"Global Libertarianism: How much freedom does international human rights law demand?"

NOTE: This article will appear shortly in the journal *International Theory* at https://www.cambridge.org/core/journals/international-theory

Abstract. International human rights specialists and libertarian philosophers have rarely pursued meaningful exchanges, but this article probes some of their common ground. In recent years, leading international monitoring bodies have developed a principle described here as the "Libertarian Principle of Human Rights" (LPHR). It runs as follows: *Governments cannot legitimately recite public morals as a sufficient justification to limit individual human rights.* That principle might seem obvious in many societies today, but throughout history, including the history of liberalism, any notion that certain individual interests must trump religious or customary beliefs has stood as the rare exception. The seemingly Western and secular suggestion of a libertarian principle inherent within human rights may seem at odds with the view that human rights ought to reflect diverse cultural traditions; however, LPHR underscores an anti-authoritarianism, which, it is argued, must form part of any serious conception of human rights. LPHR can be substantiated even for highly controversial rights, such as LGBTQ+ rights, suggesting that it applies *a fortiori* to more settled rights.

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1. Introduction

Enlightenment charters of individual rights have long inspired multiple, often mutually contradictory laws and policies. Both libertarianism and international human rights emerged in the twentieth century as heirs to that tradition, and both aim to combat abuses of government power by building law upon a foundation of individual rights. Yet rarely have specialists within the two movements engaged in much dialogue. To mention the two jointly

[1] I would like to express my heartfelt appreciation to this article's editors and anonymous peer reviewers, who offered extensive and insightful comments even during the darkest days of the Covid-19 lockdowns. I would also like to express my gratitude to the Centre LGBT+ de Bordeaux, le Girofard, for inviting me to introduce some ideas set forth in this article during my presentation entitled 'Quel est le «monde» des minorités sexuelles?', at the conference *Échanges pluridisciplinaires concernant la protection des minorités sexuelles et des minorités de genres au XXIème siècle : entre violence, tolérance et acceptation*, sponsored by Université de Bordeaux on 5 June 2019. My thanks in particular for the kind support of the event organiser, Lucien Carrier, and for the helpful responses of other participants.

would more likely trigger a sense of their differences than their similarities. They continue to disagree about which rights ought to enjoy elevated legal status, but also about how to interpret the rights they otherwise agree on. Libertarianism recognises small sets of fundamental rights, based on life, liberty, and property, to which it then accords an exceptionally high legal status, meaning that those rights could rarely be overridden by competing rights, claims, or interests.[2] By contrast, international human rights law embraces a large set of rights, which can more readily be balanced against each other and against other claims and interests.[3]

As far back as 1948, the Universal Declaration of Human Rights (UDHR), a pillar of contemporary international human rights law, had embraced social-welfare rights, including rights to adequate levels of food, education, health care, and housing.[4] Libertarians have long rejected such rights, which, they argue, place overreaching and inefficient powers in the hands of governments.[5] Meanwhile, from the standpoint of human rights advocates, libertarianism would push Western individualism to an extreme, contrary to the priority of presenting human rights as drawn from values long shared across diverse cultures and belief systems.[6] Unsurprisingly, the political scientist Bas van der Vossen laments that the philosophy of human rights has witnessed a "nearly complete absence of libertarian input."[7]

My aim in this article is not to argue that libertarianism has conquered the world, nor that the totality of human rights really "is" or really "should be" libertarian; nor in any other way to propose some splendid fusion between libertarianism and international human rights.

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[2] See Section 2 below.

[3] See, e.g., Griffin 2008, 29-56.

[4] Universal Declaration of Human Rights [UDHR], G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), arts. 22-27.

[5] See, e.g., Brennan 2012, 129-49.

[6] On reconciling human rights with traditional values, see, e.g., Universal Declaration on Cultural Diversity (adopted by UNESCO General Conference, 31st session), 2 November 2001. See also, e.g., An-Na'im 2000; An-Na'im 2010; Baderin 2005; Kim 2015. For sceptical views, see, e.g., Douzinas 2000; Douzinas 2007; Mutua 2008.

[7] Van der Vossen 2013. For an emerging shift, see, e.g., Queralt and van der Vossen 2019.

