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Harvey, Colin, "A Conversation Without End: Human Rights Law In Perspective?" (2011). *Res Gestae*. 3.
https://ir.lawnet.fordham.edu/res_gestae/3

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A CONVERSATION WITHOUT END: HUMAN RIGHTS LAW IN PERSPECTIVE?

Colin Harvey*

INTRODUCTION

This essay is an extended reflection on the present condition of human rights law. Its origins rest in a class I taught at Fordham Law School in April 2011, and the structure of the essay follows the direction travelled in that class. The title also derives from a book series I edit with Hart Publishing in Oxford. The class and the book series have prompted me to consider what it might mean to think about rights *in perspective*. *Res Gestae* offers a welcome opportunity to “think out loud” about the subject.

Human rights law holds out the prospect of a transformed world, with a language and practice that promises much. It is a subject that cannot avoid reimagining political, legal, and social relations at the local and global levels. The law of human rights is woven through with aspiration and hope. Even in legal study, where so much time is spent exploring the standards and their interpretation, human rights discourse comes magnificently cloaked in the idealism of popular struggles through history, continues to pose the question of fulfillment, and encourages expectations of radical change.

Human rights law presents particular challenges for scholarship, and it is one aim of this essay to indicate what they might be. Rather than recite the established legal standards, the essay is intended to be read in the spirit of a tentative intervention and thus stimulate further discussion. The underpinning assumption is, however, that human rights law is about more than the steady accumulation of legal doctrine. The critical intent of human rights law can be lost within the discourse of law, where it becomes easy for established ideas to absorb and neutralize new thought and practice. The concern expressed in this essay is how a discourse which holds out the vision of human emancipation can be so readily deployed for other ends, or simply crushed under the dead weight of established orthodoxies. How do we see human rights law in perspective *and* retain the enthusiasm, energy, and practical engagement that flow from popular struggles for rights over time?

This essay will start with thoughts on history, theory, and context. It will then proceed to look at the selected themes of refugees, socioeconomic

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rights, national human rights institutions, and bills of rights. The ambition is to suggest that *in perspective* primarily means resisting legal and political closure, thus keeping the conversation about rights going.

I. IN PERSPECTIVE? HISTORY, THEORY, AND CONTEXT

The title begs obvious questions. What does human rights law *in perspective* mean? The human rights law component seems straightforward enough, but what is meant by *in perspective*? My dictionary says “correctly regarded in terms of relative importance.”¹ The sense is of seeing an object “correctly” within its surrounding context. The implication is one of a relationship to other things; we view something in perspective when we see it as part of a larger picture. The object is there, but it is not the only or most important thing. This is not the same as the popular meaning of the term. Sometimes *in perspective* is taken to imply a negative, that human rights are somehow lessened or devalued. In this meaning, placing human rights law in perspective is essentially about diluting the normative power of the discourse. That is not the argument here. To view anything “in perspective” is not to erode its intrinsic integrity, but to accept its *relational nature*.

The dilemma when faced with human rights law is that the discourse can sound foundational in some basic senses. It often appears in popular imagination as the granite-faced representative of absolutist thinking. The bringing of *perspective* to human rights can therefore sound like an attempt to relativize it out of existence. Surely human rights are foundational, universal and binding, both morally and legally? The argument advanced here is not intended to impede the implementation of existing standards, or to prevent the emergence of new ones. It is to suggest that if we are to nourish the resources that might keep human rights law alive we must understand both why the normative standards emerged as well as the global and local societal contexts in which they now function. We are likely to do a disservice to human rights if we do not advance this questioning mindset and keep alive the resources that energize a global movement.

