

SYMPOSIUM
HUMANITY WITHOUT DIGNITY



SANGIOVANNI ON HUMAN RIGHTS
AND EQUAL MORAL STATUS

BY
PETER JONES

[THIS PAGE INTENTIONALLY LEFT BLANK]

Sangiovanni on Human Rights and Equal Moral Status

Peter Jones

Andrea Sangiovanni's *Humanity without Dignity* covers a lot of territory and it is deep as well as broad in its endeavour.¹ Its argument is ultimately targeted at the idea of human rights, but much of it deals with issues general to moral and political philosophy and has a significance that extends well beyond human rights. In this brief discussion, I shall, even so, comment only on his more immediate thinking on human rights. Sangiovanni aims to vindicate rather than subvert human rights, but he does so in a way that dismantles much accepted thinking on human rights. I briefly summarise his thinking before commenting on some issues it raises.

What are human rights? A traditional answer, which Sangiovanni labels the 'Orthodox' view, is: 'individual moral rights that we possess merely in virtue of our humanity' (177). The answer of the more recent 'Political' view, as formulated by Sangiovanni, is: 'individual moral rights (or morally urgent interests) whose violation (primarily) by states makes sovereignty-overriding interference or other forms of international action ... permissible if not required' (177). He finds both answers

¹ References within brackets in the text are to A. Sangiovanni, *Humanity without Dignity. Moral Equality, Respect, and Human Rights* (Cambridge, MS: Harvard University Press, 2017).

unsatisfactory. Neither captures the diversity of thought and practice now associated with human rights. His own answer, which he describes as the ‘Broad View’, is: “those moral rights whose systematic violation ought to be of universal moral, legal, and political *concern*” (191, emphasis in the original). Thus, we discover whether a moral right is a human right by establishing whether its violation ‘ought to garner universal moral, legal, and political concern’ (191).

Sangiovanni uses the concept/conception distinction to explain how we should move from his formal concept to a substantive account of human rights (194). We should not suppose, he insists, that that entails developing a single master-list of human rights. Rather different contexts make different conceptions of human rights appropriate. Accordingly, he describes his view as the ‘Context Sensitive Broad View’ (CSBV). The kind of contexts he means are not the diverse social and cultural settings in which uniform human rights have to be realised. Rather he means the different contexts in which activists, advocates and practitioners deploy the idea human rights; these imply and make appropriate different conceptions of human rights. He also suggests that moving from the formal concept to contextualised conceptions requires ‘mediating concepts’ suited to particular contexts.

We commonly think that conceptions stemming from a single concept are rivalrous as well as different. For example, if theorists, accept a common concept of distributive justice, but go on to develop different conceptions of that concept, they present competing accounts of the distribution justice requires. Are Sangiovanni’s conceptions rivalrous? The answer depends on what explains their difference. Insofar as they reflect mere differences of context, they are not. But, insofar as they differ with respect to the same context, they compete and their proponents must disagree.

That distinction bears on Sangiovanni's appraisal of the Orthodox and Political views. As we have seen, he rejects the account each presents of the basic concept of human rights. He suggests, nevertheless, that his CSBV can subsume both views (191, 192-93). It does so by re-interpreting them as conceptions appropriate to different contexts. So understood, the Orthodox and Political views cease to be rivals, either with one another or with Sangiovanni's CSBV. But that cannot be the whole story, since Sangiovanni's critique (180-90) faults both as general theories rather only for their basic concepts. Thus, his subsumption of the Orthodox and Political views within his CSBV would seem more formal than substantive. While he finds a place for each as a *candidate* for the role of mediating concept or substantive conception appropriate to its context, he finds each to be an *unsatisfactory* candidate, at least in its extant forms.

Human Rights: the Concept

Sangiovanni, then, understands human rights to be "those moral rights whose systematic violation ought to be of universal moral, legal and political concern." That sets the template for the larger view of human rights he goes on to develop. He means his concept to be broad enough to encompass most contemporary usage (191) and to keep faith with the human rights culture that has emerged since 1945 (179, 203-05). Yet it has some puzzling features which make it an unlikely object of consensus.

First, it defines human rights by way of the response their violation should evoke. But that seems to make the tail wag the dog. Surely the violation of a human right ought to be of concern because what is violated is a human right; it is not its evoking that concern that makes it a human right. Sangiovanni's concept makes

essential to the very idea of a human right something that would seem better understood as a consequence that follows from it.

