

Neither Relative nor Universal: A Response to Donnelly

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ABSTRACT

This response raises questions about Jack Donnelly's argument for the "relative universality" of human rights. It shows that Donnelly's reliance on the terms relative and universal dulls many of his sharp analytic points and in some instances leads to inconsistencies in his account. This response also contends that in defending the relative universality of human rights Donnelly obscures or mischaracterizes the bases of their legitimacy. It concludes by arguing that human rights are neither relative nor universal and shows how abandoning this vocabulary would improve our theoretical understanding of them.

INTRODUCTION

Jack Donnelly's recent article, "The Relative Universality of Human Rights," reminds us why he is the leading theorist of human rights today.¹ It combines an unparalleled breadth of learning with the surety of argument and power of exposition that we have come to expect in his work. In the article Donnelly analyzes and assesses different claims about the universality of human rights;

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1. Jack Donnelly, *The Relative Universality of Human Rights*, 29 *HUM. RTS. Q.* 281 (2007).

his main purpose in doing so is to clarify and extend his argument for the “relative universality” of human rights, “a form of universalism that also allows substantial space for important (second-order) claims of relativism.”²

I agree with many of Donnelly’s substantive arguments, particularly his insistence that human rights do not entail cultural homogeneity and that they are consistent with diversity and pluralism in practice. Yet I am troubled by the idea of the relative universality of human rights. This idea obfuscates and in some cases contradicts Donnelly’s important theoretical insights and, in my view, mischaracterizes the bases of human rights’ legitimacy. In this response I argue that human rights are neither relative nor universal in the familiar senses of those terms and that giving up on this problematic vocabulary would significantly improve our theoretical understanding of them.

1. THE RELATIVE UNIVERSALITY OF HUMAN RIGHTS

Donnelly begins by locating his argument for the relative universality of human rights within the ongoing debate on cultural relativism, which he rightly describes as the most discussed issue in human rights theory. He makes a powerful case against cultural relativism, deftly detaching the fact of cultural relativity and the methodological disposition that confirms it from a substantive cultural relativism that demands respect for cultural differences.³ Substantive cultural relativism has been the bugbear of human rights theorists for decades; by carefully distinguishing its various facets and assessing each individually, Donnelly takes away much of its bite.

This argument illustrates what I take to be the main strength of the article: it systematically disaggregates analytically distinct questions that have been lumped together and by doing so provides clearer and more precise understandings of perennially disputed points. By distinguishing what he calls conceptual, functional, legal international, overlapping consensus, anthropological, and ontological universality, Donnelly shows that the question of whether human rights are universal is better understood as a related set of inquiries into how they might be universal. These distinct questions have different answers: he defends conceptual, functional, legal international, and overlapping consensus universality while insisting that “anthropological and ontological universality are empirically, philosophically, or politically indefensible.”⁴

Before considering Donnelly’s arguments more closely, I want to draw attention to two important assumptions that structure the wider debate over universalism and relativism. The first is that demonstrating that human rights

2. *Id.* at 282.

3. *Id.* at 294.

4. *Id.* at 281.

are not universal would significantly damage the philosophical case for, and therefore also the political cause of, human rights. This assumption is shared by universalists and relativists, and it explains why this debate is so heated: what hangs in the balance is apparently nothing less than the legitimacy of human rights. The second assumption, which for universalists is closely tied to the first, is that theoretical or analytical arguments for the universality of human rights are crucially relevant to the work of human rights advocates. Put differently, the assumption is that the answer to the "universality" question matters on the ground.

It seems clear that Donnelly shares both of these assumptions. He characterizes his discussion as a defense of certain types of human rights universality and has for years been advocating what he has called strong (not radical) universalism or weak relativism.⁵ Indeed, Donnelly's three-tiered schema of concepts, conceptions, and implementations is designed to show "what ought to be universal, and what relative, in the domain of 'universal human rights.'"⁶ The point is to restrict the claims of human rights universalism to make them more defensible. He posits fairly strong universality at the level of human rights concepts and increasing relativism at the levels of conceptions and implementations of human rights. The idea of relative universality represented in this schema and articulated throughout the article appears to Donnelly as "a powerful resource that can be used to help to build more just and humane national and international societies."⁷ Softening universalist claims "allows substantial space for important (second-order) claims of relativism," making universalism more palatable and thus more useful.⁸

2. (HOW) ARE HUMAN RIGHTS UNIVERSAL?

