

Submission to Leveson Inquiry into the culture, practices and ethics of the press

John Tasioulas, Quain Professor of Jurisprudence,

Faculty of Laws, University College London

Introduction

My expertise is in moral and legal philosophy generally, and in particular in the philosophy of rights and human rights, rather than in freedom of speech or freedom of the press and such. However, there are two general observations that I believe it would be useful to introduce into the Inquiry's deliberations, observations formulated in the light of two considerations. The first consideration is that the notion of a *right* – to free speech, to a free press – will no doubt figure prominently in the inquiry's deliberations and recommendations. The second is that various fallacies surround the notion of a right and, in particular, of a human right. These fallacies are plausibly described as philosophical because of their abstract and foundational character. If they are not dispelled, they threaten to undermine the cogency of any recommendations that rely upon them. Unfortunately, the fallacies to which I shall refer are widespread in contemporary 'rights talk'.

I should say at the outset that in speaking of rights, I am referring first and foremost to moral rights. These rights are identifiable by moral reasoning, irrespective of whether or not they are embodied in law. And it is a further moral question whether they are properly enforced through law and, if so, what is the best legal-institutional mechanism for giving effect to them. Moral rights, including fundamental human rights, exist independently of the law, and provide a basis for criticizing the law. Insofar as law includes a doctrine of 'rights' or 'human rights', it is in significant part to be understood as the attempt to give institutional shape and force to these background moral rights insofar as it is appropriate to do so through the workings of law and the state.

Rights are not Interests

The first fallacy I wish to address consists in the failure to distinguish between rights (e.g. the right to life) and interests (e.g. one's interest in continuing to live). By 'interests' here I mean the elements of a good life, the realization of which in a person's life makes that life better for the person living it. Whether something furthers a person's interests is an objective matter, one not simply determined by whether he believes it does.

Paradigmatic moral rights serve the interests of their holders: e.g. the right not to be tortured serves the right-holder's interests in avoiding pain, in autonomy, in being able to form intimate and trusting relations with others, and so on. Some philosophers contend that rights are not based on the interests they serve, but rather are themselves basic moral norms that are not derived from any more fundamental consideration, including interests. This is not the view I hold. Instead, I believe

that the basis of rights – the grounds on which we are entitled to assert the existence of a right – characteristically centrally include the interests of the right-holder (Raz 1986: ch.7). But even if rights are justified by reference to the interests of their holders, they are not to be identified with those interests (see Tasioulas (2012): 21-26).

Consider, for example, the case in which A is in dire need of a kidney transplant. It would clearly further A's interest in continuing to live if B were to surrender their spare, healthy kidney to A. So, receiving B's kidney would enhance the fulfilment of A's interest in life. But does A have a right to B's kidney, in virtue of A's right to life? The answer is clearly not. Rights involve counterpart duties: I only have a right to X if someone else is under a duty to me with respect to X. So, in determining whether a right exists, we have to ask whether a putative right-holder's interest in X – the way that having X would actually enhance the quality of their life – suffices to impose a duty on someone else with respect to their access to X. In other words, to discover whether a right exists one must take into account the burdens that recognition of the right would impose on others. In the case under consideration, the burdens imposed on B in making available their spare kidney to A are too onerous to justify imposing a duty on B to do so, such that he would act wrongfully in withholding his spare kidney from A. Nevertheless, B might still donate their kidney, and in so doing could manifest great virtue, e.g. the virtue of charity. But this just goes to show that there is more to morality than the rights-involving component. Individual rights belong to that part of morality in which the interests of individuals, considered in themselves, suffice to impose duties on others to respect or further those interests in various ways.

The upshot of this is that rights are not the same as the interests that ground them; instead, the content of the right is given by the content of its counterpart duties. Therefore, an interest can be unfulfilled or impaired without any rights-violation having taken place. Now, it is no easy matter to determine the precise contours of a given moral right – the content of the duties associated with that right. And in many, if not all, cases pure moral reasoning will only specify certain rough parameters, leaving it to law or social convention to fill in the gaps in order to yield a more determinate and practically workable standard. Still, only when we embark on this process is it appropriate to speak of a 'right'.