Secondly, it is the *universality* of that concern that for Sangiovanni distinguishes its object as a human right. Universality is, of course, a feature standardly ascribed to human rights but it is normally taken to be a feature (even if with qualification) of the range of those who hold human rights. Why should the relevant universality be a universality of concern amongst onlookers? That may be a roundabout way of referencing the humanity of those who hold the right – a violation's being properly the concern of *all* signals a concern for another as a human being, rather than as, say, a citizen of a particular state. But, if that is what Sangiovanni intends, it seems unduly circuitous. He may intend universality, additionally or instead, to capture the special moral significance of human rights.²

Thirdly, Sangiovanni identifies the relevant concern as 'moral, legal *and* political'; but why 'and' rather than 'or' or 'and/or'? Questioning a conjunction may seem a descent into pedantry, but Sangiovanni is consistent in his use of that conjunction and it creates a puzzle for his claim about the significance of context. It may be that a context to which political or legal concern is appropriate will always be one to which moral concern is also appropriate, since the violation of human right is for Sangiovanni always the violation of a moral right. But his emphasis on the significance of context seems to imply that a violation could be properly of moral concern and only of moral concern; one, that is, for which political or legal concern would be inappropriate.

Fourthly, Sangiovanni's concept is intentionally broad; it aims 'to capture the distinctiveness of human rights claims in all their

² Sangiovanni remarks (194) that "a central feature of all human rights claims [is] ... their universal and preemptory status".

diversity' (192). Yet it excludes one significant conception of human rights: a purely legal conception. It does so because it requires a human right always to be a moral right. For Sangiovanni that requirement does not stand in the way of his concept's accommodating international legal human rights, since those rights, he argues, must always be justified by underlying individual moral rights (212). In response, many lawyers and legal scholars would insist that, even if morality does justify the creation of legal human rights, those rights *exist* as legal rights only. Some also insist that the rationale for legal human rights is to be found within international law itself³.

Finally, there is the question of what justifies our continued use of the term 'human right'. Sangiovanni is unwilling to accept that a human right is a right we hold 'in virtue of our humanity' (191, 192), since he associates that phrase with the Orthodox view and particularly with claims about human dignity whose inadequacy he exposes in his first chapter. But the phrase 'in virtue of our humanity' need bring with it no such baggage. It need convey only that human rights are rights people hold in virtue of their status (moral or legal) as human beings, just as 'citizen's rights' are rights people hold in virtue of their status (moral or legal) as citizens. In the absence of some such clear link to humanity, the phrase 'human rights' becomes inaccurate and misleading (as it is for the Political view).⁴ Doubtless it remains rhetorically useful but that is hardly a respectable reason for conniving at its continued use.

³ See e. g. P. Macklem, *The Sovereignty of Human Rights* (Oxford: Oxford University Press, 2015).

⁴ Sangiovanni allows that, on his view, moral rights possessed by non-humans would be human rights provided only that their systematic violation ought to be of universal moral, legal and political concern (192). We may indeed share some

Human Rights: Conceptions and Contexts

The most distinctive feature of Sangiovanni's developed account of human rights is the significance he ascribes to context. As we have seen, he rejects the assumption that there should be a single unified human rights practice informed by a single master list of human rights. Rather, we should recognise a multiplicity of practices reflecting the multiplicity of contexts in which human rights can be invoked. Those practices are united by Sangiovanni's concept of human rights, but we can move beyond that formal concept and give substance to human rights only with respect to a particular context. Only then can we judge what counts as relevantly 'universal' and relevantly 'moral', 'legal', and 'political', and give substance to human rights and their correlative duties (192). Only then does a conception become 'determinate' and 'truth-evaluable' (198, 206).

