

INSTITUTIONAL INTERPRETATION OF HUMAN RIGHTS. CRITICAL REMARKS

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ABSTRACT

Some scholars believe that only governments or those who uphold governmental policies can be human rights violators. Others argue that private individuals (with no governmental mandate and acting for themselves) are also able to violate human rights. The two positions have come to be known in the literature as the institutional interpretation and the interactional interpretation of human rights respectively. This paper critically analyzes an exemplary case: Thomas Pogge's institutional conception of human rights as presented in *World Poverty and Human Rights: Second Edition*. This paper focuses on some of the negative consequences implicit in his approach. First of all, it shows that Pogge does not provide an adequate explanation of the reason why human rights should be conceived as claims on coercive social institutions and on those who uphold such institutions but not on single individuals, independently of their commitment to institutions. Secondly, it shows that *official disrespect* rather than *violation* as a criterion to evaluate the respecting of human rights is unsuccessful or at least insufficient. It sees in Pogge the same perspective mistake that infects Rawls' conception of human rights, namely that of expanding unduly one of the functions human rights perform - establishing the limits of legitimate sovereignty - into their very essence. Therefore, this paper puts in question the way in which Pogge's institutionalism mix the conception of human rights with the conception of (global) distributive justice. The conclusion to which the whole paper comes to is that proponents of the institutional interpretation (at least in the case of Pogge) misconstrue human rights because they conflate two philosophical agendas, that of human rights and that of global justice.

Key words: Thomas Pogge. Human rights. Institution interpretation. Interactional interpretation. Global justice.

Introduction

Human rights are currently conceived in two different ways depending on whether one thinks that they first address institutions or individuals. The two views have come to be known as the institutional and the interactional interpretations. On the institutional interpretation, human rights are political norms dealing mainly with how people should be treated by their governments and institutions. They are not ordinary moral norms applying to interpersonal conduct (NICKEL, 2010). Rather, they are claims held primarily against states (BEITZ, 2009), or any coercive social institutions (POGGE, 2008). On the interactional interpretation, all human agents, both governments and individuals, have a direct responsibility not to violate human rights. The institutional

interpretation denies that an offence – no matter how serious – constitutes a violation of human rights if the offence is perpetrated by private individuals. Human rights can only be violated by governments, or by government agencies and officials, but not by private actors such as a petty criminal or a violent husband (POGGE, 2008).

The controversy between supporters of the interactional and of the institutional interpretation seems to impact on another fundamental dispute in the current debate, that between what Beitz (2004) calls the 'orthodox' and the 'practical' conceptions. According to the orthodox conception, human rights are rights possessed by all human beings, at all times and in all places, simply in virtue of their humanity. As such, they have the properties of universality, independence from social or legal recognition, and inalienability (SIMMONS, 2001). The main feature of this account is the idea that human rights have an existence in the moral order that is independent of recognition by international law. It is the central point of differentiation with the practical conception which, by contrast, takes the doctrine and the discourse of human rights *as we find them in international political practice* as basic (BEITZ, 2004), i.e. as a point that requires no further foundation. The current practice views human rights' goal as confined to providing practical principles primarily governing relations between citizens and their respective states, and secondarily between states and other institutional agents. If this is how the practice of human rights goes, it simply follows that this is their essence. A similar stance – the political view – assigns the same role to human rights, albeit basing its theoretical justification on an alternative perspective closer to Rawls's understanding.

Scholars who adopt the orthodox conception usually adhere to the interactional perspective. Those who adopt the practical conception, and even more the political view, usually endorse an institutional interpretation. The interactional account is thus strictly linked with the orthodox conception. In contrast, the institutional interpretation is more recent, and it owes much to the Rawlsian conception of human rights. Rawls' conception diverges considerably from the traditional view. In *The Law of Peoples* (1999), he adopted the same methodology used in *Political Liberalism* (2005) to define the principles of domestic justice to define human rights. In *Political Liberalism*, he suggests that although people may disagree about the content of the principles of justice—that is, they may hold different *conceptions* of justice—they may nevertheless agree about the role these principles should play in moral and political thought. The brief remarks on human rights in *The Law of Peoples* seem to reflect a similar line of

thought. Although people disagree on the content of human rights, they may agree on the role that human rights play in international affairs (BEITZ, 2004). This is actually the intuition that lies behind the institutional understanding. Both take human rights *primarily* as standards of international legitimacy. Although many of the scholars who adopt the institutional approach disagree with Rawls' radical view, they share this fundamental (and controversial) premise.

