

Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation), Order of 19 April 2017, paras. 72–77, 80–83). One hopes the author will elaborate further on this topic in his future writings.

The concluding chapter of the book, which is dedicated to provisional measures as an instrument of litigation strategy, is of particular interest. Miles effectively brings together various writers' approaches to the use and abuse of provisional measures, the purposes of requests for provisional measures and issues of compliance. Unlike recent studies which downplay the use of provisional measures in the absence of compliance by respondent states, Miles convincingly concludes that "an application for interim relief may nevertheless be used to apply pressure to [the] respondent [state]" (p. 471). However, such an application comes at a risk of removing the "surprise effect" which the applicant state's argument can have, since "[a] fully argued application for interim relief will ... give the respondent an appreciation of the applicant's case" (p. 446). Practitioners dealing with requests for provisional measures are likely to find Miles's discussion helpful and instructive.

Provisional Measures before International Courts and Tribunals is a work to feature prominently on the bookshelves of international legal academics, judges and practitioners. Miles has written a monograph which is likely to be regarded as a classic in its field, both because of its depth of analysis, and because of its valuable comparative perspective.

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One Another's Equals: The Basis of Human Equality. By JEREMY WALDRON
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We humans could hardly be any more different. We differ in age and acumen, in class and character, in ethnicity and education, and in size and shape. Despite these differences we consider ourselves to be fundamentally equal. Resolving how equality is possible without uniformity is the exacting task Jeremy Waldron has assigned himself in *One Another's Equals*. In essence, the principle of basic equality for which Waldron argues holds that there are no distinctions in kind between one human and another which would justify treating them differently in the way that humans and other animals are treated differently.

What makes such differential treatment inadmissible within the human realm? Waldron's answer is that basic equality can be grounded in a set of natural properties that are only part of humans' organic makeup. In contrast to other foundationalist approaches, Waldron's does not zero in on certain equality-grounding properties in a freeze-frame way. Instead, it conceives of the grounding set of properties in a more dynamic way. The relevant properties, Waldron argues, must be considered to be on a *trajectory*, which takes into account how these properties emerge, develop and founder over time. According to Waldron, the properties of all human beings are on such a trajectory: every human individual has a story as to how, in his or her case, these properties have (or have not) developed. The mere fact that the relevant properties are on a trajectory could not account for why only humans should be considered equals, however. After all, the properties of all living beings are on a trajectory. Waldron therefore adds *teleology* as the

second mark of the set of properties that ground equality. Far from being random, Waldron argues, the trajectory of human properties has a particular *telos*, namely the full development of the relevant properties. Only human beings are on a trajectory with the aim of bringing their capacities to full flourishing.

One Another's Equals has to be commended for its courage to defend a foundationalist account of basic equality, and can be considered one of the more plausible such accounts to date. Although anti-foundationalist approaches may in practice be more successful than Waldron acknowledges, he is right in arguing that these approaches cannot forever avoid drawing on facts that render their normative principles intelligible and sensible. Because of its intellectual charitableness and analytic rigour, Waldron's book serves as an excellent test case for the foundationalist egalitarian approach. In fact, Waldron's theory exposes a fatal dilemma that egalitarians of his kind face: in an effort to dismiss claims that some humans are of a different kind to others, they marginalise the very humans they aimed to include in the community of equals. This dilemma is caused by the fact that foundationalist egalitarians require a conceptual device that allows basic human equality to be upheld in spite of the manifold differences of human beings. Most suited for this purpose are "range properties", that is, properties that are understood to have a certain threshold (or range) above (or within) which all who possess the property possess it equally. Typically, the properties selected as range properties are distinctive of the human species, since their purpose is to provide a ground for the equality of all and only human beings. Waldron leaves it open in his book as to what exactly the range properties are that he takes to ground human equality. However, two properties pop up often over the course of the book: moral agency and rationality. Invoking the device of the range property, Waldron argues that while it is true that humans possess agency and rationality to different degrees, they are all equal agents and rational beings as long as they pass a certain threshold of agency or rationality.

While most human beings pass the necessary thresholds, some others who are profoundly mentally disabled do not. They are on a trajectory that has gone astray, so to speak, travelling to a place far beyond the "standard deviation" of "normal" human beings. Waldron sees this problem and argues that there are two different routes one can take to include the profoundly disabled in the community of equals despite their falling short of the relevant thresholds. According to the first route, the profoundly disabled are seen as having at least had the *potential* to reach the *telos* of becoming, say, fully rational. They, too, had the organic infrastructure shared by all human beings, but in their case the organic infrastructure has malfunctioned. This is a widespread and problematic argument. A first and important difficulty, which Waldron leaves unaddressed, is that profoundly disabled humans whose disabilities have a genetic cause never possessed the organic bases that would have conferred on them the potential to develop "normally". Second, even if they did possess those bases, solid objections have been raised against resorting to the potential possession of a property to ground a normative status, such as basic equality. Surely conscious of these difficulties, Waldron presents us with an alternative route to extending basic equality to the profoundly disabled which avoids the pitfalls of potentiality. On this route, the equality-grounding properties are properties that are *actually* realised by a human being at a certain moment in his or her life. What matters, on this more complex approach, are the capacities humans develop over the course of their lives and their exercise of those; that is, what matters is the extent to which humans realise their potential. These two routes, Waldron clarifies, should only be used as the last resort of a "two-track model" (p. 254). We should always start with the first track and try, as far as possible, to view human

beings as falling within the normal range of the human trajectory. Only if we cannot possibly do so should we invoke either the pure potentiality or the actuality route to include them in the community of equals.

