificatory structure of human rights itself may be problematic for the proposed account of politics and justice he defends. Indeed, the latter seems to be Rawlsian in inspiration (e.g. p. 257) and relies on some test of substantive reasonableness. At places, moreover, the author even reads as endorsing some form of moral foundationalism (e.g. p. 251). Provided they are applied to human rights, both features of Kumm's argument are in tension, however, with the more procedural and democratic approach to justification at play in Rainer Forst or Seyla Benhabib's accounts of human rights that are also used in the chapter (e.g. pp. 239 or 256).

To alleviate this tension between claiming that human rights are justificatory and providing distinct justifications for them, I have argued elsewhere that we should not look for justifications of human rights outside the political-moral equal status they are constitutive of.[5] On this approach, equality does not amount to a founding value of human rights, but to a status they are constitutive of. Importantly, this justification of human rights through their own justificatory function or self-justification is not in tension with an independent justification of the interests protected by human rights or

[3] For a full argument, see Besson 2013, pp. 38–40.

[4] For a discussion of the various proposals, and in particular of moral (i) or legal (ii) justifications of moral (i.a) and/or legal (i.b) rights, and the distinction from the discussion of their legitimate authority as grounds of legal duties, see Besson 2013, pp. 39ff. See also Waldron 2013; Buchanan 2013, chs. 3 and 4.

[5] See Besson 2013, pp. 44–6.

of the content of human rights themselves (i.e. their corresponding duties), provided such justifications are needed or provided.

2. Human Rights' Limited Object and Unlimited Scope

In Section I of Chapter 7, Kumm argues that the practice of human rights is inflationary. By this, he does not mean what is usually meant by human rights theorists (i.e. their object and/or content are/is unlimited), but that human rights are found everywhere in legal reasoning (i.e. their material scope is unlimited). His two examples are the right to liberty and the principle of non-discrimination—not only but mostly in EU legal reasoning, and this is telling because EU law is not only or merely about the protection of human rights. He then accounts for this feature of the practice by reference to the inherently justificatory nature of rights that itself matches what Kumm understands to be the nature of law in a liberal democracy. This reading of human rights practice is what the author refers to as "total rights".

This is not only a mischaracterization of the legal practice, but it misses the truly perplexing inflation of human rights in practice.

True, rights and duties are common elements in legal reasoning. Not all rights are human rights, however. And the two examples given are clearly not human rights and, importantly, are not even considered as such legally. The free movement of persons under EU law has not developed as a fundamental right and the Court of Justice of the European Union does not apply fundamental rights reasoning when interpreting and applying it. The non-discrimination principle is more complex, but its auxiliary position in fundamental rights reasoning, be it under EU law or ECHR law, shows how it is not treated as another fundamental right by human rights courts. Evidence for this may actually be found in the kind of proportionality test used by those courts when assessing restrictions to the freedom of movement or to the principle of non-discrimination: it is very different from the one used in the human rights context, thus strengthening my argument in Section 3. As to Kumm's point about the mere possibility of "reframing" any claim of injustice into a human rights claim (p. 243), it is moot: mere reframing does not turn that claim into a practice—and even less a justified one. As a matter of fact, it is hard to understand why Kumm insists on identifying the whole domain of justice with that of human rights (p. 256). Human rights may be constitutive of some political justice and, to that extent, be constitutive of one's equal political status,[6] as I have argued elsewhere, but without being conflated with the whole of (political or other) justice. Democracy is a case in point or, less controversially, distributive equality.

A related feature of human rights practice that is more intriguing for the purposes of human rights theory, but is not addressed in the chapter, is not the scope, but the object and/or content of human rights. The difficulty lies, in other words, in the many

[6] See Besson 2012b; Besson 2014b.

international legal rights referred to as "human rights" that do not correspond to what can be reasonably understood as (moral) human rights (e.g. the right to paid holidays, Article 7 ICESCR). Here, the solution may be to provide a careful account of the relationship between law and morality, between moral and legal rights, and, finally, between moral and legal human rights, on the other.[7] Then, moral justifications for legal rights that are not "human rights" may be articulated.[8] It is unclear, however, what the position of the author of the chapter is on those relationships—he refers at times to the legal "recognition" of human rights (p. 255) and to their "codification" (p. 247), but those terms may be understood either way. Moreover, the question of the delineation between the object and/or content of human rights and that of other moral and legal rights is not addressed. A key feature in a constitutive account of human rights of the kind proposed in the chapter, where human rights constitute one's political-moral equal status,[9] could be, as I have argued elsewhere, to identify what makes people fundamentally equal morally.[10] However, this relational feature cannot be unlimited and could certainly not cover all interests protected by rights other than human rights. Nor could Kumm's concurrent reference to freedom. Nor can this relational feature and the status it constitutes actually be the object of human rights and a distinct object has to be articulated. Regrettably, these crucial questions are not addressed in the chapter.

3. Absolute and Non-Absolute Human Rights

In Section II of the chapter, Kumm argues that human rights are rarely protected in an absolute fashion and that restrictions are a central feature of reasoning about human rights. He takes the widespread use of the proportionality test as evidence of this feature. He then accounts for this feature of the practice by reference to the inherently justificatory nature of human rights by unpacking the connection between human rights reasoning and public reason.

