FESTSKRIFT TILL

Elisabeth Rynning

Integritet och rättssäkerhet inom och bortom den medicinska rätten

Festskrift till Elisabeth Rynning

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Innehåll

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The Concept of Human Rights in the UDHR and the Rule of Law for the World Today

Introduction

The idea of human rights is central to the liberal idea of governance by the rule of law. In this chapter, we argue that the concept of human rights employed in the United Nations Declaration of Human Rights 1948 (UDHR) presupposes that Alan Gewirth's Principle of Generic Consistency (PGC) is the supreme principle of human rights.[1] We reflect on the degree to which two appeals to human rights of those opposed to state interference with their freedom to dispose of their bodies as they wish accord with the UDHR. These appeals are to a right not to wear masks and to refuse vaccinations during the COVID-19 pandemic, and a right to abortion. We also reflect on the extent to which actions of Western Democracies during the COVID-19 pandemic are in line with their declared commitment to human rights. Specifically, we argue that commitment to human rights presupposes the existence of a categorical imperative, Immanuel Kant's Formula of Universal Law, as the *a priori* law of human agential self-understanding. This implies that all human agents have inalienable rights to what Gewirth calls

[1] See below for what the PGC requires.

'generic rights' under his PGC, which are both positive and negative under the will conception of rights. On this basis we argue that:

(1) there is a prima facie duty to wear masks and accept vaccinations to prevent the spread of infectious diseases like COVID-19;
(2) intrinsic duties to unborn humans, though proportionate exceptions to the duty to save their lives must be permitted; and
(3) national sovereignty is at most an instrumental good, even though that is not how Western Democracies tend to view it.

Human Rights and the PGC

Although the UDHR is not legally binding in its own right, all human rights conventions promulgated by the United Nations purport to give legal effect to rights expressed in it, as does the European Convention on Human Rights (ECHR). This they can only do if they operate with the concept of human rights it asserts, which is succinctly stated in Articles 1 and 2 of the Declaration. Consequently, our analysis is not merely a Gewirthian philosophical take on human rights. It is directly legally relevant. Although the rights in the UDHR have been subject to elaboration and interpretation in their implementation, it is impermissible to depart from what is clearly contained in Articles 1 and 2 of the UDHR, the content of which is reproduced in, e.g., Article 14 ECHR.

According to Article 1 UDHR,

> All human beings are born equal in dignity and human rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2 declares that human rights are possessed

> without distinction of any kind … [and not on] … the basis of the political, jurisdictional or international status of the country or territory to which a person belongs.

Hereby, human rights are declared to be inalienable, possessed simply by virtue of being human and human agents (those endowed with reason and conscience) are unconditionally bound to act in accord with them. This entails that 'Act in accord with the strict requirements of rights possessed by human beings simply by being human' is presumed to be a categorical imperative.

However, as Immanuel Kant maintains, there can be only one categorical imperative.[2] This is because two imperatives that govern all human action inalienably would cancel each other out if they are incompatible, whereas two such compatible imperatives would be combinable into a single imperative.

Furthermore, Kant is right that understanding the concept of a categorical imperative requires acceptance of the principle 'Act only in accord with that maxim which you can at the same time will to be a universal law', which is generally known as the Formula of Universal Law. This is because an imperative can only be categorical for any human agent (e.g., Agnes) if all human agents must accept it unconditionally, which can only be the case if Agnes must adopt it to avoid implying that she is not an agent. As such, the Formula of Universal Law is the requirement to act only in accord with the strict requirements of human agential self-understanding, and so may also be designated the Imperative of Human Agential Self-Understanding.

We also contend that no one can understand the concept of a categorical imperative without accepting it because no one can understand anything without possessing the powers that make human agential self-understanding possible. It follows that it is unintelligible to deny that one is strictly required to think and act in accord with the Imperative of Human Agential Self-Understanding. However, we need not argue this here, because anyone who accepts that there are human rights per the UDHR must accept that there is a categorical imperative, which they can only do by understanding its concept.

