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In What Sense Should Respect for Human Rights Be Attainable?

A Response to Brownlee

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I

In her insightful and illuminating chapter, Kimberley Brownlee outlines four ways in which human rights are ‘comprehensive, aspirational and presently unrealizable’ *ideals*, rather than ordinary goals: human rights are ‘sustainability ideals,’ ‘significant moment ideals,’ ‘ongoing progress ideals,’ and ‘just out of reach ideals.’¹ Brownlee argues that because ‘even the most uncontentious human rights are ideals of one or more of these kinds,’ it follows that ‘feasibility is not a condition for human rights status.’² Instead, human rights can exist, and indeed guide action, even if they are not *feasible* or *realizable*: ‘Even if a right were to fail all of the feasibility-related tests noted above’—namely, Shue’s remediability requirement, Geuss’s enforcement requirement, Sen’s social influenceability requirement, and Nickel’s reasonable burdens and implementability tests—‘this would not threaten its status as a human right.’³

I begin by arguing that Brownlee’s inference seems incorrect when construed simply as the claim that *because* human rights are ideals, they *cannot* be subject to feasibility conditions. Even though we should agree that human rights are ideals of the types outlined by Brownlee, this does not in itself entail that there can be no feasibility conditions on human rights. Feasibility conditions are compatible with the ideality of human rights as outlined by Brownlee.

I go on to consider an alternative, more complex interpretation of Brownlee’s claim, an interpretation perhaps better supported by her chapter: that because human rights’ ideality, as outlined by Brownlee, is compatible with human rights guiding action and bearing practical importance, there is *no reason* for the theorist to commit herself to

¹ Brownlee, p. 000.

² Brownlee, p. 000.

³ Brownlee, p. 000. Note that I follow Brownlee in using ‘feasible’ and ‘realizable’ interchangeably (Brownlee, note 13).

feasibility conditions on human rights. Assessing the plausibility of this claim will draw me into methodological debates relevant to the evaluation of the rival ‘political’ and ‘orthodox’ views of human rights: should the conceptual analysis of human rights closely reflect the legal and political practice? I will not take a stance on this question, but will show that a negative answer best supports Brownlee’s complex argument against feasibility conditions.

In Section IV I introduce a suggested further argument of the simple form rejected at the start: because human rights are—I will propose—‘ideals’ in the specific sense of being natural rights held by all modern humans, their existence cannot be subject to feasibility conditions requiring that they be actually recognized or responded to (as advocated by ‘rights externalists’).⁴ This simple argument can supplement Brownlee’s complex one.

I end with a brief comment on Brownlee’s analogy between human rights and parenthood.

II

First, I consider Brownlee’s inference taken in an (uncharitably) simple way. Brownlee argues persuasively that human rights are ‘sustainability ideals’, by which she means that they require duty-bearers ‘to sustain indefinitely a particular attitude, disposition, mode of conduct, state of affairs, or combination of those things’.⁵ And she notes, again persuasively, that ‘no government can sustain indefinitely the requisite combination of attitudes and practices necessary to ensure that those rights are always fully respected. There will inevitably be circumstances in which some people are either denied due process or illegitimately disenfranchised due to errors or prejudices’.⁶ It is worth noting that for human rights, unlike some other ideals and ends with this ‘sustainability’ or ‘infinite’ aspect, the duties or requirements have a range of statuses: some are requirements of *non-violation* (e.g. duties not to create a secret police force to assassinate members of the opposition), others are requirements whose non-fulfilment would qualify as a *deficit* but perhaps not a *violation* (e.g. duties to set up open democratic systems that make it hard to create a secret police force), some are requirements on *individuals* and others on *states*.⁷ Brownlee seems correct to note that many of these

⁴ Darby 2004. My point will also undermine Geuss’s ‘enforcement’ condition (Geuss 2001, p. 144).