Unfortunately, a lot of contemporary rights discourse fails to heed this crucial distinction between rights and interests. This is one important explanation of the phenomenon of rights 'proliferation' – the tendency to describe every valuable goal as a 'right'. If rights are simply interests or valuable goals, then not only will there be very many of them but also, in consequence, they will be readily overridden by other, conflicting valuable goals. This robs rights of their distinctive, normative force. More worryingly, this confusion seems to have become entrenched in the standard legal analysis of constitutional rights. This approach starts from a very broad view of the content of a right – in effect, one that identifies it with some underlying interests – and then, at a second stage, inquires into the justifiability of certain infringements of the 'right' by 'balancing' it against competing considerations, such as public order or national security. Adopting this approach may have some heuristic value in the institutional context of judicial decision-making. However, it seriously threatens to obscure the underlying moral reality, which is that the right is not its underlying interests, but rather the array of duties generated by those interests.

To revert to our initial example: it would be a travesty to say that B's withholding of his kidney from A constitutes a breach of A's right to life, and hence is to that extent *pro tanto* wrongful, but that it is nonetheless justified all things considered, once B's interests (or rights) in autonomy and health are balanced against A's right to life. This is a mistake for the same reason that it is wrong to say that the imprisonment of a justly convicted murderer, for a period of time proportionate to the gravity of his crime, is a violation of his right to liberty, albeit one justified by considerations of retributive justice. In the latter case, the right to liberty does not encompass a duty to refrain from inflicting a deserved punishment on the murderer; in the former case, the right to life does not extend to a duty to provide the right holder with one's kidney if he is in dire need of a transplant.

All of this, of course, applies to a right such as the right to freedom of speech, once we distinguish it from the underlying interest in communicating freely. The existence and content of the right is determined by the counterpart duties, and these are given shape in significant part by considering the burdens that would be imposed on others, including the implications for others' rights. For this reason, there is no question of 'balancing' A's right to defame B against B's interest or right in his reputation, or A's right to reveal top secret information to an enemy state against a collective interest in national security. A proper specification of A's right to free speech would not include a duty to permit him to defame others, just as it would not include a duty to permit him to act treasonously. Sometimes, of course, it is appropriate to speak of a right being justifiably overridden or breached – for example, in a time of national emergency, it might be necessary for the state to violate the liberty rights of individuals who belong to certain classes (e.g. enemy aliens) through a policy of internment. But in these cases, the fact of the breach of a right manifests itself in the subsequent appropriateness of issuing an apology to those affected, or even of compensating them once the state of emergency has passed. But this would not be appropriate in the cases discussed above, e.g. the kidney, murder and defamation cases, and what explains this is the fact that no rights violation – even one all things considered justified – has occurred in those cases.

In short: if we are to have rights to free speech or a free press that are worthy of the name, then we have to distinguish them from anyone's *interest* in free speech or a free press. We have to take seriously the question of specifying the content of the associated duties and also (something I have not considered here) the identity of those who bear those duties. Doing so preserves the integrity and power of the language of rights, preventing rights from being treated merely as considerations that are readily and habitually liable to be overridden in trade-offs against other values.

Rights Have a Non-Rivalrous Relationship to the Common Good

As a starting point, I take the 'public interest' to mean those values the protection and advancement of which properly fall within the remit of 'public' authorities – the various organs of the state, such as Parliament, the judiciary, the executive, the police, and so on. Now, to a philosopher's ear, the phrase 'maximizing the overall public interest', which recurs in the Inquiry's questions, is liable to ring alarm bells. Of course, on one interpretation the phrase is entirely benign precisely because it is rather vacuous: it just means, doing whatever will best ensure the protection and advancement of those evaluative considerations which properly fall within the remit of 'public authorities'. But this piece of jargon also has a less benign interpretation, according to which it encapsulates the utilitarian idea that the ultimate standard of moral rightness, and hence of public policy, is bringing

about that state of affairs that maximizes overall welfare, where maximization involves a process of aggregating interests across persons, so that set-backs to some people's interests are traded-off against greater gains to other people's interests.

If this is what is meant by 'maximizing overall public interest', then the alarm bells are surely warranted. This is because there are powerful reasons for rejecting utilitarianism. First of all, it is unclear whether we can form any reliable view regarding which actions or policies would maximize overall welfare, given the mind-boggling complexity and uncertainty of the calculations involved. Deeper still, the very idea of maximizing welfare may be an incoherent ideal, since human interests encompass such a diversity of elements (knowledge, accomplishment, enjoyment, etc) that there is no single scale on which they can be placed in such a way as to identify the maximally good outcome. Second, the idea that morality demands the impartial maximization of welfare threatens to undermine our sense of personal agency, as individuals with values and commitments of our own. Finally, and perhaps most importantly, is the thought that the maximization of overall welfare licenses grave injustices, as some people's interests are traded off against others', with those losing out potentially having their vital interests sacrificed on the altar of the common good. According to this last objection, the problem is that, within the utilitarian framework, there is in principle no objection to torture or genocide provided the outcome of engaging in these practices maximizes the aggregate fulfilment of interests. (The case against utilitarianism has been most cogently advanced in recent years in Wiggins (2006), chs.6-8).