The history of human rights can circle around start dates. Should we trace the origins of rights as far back as we can credibly go? The purpose of such extended historical work is often to demonstrate that human rights are genuinely universal and shared across all cultures and traditions. If at times this stretches belief, the aim is a commendable one: to show that we have always somehow known (and explicitly recognized via ancient texts and practices) that each human person has entitlements by the simple virtue of their humanity. The challenge to this line of thinking is that human rights, as we understand them today, look like newer arrivals. The historical record suggests that human beings have an inconvenient habit of according primacy to status over express recognition of a common humanity. In the concentric circles of life and human belonging, the “stranger” can often appear a long way from the core of rights, entitlements, and duties.

1. THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 889 (8th ed. 1990).

There are at least two strands to recent history that seem promising as a beginning. The first looks to seventeenth century England, and then to eighteenth century France and the emerging United States. This view locates human rights in the rise of the constitutional state. Rights therefore emerge from discussions of how new constitutional spaces will be created that recognize and capture the purpose of democratic government. The difficulty with this line of thought is that these were often national/nationalist debates that were principally concerned with the rights and duties of citizenship.² In the English context, the Bill of Rights of 1689 evolved from internal political struggles over the balance of power between rival institutions, and in France again the context is largely one of internal citizenship struggles and constitutional contestation. The U.S. constitutional journey started in an anti-colonial context, with a battle for independence, and then the desire to bring together, in a coherent way, a new state. The birth of constitutional rights is in these discussions, but whether they are accurately described as part of the emergence of the *human* rights movement, or as the constitutional vindication of human rights, is an open question. The self-determination struggles that have followed (including recent developments across the Middle East) do continue the pattern of a global conversation about citizenship and its meaning, but again, are they to be classified as a human rights dynamic waiting to happen, or the victory of human rights discourse? Are they instead principally concerned with national renewal or self-assertion, or are they about a complex blend of the national, regional, and global in a world where technological innovation is rendering borders meaningless?

Those searching for beginnings may find more fertile ground in the post-1945 explosion of human rights standard setting and institution building, anchored around the United Nations. Revolutionary developments have taken place in the international legal order. The transition from a state-based system of regulation to one that recognizes and formally acknowledges the existence of human rights is well-trodden ground. It stands as an impressive achievement, even if the challenges of implementation are a persistent practical reality. This does seem a more likely candidate for the birthplace of a fully-fledged human rights culture. Whatever view is taken of when precisely this modern human rights movement gained political traction, it is hard to argue that there was not something distinctive about the post-1945 human rights movement, in terms of its more expansive embrace of the idea of rights and, to an extent, also the rise of more sophisticated understandings of how rights might operate globally. Even if this new normative imagination did not take hold until later, it seems like a good place to commence the international legal and institutional story.

To many observers, the history of how we got here is of less interest than the fact of arrival. Historical analysis may have relevance to understanding what people intended by their actions, but to lawyers this can often appear

2. See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 16–31 (2010).

the only significant practical relevance. This is, in my view, a mistake. When approaching the language and practice of human rights, understanding historical moments assists in grasping what makes an advance possible in concrete context. Lessons may or may not exist, but knowing this remains a more than purely doctrinal interest. The human rights movement is prone to forget its own origins in popular struggles and in movements that sought transformational change both locally and globally. The energetic attempt to suppress these inconvenient memories—to ensure institutional and doctrinal stability—does not keep with human rights law *in perspective*.

The theoretical context is potentially vast and can involve all the key conceptual debates of law, constitutionalism, and democracy. It is here that perspective becomes so significant. The idea underpinning human rights law *in perspective* is precisely that rights are conceptually relational. In other words, rights are embedded in societal contexts. Whether these contexts are understood as intrinsic to persons—or even communal entities—they carry with them social implications and consequences. The claim to possess a right, particularly a human right, is a *species claim*. It is to argue that human beings have these rights. Even if the position is advanced by the last person on earth, it stands as a statement of what *all* humans possess. This social and contextual basis for rights precedes the formation of collective arrangements and does not imply that rights may only arise from communal recognition and award. Rights discourse may well have found itself branded as atomistic, and as a perpetuator of selfish individualism, but this is not a necessary result of its emergence. Rather this is the outcome of the balance of political and legal forces amassing around rights arguments in the public sphere, and indicates which hegemonic positions can dominate public discourse. Those who retain a belief in a vision of human rights that can still transform global, national, and regional orders simply lose the argument.