⁵ Brownlee, p. 000. Compare Sebastian Roedl’s notion of an ‘infinite end’: ‘Examples are: living healthy, honouring one’s parents, and being true to one’s word. In the representation of these ends there is no opposition of progressive and perfective aspect: as I am living healthy, I have lived healthy; as I am honouring my parents, I have honoured them; as I am being true to my word, I have been true to my word. Hence, these ends do not come to a limit. It is not that, at some time, I am done with living healthy, or honouring my parents, or being true to my word. My wanting to live healthy does not expire. I may give up on it, and so my wanting to live healthy may come to an end; I may no longer want that. But that it comes to this is not internal to its logical character. Therefore we may call such an end an infinite end’ (Roedl 2010, pp. 147–8).

⁶ Brownlee, p. 000.

⁷ For discussion of the violation/deficit distinction, see Brems 2009.

requirements—of each type—will be ‘sustainability’ requirements that agents will, predictably, fail to fulfil sometimes. She also seems correct to note that ‘all ordinary values and norms are sustainability ideals if their value lies at least partly in their ongoing maintenance rather than in a one-off instantiation.’⁸ I think we can add that even one-off instantiation requirements (perhaps: to look after my neighbour’s parcel on the one occasion it is left with me) will predictably go unfulfilled when considered as a global set (*someone* will fail to care for the parcel for *their* neighbour).

But human rights’ status as sustainability ideals is compatible with their meeting feasibility requirements. For example, human rights can be remediable in Shue’s sense—that is, they can protect people only against harms for which protection is possible, rather than protecting against ‘ineradicable threats like eventual serious illness, accident, or death’⁹—yet nonetheless be ideals which duty-bearers will predictably fail to fulfil sometimes. Similarly, the predictability of occasional failures to meet the duties entailed by human rights is compatible with conceptual requirements demanding that human rights be protected by enforcement mechanisms (as Geuss implausibly demands), or be ‘socially influenceable’ in Sen’s sense.¹⁰ It is also compatible with requirements that human rights impose only ‘reasonable burdens’ and be ‘implementable’.¹¹

In response to this point, Brownlee writes: ‘the consistent ongoing maintenance of the protection, implementation, enforcement, social influence, and reasonableness of the human right is, in all probability, unsustainable. To give an analogy, human rights protection is like the philosopher’s ideal of truth and sound reasoning [...], which Coady observes will in all likelihood forever elude her.’¹² But it is surely a very strong feasibility requirement which requires that for something to be a human right, it must be possible for it to be implemented, enforced, and so on *across time without exception*, contrary to the predictability of occasional lapses. I do not think the feasibility requirements should be read in this way.¹³

Another way to put this point is that what it is ‘possible’ for me to do, as encapsulated in feasibility requirements like Shue’s, should not be taken as limited by what I predictably will not do. There is a sense in which it is possible to be ‘a good parent in a comprehensive, ongoing sense’, precisely because, as Brownlee notes, ‘for ordinary adults, being a good parent at any one moment is readily realizable, as it is not very

⁸ Brownlee, p. 000. One might try to argue that human rights are not ‘sustainability ideals’ because human rights demand, for example, merely that the risk of unfair trials be *mitigated* rather than that there be *no* unfair trials. But even on this weak interpretation, I would say that human rights are still ‘sustainability ideals’ because even mere mitigation involves ‘ongoing maintenance’ and hence will, predictably, not be pursued in some places at some times. Thanks to Adam Etinson for raising this issue.

⁹ Shue 1996, p. 32.

¹⁰ Geuss 2001, p. 144; Sen 2004, p. 329.

¹¹ Brownlee, p. 000, drawing on Nickel 2007, pp. 78–81.

¹² Brownlee, p. 000.