Thomas Pogge was one of the first authors who insisted on the distinction between interactional and institutional interpretation. He adopted a particular institutional interpretation for which human rights are primarily claims on coercive social institutions and secondarily claims on those who uphold such institutions (POGGE, 2008). Pogge supports his institutional interpretation through a historical excursus that shows how the notion of human rights has evolved from the notions of natural law and from that of natural rights. He suggests that implicit in the current notion is the idea that through human rights one demands protection only against certain threats, namely official ones. It follows that it makes no sense to say that a private individual – with no public authority – may violate human rights. As already said, a petty criminal or a violent husband cannot violate human rights on this account.

Other authors, such as James Nickel (2010) and Mathias Risse (2008), agree with the official view proposed by Pogge. Others defend their own version of the institutional interpretation by offering further justification for this view; this is the case of Charles Beitz. On Beitz's account, institutionalism in relation to human rights is justified by the role that international human rights play within the relevant discursive practice (BEITZ, 2009). Beitz infers from such practice that the role of human rights is to provide constraints on the way in which relationships between citizens and their state, as well as among states, are to be shaped. Consequently, he holds, like Pogge, that simple civilians cannot violate human rights.

On the other side, scholars such as Simon Caney (2005), Thomas Nagel (2002), John Tasioulas (2003 and 2012), Griffin (2008) remain close to the interactional interpretation, and reject the institutional one, although not all of them endorse the orthodox conception of human rights. A common concern about the institutional view seems to be precisely its excessive closeness to the practice of human rights. Basically, that human rights have been 'practiced' in a certain way is no sufficient guarantee that they have been practiced (and understood) *properly*. Of interest is the halfway position

held by Allen Buchanan (2010) who holds that the theory and the practice of human rights should dialectically influence one another toward some sort of reflective equilibrium.

The institutional/interactional divide is thus still at the center of our understanding of human rights. Holding one or the other of these two conceptions has significant theoretical and practical consequences, and theoreticians have already devoted a considerable amount of attention to the problem. The impression is, however, that we are far from a satisfactory account capable of displaying the weaknesses and strengths of each competing conception, let alone estimating their consequences on the practice of human rights protection. As a working hypothesis, we hold that due recognition is to be given to the fact that current practice and international doctrine view human rights as instruments primarily intended to establish the limits of legitimate sovereignty. We thus acknowledge the plausibility of the institutional interpretation. We believe, however, that this recently assigned function should not exhaust what human rights are supposed to do. Expanding one of the functions human rights perform into their very essence might entail some seriously negative consequences. For instance, excluding the direct responsibility of private individuals entails the denial of human rights violations in cases where suffering was not caused by the imposition of some institutional scheme (CANEY, 2005).

To reach this conclusion, this paper adopts the following approach. It focuses on the exemplary case of Thomas Pogge's interpretation of human rights as presented in *World Poverty and Human Rights: Second Edition* (POGGE, 2008) to highlight the negative consequences implicit in the institutional conception of human rights. Particularly, in the first section, after a brief reconstruction of Pogge's account, the paper shows that Pogge fails to explain why human rights should be conceived as claims on coercive social institutions, but not on single individuals. To reinforce the point, a few counter-intuitive consequences of Pogge's institutional conception are singled out and analyzed. The second section shows how Pogge does not give due consideration to the right-holders, and how this has seriously negative consequences for the development of his conception, particularly for the choice of using "official disrespect" rather than actual violations as a criterion to evaluate the level of human rights protection. In the third section, a few examples show why official disrespect is unsuccessful as a criterion for assessing the respect of human rights. To be sure, Pogge's

institutional view has been object of criticism for quite a long time, and the debate is still vigorous as confirmed by quite recently Pogge's responses to four critics (POGGE, 2014). Many authors have already criticized his understanding of human rights, and in many respects this paper follows the lead of these critics. Nonetheless, Pogge's institutional account is here criticized for a reason overlooked by previous critics. For example, Elizabeth Ashford and Simon Caney focused on the two aspects of Pogge's institutional account. Ashford (2007) contested the idea advocated by Pogge that human rights impose only negative duties. By contrast, she sustains that many negative duties imposed by human rights are similar in nature to positive duties. The human right to basic necessities, for example, imposes positive duties. Caney (2005) considered highly problematic the way in which Pogge's unrestricted institutional account grounds cosmopolitan principles of distributive justice, because it "pays too much attention to 'duty-bearers' and not enough to 'entitlement-bearers'— to the needy, the hungry, and the sick" (CANEY, 2015, pp. 114). In other words, Caney criticizes Pogge's negative duty argument merely in terms of its inability to lead to a satisfactory account of distributive justice. Neither Ashford nor Caney focus and put in question the way in which Pogge's institutionalism mix the conception of human rights with the conception of (global) distributive justice. In this regard, the debate between interactional and institutional interpretations might properly illuminate this central aspect. The point is not to prove that only one of these two interpretation is plausible. A compelling human rights conception should sanction both institutional and interactional violations. What is in stake is not that there is just one correct understanding of human rights. As Buchanan (2013) notes, it is important to distinguish between moral human rights and international legal human rights, as well as between interactional and institution interpretations, because all these accounts refer to different meanings, and perhaps different kinds of normative phenomena. Instead, the conclusion to which the whole paper comes to is that proponents of the institutional interpretation (and the very same can be said for those who support the political view) misconstrue human rights because they conflate two philosophical agendas, that of human rights and that of global justice.² Pogge for example is driven by the attempt to formulate "a complex and internationally acceptable core criterion of basic justice" (POGGE, 2008, pp. 50.) in the language of human rights. While it is possible and desirable to consider respect of human rights as a threshold below which coercive social institutions should be considered unjust,