Neither movement is even internally unified, given conflicting schools within each of them. My own background is in human rights, and I believe libertarianism suffers from plenty of shortcomings.[8] Instead, I shall focus on just one essential strand of libertarianism within international human rights, namely, their anti-authoritarianism, which is too vital to be overlooked, yet which major organisations sometimes downplay in order to keep autocratic regimes on board.[9] Indeed, the panoply of internationally recognised civil and political rights makes no sense at all except insofar as it serves to limit state power.[10] In this article, I shall not explore all possible strands of anti-authoritarianism within human rights, but will focus on one, which I shall call the "Libertarian Principle of Human Rights" (LPHR). It runs as follows: *Governments cannot legitimately recite public morals as a sufficient justification to limit individual human rights.*

That principle has never been philosophically scrutinised as a common thread running through human rights, let alone identified as libertarian. It may at first seem obvious within some contemporary societies, and yet throughout history, both within the West and beyond, any suggestion that public morals must yield to individual interests has stood as a rare exception. Even within contemporary liberalism, LPHR seems so familiar that some might doubt that it can be called distinctly libertarian, which would seem to package the principle as novel or marginal. However, I shall argue that, until recently, dominant liberal legislation and jurisprudence took for granted that government *could* recite public morals as legitimate grounds for limiting civil rights and liberties. From an historical standpoint, there is nothing "classically" liberal about LPHR. Throughout the history of liberalism, such a principle certainly *has* been novel and marginal, even subversive, so calling it "libertarian" is

[8] I discuss some of these throughout Heinze 2016.

[9] See, e.g., Heinze, 2022, Sections 5.3 – 5.6 (challenging the dominant view that human rights apply to all types of contemporary political systems). See also text accompanying note 64 below.

[10] See, e.g., Bantekas and Oette 2016, 339-98.

altogether justified.

Of course, there are many legitimate grounds for limiting individual rights, and they can always be linked to some moral concern. To cite an obvious example, rights of religious freedom do not extend so far as to jeopardise the food supplies of non-believers. That limit certainly entails moral principles, but which are linked to accepted understandings about risks to life and health. By contrast, LPHR stands for the proposition that public morals in themselves – including traditional religious or customary beliefs, which continue to be invoked by autocratic regimes[11] – cannot stand alone as grounds for denying internationally recognised human rights. In practice, LPHR has been applied mostly to claims about civil rights and liberties, since governments abridging social and economic rights tend to cite cost or other material obstacles, and not distinctly moral rationales. Nowadays, for example, a government may withdraw access to health care from a region populated by a disapproved religious minority, but, as a diplomatic matter, is far more likely to recite cost or other such pragmatic obstacles as opposed to expressly reciting such moral disapproval. Nevertheless I shall argue that, in principle, LPHR applies to all individual human rights.[12]

I shall not focus on enforcement, which is notoriously weak in international human rights. Yet human rights continue to supply widely accepted norms for assessing state conduct. I shall argue (a) that LPHR has steadily emerged as a bedrock principle, but I will also make the stronger claim (b) that LPHR *must* be respected as a necessary condition for international human rights to have any serious meaning. If I wanted to demonstrate only point (a), that would be easy to do. I would simply need to survey reports issued by leading monitoring bodies in order to show that, in recent years, they have rarely if ever admitted purely moral appeals as grounds to limit human rights. No one would have reason to resist

[11] See below, text accompanying notes 63-66, 92, and 95.

[12] I say 'individual' because support has emerged in recent decades for group rights, which are assumed to be exercised collectively. LPHR might arguably apply even to those rights, but I shall not examine that question here.

the conclusion that human rights reflect libertarian outcomes in particular cases, because that finding would not commit human rights to proposition (b), namely, that a deeper libertarian principle necessarily structures human rights. By the same token, one would have no reason to resist suggestions that human rights, in some instances, might also reflect utilitarian, managerial, pragmatist, or other outcomes that do not necessarily define or constitute human rights as such.