¹³ It is worth noting, in response to Brownlee’s reference to Coady, that if there are (as seems likely) some feasibility requirements on epistemic norms of sound reasoning and the pursuit of truth, they will not require that I be superhumanly capable of adhering to such norms across time without exception, contrary to the predictability of irrational moments.

demanding'.¹⁴ Because it is possible at any one moment to do what the ideal good parent would do, it is in the relevant sense 'possible' to achieve the ideal of ongoing good parenthood, even though predictably nobody will achieve this across time. I suggest that feasibility requirements—whether on parenthood or human rights—demand the 'possibility' of achieving such ideals only in this sense. They do not require that attainment of the ideal across time without exception be a realistic, live option.

Thus for example Nickel's feasibility test maintains that '[a] necessary condition for the justification of a specific human right is the possibility of successfully implementing it in an ample majority of countries today'.¹⁵ This, I suggest, does not require implementability now in a majority of countries *across time with no lapses*. A right could meet Nickel's feasibility requirement even if there will unavoidably be occasional lapses in its implementation within a majority of countries.

The same point can be made regarding the other forms of ideal Brownlee outlines: many human rights are 'significant moment ideals' picking out 'a significant, broadly specifiable event, objective, or experience that is presently unrealizable';¹⁶ many are 'ongoing progress ideals' picking out 'the kinds of progress that have to be made in order to achieve the significant moments of realizing and implementing human rights';¹⁷ and many are 'just out of reach ideals' picking out 'something that is *just* beyond our present abilities'.¹⁸ But human rights' ideality in these senses is, I think, perfectly compatible with their being subject to feasibility requirements of the kinds outlined. This is partly because the kind of unrealizability referred to by Brownlee in describing the ideality of human rights is fairly weak: in Brownlee's sense of unrealizability, the achievement of democracy in Burma was unrealizable before 2010, and has begun to become realizable since Aung San Suu Kyi's release and then election in 2012.¹⁹ By contrast, the kind of unrealizability that would make a human right fail Shue's remediability test is much stronger: under Shue's conception, a right would be unrealizable if it required 'social guarantees against every conceivable threat' or 'guarantees against ineradicable threats like eventual serious illness, accident, or death'.²⁰ Similarly, Nickel's implementability test involves a moderately strong conception of what it would be for a human right to be unrealizable (though not as strong as Shue's): an unrealizable right in Nickel's sense could not be successfully implemented in a majority of countries today.²¹ When we focus on these different conceptions of unrealizability, we see that a human right could be unrealizable in Brownlee's sense while being realizable in Nickel's or Shue's. In general, it appears that the ideality of human rights to which Brownlee correctly draws attention is consistent with feasibility requirements on human rights.

¹⁴ Brownlee, pp. 000 and 000.

¹⁵ Nickel 2007, pp. 78–9.

¹⁶ Brownlee, p. 000.

¹⁷ Brownlee, p. 000.

¹⁸ Brownlee, p. 000.

¹⁹ Brownlee, p. 000.

²⁰ Shue 1996, p. 32.

²¹ Nickel 2007, pp. 78–9.

III

As I mentioned at the start, there is a different way to read Brownlee's argument. This is as the claim that because human rights can be action-guiding and practically important even while being ideals of the kinds outlined, there is no reason to add feasibility requirements on human rights' existence.

There are of course some kinds of infeasibility which would make human rights incapable of guiding action. For example, they cannot require the logically, metaphysically, or physically impossible. This seems to be part of Shue's point (human rights cannot guarantee against death), and can also be found in Miller and Tasioulas.²²

But Brownlee seems correct to point out that human rights can be action-guiding even if what they require is impossible in weaker senses: even if, for example, we know that no state or individual will be able to fulfil human rights across time (because they are 'sustainability ideals'), or even if under current conditions human rights are unachievable although as conditions change they could become achievable (because they are 'just out of reach ideals'). Brownlee is persuasive in her claim that such ideality is compatible with human rights providing a practical guide to action. This, I venture, is due to the weakness of the conceptions of impossibility involved in such ideality. We can have no idea how to pursue the logically, metaphysically, or physically impossible, because we cannot form a practical idea of what such a goal would be.²³ (Or it might be that what it is to be impossible in one of these strong senses is precisely to be unpursuable.) In contrast, as Brownlee shows, we *can* pursue what we predictably will fail to attain, and what we cannot attain at the moment. Such 'ideal' goals can shape our intentions and plans—including concrete institutional plans such as the 'human rights action plans' found in many states.²⁴