Although the Imperative of Human Agential Self-Understanding is not a substantive imperative, human agential self-understanding itself provides it with a material content. This is what, in effect, Gewirth's argument for the PGC aims to prove.[3]

Human agents are finite embodied beings who adopt means to try to achieve the purposes they have chosen. As such, Agnes must accept that if doing or having something (X) is necessary for her to achieve her chosen purpose (P) then she must do or secure X or give up P. That is, Agnes must accept the Principle of Hypothetical Imperatives or misunderstand what it

[2] Immanuel Kant, *Groundwork of the Metaphysics of Morals*, ed. and trans. Mary Gregor (1998, Cambridge: Cambridge University Press, AK 4:420). We employ the standard Prussian Academy (AK) volume and page numbering for Kant's works.

[3] See Alan Gewirth, *Reason and Morality* (1978, Chicago: University of Chicago Press). For a comprehensive defence of Gewirth's argument, see Deryck Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency*. (1991, Chicago: University of Chicago Press).

is for her to be a human agent, thereby implying that she is not a human agent. In Gewirth's terminology, the Principle of Hypothetical Imperatives is 'dialectically necessary' for Agnes.[4] The Imperative of Human Agential Self-Understanding is thereby the requirement to act only in accord with one's dialectically necessary requirements.

Now, there are some needs or conditions, 'generic needs', that Agnes must have in order to be able to act at all or with any general chances of success regardless of what her purposes are or who she is (i.e., simply by being a human agent). These are the necessary means to achieve her purposes, the non-possession of which will, at least to some extent or in some way, hinder her from being able to achieve any of her possible purposes. Here, it will suffice to say that the generic needs include freedom to choose one's purposes, life (and the necessary means to this, like health, clothing, food, and shelter), and the mental equilibrium needed to pursue one's chosen purposes.[5]

It follows that it is a strict requirement of human agential self-understanding (dialectically necessary) for Agnes to accept 'I unconditionally ought to act to defend my possession of the generic needs unless I am willing to accept generic damage to my ability to act.' Furthermore, because Agnes requires the generic needs to defend her possession of them, she must accept 'I unconditionally ought to have the generic needs unless I am willing to accept generic damage to my ability to act', which is to say that Agnes must consider that she has both positive and negative rights to possess the generic needs (generic rights) under the will conception of rights.

We consider that Gewirth is right that the dialectical necessity for Agnes to consider that she has the generic rights logically entails that it is dialectically necessary for her to consider that she need be no more than a human agent as such to have the generic rights, which entails that she must consider that all other human agents (e.g., Brian) have the generic rights.

However, whether this is so or not, if Agnes considers that there are human rights per the UDHR, she must consider that all human agents have the generic rights equally. Because the UDHR proclaims that all human *beings* equally have human rights, it implicitly declares that all human *agents* equally have them. Because human rights, as rights, impose duties on agents, and possession of the generic needs is required by all action, it follows that human rights must, at the very least, include the generic rights. Furthermore,

[4] 'Dialectical' arguments are those conducted from the internal perspective of an agent and they are 'necessary' where they draw out the strict implications of premises that cannot be coherently denied within that perspective: see Gewirth, *Reason and Morality*, 42–47.

[5] See further Gewirth, *Reason and Morality*, 54.

because acceptance of the Principle of Hypothetical Imperatives is dialectically necessary, these rights must be rights under the will conception. Finally, these rights must be positive as well as negative for two reasons: they are needed to exercise any rights and Article 1 UDHR imposes duties on human agents to act in a 'spirit of brotherhood'.