Human rights are *species claims* for humans, anchored in how we should regard each other and what we owe to each other. This is the premise from which all else flows. Possessive individualism may be one consequence of the rights culture we have inherited, but that need not be the case. Human rights discourse can still rescue its potential by contextualizing the debate and placing it *in perspective*. The argument advanced here locates human rights *in perspective* not to bury them under a stultifying and relativist critique, but precisely because of the disruptive potential. It flows from a desire to keep the law of humanity open to humanity in a way that expresses discomfort with those who would insist on closure and the end of the conversation.

One consequence is that many struggles are now internalized within legal discourse. What may to observers appear as dry and technical legal argument is frequently very public contestation absorbed into the language and practice of law. Who then wins these legal arguments, and on what basis, really does matter profoundly, and that is why we now turn to the selected themes.

II. RIGHTS IN PERSPECTIVE

The aim in this part is to draw out tensions and place the arguments *in perspective*. The intention is also to promote further discussion. I include reference to what an *in perspective* view of these subjects might entail.

A. Refugees

The story of those who flee human rights abuses, and thus seek refuge elsewhere, echoes down human history. The treatment of the “stranger” raises many questions which flow to the heart of human rights. Why? Because here we have the human being at its most vulnerable, when the basis for seeking assistance is the very humanity on which so many fine legal and political words have been spoken and written. To talk of human rights is by necessity to acknowledge that status, including citizenship, should be morally irrelevant to the treatment of human persons. In practice, however, we know that is not the case. In fact, status seems to matter more than ever. The emergence of a state-based international global order has brought with it both the enhanced capacity of individuals to move (because of the technological, political, economic, and social advances that modernity brings) as well as the ability of states to regulate entry, residence, and removal. Although the death of sovereignty is often heralded, it appears alive and well in the desire of states to decide who will enter and belong. This instrumentalism is reflected in the decisions states take on entry, for example. They will often ensure ease of movement for those who bring knowledge, skills, finance, and other advantages. Those deemed less desirable find the right to freedom of movement absent or severely restricted.

Refugees pose an intriguing dilemma. Conflict appears an enduring part of the narrative of our species. One consequence is displacement, and history tells us that this has been the case from the start of our story. But what is the instrumental value to be derived from permitting entry in these contexts? Refugees may well bring with them talent and skill, but not necessarily so. They will often present as other human beings in need of protection and assistance. Whether from a humanitarianism embedded somewhere in us, or because refugee movements are problems requiring practical management, the humanitarian institution of protection has emerged (attaching to refugee status, asylum, displaced persons, and other forms of humanitarian status). These are now reflected in legal instruments at all relevant levels. So, in addition to the generalized guarantees provided by human rights law, refugees and asylum seekers “enjoy” protections from specialized regimes. These protections apply both to those who seek safety externally and internally, but the applicable systems differ.

What might it mean to place this discussion *in perspective*? We could just mean the perspective of a particular participant. Viewed from the perspective of the state, the first conclusion is to draw out and recognize the competing tensions in play. In a world still largely modeled on state-based formations—which are attempting to function in a globalized order with a

citizen-state model—the disruptive potential of mass movement is obvious. Here, state systems are presented with the everyday problems of governance and management of human life (in the context of an at times skeptical national electorate). From the perspective of the refugee, bureaucratic dilemmas are less pressing than the urgency of protection. In a world awash with the language of human rights, one would be forgiven for thinking that practice might match the warm and welcoming rhetoric. The tensions play out in debates on who is entitled to state-based protection, and on the creative ways states have of attempting to discourage arrival. Legal systems are implicated in how this overall system is managed, how people are treated within it, and in deciding who is entitled to claim protection. Understanding participant perspectives is vital, but it is not the totality of what it means to view human rights law *in perspective*.