As I am interpreting her here, Brownlee's point seems in part to be that because human rights' ideality is compatible with their guiding action, there is no need for further feasibility requirements on human rights. We can imagine thinking the same thing about personal ideals: as a pianist, my ideal of pianistic achievement might be out of my reach but not physically impossible for me. The fact that I will, predictably, fall short of my ideal does not undermine its capacity to guide my action in terms of practising, exercises, attending lessons and masterclasses. Given its practicality, why should I limit this ideal by imposing further feasibility constraints? Why, for example, should I downgrade my conception of what I am trying to achieve to the kind of performance compatible with a 'reasonable' practising regime which allows time for

²² See Miller 2015, p. 233 and Tasioulas 2015, p. 59. Tasioulas interestingly argues that a human right to romantic love would require something which is impossible in a broadly 'conceptual' sense: love motivated by *duty* (a duty correlative to a human right) cannot be romantic love (Tasioulas 2015, p. 59).

²³ A perfectly competitive market is physically impossible, I suspect; those who think we should aim to 'approximate' such a thing should take note.

²⁴ See the national action plans listed at: <<http://www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx>>.

other aspects of my life? This might leave me uninspired and under-motivated, while the more demanding ‘infeasible’ ideal works better.

But, as I hope this example shows, in certain circumstances there can be good reasons to introduce feasibility requirements on ideals, requirements that go beyond the requirements of logical-physical possibility needed for the ideal to be action-guiding. For instance, the importance of family or career commitments might give me good reason to limit my pianistic ideal. Similarly, there could be grounds to introduce feasibility constraints on human rights, even though absent such requirements their ideality in Brownlee’s sense would still leave them as practical guides to action. For example, a theorist’s methodology might legitimately ground extra feasibility constraints.

Suppose we follow Beitz in ‘tak[ing] the doctrine and practice of human rights as we find them in international political life as the source materials for constructing a conception of human rights.’²⁵ If this doctrine and practice invokes feasibility constraints as part of the concept of human rights, then we have reason to accept such constraints. This, I suggest, is one way to understand Nickel’s feasibility constraint: the international practice of human rights simply incorporates the requirement that it be possible to implement a human right in a majority of countries now; it incorporates a requirement that human rights not be ‘mere showcase rights.’²⁶ By contrast, it is less clear that *natural rights* (as opposed to *human rights*) must be implementable in a majority of countries, because the discourses in which the concept ‘natural rights’ appears do not presuppose this—while discourses involving ‘human rights’ do.²⁷

One way to challenge this is to reject the methodological commitment to fidelity to the way ‘human rights’ is used in the dominant international practice. One might reject this commitment because one is not interested in the concept found in international practice, perhaps because one prefers to focus on the face-value intension of the concept as ‘the rights we have in virtue of being human.’²⁸ Or one might reject the commitment on the ground that it cannot be honoured, as Tadros suggests: ‘the question “what is a human right?” has a non-stipulative answer only if there is a dominant discourse of human rights with a certain degree of coherence in its use of the concept of a human right. I suspect that there is no single dominant discourse.’²⁹ Alternatively, one might reject the commitment even though one thinks it *could* be honoured, on the grounds that the discourse does not pick out a normatively important concept—as Tadros also suggests: ‘even if [philosophers could identify a dominant discourse of human rights, and identify what features of a right make it a human right in that

²⁵ Beitz 2009, p. 102.

²⁶ Nickel 2007, p. 81.