conceiving human rights in general only with reference to their function of limits of global justice leads to some negative consequences. Human rights should be conceived independently of further theoretical goals we may want to assign to them, especially when these goals may vary in time. For this reason, the last (fourth) section focuses on the theory of global justice that seems to be presupposed (at least in the case of Pogge) by the institutional interpretation of human rights.

1 Pogge's Institutional Conception

Thomas Pogge proposes to conceive human rights “primarily as claims on coercive social institutions and secondarily as claims on those who uphold such institutions” (POGGE, 2008, p. 51). He asserts that his institutional conception allows us to transcend the terms of debate between those who advocate a minimalist account of human rights, which requires exclusively negative duties, and those who advocate a maximalist account, according to which all human rights entail both negative duties and positive duties. (POGGE, 2008) His institutional understanding would accept minimalist constraints without disqualifying social and economic human rights.³

Pogge supports his institutional interpretation through a historical excursus that shows how the notion of Human Rights has evolved from the notions of natural law and natural rights. For this reason, I think that Pogge's interpretation of human rights is closer to the practical view, understood broadly, than the political one. The main clue to that lies in his personal historical excursus on the evolution of human rights whereby he justifies his institutional interpretation of human rights. He underlines the continuities in the conceptual evolution. For instance: “all three concepts have in common that they were used to express a special class of moral concerns, namely ones that are among the most weighty of all as well as unrestricted and broadly sharable”. (POGGE, 2008, pp. 60). Pogge, however, is mainly interested in stressing the discontinuities. An important discontinuity that, according to Pogge, characterizes the modern notion of conception of human rights is the following: “Through the language of human rights, one demands protection only against certain - official – threats” (POGGE, 2008, pp. 64).

Pogge suggests that human rights violations must be in some sense official, and for this reason human rights protect persons only against violations from certain sources. “Human rights can be violated by government, certainly, and by government agencies and officials, by the general staff of an army at war, and probably also by the

leaders of a guerrilla movement or of a large corporation - but not by a petty criminal or by a violent husband.” (POGGE, 2008, pp. 63-64).

Pogge thus defends an institutional interpretation of human rights in which human rights are conceived, primarily, as claims on coercive social institutions and is careful to specify well the notion of official violation. For instance a government may legally commit itself never to violate human rights and yet do nothing to avoid that its agencies or officers violate them; or a government can tolerate official acts of private violence or stand passive in front of private violence despite its illegitimacy. For this reason, “the language of human rights involves a demand for protection not only against official violations but, more broadly, against official disrespect, and it addresses this demand not only to officials, but also to those in whose name such officials are acting”. (POGGE, 2008, pp. 63-64). While primarily directed against institutions, human rights are also, and secondarily, claims against those who uphold such institutions.

Pogge supports the need to separate the notion of official disrespect from that of violation, because in some societies, people could self-censor their behavior; they could be intimidated and demoralized. In these cases we may see a decrease in violations, without an improvement in human-rights records. Detaching the notion of official disrespect from that of violation entails an important consequence: if a society wanted to avoid official disrespect it would have to ensure that people are, and feel, secure with regard to the objects of their human rights. Consequently, unofficial crimes may not constitute human-rights violations, but official indifference toward such private violations does constitute official disrespect. (POGGE, 2008).

I will quote a classic example to show how according to Pogge's institutional conception ordinary individuals cannot violate the human rights of others directly.

In one, an adolescent Iraqi girl was beaten to death by her father for having affection for a British soldier, though by all accounts the affection was not mutual and nothing sexual had transpired between them. Killings of family members, especially girls, are not unusual in Iraq and are socially condoned by some groups. No charges were raised against the man; in fact local authorities appear to have supported his action. In the other case, an adolescent Muslim girl was beaten to death by her father, in this case for refusing to wear the hijab, the traditional Islamic headdress. This incident occurred in Canada where such occurrences are rare and socially condemned. The father has been charged with first degree murder and awaits trial in state custody (TOMALTY, 2011, pp. 105).