Therefore, the UDHR implies that all human agents must act in accord with the PGC: '*Act in accord with the generic rights of your recipients as well as of yourself*', 'your recipients' being those agents who stand to be negatively affected by your actions.[6]

A Duty to Protect Others from COVID-19

Freedom of choice is a generic right. But this does not grant a licence to Agnes to do anything she pleases. It only grants her a licence to do as she pleases if doing so is at the same time consistent with the like freedom of others. Since human agents require the generic needs in order to act, Agnes's unconditional generic right to freedom permits her to do as she pleases only when doing so has, or will have, no negative effects on possession of the generic needs by another (e.g., Brian) against his will.

Libertarians adhere to the will conception of inherent rights, but claim that these rights are only negative, that Agnes has an inherent duty not to do things that themselves harm others but no inherent duty (i.e., one she has not chosen to have, e.g., by contracting to be a fire or police officer or a soldier) to protect or rescue others from harms that are not brought about by Agnes's own positive actions (omissions not necessarily being recognised as positive actions). In line with this, Agnes has no inherent duty to wear a mask or to be vaccinated to protect either herself or others against COVID-19, and governments act immorally (violate human rights) if they impose such duties or lockdowns by law on any persons against their will.[7] That doing so might be necessary to save lives is deemed to be irrelevant because COVID-19 does not exist because of Agnes's positive actions.

However, on our analysis, this position is incompatible with commitment to human rights per the PGC, hence incompatible with the UDHR. Anyone (thus any legal system) that proclaims adherence to human rights per the UDHR must, in consistency with this, impose a duty on Agnes to assist Brian

[6] Gewirth, *Reason and Morality*, 135. See further Deryck Beyleveld, 'The Principle of Generic Consistency as the Supreme Principle of Human Rights' (2011) 13(1) *Human Rights Review* 1.

[7] See, e.g., Justin Bernstein, 'The Case against Libertarian Arguments for Compulsory Vaccination' (2017) 43(11) *Journal of Medical Ethics* 792, who argues that libertarian arguments for compulsory vaccination made hitherto are inconsistent with their libertarian premises.

to protect his life when he cannot protect it adequately himself and wishes this assistance, *unless* complying with this duty will disproportionately have a negative effect on Agnes's or yet other agents' possession of the generic needs against their will.[8]

The only absolute duty that Agnes's commitment to human rights imposes on her is to act in accord with the PGC. All her other rights and duties, whether positive or negative, are prima facie only, and conflicts between them are to be arbitrated by the criterion of needfulness for agency. Consequently, the duties to wear masks, accept vaccinations, and impose lockdowns are subject to compliance with them not causing more serious generic harms to human agents than are threatened by COVID-19.

We cannot, here, provide a comprehensive analysis of this assessment, let alone of its application, so we will only indicate some of the things that need to be considered. We accept, but do not examine, the claim that masks, vaccinations, and lockdowns are capable of significantly reducing transmission of COVID-19. We similarly accept that COVID-19 poses a material risk to the life or health of those exposed to the virus, unless and until they develop an effective immune response.

Wearing a mask is generally no more than an inconvenience and discomfort, though these effects can be magnified by prolonged duration or frequency of use. Where Agnes does not suffer from atypical physical or psychological effects, she has a positive duty to wear a readily obtainable mask when she is interacting with others outside her household. This obligation would generally no longer arise once Agnes is able to rely on other equally or more effective means of reducing the risk to others, such as vaccination.

Since assisting those in need often requires coordinated collective action, in a complex society the discharge of many positive duties will fall primarily on the state and its institutions. In this context, the state has an obligation to ensure that individuals have access to appropriate means of reducing the risk of transmission of COVID-19. This includes facilitating the creation of suitable vaccines and ensuring widespread vaccination takes place thereafter. Agnes has a prima facie duty to accept the offer of a vaccination where it significantly reduces the risk of infection (or at least transmission of COVID-19 to others) and carries side-effects of less severity or likelihood than the effects of COVID-19. But no such duty arises, or has overriding

[8] Proportionality is to be assessed by a criterion of degrees of needfulness (or necessity) for action (see Gewirth, *Reason and Morality*, 53–58 and *The Community of Rights* (1996, Chicago: University of Chicago Press), 45–46 that (in the final analysis) ranks generic needs on the basis of whether the possession of one is necessary or not for the possession of another.

weight, if vaccination imposes a disproportionate burden (as measured by the criterion of needfulness for action) on Agnes. Some persons are, for example, allergic to vaccines or are unable to benefit from them or have an extreme phobia of needles so that administration is traumatising.