The relevant context is, for Sangiovanni, one in which, or for which, we deploy the idea of human rights. His trio of human rights concerns – moral, legal, political – might lead us to suppose that those three describe the types of context that are significant. They do indeed have contextual significance for Sangiovanni, particularly it would seem for mediating concepts, but his view of contextual difference is more refined than that. In arguing for the relevance of context, he gives a wide array of examples of practitioners and activists deploying human rights in different contexts. These include (195-203) the UN High Commissioner for Human Rights; judges serving in the European Court of Human Rights; a domestic court or judge in Germany or South Africa addressing human rights issues; state-actors deciding whether

rights with other animals but it would be odd to describe the rights of all of those animals as 'human rights'.

human rights violations justify intervention in Syria or Libya or Egypt; domestic human rights movements across Latin America, sub-Saharan Africa, and Asia; Human Rights Watch considering whether it should treat homophobia in South Africa as a human rights issue; Amnesty International seeking to combat state-authorized threats to liberty; Black Lives Matter invoking human rights in relation to illiteracy amongst black children in US inner cities. Rather than try to understand these different actors as engaged in a single human rights project, we do better, insists Sangiovanni, to keep faith with the multiplicity of practices they represent (196, 198). We should embrace ‘the great diversity in the kinds of universal concern relevant to different contexts’ (198).

How far, then, should we be persuaded by Sangiovanni’s claims for context? Perhaps the clearest contextual contrast is between cases in which practitioners appeal to morally grounded but legally unrecognised human rights and cases in which they are tasked with interpreting and administering an already established body of legal human rights. Sangiovanni gives special attention to international law as a “specific context”, but the international legal human rights system has itself to address different contexts and it engages in diverse legal or quasi-legal human rights practices (178, 207-08). Yet we still have reason to expect some overlap of content between human rights legally and non-legally conceived, even though a legally recognised right is a different animal from a right that is only a moral claim. Recall, though, that Sangiovanni’s test for a human right is a right whose violation *ought* to garner universal moral, legal and political concern. We can intelligibly claim that concern for the violation of a legally established human right. But we are more likely to reach for Sangiovanni’s ‘ought’ test if we are considering not which rights are, but which *ought* to be, recognised as human rights in law (cf. 199). Those rights are likely to overlap in significant measure with morally grounded human rights, even

though the two types of right may still not be co-extensive⁵ (cf. Buchanan 2013).

Considering which rights human beings possess morally and which politically warrant sovereignty-overriding interference, are clearly two different concerns; but whether they need spawn different conceptions of human rights is moot. Sangiovanni objects that the Political view's concept of human rights is unsatisfactory, because it makes the existence of those rights depend upon shifting political contingencies (186-90). But, he claims, if we recast the Political view as a conception of human rights, and one conception amongst others, we avoid that objection (192-93). Do we? If the Political view remains a conception of the human rights we possess, its human rights will remain tied to shifting political contingencies. We can liberate it from the contingency objection only by making it a view on the international political action we should or should not take to uphold human rights, whose identity as human rights is independent of itself.

When we turn to some of the other cases Sangiovanni cites, their differences of concern have no obvious significance for conceptions of human rights. Organisations such as Amnesty International, Human Rights Watch, and Black Lives Matter, certainly focus their efforts on different domains of human rights, and single-human rights organisations such as Article 19 and PEN International even more so, but it is hard to see why their different concerns should amount to different contexts that require different conceptions of human rights. All of those organisations could function with the same conception and, insofar as there is

⁵ Cf. A. Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013).

scope for differences of conception, they might be found amongst activists within the same organisation.

Sangiovanni considers contexts to be determinative of human rights conceptions, at least in some measure. A particular context makes a particular conception of human rights ‘appropriate’. But how particular and exclusive is that ‘appropriateness’? It is difficult to know and it may not be easy for Sangiovanni to say. It is hard to believe that context alone can do much to tell us what human rights there ought to be or to pre-empt or defuse the disagreements human rights attract. It is more likely that those disagreements will still need to be addressed through substantive argument – argument of the sort that takes up much of Sangiovanni’s book.

There also seems ample scope for rights to ‘run across’ contexts, including Sangiovanni’s three broad contexts: moral, political and legal. Consider the paradigm instances he gives of ways of treating people as moral unequals from which, he argues, human rights should protect us: torture; slavery; rape; segregation and apartheid; caste societies; persecution and invidious forms of discrimination; demeaning forms of paternalism; concentration and death camps; genocide; cruel, inhuman and degrading treatment (74). Forms of mistreatment of this sort obviously merit universal concern and, if human rights ever warrant international political or legal action as well as moral concern, they must do so in these cases. The legal positivist might insist that, even though they may be motivated by the same concern as moral human rights, international legal human rights belong to a quite separate context. But Sangiovanni rejects that sharp separation, especially in the case of legal human rights that protect people from socially cruel treatment as moral unequals. Thus, the human rights that are pre-eminently Sangiovanni’s concern do not comport well with the image of three separate bodies of right – moral, political and legal

– each circumscribed by its own conception and each cocooned within its own context.