Some difficulties with the relative universality of human rights become apparent when we consider Donnelly's arguments about the different types of universality. He begins with an assessment of "conceptual universality." Conceptual universality, according to Donnelly, is "implied by the very idea of human rights," which are the rights one has simply by virtue of being human. "As such, they are equal rights, because we either are or are not human beings, equally. Human rights are also inalienable rights, because being or not being human usually is seen as an inalterable fact of nature."⁹

What Donnelly calls conceptual universality is really a formal feature of some accounts of human rights. While the idea that all human beings

5. *Id.* at 292 n.27.

6. *Id.* at 299.

7. *Id.* at 306.

8. *Id.* at 282.

9. *Id.*

possess human rights simply by virtue of being human might be an appealing one, this feature is not common to all accounts of human rights. Several familiar and plausible human rights theories do not conceptualize them in this way—most notably, those based on autonomy.¹⁰ It may be that the most attractive accounts of human rights, or at least those that Donnelly and I find most attractive, do apply to every human being. Nonetheless, this formal characteristic is neither inherent in the idea of human rights nor common to all understandings of them.

Donnelly acknowledges this latter point, noting that the “conceptual universality” of human rights proves nothing about whether any such rights exist.¹¹ This latter question he refers to as “substantive universality” or “the universality of a particular conception or list of human rights.”¹² Donnelly is primarily concerned with whether the rights articulated in the Universal Declaration of Human Rights exhibit substantive universality. It is at this point that he disaggregates and assesses the various questions regarding the functional, legal international, overlapping consensus, anthropological, and ontological universality of human rights.

Those assessments reveal that the argument’s greatest strength also turns out to be its greatest weakness. Despite his admirable willingness to assess each of these distinct questions separately, Donnelly treats “substantive universality” as a single question that admits of a single (if nuanced) answer: human rights are *relatively universal*. He reaches this conclusion after dismissing two of these five types of universality as untenable, calling two others “contingent and relative,” and one more universal than relative. I shall consider those judgments more closely in a moment. My broader concern, however, is that in rendering a cumulative judgment about substantive universality Donnelly seems to ignore what his own arguments indicate: that “the universality question” is really a cluster of distinct questions addressing very different conceptual dimensions of human rights. Indeed, what Donnelly’s insights seem to show most clearly is that treating these diverse dimensions all as questions about universality proves quite confusing and obscures more than it clarifies.

Consider “functional universality.” Donnelly claims that “human rights represent the most effective response yet devised to a wide range of standard threats to human dignity” that have spread globally. They “remain the only proven effective means to assure human dignity in societies dominated by [capitalist] markets and [bureaucratic] states.”¹³ He also recognizes that

10. While many human beings—perhaps all normal human beings—possess the capacity for autonomous action, this capacity is not shared by all members of the species.

11. Donnelly, *supra* note 1, at 283.

12. *Id.* at 282.

13. *Id.* at 287–88.

on this functional dimension human rights are “contingent and relative” because the threats to which they respond are themselves specific to the modern era—they are “universal—for us, today.”¹⁴ Donnelly concludes that “the functional universality of human rights depends on human rights providing attractive remedies for some of the most pressing systemic threats to human dignity.”¹⁵

There are several related claims here. One concerns the proliferation of threats and the responses to them; another concerns the unique effectiveness of those responses. Still another relates to the appeal of human rights, which Donnelly attributes to the universality of the threat and to their unique status as effective responses. I agree that certain distinctively modern threats are today essentially global and that human rights provide an effective, and therefore appealing, response to those threats. But to call human rights functionally universal “for us” but simultaneously contingent and relative seems more likely to confuse these important insights than to clarify them.

Similarly, Donnelly notes that the Universal Declaration is accepted nearly everywhere, which in his view justifies describing human rights as having international legal universality. But once again he qualifies that universality as “contingent and relative” depending on whether states decide to treat the Universal Declaration and the Covenants as authoritative (a decision that they might reverse tomorrow).¹⁶ Once again, while the observation that worldwide legal and political recognition do not translate into anything like consistent application and enforcement is valuable, little seems to be gained by forcing the questions of legal/political recognition and enforcement into a single rubric—especially when the answer turns out to be that human rights have international legal universality that is contingent and relative.

Donnelly uses the idea of overlapping consensus universality, following John Rawls, to describe how a political concept (here, human rights) might be universal even without agreement on its ontological foundations. This consensus is political, and it is also partial or incomplete.¹⁷ As he puts it, “over the past few decades more and more adherents of a growing range of comprehensive doctrines in all regions of the world have come to endorse human rights—(but only) as a political conception of justice.”¹⁸ Donnelly sees this overlapping consensus consisting in the “convergence” of leading comprehensive doctrines in all regions of the world on “the moral equality of all human beings.”¹⁹ Growing evidence that this consensus is unforced

14. *Id.* at 288.