Time-limited lockdowns and restrictions on freedom of movement can be appropriate regulatory responses only where they provide an effective and proportionate means of reducing transmission within the population. The benefits of lockdowns are increased by mask and vaccination hesitancy and can, paradoxically, include increased freedom of movement for some, such as by reducing the risk of exposure from essential trips. But lockdowns are significant deprivations of liberty with potentially long-term effects on mental health and the ability of persons to make a living (and thereby provide for their own generic needs). The burdens of lockdowns are not distributed evenly: some have greater caring responsibilities or more limited facilities available to them (such as access to outdoor spaces or food delivery services). Thus, lockdowns require the state to provide additional assistance to those who would otherwise have to bear a disproportionate burden.

A Right to Abortions

Theories like Kant's and Gewirth's accord no inherent moral status to non-agents. It is generally thought that this means that they do not grant inherent rights to unborn human beings or born human beings who lack the behavioural capacities of agents. The PGC grants the generic rights only to agents. Thus, it might seem that the PGC, even if it is the supreme principle of human rights, prohibits abortion at any stage against the wishes of the mother only if permitting it would interfere with more important generic rights of another human who behaves like an agent. But this is false. While the generic rights, being rights under the will conception, cannot intelligibly be granted to beings unable to display agency capacities, it does not follow that the PGC does not impose duties on agents to protect unborn humans for their own sakes, correlative to which it grants inalienable rights.

To understand why this is so, it is necessary to appreciate that Agnes can only be certain that she herself is an agent. Because agency requires self-consciousness (which involves powers of understanding, judgement, and reason), she can (at best) know that Brian behaves as though he is an agent. However, since Agnes is categorically bound to obey the PGC, she may not deny any agent the generic rights when it is possible for her to do so. If she treats Brian (who just happens to be an agent) as a non-agent, she violates the PGC whenever it is possible for her to treat him as an agent, which is the

case when he behaves like an agent. But, if she treats him as an agent when he is not, she does not violate the PGC. Therefore, she must treat all human beings who behave as though they have the capacities of agency (which we have previously variously called 'ostensible agents' or 'apparent agents', but here will call 'agent behavers') as agents.

Equally, Agnes cannot know that non-agent behavers (those unable to display the capacities of agency) are not agents. Thus, the PGC requires her to take precautionary measures not to discount the possibility that they are agents. However, because non-agent behavers cannot behave like agents, Agnes cannot grant them generic rights. Nevertheless, some of them have properties related to their behavioural capacities that correspond to the generic needs of agents. Some are alive, and some of them can display signs of pain, pleasure, and affection. Some can even display problem-solving abilities. Indeed, the abilities of some are such that Agnes cannot be sure that they do not behave as though they are self-aware.

It follows that non-agent behavers can be placed in a hierarchy according to how closely they approach being agent behavers by virtue of interests they have that would be generic rights if they are agents. Inanimate objects, like tables, display no such interests, whereas all living things display these to some extent. According to the degree that a being approaches being an agent behaver, the being has a precautionary probability of being an agent, in accordance with which Agnes has a duty to protect its interests, correlative to which the being has inherent rights that are not generic rights (they are 'interest rights', rather than 'will rights'). We cannot, here, elaborate on the rankings of various living things. Their status is discussed further elsewhere.[9] For present purposes, it will suffice to say that we have argued elsewhere that being a potential agent behaver, the concept of which is applicable to unborn humans, is an additional, independent factor that adds to the precautionary probability that the being is an agent.[10]