Human rights law *in perspective* brings the following to the discussion of refugees. First, it brings the idea that we are dealing with *human beings*. The point may seem banal but is significant. We are not talking about the regulation of agricultural produce; *human persons* seek refuge from persecution. To accept the logic of human rights, in all its relational complexity, is to acknowledge that we should not lose sight of this basic fact. Second, such a mode of engagement would suggest we remain focused on the humanity of the person, not the hierarchies and legal typologies that states create for the purpose of selection. Such an approach would suggest discomfort with the idea that hierarchies of protection can easily be justified, or that we begin to reconstruct notions of the deserving and undeserving in contexts where serious human rights abuse is in play. Third, it would mean that the physical location of the person is of less importance than the fact of harm. The human plight of the internally displaced person therefore becomes just as pressing. An *in perspective* approach would view this in context and with all the real world complexities. What it would not do is abandon the idea of humanity as the way to always “experience the person.” It injects into the refugee law conversation a tension that can assist in avoiding closure, often on a harsh basis.

B. Socioeconomic Rights

The argument that the main lines of the doctrinal debate on socioeconomic rights are settled confronts domestic hostility. The normativity of rights, which many people regard as intrinsic to a fully human existence, can be contrasted with the stark reality of inequality and continuing institutional debates about responsibility. The plea from the human rights movement to acknowledge the indivisibility of all rights faces the practice of continued “second-class treatment.” There are still those, however wrong they are in doctrinal terms, who see these not as “rights” in a meaningful sense, and/or believe there are distinct and weakened institutional implications. Attempts to persuade skeptics that all rights often have resource implications are still frequently resisted.

What might an *in perspective* analysis imply? First, it means firmly insisting on the starting point of the human rights movement: there is no easy way to detach categories of rights. Separate but equal is not a defensible way forward. Second, it would therefore promote a skeptical view of arguments that create hierarchies of significance. For example, how persuasive is the notion that rights can be neatly packaged into generations? Third, it brings cold recognition of global realities and national arrangements, not for the purpose of lessening our priorities, but to alert us to the sober reality of the scale of the challenge in a world of profound socioeconomic inequality and national diversity. Finally, this approach should help us to imagine sophisticated ways to realize the goals of human rights in regionally and nationally diverse contexts.

C. National Human Rights Institutions

There has been a steady proliferation of national human rights institutions. These institutions can vary widely in terms of resources, remit, composition, modes of operation, and effectiveness. Their creation, however, reflects the view that traditional national institutions for the protection and promotion of human rights are inadequate. Whatever the precise motivations in each case, the establishment of a national human rights institution implies that the executive, legislature, judiciary, and existing civil society mechanisms are not in themselves enough. Like any national institution, human rights commissions can be effective or ineffective, some can simply be for international presentational purposes, and some are determined defenders of human rights.

What might an *in perspective* view add? First, it implies that a national *human* rights institution is part of a global conversation about rights. This is practically expressed through various international networks, but even if these networks never existed, the approach suggests that these bodies should be in dialogue internationally. They are of necessity part of a global dialogue that must stretch beyond borders. This also means that whatever their nationalized remit, they cannot and should not confine themselves to the purely local. Second, it brings tools of analysis that look at how institutions like this can be effective, and is willing to draw on comparative experience from bodies that do not work expressly on human rights. If there are lessons to be learned from other institutions, perhaps grappling with very different problems, they should be learned. Third, it means being clear about what the precise role of a national institution should be, and the reasons for creating one.