15. *Id.*

16. *Id.* at 289.

17. *Id.*

18. *Id.* at 290.

19. Curiously, what Donnelly describes resembles not an overlapping consensus on political principles but rather a convergence of comprehensive moral doctrines—precisely

and increasingly widespread leads him to conclude that “we should talk more of the relative *universality* of human rights, rather than their *relative universality*.”²⁰ Once again, invocation of universality seems only to confuse an otherwise clear and important point about the nature and extent of agreement about human rights.

All of this becomes more puzzling when we consider the bases of Donnelly’s rejections of anthropological and ontological universality. He calls the former empirically unfounded: human rights have not existed at all times and places.²¹ The latter he deems implausible and politically unappealing: if there were some objective truth behind human rights it would have been discovered by moral and religious traditions throughout history. Since it has not been, the ontological universality of human rights would be objective proof that many moral and religious doctrines are false.²² That these conclusions are implausible and politically unpalatable seems beyond question.

So once again, I agree with the substance of Donnelly’s argument. My confusion arises because, given his views on functional and legal international universality, we might just as readily see human rights in their anthropological and ontological dimensions as universal but contingent and relative. While human rights have not existed at all times and places, there exists today a “transnational consensus”²³ on the Universal Declaration that makes human rights effectively “universal—for us” even though they are contingent and relative in that this consensus has only emerged recently. Likewise, while there is no “single transhistorical foundation” for human rights, there has been a “convergence” among moral doctrines on the belief in the moral equality of all human beings.²⁴ This seems to make them, again, “universal—for us” or at least relatively *universal*. Again, the terminology gets in the way of what had been valuable and incisive analysis. And it is hard to know why exactly two rejections of universality, two instances of “contingent and relative” universality, and one case of “more universal than relative” add up to a determination that human rights are *relatively universal*.

My aim in raising these issues is not to score easy semantic points against Donnelly. It is rather to illustrate how clumsy and, ultimately, how confusing the language of universality, contingency, and relativism becomes when

the opposite of what Rawls imagined. Perhaps Donnelly sees “the moral equality of all human beings” as a political rather than metaphysical principle and intends to signal that different moral traditions have divergent reasons for believing in this moral equality. These questions fall outside this essay’s scope. *Id.* at 291.

20. *Id.* at 292 (original emphases.)

21. *Id.* at 284–86.

22. *Id.* at 292–93.

23. *Id.* at 292.

24. *Id.*

applied to the myriad conceptual questions about human rights in which scholars are interested. Following Donnelly's insights, if not his vocabulary, we might do better. Instead of conceptual universality we should discuss the *inclusiveness* of an account of human rights and the *uniformity* of the rights it prescribes. Instead of functional universality we might emphasize the *generality* of the threats to which human rights respond (on which more is below). Instead of legal international universality we should discuss the *variability* of recognition and enforcement (these might vary across several dimensions). Overlapping consensus universality really refers to the extent of *concurrence* on a particular concept of human rights. This might be broad or narrow; here Donnelly's three-tiered schema proves useful. The more *abstract* a concept of human rights, the more extensive concurrence on it is likely to be; as conceptions and implementations become more *particular* they will be likely to command narrower consensus. Contemporary anthropological universality can be similarly assessed as broader or more narrow. Finally, ontological universality refers to the *metaphysical status* of human rights and might be best discussed in those terms.

3. NEITHER RELATIVE NOR UNIVERSAL

The preceding analysis demonstrates that we can discuss the inclusiveness, generality, and variability of human rights, the extent of concurrence on human rights concepts, and their metaphysical status all without invoking the terms relative and universal. Avoiding these terms actually enhances the precision with which we can analyze the distinct conceptual dimensions of human rights; constructions like "relative universality" and "contingent and relative" universality are both confusing and unnecessary.

They are also potentially misleading. As Donnelly explains, the question of human rights universality typically arises in connection with debates about cultural relativism. It is worth emphasizing that in these debates universalism usually refers to the metaphysical status (what Donnelly calls the ontological universality) of human rights. The reasoning, I suspect, is that if human rights are based on a "single transhistorical foundation" or objectively correct moral code (that is, ontologically universal),²⁵ then they must be legitimate in all social and cultural contexts. So for better or worse, questions about the universality of human rights usually boil down to questions about their metaphysical status, their foundations, and by extension, their legitimacy—or more precisely, the legitimacy of "imposing" them on cultures that hold

25. *Id.* at 292–93.

different values. If asked whether human rights are universal I suspect most readers would reflexively interpret the question along these lines.