It follows that Agnes has a duty to protect the life of human embryos, foetuses, babies, and young children in proportion to the degree to which

[9] See, e.g., Deryck Beyleveld and Shaun D. Pattinson, 'Precautionary Reasoning as a Link to Moral Action' in Michael Boylan (ed.) *Medical Ethics* (2000, Upper Saddle River NJ: Prentice-Hall), 39; Shaun D. Pattinson, *Influencing Traits Before Birth* (2002, Aldershot: Ashgate), esp. 71–75; and Deryck Beyleveld and Shaun D. Pattinson, 'Defending Moral Precaution as a Solution to the Problem of Other Minds: A Reply to Holm and Coggon' (2010) 23(2) *Ratio Juris* 258 (responding to Søren Holm and John Coggon, 'A Cautionary Note Against "Precautionary Reasoning" in Action Guiding Morality' (2008) 22(2) *Ratio Juris* 295).

[10] See Beyleveld and Pattinson 'Precautionary Reasoning', 50–52 and Shaun D. Pattinson, *Law at the Frontiers of Biomedicine: Creating, Enhancing and Extending Human Life*. (2023, Oxford: Hart Publishing), 104 (responding to Holm and Coggon 'A Cautionary Note', 302).

they approach apparent agency. However, potentiality must be distinguished from 'futurality'. Potential agent behavers have *generic* rights as future agent behavers. They do not, however, have generic rights to become or be allowed to develop into agent behavers. Futurality imposes duties to treat potential agent behavers in such a way that they will be able to have the generic needs if, and when, they become agent behavers.[11]

Assessing the precautionary status of unborn potential agent behavers is complex. If the life of an agent behaver conflicts with the life of a human foetus, then the life of the agent behaver must be given priority unless the agent behaver wills otherwise. But, while degrees of approach to apparent agency can produce at least some degree or ordinal ranking of approach to apparent agency, and the importance of generic needs can also be ranked ordinally to an extent, no cardinal rankings can be given except to apparent agency ('1' on the scale of the precautionary probability of agency) (in relation to which the precautionary probability of the agency of a table is 0) and life ('1' or '100%', on its importance to agency). To complicate matters further, while precautionary importance for agency only applies when there is a precautionary probability of agency above 0, it does not follow that a precautionary probability of 0.5 is to be given the same weight as an importance for agency of 0.5 (even if such cardinal values could be assigned).

These considerations are of direct importance to whether a pregnant agent behaver (e.g., Chris) has a right to abortion. They imply the following.

If the continued lives of Chris and the developing human are incompatible, then abortion is permitted at any stage of pregnancy. No one other than Chris has any legitimate say in whether an abortion should be performed or not if Chris is able to reach a decision. If Chris is not, then, unless there is clear evidence that Chris would wish to sacrifice Chris's life, an abortion should be performed by any available person able to do so.

Any problem only arises when the life of Chris is not at stake. Two questions then arise. On what principled basis is the decision to be made, and who has *locus standi* to make the decision?

The second of these questions is, at first sight, easier to answer than the first. It should be clear that Chris has the most standing; some might say that Chris is the only one with any standing. But this cannot be true if it grants Chris an absolutely unfettered licence to decide as Chris wishes. Granting such a licence presupposes that the foetus in Chris's womb has no status at

[11] See Deryck Beyleveld, Oliver Quarrell, and Stuart Toddington, 'Generic Consistency in the Reproductive Enterprise: Ethical and Legal Implications of Exclusion Testing for Huntington's Disease' (1998) 3(2&3) *Medical Law International* 135.

all. There must be some fettering of Chris's discretion that is dictated by the PGC, and it is only when the PGC permits any agent discretion to decide that Chris has this discretion. What we can say is that, when Chris has discretion, that discretion is complete unless its exercise threatens the PGC-protected rights of others disproportionately in relation to those of Chris. It is only when others are so affected that they have any say.