Equal Moral Status

Human rights are normally associated with moral status and with equal status. Human beings are said to possess both. They matter one-by-one and they matter equally. Their equal moral status underpins their human rights and their human rights manifest their equal moral status. Claims of ‘dignity’ or ‘worth’ are often used to express these ideas, especially in preambles to human rights declarations, and some philosophers have tried to justify them by way of a property or capacity all humans allegedly share and share equally. Having shown their lack of success, Sangiovanni concludes that we should abandon entirely this way of thinking about human rights and equal moral status and conceive their relationship in quite other terms.

The equality that matters, he argues, is absence of inequality, and inequality matters because of the bad of being treated as less than an equal – being treated as, for example, a mere animal or an object or a ‘polluted’ being. Such inferiorizing is socially cruel; it attacks or obliterates people’s “capacity to develop and maintain an integrated sense of self” (76). I listed above some severe instances Sangiovanni gives of that cruelty: torture, slavery, rape, and the like. Here I cannot do justice to his subtle and perceptive account of the harm and the wrong wrought by inferiorizing treatment; nor do I challenge it. I focus only on the way it leads Sangiovanni to invert the relationship between human rights and equal moral status as it is usually understood.

On Sangiovanni’s view, equal moral status does not precede human rights or, *qua* status, contribute to the case for them. Rather, it is a status bestowed upon us by human rights that safeguard us

from treatment as an inferior. In order of concern, therefore, inequality precedes equality and it does so in two respects.

First, equal moral status is *constituted* by or *consists* in a bundle of rights against certain kinds of inferiorizing treatment (rather than the other way round), and, second, our commitment to moral equality is *explained* by or *grounded* in the rejection of inferiorizing treatment as socially cruel (rather than the other way round). (103, emphases in the original)

Equal moral status is therefore an *object* of human rights, something to which we have a right. It is a status that human rights aim to secure for us, rather than a status that we already possess.

I do not quarrel with Sangiovanni's claim that human rights can be equality-bestowing or, more accurately, inequality-preventing, but I question whether accepting that view entails rejecting equal moral status traditionally conceived. These are two different yet compatible sorts of equality, located at different points in human rights argument. One concerns the object of some human rights (Sangiovanni does not claim that his equality is the only or the major object of *all* human rights); the other concerns the possession of human rights as such. One is a distribuend of some human rights; the other is a principle governing the distribution of human rights.⁶ It is hard to see why that distribution should be equal if we dispense with the equal moral status of human beings as bearers of human rights.

I want to point to a particular feature of human rights usage which is hard to justify without the traditional idea of equal moral status. Sangiovanni concedes that the capacity to which he appeals in condemning the social cruelty of unequal treatment – the “capacity to develop and maintain an integrated sense of self” – is

⁶ Although not only that; status matters as well as equal status.

one in respect of which people may be differently vulnerable. He argues, reasonably enough, that variable vulnerability is not a problem for his position: a common right to equality can justify different duties in respect of people who are differently vulnerable to inequality and its consequences (104-10). By contrast, such variability *is* a problem, he claims, for dignity-first accounts which make dignity dependent on a variable property such as capacity for rational action. But why should we make people's moral status – the extent to which they matter – dependent on any such capacity? Freed of that misplaced endeavour, the idea of equal moral status enables us to make sense of variable human rights. Several rights claimed as human rights, including in UN documents, are not universal. Some are unique to women, such as the right not to be subjected to forced pregnancy or forced abortion; some are possessed in childhood but not adulthood, and vice versa; people suffering from dementia or other forms of mental incapacity have rights to care that others do not, but they may not have rights to freedoms they would otherwise possess; indigenous peoples have rights that differ from those of other peoples. How, then, can these be human rights? The answer is by being rights we hold in virtue of our status, and our equal status, as human beings. So understood, the rights we have can vary according to differences in our condition and circumstances⁷; but they can remain human rights because they are rights we hold in virtue of our equal moral status as human beings.

Newcastle University

⁷ See further P. Jones, Peter. 2018. 'Collective and Group-Specific: Can the Rights of Ethno-Cultural Minorities be Human Rights?', in G. Pentassuglia (ed.), *Ethno-Cultural Diversity and Human Rights: Challenges and Critiques* (Leiden: Brill Nijhoff, 2018), 27-58.