It is this close association between universality and legitimacy that explains why the nomenclature we use in analyzing human rights matters so much. I think Donnelly's arguments against cultural relativism and in support of an overlapping consensus on human rights are powerful counterweights to concerns about their legitimacy. Nonetheless, his defense of human rights universality sustains this association by reinforcing the widely held assumption that if universality cannot be defended, even in a qualified or "relative" form, the case for human rights would be significantly damaged. In my view linking the legitimacy or the political efficacy of human rights to their universality is mistaken and dangerous. In the remainder of this essay I shall explain why and argue that rejecting the universality of human rights actually boosts their legitimacy. I shall also argue that rejecting universality does not mean embracing relativism. Human rights are neither relative nor universal in the familiar senses of those terms; understanding this fact is the key to understanding their power and appeal.

The logic underlying the assumption about universality being key to the defense and justification of human rights is formally sound: if there were a single, transhistorical, and objectively correct foundation for human rights it would obviate all questions about their legitimacy. It does not follow, however, that the absence (or unavailability) of such a foundation proves the illegitimacy of human rights. There are many other potential bases of moral and political legitimacy; rather than speculate about them in some abstract way, let me simply explain what I take them to be in the case of human rights.

Human rights, as Donnelly argues, provide protections against what Henry Shue has called standard threats.²⁶ The range of these threats is historically much broader than those posed by bureaucratic states and capitalist markets: it also includes threats posed by husbands, parents, officials, landowners, and religious and social authorities—in a word, by *power*.²⁷ Human rights provide protection against domination and oppression, the arbitrary or unwarranted use of power to control or interfere in people's lives. International human rights law is largely restricted to the (mis)use of state power against citizens, but in the political struggles for democracy, human dignity, and social justice where human rights play a crucial role, no such restriction obtains. Human rights offer people a way to challenge power, to

26. HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* (1996); Donnelly, *supra* note 1, at 287.

27. Cf. Michael Ignatieff, *The Attack on Human Rights*, 80 *FOR. AFF.* (2001).

call power-holders to account, and in so doing to combat domination and oppression in their myriad forms.²⁸

In this respect, human rights have global appeal: they are available to anyone, and everyone might have or imagine reasons to find them useful since everyone is potentially subject to domination and oppression.²⁹ The more inclusive an account of human rights and the more general the threats of domination and oppression to which it responds, the greater its appeal. The legitimacy of human rights stems from this appeal, which promotes widespread and growing acceptance that they are necessary and right, that there is no better way to counter the threats of domination and oppression.³⁰

That human rights should be available and potentially useful to everyone is an aspiration, not a moral truth. It is the promise of human rights that makes them so appealing, especially to those who have no other recourse.³¹ One reason I dislike accounts of human rights that are not inclusive—such as the argument from autonomy—is that the mere admissibility of some justified exclusions opens the door to the possibility of others. The exemptions also become ripe for abuse, as with arguments about the limited “rationality” of all of those historically excluded from natural rights arguments. Such accounts undermine the promise, and thus the appeal and the legitimacy, of human rights.

Conceiving the global appeal of human rights as aspirational helps to explain significant aspects of their development and to answer a common criticism. Historically, human rights have been defined by those with power. These definitions were initially quite narrow, excluding many “private” forms of domination and oppression in the home and the workplace, and they were often invoked in ways that licensed the conquest and colonization of non-European societies. These forms of exclusion, double standards, and sheer hypocrisy fuel what Donnelly aptly describes as the most powerful contemporary challenge to universality, the challenge from post-structural, post-colonial, and critical theorists.³² Their arguments are so powerful because it is depressingly easy to show that human rights discourse has been and

28. Crucially, this account accommodates civil, political, social, and economic rights. For an elaboration of this point see Michael Goodhart, “None So Poor That He Is Compelled to Sell Himself”: *Democracy, Subsistence, and Basic Income*, in *ECONOMIC RIGHTS: CONCEPTUAL, MEASUREMENT AND POLICY ISSUES* (Shareen Hertel, Lanse Minkler & Richard A. Wilson eds., 2007); MICHAEL GOODHART, *DEMOCRACY AS HUMAN RIGHTS: FREEDOM AND EQUALITY IN THE AGE OF GLOBALIZATION*, at ch. 7 (2005).

29. See Charles R. Beitz, *Human Rights as a Common Concern*, 95 *AM. POL. SCI. REV.* 269 (2001); cf. Amartya Sen, *Democracy as a Universal Value*, 10 *J. DEMOC.* 3 (1999).

30. This account is quite similar to Donnelly’s except for the broader range of threats it comprises.

31. Here, as in so many respects, Donnelly’s arguments have been formative of my own thinking. See esp. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 7 (2d ed. 2003).