This, however, implies that it is necessary to answer the first question in order to be able to apply the answer to the second question. Now, on the basis that the unborn are to be accorded increasing status as they approach being agent behavers, to answer the first question requires being able to say what limits this places on Chris's discretion to decide. In our opinion, until the fertilised ovum is incapable of splitting so as to be able to generate more than one child, Chris has complete discretion. Consequently, there can be no objection to the morning-after pill. Some persons, on religious grounds, believe that the unborn have status (indeed, full status) from conception. If Chris happens to hold such beliefs, then Chris is entitled to decline an abortion on this basis, but no one else is permitted to fetter Chris's discretion on this basis as there is no rational ground on which religious beliefs can be compelled.

Where the foetus is on a development trajectory towards live birth and reaches the stage at which its brain development and responsiveness to stimuli suggest awareness of its surroundings, then the only basis on which an abortion should be permitted is that not doing so threatens Chris's life or basic well-being. In early pregnancy, Chris's wishes could be regarded as determinate on the ground that the standard stresses of pregnancy and childbirth on the body mean that continued pregnancy, up to at least 12 weeks gestation, presents greater risk to the pregnant individual's life and physical health than are presented by abortion performed in accordance with best practice.[12]

It might be thought that a crucial developmental stage is the point at which the unborn could survive on its own, outside Chris's body. Indeed, the greater likelihood of survival outside the womb, the weaker the foetus's right to remain in Chris's body against Chris's will. But abortion involves the termination of the foetus's life and the likelihood of survival outside the womb (which varies according to access to facilities and technological developments) weakens the case for termination only because it is loosely

[12] See, e.g., RCOG (Royal College of Obstetricians and Gynaecologists) (2015) *Best Practice in Comprehensive Abortion Care*.

correlated to the development of the foetus's brain, awareness and other characteristics associated with the potential for agency behaviour.

Clearly, the closer the foetus becomes to being an agent behaver, the more important its life becomes. At the same time, the less the extent to which requiring Chris to carry the unborn to term would interfere with Chris's possession of the generic needs, the less legitimate it becomes for Chis to have their pregnancy terminated.

Chris should not be required to continue with a pregnancy brought about by rape. This is because the continuance of pregnancy is likely to increase and prolong the basic generic harm inflicted by the rape. While rape indicates that Chris has no responsibility for the pregnancy (so is in no way responsible for the subsequent conflict of rights), the converse inference cannot be legitimately drawn for consensual sexual intercourse for two reasons.[13] First, the only way that a fertile heterosexual female who wishes to engage in vaginal intercourse can completely remove its potential to cause pregnancy is to repress her wishes and abstain, which profoundly restricts the exercise of her generic rights. Secondly, the enquiries needed to determine Chris's responsibility for the pregnancy would be very invasive, open to abuse, likely to result in mistaken conclusions and likely to facilitate the continued sexual repression of women.

Foetal abnormality is directly relevant to the right to abortion where it indicates that the resulting child is unlikely to survive or become an agent behaver. In our view, in more controversial or complex cases, including but not restricted to those involving foetal abnormality, the discretion granted to Chris must be proportional to the level of readily available pre- and post-birth support. The availability of abortion will therefore need to be greater in states offering little post-birth support than in states offering extensive post-birth support. It seems to us, however, that this is the converse of the position in many existing states.

To all of this it might be objected that, because the UDHR grants all its rights to all human beings, our argument that the PGC is the supreme principle of human rights per the UDHR is fundamentally flawed. This is also false. Although, Article 1 UDHR grants human rights to all human beings, it says that they are endowed with reason and conscience and owe duties to each other. But only agent behavers display reason and conscience, which complicates the attribution of equal rights to all human beings. Some might think that this implies that Article 1 UDHR is self-contradictory. However, such a conclusion can be avoided if, as we just argued, not all human

[13] Cf. Mary Anne Warren 'On the Moral and Legal Status of Abortion' (1973) 57 *Monist* 43.