The prioritisation of the first track in Waldron's model brings to the fore the crucial problem of his approach. In order to ground basic equality in human properties, foundationalist egalitarians single out characteristics which they interpret as range properties so as to include as many humans as possible. In doing so, however, foundationalists inevitably set a benchmark against which every human is to be measured; a standard of which exactly those human beings fall short whom Waldron assures us egalitarians are "grimly determined" to include "as humans and as our equals" (p. 252). For the purposes of basic equality, and the fundamental rights that go with it, these humans are then only of interest in virtue of the potential they have to realise the standard or the extent to which they approximate it. This disconcerting fact becomes evident from the language Waldron uses to describe these beings: he calls them, alternately, "heartbreaking cases" (p. 216), "misfortunes" (p. 246) or "tragedies" (p. 225). To be sure, Waldron shows awareness that we need to be careful with such vocabulary: "Many people in the disability rights movement protest being analysed through the lens of tragedy or misfortune." But he then goes on to add that for profoundly disabled humans "the language of misfortune is not inappropriate" (p. 245). As evinced by this language, foundationalist egalitarianism marginalises at least those who, like the profoundly disabled, hold the features set out as range properties only potentially, if at all. Waldron recognises that his account "seems to privilege just one of the stages in the whole trajectory" (p. 240), but he does not appear to grasp its gravity. He thinks that there is merely a "tension" (p. 240) in focusing on those whose agency and reason has developed fully while still valuing those whose has not. What constitutes a tension in Waldron's eyes is a fatal dilemma in mine.

One could object that in order to do justice to disabled human beings, one must not ignore the fact that something has gone wrong in their development. Waldron empathetically quotes the reaction of a mother of a profoundly disabled child to a Peter Singer presentation: "This is a being made for thought that can't speak . . . You can't understand her predicament unless you understand the potential that has been frustrated in her case. She is not like a well-functioning chimpanzee" (p. 241–42). In other words, we should call a spade a spade and see the disabled for what they are. They are not a separate species but human beings who have failed to acquire abilities that are part of their *telos*.

This objection simply begs the question, however, why focusing on what is missing in a profoundly disabled human should be more desirable than focusing on what is present. It is especially unclear how seeing the profoundly disabled through the prism of "normality" should help these beings. What good is done by a constant reminder of what they failed to be? It would be preferable to abandon the dominating standard of "normality" and instead to take beings (human or other) for what they really are, that is, to measure them by these properties, rather than those of someone they will never be. This remains true even if their properties then bear closer resemblance to those of the members of other species than of their own. Taking this important step to what, with Waldron, we can call "differential consideration", would remove a lot of the pressure that is currently put on disabled beings in societies that follow something like Waldron's model."

The approach of differential consideration is more plausible than Waldron's account of basic equality, judged by Waldron's own standards. As Waldron argues in the book, the success of normative principles depends on whether they make sense or not, which in turn depends on how well they correspond with reality.

Allowing for some detachment from the facts which every normative principle requires, Waldron holds that the more of a gap there is between a normative principle and the reality it purports to govern, the less it makes sense to adopt this principle. If we apply this criterion of success to decide which approach is preferable, Waldron's account of basic equality fares worse than differential consideration as the latter is more in tune with reality. This is because by embracing the principle that different properties require different consideration, we can account for what all human beings (including the profoundly disabled) are due based on what they are rather than what they could be or approximate. Profoundly disabled human beings are no "tragedy"; they are, simply, what they are. This approach is not committed to denying that the profoundly disabled are suffering from deficiencies. But in contrast to Waldron's position it does not force us to view these beings exclusively through the lens of what they have failed to become.

To adopt differential consideration, we need to open our eyes to the world's many facets and be willing to listen to what the sciences have to tell us about it. Only in doing so can we avoid invoking erroneous factual accounts that deny beings the treatments that they are due, as former slaves, women and other disadvantaged groups had to experience first-hand. Today, non-human animals find themselves in a comparable position, with their capacities often being underestimated or misunderstood. Claiming that the cognitive faculties of other animals can be understood "at its most optimistic in terms of the counting and manipulation of bananas" (p. 95), Waldron, too, would have reason to acquaint himself more thoroughly with the relevant science.

Adopting differential consideration means accepting the fact that life is evolving gradually and that this will forever plague attempts at pigeonholing it into categories of equal beings and categories of unequal ones. Instead of swimming against this stream, we should plunge into it – even if this entails abandoning (or at least attenuating) some of the concepts we hold dear and that some, like Waldron, have defended so ably.

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