For Pogge, a human rights infringement occurred in the Iraq case but not in the Canadian one because “appropriate and effective coercive social institutions that offer the security of person to everyone are in place and generally effective in Canada, but not in Iraq.” (TOMALTY, 2011, pp. 106).

Human rights violations occur only when a threat to persons' fundamental human interests is systemic. The access to the objects of human rights has to be secure. Accordingly “avoidable insecurity of access, beyond certain plausibly attainable threshold, constitutes official disrespect and stains the society's human rights record”. (POGGE, 2008, pp. 70). Pogge, however, goes beyond this point and adds: “since citizens are collectively responsible for their society's organization, persons share responsibility for official disrespect of human rights within any coercive institutional order they are involved in upholding” (POGGE, 2008, pp. 70). Individuals are required not to uphold social structures which do not ensure that all members of society have secure access to the objects of their human rights. They have an indirect responsibility towards human rights. In contrast, according to the interactional interpretation of human rights, either government or individuals have a similar direct responsibility not to violate human rights.

Besides the point about the addressees of human rights claims, there is another feature of Pogge's view we need to take into consideration. His conception represents a middle ground between a minimalist interactional conception – “which disconnects us from any deprivations we do not directly bring about” (POGGE, 2008, pp. 72) – and a maximalist interactional conception – “which holds each of us responsible for all deprivations whatever, regardless of the nature of our casual relation to them” (POGGE, 2008, pp. 72) – because it does not deny the little more beyond bodily security (minimalism) that even a libertarian would endorse. Thus human rights on Pogge's interpretation entail only negative duties; but beyond minimalism they also include some social and economic rights. Indeed, on this view a human right to basic goods – for instance Article 25 of the UDHR – entails no duty for individuals to contribute directly to meet these necessities. As Pogge puts it: “it rather holds a duty on citizens to ensure that any coercive social order they collectively impose upon each of themselves is one under which, insofar as reasonably possible, each has secure access to these necessities.” (POGGE, 2008, pp. 73).

Having recalled the main features of Pogge's institutional interpretation we can move to the critical part. We want to show that Pogge does not provide an adequate explanation of the reason why human right should be conceived primarily as claims on coercive social institutions and not as claims on all individuals. Also, we want to show that he does not keep in due consideration right-holders.

2 Pogge's Institutionalism and Right-Holders

Pogge argues that in the language of natural rights one demands protection against threats; but in the language of human rights, only against certain "official" threats. Pogge provides an example in order to prove that any violations of human rights, to count as such, have to be *official*. He quotes Article 17.2. "No one shall be arbitrarily deprived of his property"⁴ (UDHR), and he argues that if a simple person steals a car we would not consider it as a violation of human rights even if such action is wrong and possibly highly damaging to the victim; on the other hand, if the same car is confiscated arbitrarily by a government this does strike us as a human rights violation.

Now, it is true that the latter act is perceived as a human rights violation more than the former. There are reasons to believe, however, that this perception is due to the fact that in the latter case more than one human right is violated. In the first case, we perceive a violation of human rights, i.e. Article 17.2; in the second case, we perceive two or more violations of human rights, i.e. article 17.2 and article 7 "All are equal before the law and are entitled without any discrimination to equal protection of the law" (UDHR, Art. 7). We cannot fail to see that if the government decides to confiscate something arbitrarily, this could be a discrimination over and above the 'simple' damage done to the victim. Hence there is no reason to assume that in cases of 'private crimes' of the sort suggested by Pogge's example, no violation of human rights is involved. A violation by government may be perceived as a more serious violation because it invests the principle of equality in front of law. In this sense the official character of the violation constitutes an aggravation but that does not mean that violations carried out by individuals cannot be conceptualized as human rights violations. Pogge's example of the car is not convincing. He fails to provide an adequate explanation of the reason why the direct violation by individuals ought not to be considered as human rights violations.

There is a further complication with Pogge's account. He argues that human rights are conceived primarily as claims on coercive social institutions and secondarily as claims on those who uphold such institutions. This seems to imply that human rights always presuppose the existence of coercive social institutions. As he puts it, the duties of individuals correlative to human rights always derive from these institutions (TOMALTY, 2011). This means that if human rights violations must be *official*, in one scenario in which there are simply no coercive social institutions, one can commit any sorts of atrocities without violating human rights. But this assumption is hardly trivial and, thus, has to be demonstrated adequately but Pogge fails to take this challenge seriously.

To be sure, all institutional conceptions of human rights presuppose the existence of coercive social institutions, as in Pogge's institutional interpretation; following this view, even if human rights have a moral content, they belong, through their structure, to a scheme of positive and coercive law which supports justifiable individual rights claims (HABERMAS, 1995). In sum, the concept of human rights is not of moral origin, but it is a specific form of the modern concept of - subjective rights - i.e. a category specifically juridical. Human rights are at the outset by nature juridical. (HABERMAS, 1995). On this view, it is evident why human rights presuppose the existence of coercive social institutions. But Pogge proposes an institutional interpretation alternative to the usual sort of institutional interpretation that "conceives a human right to X as a kind of meta-right: moral right to an effective legal right to X." (POGGE, 2008, pp. 51). The main distinction between his institutional interpretation and others is that human rights are understood as moral claims. He considers human rights as *moral claims* rather than *claim rights*⁵, and the distinction is relevant.