So proposition (b) raises the stakes. To identify a libertarian principle as constitutive of human rights is to posit an inherently libertarian component within human rights. Yet if we are to grasp the confluence between libertarianism and human rights, then we must first remove some obstacles standing between them. This article therefore proceeds as follows. I start in Section 2 by examining doubts that libertarians might have about international human rights, borrowing Jason Brennan's distinction between three schools of libertarianism, each of which rejects any notion of social and economic rights as part of the global human rights corpus. One way around that problem would be to bracket-out social and economic rights by enquiring only into internationally recognised civil rights and liberties. However, social and economic rights cannot so easily be set aside. In Section 3, I therefore turn the tables, exploring doubts that human rights advocates might have about libertarianism, in particular about its individualist assumptions. I cite Martha Minow's "relational" jurisprudence, which maintains that rights rest largely upon the ways in which they foster inter-personal and communal bonds. I respond that such a view, far from undermining the individualism of human rights, entirely presupposes it, and therefore poses no obstacle to LPHR.

In Section 4, I recall that conventional liberalism has long acknowledged public morality as grounds for limiting civil rights and liberties, well into the 20th century. We must therefore distinguish between *classically liberal* and *distinctly libertarian* approaches: in historical perspective, only the latter unequivocally affirms LPHR. Finally, in Section 5, I

aim to demonstrate LPHR by citing the globally controversial example of LGBTQ+ rights. It can be hard to prove a negative, that is, to show why monitoring bodies have *not* allowed public morality to override individual rights, so my strategy is to pursue an *argumentum a fortiori*: if leading monitoring bodies are now applying LPHR even to civil rights and liberties that have long provoked moral outrage, then they can be assumed to apply it all the more reliably to long-settled rights. For example, leading monitoring bodies now widely deem the free choice of sexual partners in the private sphere between competently consenting adults to be protected by human rights despite government recitations of public morals. It thereby becomes so much less plausible that those monitors would allow appeals to public morals as a justification, say, for practicing torture, denying fair trials, or hindering delivery of essential food supplies.

2. Doubts about Human Rights from a Libertarian Perspective

Curiously, the people who are most likely to suspect this embedded libertarianism are the ones who altogether reject human rights. For example, a Marxist or critical theorist who rejects individual rights regimes as inherently wedded to global capitalism[13] is likely to view libertarianism and human rights as two sides of the same neo-liberal coin. Indeed, any sceptic who rejects rights regimes as inherently detrimental to longstanding cultural norms might have the same impression.[14] Any debate about marrying libertarianism to human rights therefore remains largely a problem *within* the two fields. In this section I shall consider some doubts about human rights from a libertarian perspective, then in the next section I shall examine doubts about libertarianism from a human rights perspective.

[13] See, e.g., Douzinas 2000; Douzinas 2007.

[14] See, e.g., Heidegger 2000 [1949], 12–16, 51.

The political philosopher Jason Brennan describes three schools of libertarianism, calling them "hard," "classical," and "neo-classical."[15] For "hard" libertarians, a government's only legitimate role is to safeguard individual rights to life, liberty, and property. Any regulatory policies beyond that mandate, and certainly any actively redistributive programs, become presumptively illegitimate, even when they are democratically popular. Brennan observes that "hard libertarianism does not represent the mainline of broadly libertarian thinking."[16] Still, impressions that libertarians do take that view remain widespread, arguably through the influence of figures like the 20th century ideologue Ayn Rand. Widely read in the United States but scarcely known elsewhere, Rand boasts her share of disciples in American public life, yet academics generally read her arguments as too polemical and sparsely reasoned to withstand scrutiny.[17]

"Classical" libertarians, too, adopt as their baseline that law's role should be to safeguard individual rights to life, liberty, and property, but they allow important exceptions. For example, Robert Nozick takes that view, but calls it legitimate only when property has been justly acquired. Given the course of much human history, that exception becomes crucial. Rand agrees only in the limited sense that she allows the law to punish present acts of theft. Nozick takes a step further, admitting cases in which property acquired through historical injustices would warrant government in implementing redistributive adjustments.[18] Of course, even Nozick still falls short of the UDHR's social-welfare rights. Still, we must not conflate the phrase "classical *liberal"* with this category of "classical *libertarian."* As will be explained in Section 3, "classical liberalism" is a broad concept that has been

[15] Brennan 2012, 8-12. For a range of perspectives see also Brennan, Schmidtz, and van der Vossen 2019.

[16] Brennan 2012, 11.

[17] Brennan 2012, 20-21.

[18] Nozick 1974, 150-53. Cf. Brennan 2012, 132.

interpreted in contradictory ways. By contrast, "classical libertarianism" denotes a position like Nozick's.