rights are interpreted as generic rights. In line with this, the declaration that all human beings are equal in dignity and rights must be interpreted in a particular way. It cannot mean that the rights of all human beings are equal. Since only human agents and agent behavers can have duties, to suppose that human non-agent behavers have universally equal rights to them is self-contradictory. If human agents and agent behavers have duties to respect human non-agent behavers that the latter cannot reciprocate, then the rights of human non-agent behavers are more important than those of human agents and agent behavers. Thus, to avoid Article 1 UDHR being self-contradictory, 'being equal in dignity and rights' can only mean 'being equally under the protection of human rights', which (given our analysis) means 'equally under the protection of the PGC'. According to the Preamble to the UN's International Covenant on Civil and Political Rights, dignity is the basis of all human rights and fundamental freedoms. As such, it is not a principle (though it has one, the PGC), but the property that enables human beings to possess human rights and fundamental freedoms. This property is agency. Although not all human beings necessarily have it, given our precautionary argument, it is nonetheless the basis on which all human beings have inalienable rights against all human agents and agent behavers.

There is nothing strange about this. The fact is that only those who display agency can recognise any rights or duties. Thus, any justification for rights and duties must be on the basis of what they must accept. Reasons *for them* to accept that anyone or anything has inalienable rights or duties must render at least themselves the bearers of these rights and duties and can only extend this grant to any others by grounding it unconditionally in some way, directly or indirectly, in the possession of agency. Because human rights are, by their concept inalienable and possessed simply by virtue of being human, acceptance of them presupposes that there is a categorical imperative: 'Act only in accord with human rights and duties'. But, because justification for this must be given to agents, this (as a *categorical* imperative) can only be justified by showing that human agents contradict that they are agents if they do not accept it. This, in turn, presupposes that human rights can only be justified as a strict requirement of human agential self-understanding, and that *the* categorical imperative is 'Act only in accord with the strict requirements of human agential self-understanding', which (we contend) is self-evidenced as a categorical imperative because the powers that make human agential self-understanding possible must be possessed to be able to think anything at all. Justification of human rights per the UDHR requires that the PGC be justified as being a strict requirement of human agential self-understanding, which is what Gewirth's dialectically necessary argu-

ment purports to do. We think he is right, but our claim is that whether Gewirth is right or not, anyone who believes in the existence of human rights presupposes that he is.[14]

National Sovereignty?

Belief in human rights, as Article 2 UDHR makes perfectly clear, is antithetical to belief in national sovereignty as against subsidiarity. It is tantamount to belief in cultural relativism as against cultural pluralism; the former denying the very possibility of inherent inalienable rights possessed by all, the latter permitting variable norms so long as they are consistent with the inalienable universal rights. National sovereignty as the supreme inalienable value is no more than tribalism writ large, which is no more than blood family exclusivism writ large, which itself is no more than narcissistic egotism writ large, which presupposes that might is right in the final analysis. In an episode of the American TV series NCIS Los Angeles, one of the main characters declares that allegiance to family is not just very important, it is the only thing that ultimately matters, justifying any actions whatsoever to defend a family member against lawful reprisal no matter what the family member has done. The irony of this, to put it mildly, coming from someone supposedly committed to the law of a country supposedly grounded in the American Bill of Rights is inescapable.

In fact, commitment to the existence of human rights entails that the only fully acceptable world order is a federation of states organised in conformity with the PGC as the fundamental constitutional principle of all of them. In other words, it entails the existence of 'one kingdom' of ends governed by the PGC as the categorical imperative.