Pogge does not argue directly in favor of this distinction, but we can infer it from his words and his particular institutional interpretation. "A human right is a moral claim on any coercive social institutional imposed upon oneself and therefore a moral claim against anyone involved in their design or imposition." (POGGE, 2008, pp. 52). And, "human rights are moral claims on the organization of one's society" (POGGE, 2008, pp. 70).

Pogge's institutional interpretation diverges from those that conceive a human right to X as a kind of meta-right because, in his view, they lead to demands that are both too strong and too weak. "They are too strong , because a society may be so

situated and organized that its members enjoy secure access to X, even without a legal right thereto,” (POGGE, 2008, pp. 51.) and “they are too weak, because legal and even constitutional rights, however conscientiously enforced, often do not suffice to ensure secure access.” (POGGE, 2008, pp. 51).

On other familiar institutional conceptions, it is obvious why human rights always presuppose the existence of coercive social institutions; precisely, because these conceptions hold that human rights are by nature juridical. For Pogge's institutionalism, instead, things are quite different. Here a human right is conceived as a moral claim to have secure access to X which does not need to be translated into an effective legal right to X. From this perspective one fails to understand why human rights presuppose the existence of coercive social institutions and human rights violations must be *official*. Finally, Pogge still needs to explain why these moral claims are not direct claims against individuals but primarily against coercive social institutions.

I do not deny that coercive social institutions are extremely important in order to achieve a widespread respect for human rights, especially in the light of the complexity of our contemporary world. And I also hold that for some human rights social institutions are presupposed. For instance, Article 7 of the UDHR says: “All are equal before the law and are entitled without any discrimination to equal protection of the law” (UDHR). Obviously, it is very difficult to envisage these human rights without any kind of social coercive institutions. Nonetheless not all human rights presuppose their existence. For instance, article 16.1. (UDHR) “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution”. Human rights such as this do not need to be fully institutionalized, although a minimal societal structure seems to be presupposed in the very notion of marriage.⁶ Human rights like this one can be conceived also without presupposing the existence of coercive social institutions.

Put it differently: conceiving human rights as moral claims to secure access to X, while at the same time insisting on the fact that they need not be proto-legal rights, makes room for conceiving them independently from coercive social institutions. Pogge himself recognizes that human beings at times fulfill these moral claims without appealing or responding to institutions.⁷ Moreover, it is reasonable to assume that Pogge would accept that human rights are universal also in the sense that they apply to

all individuals *independently of any conditions they find themselves in*. This means, among other things, that if they live within societies that lack a centralized (and perhaps monopolized) power, in short if they live in societies where there are no institutions of the kind Pogge seems to be assuming, they would still be entitled to the protection offered by universally valid human rights. For reasons of consistency, therefore, Pogge should consider cases of violations by individuals, similar to the car theft in the example above, as cases of human rights violations. If Pogge denies, as he does, that human rights are “rights claims” or proto-legal rights, it seems that he can no longer explain why direct violations by individuals should not be considered as human rights violations or why simple individuals should not be considered as *direct* duty-bearers with respect to human rights.

We can approach the same problem also from a different angle, i.e. starting from the idea that human rights do not assign obligations to everyone. An important distinction between rights is that between *universal* and *general* rights. As W. Hinch and M. Stepanians (2008, pp.122) noted: “we mark this distinction terminologically by calling a right – universal – if and only if everyone possesses it; but a right is – general – if and only if it is held against everybody.” It is clear that human rights are universal in the sense that every person has these rights. By contrast, “there are human rights against some, but not necessarily all others agents” (Hinsch and Stepanians, 2008, pp. 122). While it is true that having human rights does not mean having rights against everybody, this does not exclude that there are human rights not only against institutions, but also against individuals. By using James Nickel’s (2003) classification of human rights in different families – security rights, due process rights, liberty rights, political rights, equality rights, social rights, group rights – we can observe that many rights, for instance security rights or liberty rights, seem to assign duties both to individuals or to social institutions. It is difficult to imagine that for these human rights individuals do not have any duties that go beyond the responsibility to uphold or call for the ‘right’ institutions. But Pogge’s theory seems to be committed just to that and it is interesting to wonder why he commits himself to such a counter-intuitive claim. My suggestion is that this is a consequence of his project of using human rights as the core criterion of global justice. “Human rights are primarily supposed to govern how all of us together ought to design the basic rules of our common life”. (POGGE, 2008, pp. 53). But we shall come back to this point in the last section.