²⁷ My claim about natural rights is debatable. Some, such as Tasioulas, add feasibility constraints on human rights conceived as natural rights (Tasioulas 2015, pp. 50–1—see condition (iii) in the schema in this section), and one might see Locke’s ‘provisos’ as constraints that prevent our natural property rights from being excessively burdensome on their correlative duty-bearers. But such constraints do not seem essential to natural rights theory. Thanks again to Adam Etinson for discussion.

²⁸ Griffin 2008, p. 2.

²⁹ Tadros 2015, p. 443.

discourse], there would be little point in doing it. For the way in which we draw the distinction between human rights and other rights lacks normative implications.³⁰

The latter claim can be questioned. If Rawls is correct and human rights are grounded in international public reason in a way that other rights are not, then the distinction between human rights and other rights will be relevant to the acceptability, legitimacy, or enforceability of complaints about a state's treatment of its citizens. Complaints framed in terms of human rights will be legitimate, and enforcement to support such complaints might be legitimate, given the fact that human rights are matters of public reason, accessible to any reasonable peoples. Complaints framed in other terms—e.g. in the Lockean terms of rights conferred by a Christian god—will not be legitimate or enforceable internationally in the same way.³¹ Similarly, if Raz is correct then a right's being a human right entails that its violation is a legitimate matter of international concern, where its being some other type of right would not.³² Each 'political' approach has normative implications. Further, either approach might well bring with it some feasibility constraints beyond the most minimal. For example, rights whose violation 'is equally condemned by both reasonable liberal peoples and decent hierarchical peoples' should not normally, I think, place unreasonable burdens on correlative duty-bearers.³³ Such excessively demanding rights would be unlikely to be matters of public reason.

I have outlined two routes taking us to additional feasibility constraints on human rights. First, one might simply observe usage in the dominant practices of human rights and note that such constraints exist. Secondly, one might infer from the special normative role of human rights within such practices that, to play this role, human rights must be subject to some feasibility constraints. There is a range of ways to challenge the second approach (e.g. by questioning the alleged role etc., as Tadros outlines). The simplest challenge—and it applies to both approaches—is methodological: why should we take our conception of human rights from the practice? Why trust 'ordinary usage' in this way? Of course, a deeply radical departure from usage (e.g. one on which 'human rights' had the same referent as 'aeroplane') would just involve changing the subject. But for 'human rights' there seems to be a range of usages, including the historical link to natural rights, and it is unclear why we should prioritize that which is currently dominant.

I suggest that to support her rejection of feasibility requirements, Brownlee would benefit from some such a methodological move. The international practice does seem to involve certain feasibility requirements, and this is not surprising given its genesis in the compromises of international treaty-making: often, states will not want to sign up to rights which are not in some sense readily feasible. To reject such requirements, Brownlee would do well, I think, to explain why we are better off with a conception of human rights that is not specially tied to the international practice and its limitations.

³⁰ Tadros 2015, pp. 443–4.

³¹ Or at least this is my reading of Rawls 1999.

³² Raz 2010.

³³ Rawls 1999, p. 79.

I cannot develop this argument myself here, but I think such an approach can be made to work—especially given, as Tadros notes, our unclarity about whether international law and politics constitute the dominant discourse here (what about national human rights laws? what about the ‘ordinary person’ and their conception of human rights as important rights borne by humans?).

In itself, a defence of something other than the ‘political’ conception of human rights will not be enough to deliver Brownlee’s conclusion that human rights need not be subject to demanding feasibility conditions. For within, say, an ‘orthodox’ or natural rights approach there might seem to be moral reasons to introduce some extra feasibility requirements (e.g. in order to limit human rights’ demandingness)³⁴ or there might seem to be conceptual reasons to do this (e.g. if human rights must be suitable for legalization). Nonetheless, in my view Brownlee’s argument, under the interpretation developed in this section, has some force if human rights are natural rights. It has force in that it makes it unclear how to answer the following question: given that human rights can be action-guiding even though they are ideals of the kind Brownlee outlines, why should we take human rights to be subject to additional feasibility requirements beyond the minimum requirements necessary for them to be action-guiding?³⁵ ‘Political’ conceptions give some persuasive answers to this question (appealing to conditions built into human rights’ political role), but if human rights are simply natural moral rights, it is less clear how to answer it. Perhaps it can be answered—e.g. by appealing to the moral costs of burdensome duties—but Brownlee’s argument shows us that it needs an answer, and simply to claim the existence of such extra feasibility requirements is not to answer it.