D. Bills of Rights

The national significance attached to rights is frequently reflected in the idea that there should be a “bill of rights.” This is the notion that fundamental rights are of such value and importance that they should be enshrined in a “sacred text.” Bills of rights can therefore emerge in national contexts as part of a process of national self-expression and self-

determination. Classic liberal accounts of the rise of constitutional democracy accord a prominent place to the rights of the person as one part of the express purpose of democratic government. Government is there to respect and uphold the rights proclaimed, with necessary implications if it fails to do so. Bills of rights (however inclusively drawn the language is) are tied very often to a discourse of national self-perception and state formation. This comes close to intertwining bills of rights exclusively with a discourse of citizenship, nationalism, and belonging. The cosmopolitan global human rights movement therefore faces a national discourse of rights that can be determined in its assertion of national heritage. The practice is, however, that even those bills of rights allied closely to moments of national renewal often reflect commitments that go beyond the citizen; many bills of rights embrace the person. In a global order of rights it is hard to seal off the conversation. This is not to deny that a national institution, such as a supreme court, may attempt to do so. National human rights protectionism may be one response to globalization and potential convergence, but it does not seem the right one.

What can an *in perspective* account offer here? First, and again, it brings the national conversation about rights into a global dialogue on the treatment of human beings as a species. Where there is any recognition at all of the humanity of rights, then the door is ajar waiting for that dialogue to happen. Second, it helps to avoid viewing rights in purely vertical terms, as the imposition of a superior global view over narrow national perspectives. The analysis suggested here would permit a more pluralistic and horizontal dialogue that recognizes that the better argument may come “from below,” and from a range of institutions. *In perspective* again means we are not binding ourselves to the deference that flows from hierarchies, but subjecting ourselves to the possibility that the best arguments might be found in unusual places. This also helps to nudge the debate beyond the “executive, legislature, judiciary” frame of analysis in order to underline that any constitutional dialogue on rights must transcend the confines of the separation of powers doctrine. Third, this approach permits more attention to comparative method and practice and encourages “looking across” national jurisdictions and traditions.

CONCLUSION

The intention of this essay is to provoke questions about what a conception of human rights law *in perspective* might resemble. The skepticism voiced here is tied to any attempt to promote political and legal closure, and thus support a static model of rights. What does this mean? What it does not mean is that we should relativize rights to the point of irrelevancy. Human rights exist, they matter, and should be practically and effectively realized. What it does mean is that the conversation about rights should be kept open for the express purpose of ensuring rights discourse does not lose the critical bite that its rhetoric promises. Political and legal documents around the world ooze with the normative language of rights. However skeptical a view is taken of all this global “rights talk,” the

normative footholds exist to realize what we can only assume people intend.

The defiance of closure is temporal, geographical, institutional, and methodological. The historical memories of the moments from which rights emerge must not be lost, or inconvenient realities ushered out of the historical record. The dialogue must defy national closure and remain connected to a global conversation on rights, but not in hierarchical normative terms. We should, as observers and participants, resist institutional and normative closure in the sense that the best arguments about the meaning and practice of rights might not be confined to hierarchies—judicial, political, or societal. Just because the Supreme Court, the Government, the opposition, or an NGO says it, does not make it so. Such interventions must be viewed as precisely that: part of the contestation at the heart of modern human rights discourse. The intrinsically disruptive nature of such an approach seems to be the only way to respect a dynamic law of humanity, however ultimately derived, and the idea that as human beings we owe each other the recognition of what it means to live a fully human life.

Let me end on a deliberately provocative note. We live in a world where human rights law has become institutionalized, legitimized, and absorbed into the respectable language and practice of the new global order. If the creation of a global architecture of rights is really a cunning deception, in the sense that there is no genuine intention of realizing them, then politicians, lawyers, and others should abandon this project now. Think of how as a species we might be judged in the future. How cruel it would be to hold up the promise of a world as envisaged in documents like the Universal Declaration of Human Rights³ if it is nothing but an elaborate hoax. Better to stop all this now than perpetuate such dishonesty to current and future generations. Better not to hold out such a transformational hope that will be honored only in neglect, and better to start a different conversation. Human rights law *in perspective* might challenge us in just such radical ways.

3. G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).