For now, let us see a bit more clearly why Pogge's institutionalism is wrong in denying the possibility that human rights violations can be both official and not official. To be sure, Pogge takes a cautious attitude towards this question. He says that:

I need not deny that postulating that persons have a human right to X entails that some or all individuals and collective human agents have a moral duty not to deny X to others or to deprive them of X. I leave open whether such moral wrongs should be considered human-rights violation. (POGGE, 2008, pp. 71).

It is hardly the case, though, that one can avoid this question without facing counterintuitive results when it comes to conceptualizing the protection right-holders are usually considered to enjoy. As Simon Caney noted, “Pogge's institutionalism entails the denial of entitlements in cases where suffering was not caused by the imposition of some institutional scheme” (CANEY, 2005, pp. 112 - 113). Let us give a rather obvious example. Let's imagine a victim of torture committed by private citizens in a society in which the security of individuals is by and large effectively guaranteed by the institutions. Let's also imagine that official authorities find and duly punish the author of the crime. On Pogge's theory the victim has not suffered any violation of his human right not to be tortured. In fact, the level of security is almost the same as before and the violation is not official. But from the perspective of the victim, it would be strange to hear that his human right was not violated. If this is what Pogge's theory commits us to, it seems that an essential specification that characterized the shift from natural-law to natural-rights has been lost, namely “the relevant moral demands are based on moral concern for certain subject: right-holders. By violating a natural right, one wrongs the subject whose rights it is.” (POGGE, 2008, pp. 61.) It seems that, when Pogge describes the transition from the language of natural rights to that of human rights, he forgets, almost inadvertently, this crucial achievement of the previous evolution that one would not want to abandon.

It should be said, however, that over time Pogge has become somewhat aware of this shortcoming. Indeed, in the first edition of *World Poverty and Human Rights* (2002, pp. 65), in proposing his institutional understanding, he rejected interactional alternatives altogether. Instead, in the second edition, as I have already quoted, he leaves open whether the direct responsibility of individuals could entail a human rights violation. Afterwards, in more recent writings, he seems to refine further his view. In *Are We Violating the Human Rights of the World's Poor?* (POGGE, 2011), he draws a

distinction between two varieties of human rights violations: the interactional and institutional. Then he adds,

I stand by my defense of an institutional understanding of human rights. But, I did not need, and should not have argued for, the rejection of the interactional understanding of human rights. There was no need to deny that agents can violate human rights in ways other than through their contributions to designing or upholding institutional arrangements. (POGGE, 2011, pp. 18).

But he then sends us back to “an expanded and corrected second edition of *World Poverty and Human Rights*” (POGGE, 2011, pp. 18). However, in this paper my criticism is based on the second edition of *World Poverty and Human Rights*. It means that, even if Pogge understood this mistake, he underestimates the relevance of this conceptual element for his understanding of human rights. Otherwise, he should abandon definitively the assumption for which human rights violations must be in some sense official, and its theoretical consequences. This question cannot be labeled as a terminological disquisition because it affects directly the heart of Pogge's institutionalism for which human rights are conceived primarily as claims on coercive social institutions and secondarily as claims on those who uphold such institutions. If Pogge believed that a single individual can directly violate human rights, he would include the direct responsibility of individuals into his alternative institutional conception of human rights. In this case if individuals can directly violate human rights, it might sound controversial the assumption for which human rights violations must be 'official'. Without an adequate explanation for this exclusion it may seem an arbitrary choice; and as I have tried to show in this paper, Pogge fails to provide such explanation.

3 Official Disrespect Unsuccessful as Criterion for Assessing the Respect of Human rights

As we saw, Pogge proposes to distinguish the notion of official disrespect from that of violation and to use the notion of secure access as the benchmark for assessing the fulfillment of human rights. According to Pogge “a human right is *fulfilled* for some person insofar as she enjoys secure access to its object” (POGGE, 2008, pp. 71). Hence,

if a society wanted to avoid being charged with official disrespect it has to ensure that persons are, and feel, secure in regard to the objects of their human rights. Moreover, individuals have negative obligations not to uphold social structures which do not ensure that all members of society have secure access to the objects of their human rights.

There are some problems with this account. First of all, the extreme variability of the threshold that marks official disrespect. Pogge says:

A human right to life and physical integrity is fulfilled for specific persons if and only if their security against certain threats does not fall below certain threshold. These thresholds will vary for different human rights and for different sources of threats to one human right; and they will also be related to the social cost of reducing the various threats and to the distribution of these threats over various salient segments of the population. (POGGE, 2008, pp. 53 - 54).