Now, some philosophers respond to the third difficulty with utilitarianism by advancing the idea that utilitarianism is only part of a sound morality and that, in addition, we need to invoke individual rights, which individuals can deploy as 'trumps' against the maximization of the overall public interest (see Dworkin (1977)). But the problem with this view is that it makes the contestable assumption that the principle of maximizing overall welfare is at least one requirement of morality. But can it be true that there is a genuine moral reason to engage in torture or rape, or the silencing of an unpopular minority, whenever doing so will maximize overall welfare, a reason that may be defeated by a countervailing right possessed by the putative victim? Like many contemporary philosophers, I draw the more radical conclusion that the difficulties with utilitarianism are not to be responded to by seeing it as only part of morality, and so subjecting it to the constraint of non-utilitarian norms, but rather by rejecting it outright. This means that we do not need to introduce rights as part of a rear-guard manoeuvre in response to the problems of utilitarianism; in particular, it means that we do not have to understand the relationship between rights and the public interest as distinctively antagonistic (rights as trumps, or limits on, the public interest).

The kind of non-rivalrous understanding of the relationship between individual rights and the public interest I have in mind has been articulated most powerfully in recent years in separate works by two Oxford legal philosophers, John Finnis (2011a and 2011b) and Joseph Raz (1986 and 1992). Both Finnis and Raz speak not of 'public interest' but the 'common good', a notion whose pedigree stretches back to at least Aristotle, and which resonates with economists' use of the idea of a 'public good'. The precise specification of the idea of a common good is itself a contested matter. But if we think about 'common goods' such as clean air, a state-provided health service, or a democratic political culture, we can see that they exemplify three characteristics: (a) they serve the interests of each and every member of the community; (b) they serve those interests in generally a uniform

fashion; and (c) the serving of one person's interests is not inherently at the expense of serving any other person's interests.

Two preliminary points are worth making here. First, insofar as we speak of e.g. a democratic political culture as a common good, there is no issue of trading off any person's interests against anyone else's. So, the utilitarian approach to 'maximizing' overall interests is simply inapplicable. Second, this is not to deny that at some point trade-offs between the interests (and rights) of individuals might be necessary. However, any such trade-offs will not be under the aegis of the common good, as specified above. Moreover, in any such process of trading-off, special force attaches to those individual interests that ground rights, since these are not merely interests to be taken into account, but sources of moral duties, and a characteristic feature of moral duties is that they neutralize the effect of many countervailing considerations, e.g. of expediency, that might otherwise justify an action or policy.

However, the main point to be made is that, if we understand the notion of the 'common good' in the non-utilitarian, broadly Aristotelian way, outlined above, then there is no fundamental opposition between rights and the common good. On the contrary, the cultivation of a rights-respecting society is itself a common good, because it meets the three conditions outlined above. More generally, the protection of rights is itself a part of the common good of a community, interpreted in the widest sense, since respecting people's rights is an intrinsic element of the common good. This means that the weight attaching to individual rights has a twofold source. In the first instance, it derives from the interests of the individual right-holders, whose interests suffice to impose duties on others. Second, it derives from the common good, since the common good is served precisely by upholding the individual right in question. So, for example, the weight attaching to the right to free speech will reflect not only the right-holder's interest insofar as it is the source of the duty associated with the right, but also the common good of a culture characterized by free speech, a common good that benefits others, in addition to the right-holder. Indeed, Joseph Raz has made the point that the common good served by individual rights is often of greater benefit to individuals than the enjoyment of their own civil and political rights (Raz 1992: 137).

To this extent, then, it is a mistake to conceive of rights as exclusively 'individualistic' moral norms that protect the interests of the individual against the demands of the common good. The very idea of such an antagonism between individual rights and the common good is itself a fallacy, one that reflects the baleful influence of utilitarian modes of thought, even on those who regard themselves as stern critics of that doctrine. It would be regrettable if the basic framework adopted by the Inquiry perpetuated this fallacy.

References

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