None of this, however, is to say that national sovereignty cannot be an instrumental good. But the extent to which it is so is conditional on the

[14] Indeed, we think that it follows from this that anyone who even has the concept of a categorical imperative (which is necessary to fully understand the concept of a hypothetical imperative, which one must understand to understand what it is to be a human agent) must consider that 'Act only in accord with the strict requirements of human agential self-understanding is the categorical imperative, and that this is what Immanuel Kant, *Critique of Practical Reason*, ed. and trans. Mary Gregor (1997, Cambridge: Cambridge University Press, AK 5:32) means when he calls the moral law 'the sole fact of pure reason'. We will not, however, attempt to justify this here. See Deryck Beyleveld and Marcus Düwell, *The Sole Fact of Pure Reason: Kant's Quasi-Ontological Argument for the Categorical Imperative* (2020, Berlin: De Gruyter) and Deryck Beyleveld, 'Why Any Legal Positivist Idea of Obligation is Untenable: A Kantian-Gewirthian Synthesis' in Stefano Bertea and Deryck Beyleveld (eds.), *Theories of Legal Obligation* (2024, Berlin: Springer) (forthcoming).

extent to which it is operated in conformity with the PGC. Thus, a country may legitimately claim sovereignty for its laws and act in accordance with this only to the extent that this is necessary to protect itself from the actions of nations (as well as other groups and individuals) that are not compliant with the PGC.

A basic point here is that the PGC requires all human agents whose possession of the generic needs stands to be affected by the decisions and actions of others to have a say in this. In a globalised world, in which there are limited barriers to communication and travel, and numerous other ways in which the actions of one country can and do have potentially negative human rights relevant effects on persons in other countries, no country can claim to be democratic in the way that the PGC requires, unless all who stand to be affected by its actions and laws have a say in them. The PGC, thus human rights properly conceived, not only places limits on legitimate choices directly, it also grounds democracy as the basis for the subsidiarity it permits and requires for decisions that it does not directly prescribe or prohibit. In other words, it sets the conditions for the legitimate delegation of authority to make the decisions it permits.

During the COVID pandemic, states best placed to finance the development, manufacture and distribution of personal protective equipment (such as masks), medical equipment (such as ventilators), and vaccines often sought to prioritise their own citizens over those of other states. Not only were resource allocative decisions made without the democratic engagement of the marginalised citizens in other states, they were not tailored to protecting the most important generic rights of the global population.

Concluding Remarks

The picture we have drawn depicts the ideal requirements of the PGC as the supreme principle of human rights. However, no country in the world has the PGC as its supreme constitutional principle, and many of them operate in ways that are incompatible with the requirements of the PGC. Any attempt to impose the requirements of the PGC by law could be unrealistic. Indeed, it could lead to greater violations of the PGC. There can be obligations to obey unjust laws, not because positive law is necessarily in line with the PGC, but because collateral considerations deriving from the PGC require it.[15] It follows from this that, in actual practice, it might not be PGC-

[15] See Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* (1986, London: Sweet and Maxwell). Reprinted 1994, Sheffield: Sheffield Academic Press.

legitimate to attempt to enforce mask wearing or vaccinations in pandemics, and compromises over the right to abortions *might* have to be tolerated as the lesser of two evils. However, precisely because this is so, it remains the duty of every agent to do what the agent can to remove the causes of the collateralities. That these are due to social conditions deriving from power structures and beliefs held only means that everyone must do what they can to alter these conditions.[16] That there is no guarantee that they will be able to do so is simply a fact of the human social condition. But what we can say is that, given the current environments, and health threats facing humanity, unless there is rapid and radical change in the cultural and political currents that appear to be dominant, governance by the rule of law in even a compromise way is under serious threat, and with it the very continued existence of the human race.[17]

[16] See e.g. Pattinson, *Law at the Frontiers of Biomedicine* on how the PGC could be operationalised by judges and legislators acting within the UK's existing institutions and constitutional framework.

[17] See further Deryck Beyleveld and Roger Brownsword, 'The Future Possibility of Bioethics, Biolaw and the Rule of Law' in Deryck Beyleveld, Roger Brownsword and Marcus Düwell (eds.), *A Research Handbook on Law, Governance and Bioethics* (2024, Cheltenham: Edward Elgar) (forthcoming).