The variables we need to take into consideration and be able to measure are too many. We have to assess force or weakness of institution structures which result from some contingent or hereditary factors, the effective and sincere acting by those who hold power and those who uphold these institutions in deciding whether human rights are violated or not. This may be very difficult to do and contrasts sharply with the classic account that identifies a violation anytime someone does not have access to the immediate objects of human rights, independently of the institutional setting and the behavior of officials.

Secondly, if, as Pogge (2008, pp. 70) says, “Human rights are moral claims on the organization of one's society” it becomes important to understand when an individual belongs to a society. Clearly, this cannot mean citizenship, otherwise an individual living in a foreign country would seem to be deprived of the protections of human rights. And, no doubt, this would be an extremely problematic result given that human rights are usually needed precisely when individuals – for several reasons – lack the protections associated with citizenship in a decent society. But if it means sheer presence within one state's territory (think of the cases of refugees), does that mean that they have claims on the organization of their society *of origin* but not on that in which they now find themselves? Wouldn't it be more useful for them to have a moral claim

on any institution, or on any *not necessarily institutional* actor that threatens their basic rights?

Finally (secondly), if we use official disrespect as a threshold, we face counterintuitive outcomes. Let me provide a hypothetical example. In state X there is a weak government which is not able to guarantee the human rights to physical security and to basic necessities because it is going through a long process of civil war. This society is traditionally poor and underdeveloped, and violent gangs⁸ violate human rights in many part of its territory. The government is trying to do its best to improve these conditions and generally citizens support the government's action in this direction; nonetheless secure access to some human rights, such as physical secure and basic necessities, remains very low. Obviously, we cannot charge this society with official disrespect, because objectively it is not able to guarantee the minimum threshold of security of human rights. It is not reasonable to ask something that such a society cannot achieve, at least immediately. As Pogge (2008, pp. 74.) says, "some may starve to death without any official disrespect of Article 25". But in my hypothetical example, it does seem that these gangs are violating human rights. Nonetheless, if we were to use Pogge's notion of official disrespect, we wouldn't be able to say that in state X there are violations of human rights.

Let me provide an opposite hypothetical example. On the territory of society Y, with appropriate and effective coercive social institutions that offer an acceptably secure access to the objects of human rights to everyone, a corporation produces various solvents and, by culpable negligence, causes a natural disaster.⁹ Over time hundreds of people will fall seriously ill and many of them die. The government and other institutional agencies prosecute the corporation and its top executives are put on trial and found guilty. While society Y is not rich enough to remedy these environmental damages, the corporation goes bankrupt. Clearly, in this scenario we cannot charge society Y with official disrespect. Even if hundreds of people have suffered what most people would consider a human rights violation *par excellence*, according to Pogge's institutionalism we have to assert that there has been no violation of human rights, pretty much in the same way in which there is no violation when a violent husband beats or kills his wife.

As announced, the roots of these weaknesses in Pogge's account are probably to be found in his broader goal, i.e. to identify a complex and internationally acceptable

core criterion of global justice in terms of human rights. Pogge emphasizes a particular function that human rights have gained recently. Indeed, in the international arena human rights represent a minimal criterion above which we have to respect the principle of sovereignty; but this recently assigned function should not exhaust what human rights are. The criterion of official disrespect is effective as a criterion for defining when the international community should respect national sovereignty but is inaccurate for measuring human rights respect *per se*. Indeed, in my examples, societies X and Y pass the test based on official disrespect and would therefore fully maintain their sovereignty, but egregious violations of human rights would still take place within them. Conversely, societies characterized by official disrespect in and of itself violate human rights (and as a consequence lose their legitimacy before the international community). Official disrespect is thus a sufficient condition for human rights violations, but *pace* Pogge, not a necessary one.

To be sure, one might object that our examples refer to isolated societies and make no reference to the global order. If the global order is brought into the picture, we get back someone/something to blame. The crimes considered, far from remaining out of the scope of human rights concerns, could actually be excellent cases of human rights violations. But, first of all we would have to provide empirical evidence, and we would find it in some cases but not in all. For example, the corporation of our example may have no economic relations with foreign countries or other foreign corporations, and not benefit from the existing rules of the global order. Similar things could be said about the gangs of the first example. Last, but not least, the global order is an actual and contingent social and economic condition, and it might be dangerous to have a conception of human rights dependent on a particular and transient condition.

4. Conflating two different philosophical agendas: human rights and global justice

The main working hypothesis of this paper is that the institutional interpretation hides several dangers, although it seems to provide, at first sight, a way to conceive human rights which is able to overcome serious limits of the orthodox view (Barry - Southwood, 2001). For instance, the justification of the controversial and contested human right to subsistence, as spelled out in article 25 of UDHR, becomes straightforward on the institutional/political conception. The problem with the

institutional interpretation is that it seems to be derived from a very controversial assumption on the relation between the theory of human rights and that of global justice. Scholars who adhere to the institutional interpretation usually have the ambition to provide a complex and internationally acceptable core criterion of basic justice *in the language of human rights*, thereby conflating two different philosophical agendas. The principles of global justice could be different from the requirements of human rights, although obviously they influence each other. As our examples show, one institutional setting could be 'just' according to a certain conception of global justice and yet in its territory huge violations of human rights (for which institutions cannot be held responsible) could occur.