IV

There is one type of feasibility requirement on human rights which I am sure we should reject: the strong ‘rights externalist’ view that to qualify as a human right, such a right has to be recognized by members of the society in which it exists.³⁶ Geuss’s requirement that human rights be actually enforced entails fulfilment of the rights externalist’s requirement, for a right cannot be enforced if it is not recognized. Or at least it cannot be enforced *as a right* if it is not recognized. Therefore, in rejecting the view that human rights must be recognized if they are to exist, I reject Geuss’s actual enforcement requirement.³⁷

Why do I reject this? In this case, I do not think we need an argument against it. Rather, simply asserting its negation is persuasive: one of the distinctive features of human rights is that one holds them if one is a human (or at least if one is a contemporary

³⁴ See note 27.

³⁵ See also the related debate about whether incompatible rights are logically possible (Waldron 1989).

³⁶ See e.g. Darby 2004. ³⁷ See Geuss 2001, pp. 144–5.

human),³⁸ whether or not they are recognized within one's society. Thus political prisoners in contemporary North Korea hold human rights not to be imprisoned even if nobody in North Korea believes this—not even the prisoners themselves following 're-education' programmes. If human rights are those we hold 'in virtue of being human', then we will hold them as all other humans do, even if our particular branch of humanity denies this.

There is a sense in which human rights' recognition-independence involves a form of ideality, but not the form Brownlee highlights. It is the ideality of normative phenomena whose existence is in some respect distinct from their place on concrete legal lists or from their embodiment in legal judgements. We can infer directly from this kind of ideality to a rejection of Geuss's actual enforcement requirement and the rights externalism it entails.

V

I want to end by discussing parenthood and human rights as different forms of ideal. Brownlee's notion of good parenthood as a 'sustainability ideal' and a 'limitlessly progressive ideal' initially struck me as implausible. A parent who aimed at faultlessly good parenting, or who kept aiming at being a better parent, struck me as unattractive in rather the same manner as Wolf's moral saints.³⁹ Doesn't a child benefit by seeing their parents' faults and weaknesses, or at least by seeing that their parents have some faults and weaknesses even if the full extent of these are hidden? In response, Brownlee might counter that if a child benefits from parenting that reveals frailties, then the best parents will reveal such frailties. But if so, good parenting no longer looks like such a hard ideal to attain.

This line of reasoning worried me at first, but I am not sure how problematic it is for Brownlee. The kind of ideal parenting that avoids the costs of saintliness is still very hard to attain invariably over time, and so even this 'frailty-revealing' parenthood might fit Brownlee's conception of parenthood as an ideal.

In any case, no such qualms seem relevant to human rights as an ideal. There is no sense, I suggest, in which partial violation of human rights is valuable in the same way that a parent's revealing their faults can be valuable.

It follows that respect for human rights really can qualify as an ideal in the ways Brownlee outlined. I argued in Section IV that we should reject social recognition or actual enforcement as conditions on human rights. But, as outlined in Sections II and III, whether to reject further feasibility conditions depends—among other things⁴⁰—on methodological questions about the aim of our theory.⁴¹

³⁸ See debates about whether human rights are held universally across time, or simply 'synchronically' under modern conditions of universality' (Tasioulas 2010, pp. 31–6).

³⁹ Wolf 1982.

⁴⁰ See notes 27 and 34, and accompanying main text.

⁴¹ Many thanks to Kimberley Brownlee and Adam Etinson for helpful discussion.

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