Again, this is not only a mischaracterization of the practice, but it also blinds us to a more complex feature of human rights practice: to quote James Griffin, "human rights are resistant to trade-offs, but not completely so".[11]

To start with, the section mischaracterizes the practice to the extent that, while it is true that human rights are prone to trade-offs, those restrictions are not justified according to the proportionality test Kumm describes. Not only is proportionality not used by human rights courts in the widespread fashion the author implies (p. 246),[12] but when it is, it is not used as an instrumental rationality or "pareto-optimality" test (p. 247) contrary to many accounts of some of the prongs of the proportionality test. On the contrary, one may argue that it is used to sustain an egalitarian interpretation of

[7] See Besson 2011; Besson 2015. See also Buchanan 2013.

[8] See e.g. Buchanan 2013, chs. 3 and 4.

[9] See Besson 2012a; Besson 2012b.

[10] See Besson 2015; Besson 2013.

[11] Griffin 2008, p. 76.

[12] Of course, this is not to say that scholarly interest in proportionality is not widespread. It is quite the contrary, actually. It is interesting, however, to find mostly *scholarly* references in footnotes relating to an argument pertaining to proportionality reasoning in *practice*.

conflicting human rights' duties.[13] In any case, upholding a cost and benefit approach to proportionality (p. 247) is in tension with the kind of moral justification Kumm's chapter endorses by reference to Rainer Forst's right to justification (p. 239).

More importantly, the feature of human rights practice that is most intriguing in this context is the coexistence of those common restrictions to human rights, on the one hand, with the absolute stringency of some of them or, at least, of some of their duties, on the other. One may mention so-called "absolute rights" (e.g. Article 3 ECHR)[14] or some of their minimal "core duties" (e.g. the right to know one's biological origins under Article 8 ECHR).[15] It is not enough to hint at the rule-like structure of certain human rights or at abstract specifications here, as the author does (pp. 245–6 and 251ff.). The latter cannot account for the absolute stringency of the human rights duties one encounters in judicial reasoning itself. Nor does the identification of alleged rules account for how this stringency may be justified from the perspective of the equality and indivisibility of human rights. Regrettably, the chapter does not explain how this works and what we should make of the coexistence of absolute and non-absolute human rights duties in any given human rights theory.

4. Universal and Local Human Rights

In Section III of the chapter, Kumm argues that human rights have to be specified in context and that this accounts for their variation from one domestic or regional context to the next. He accounts for this in terms of actual contextual differences both in the degree of abstract specification of the rights or in the consecutive interpretation of those rights, but also of reasonable disagreements about the right interpretation of those rights. Another source of variation pertains to the level of specification of human rights chosen by various international legal instruments for the protection of human rights. This variance in human rights practice reflects the "values of democratic self-government and sovereign self-determination", says Kumm (p. 257).

Again, this is not only a mischaracterization of human rights practice, albeit a slight one this time, but it also eludes a more complex feature of that practice: the minimal level of universal protection guaranteed by international human rights law.

To start with, the author slightly mischaracterizes the practice to the extent that he equates variations in the interpretation of human rights by domestic courts or in domestic human rights catalogues with variations within international human rights law and interpretations; the latter do not diverge that much overall, as a matter of fact. So doing, actually, Kumm also straddles too quickly issues of human rights-based judicial review arising in domestic liberal democracies (pp. 253ff.) with those arising out of

[13] See Letsas 2015; Besson 2017b.

[14] See e.g. ECtHR, *Ilaşcu v Moldova and Russia* 2004-VII, 40 EHRR 46, par. 334.

[15] See e.g. Joint Dissenting Opinion of Judges Wildhaber et al., in ECtHR, *Odièvre v France* 2003-III, (2004) 38 EHRR 43, par. 11. See Besson 2017b.

supranational judicial review exercised by international human rights courts. A related source of puzzlement is that his argument about democratic sovereignty and the domestic contextualization of human rights in this section of the chapter seems to provide the answer to the critique he discusses of his "total rights" position in the first section: someone may disagree with the total rights approach, but endorse the democratic sovereignty and contextualization argument.[16]

More importantly, the really difficult issue with human rights is precisely to situate the minimal level of protection that is guaranteed universally despite contextual differences, and how it is to be identified legitimately. While Kumm is right that human rights are to be both universal and local at the same time (p. 256), and I have argued elsewhere that they can and should be so,[17] a minimum needs to be set and this should be done so as to be legitimate, and democratically legitimate in particular. This could be done through the progressive consolidation of transnational human rights law in particular.[18] However, it is important that the democratic qualities of those means of consolidation at the international and universal level are considered and provided for.[19] Regrettably, this question goes amiss in the chapter, which only vaguely gestures at the tension between the universal and the local, and at the need to "justify" local interpretations by reference to "universal human rights norms" (p. 256).

So, to conclude, the three features of the global human rights practice identified in the chapter are more ambivalent and therefore more difficult to account for in one single theory of human rights than the chapter seems to argue. Human rights are both limited in content and object as well as potentially unlimited in scope; they are at the same time prone and resistant to trade-offs; and they are both universal and local in justification. While it is true that human rights are justificatory through and through, this is only one of their many specificities in terms of judicial reasoning and does not help much in understanding these three dual features of human rights.

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[16] See e.g. Tasioulas 2013a and 2013b.

[17] See Besson 2012a; Besson 2012b; Besson 2015. See also the essays in Benhabib 2011.

[18] See Besson 2015; Besson 2014a; Besson 2016; Besson 2017a; Besson 2018.

[19] See Besson 2013.

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