Thus, institutional interpretations make, *mutatis mutandis*, pretty much the same mistake made by Rawls in *The Law of Peoples*, namely unduly expanding one of the functions human rights perform (establishing the limits of legitimate sovereignty) into their very essence. Once human rights are used to define the limits of political acceptability at the global level, much of what they were intended for is lost. They protect individuals much less than they were supposed to do in the original declarations and treaties. In Rawls, the list of human rights is stripped down and they are reduced to four. In institutional interpretations, such as in Pogge's and Beitz's, even if the original list is pretty much untouched, human rights suffer a different downscaling: they protect people only from institutional misbehavior, not from all other sorts of threats coming from non-institutional sources.

Thus, using human rights exclusively for regulating the conduct of institutions - local and global - weakens their normative force. Human rights are high priority norms that ought to protect human beings in any sort of conditions. Moreover, reducing human rights to this function seems to be unfaithful to the very practise of human rights to which the political/institutional conception promises to adhere. Some human rights are traditionally thought *not* to be limits to legitimate sovereignty. It is exemplary the case of Art. 21 of UDHR. According to this article, everyone has the right to live under a democratic regime. Now, it is not clear that we would be ready to limit state sovereignty in the case of an imperfect implementation of such a right when faced with something like a decent people (in the Rawlsian sense). But on the political/institutional conception, we would be bound to deny legitimacy to such states, thereby excluding

most existing states from international recognition. So conceiving human rights as the criterion for legitimate sovereignty may be too demanding.

The last point helps us to see a final problem with the institutional interpretation. Human rights are at the same time too demanding and too relaxed as criteria for legitimate sovereignty. On the one hand, we have just seen that denying recognition to undemocratic yet decent countries sounds too harsh. On the other hand, using human rights to provide a complex and internationally acceptable core criterion of global justice may be too limiting for global justice. Quite simply, defining global justice in terms of human rights means to rule out *a priori* and arbitrarily values that are not present in the most accepted lists of human rights. For instance, all those who say that there is a human right to subsistence (Art. 25 of UDHR) agree that such a right must be conceived as a right to the *minimal* resources necessary for our survival or at most for rational agency (Griffin, 2008). But a more elevated and ambitious standard of living may be required as a matter of global justice. Conflating human rights and global justice thus rules out *a priori* whatever principles of distributive justice other than the duty of assistance we may find as fit. While a conception of human rights can hardly contain an ambitious distributive principle – it would run among other things into the 'claimability' objection (O'Neill, 2008) – this is no reason to rule out such a principle from considerations of global justice. In sum, conflating the two different philosophical agendas entails serious dangers for both of them.

Conclusion

We have argued that the institutional conception of human rights is seriously flawed. Human rights interpretations should be able to take into due consideration the current human rights practice and international human rights doctrine; but precisely for this reason, as well as for others that we have spelt out, we should avoid the institutional interpretation.

Notes:

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² Dorsey (2005) also argues that the language of human rights cannot form a plausible foundation for international obligations. However, this article offers a different, and less radical, argument against the problematic relation between human rights and the global justice agenda.

³ According to Pogge a minimalist interactional account “*disqualifies the human rights to social security, work, rest and leisure, an adequate standard of living, education, or culture postulated in Articles 22-27 of the UDHR on the ground that they essentially entail positive duties*” (Pogge, 2008, pp. 70.)

⁴ In my opinion Pogge takes into consideration a controversial human right, but I cannot detail this aspect here.

⁵ In this case *claim rights* are understood in Hohfeld's sense. (Hohfeld, 1919)

⁶ I want to follow Pogge and his reasoning. (Pogge, 2008, pp. 64).

⁷ “Even if we feel strongly that, in our own culture, human rights ought to be realized through matching individual legal rights, we should allow that human rights can be realized in other way.” (Pogge, 2008, pp. 52).

⁸ Since Pogge recognizes that the leaders of a guerrilla movement can violate Human Rights (Pogge, 2008, pp.64), it is important for the example to work that these gangs are conceived as having a smaller size, and do not have any relationship with each other. They are interested in accumulating wealth.

⁹ Again, Since Pogge recognizes that a large multinational corporation can violate Human Rights (Pogge 2008, pp. 64), it is important for the example to work that this corporation is conceived of as being small and unfit to be described as influencing in any real sense the design of national or global rules.

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