32. Donnelly, *supra* note 1, at 297.

continues to be misused to justify all sorts of domination and oppression and that human rights have been and continue to be too narrowly defined to protect everyone adequately. In short, the post-modern critique worries proponents of human rights because it is so successful in showing that they are *not* universal. It thus seems to undermine their legitimacy.

So long as defenders of human rights tie their legitimacy to universality, this conclusion is inescapable. I have argued, however, that if we understand the legitimacy of human rights as a function of their global appeal, their lack of universality need not appear so damaging. In fact, it has historically been advocates of human rights who have relied on such objections in advancing their claims—as the critiques made by feminists, socialists, and those chafing at the yokes of slavery, colonialism, and imperialism indicate. These critics point to the gap between the supposed “universality” of the rights articulated by the powerful and the reality of ongoing domination and oppression in demanding political change. Their demands prove effective in part because it is difficult for the powerful to deny them without contradicting the bases of their own legitimacy.

The history of human rights right up to the present day is replete with examples of social movements and critical theorists arguing in exactly this way. Not every movement or critic has advocated human rights for everyone; often their arguments are partial and selective. But the logic of those arguments reinforces the broader promise of human rights: the more inclusive they become, the harder it gets to justify remaining exclusions. There is a sort of ratcheting effect where successful demands for greater inclusiveness and greater generality make human rights more effective and more appealing. This view is perfectly in keeping with Donnelly's claim that the growing transnational consensus on human rights is attributable to the growing realization of people everywhere that human rights are essential to a life of dignity.

If the legitimacy of human rights were a function of their universality they would long ago have been discredited. Instead, it is the global appeal of human rights, their promise of ending domination and oppression that explains their legitimacy. It also explains why it is that even though scholars find the universality of human rights almost indefensible, people continually find human rights indispensable.³³ To advocates and people struggling for democracy, human dignity, and social justice, it really doesn't matter very much whether human rights are universal, metaphysically well-grounded,

33. See Susan Mendus, *Human Rights in Political Theory*, 43 *POL. STUD. SPECIAL ISSUE: POLITICS AND HUMAN RIGHTS* 11 (David Beetham ed., 1995); cf. David Beetham, *Introduction: Human Rights in the Study of Politics*, 43 *POL. STUD. SPECIAL ISSUE: POLITICS AND HUMAN RIGHTS* (David Beetham ed., 1995).

or whatever. It just matters that they are useful and available to anyone, that they get the job done.³⁴

These arguments in no way suggest that we should deny or ignore the shortcomings that post-modern critics identify. If we locate the foundation of human rights' legitimacy in their global appeal, as history suggests that we should, these flaws need not shake that foundation. Instead, they can become the basis of a self-reflexive critique, one in which the gap between the promise of human rights and their practice creates the normative and conceptual space to reconsider and redefine them again and again. Such a critique is consistent with Donnelly's plea for greater recognition that human rights are compatible with diversity and pluralism in their conceptualization and implementation. It is also implicit in the ongoing practice of human rights, as in the demands of homosexuals and the disabled for equal rights and in nascent efforts to reconceive and realize social and economic rights.

If we accept that human rights are not universal, are we not then committed to embracing relativism? We are not. Relative means essentially that what counts as morally correct varies with context. My account of human rights says nothing about their moral or metaphysical status; it speaks only to their legitimacy, which I have characterized as a function of their appeal. As accounts of human rights become more inclusive and the range of threats to which they respond more general, the number of contexts in which they might be appealing will continue to expand. This makes their legitimacy contingent on their appeal as effective responses to domination and oppression; it cannot make them relative because their metaphysical status is not at issue.

As scholars we have worried too much that human rights might be relative and strained too hard to prove them universal. Leaving behind universalism and relativism improves the precision of our analysis and advances our theoretical understanding of human rights. Emphasizing their global appeal makes clearer the bases of their legitimacy and insulates them from critiques of their misuse while simultaneously making those critiques the impetus for an ongoing reformulation of rights that adds to their inclusiveness and generality. This is a virtuous circle: as human rights become more appealing they become more effective, and vice versa. To advocates on the ground it is this appeal, not the metaphysical status of rights that makes them politically effective.

Human rights are neither relative nor universal. They are legitimate because of their global appeal. That is enough.

34. Except for the vocabulary, this view echoes a position recently outlined by Donnelly, who argues that "universal [sic] moral principles or practices are those which, given the state of our knowledge and our current degree of moral development, we are convinced are both proper and necessary." Jack Donnelly, *Which Human Rights Should We Have?* 7 *HUM. RTS. & HUM. WELFARE* 89 (2007).