The newer, "neo-classical" libertarians take yet a further step by admitting an even wider role for government. If a government-led policy promotes greater overall freedom than the alternatives, then neo-classicals will allow it. Brennan, himself a neo-classical, distinguishes between two broad sets of laws: *regulatory* laws that limit individual freedom of action, and *redistributive* laws that transfer wealth from some sectors of society to others. Brennan cites states such as Denmark and Switzerland[19], notable for their high quality of life, including good education, universal access to health care, and decent housing. He concedes that those states are highly redistributive, which would contravene the hard and classical schools. However, he cites studies to show that those states are freer than the United States under the regulatory criterion, since the US has adopted substantially more freedom-limiting regulation. Accordingly, Denmark's and Switzerland's greater economic freedoms, coupled with comparatively efficient redistributive regimes, partly explain their successes as states.

As to overall protection even of classical civil rights and liberties, Denmark and Switzerland out-perform the supposedly more libertarian US. Given that libertarian values are more popular in the US than in other democracies, one would expect American civil rights and liberties to enjoy exceptionally strong protections. Admittedly, on paper, LPHR can be broadly reconciled with a good deal of US Supreme Court doctrine; however, in practice, the US routinely ranks lower than a number of social-welfarist democracies on civil rights and liberties.[20] For example, since 2006 *The Economist* has published its annual

[19] Brennan 2012, 68-9, 122, 141-42, 176.

[20] See, e.g., UN Human Rights Committee, 'Concluding observations on the fourth periodic report of the United States of America', 23 Apr. 2014, UN doc. CCPR/C/USA/CO/4 (finding extensive violations of civil rights and liberties

Democracy Index reports, designed to evaluate nations throughout the world.[21] Nations are ranked according to criteria including "electoral process," "functioning of government," "political participation," "political culture," and "civil liberties." The highest ranking states have routinely been social democracies with strongly redistributive economies, which the *Economist* editors label as "full democracies," while the US has often struggled even to gain a place within that upper tier.[22]

The neo-classicals can make such concessions to social-welfarism without having to commit to internationally binding economic and social rights in the way that social democracies have generally done. After all, a social-welfare state can redistribute wealth through ordinary statutory entitlements to health care, education, housing, and the like. That would more easily allow market solutions where they work better than state programs, since ordinary statutory law is generally easier to modify.[23] By contrast, in committing to global regimes, notably under the International Covenant on Economic, Social and Cultural Rights [ICESCR],[24] successful social democracies elevate those rights above the status of routine legislation by according them higher moral and legal status, on a par with civil and political rights. Neo-classicals remain unwilling to go so far. International law by no means *requires* that social and economic rights be provided through state programs: for example, the

[21] See Economist Intelligence Unit, *Democracy Index*.

[22] Other organizations also issue annual or periodic reports relevant to democratic processes, often yielding converging results, such as the *Press Freedom Index* issued by Reporters Without Borders, the *Corruption Perceptions Index* issued by Transparency International, and the *Freedom in the World* report issued by Freedom House. Studies placing greater stress on social and economic progress do not purport to focus specifically on democratic culture or institutions, but offer useful comparators, such as the annual *Social Progress Index* issued by Social Progress Imperative. Such reports also broadly converge with the findings of the leading treaty-based UN monitoring bodies, such as the Human Rights Committee and the Committee on Social and Economic Rights. Reports on highly abusive states frequently point to gross and systemic violations, whereas reports on well-performing states largely target more isolated or supplementary problems, playing more of a fine-tuning role.

[23] See, e.g., Queralt and van der Vossen 2019.

[24] International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966. 993 U.N.T.S. 3 (entered into force 3 Jan 1976).

ICESCR certainly allows private-sector activity that meets essential social needs; yet that treaty still obliges states parties to ensure delivery of those services when the market fails to ensure their adequate delivery.[25] (Some earlier libertarian schools questioned the very existence of the modern state[26], but that problem has not taken centre stage for neo-classicals.)

A major aim of social and economic rights is not merely to ensure the basics of material well-being, but also to equalise society – not entirely, but at least to the level that all individuals can have adequate means to exercise their roles as citizens, without being perpetually preoccupied with the next meal or rent payment. From that perspective, it is an adequate rather than an exhaustive degree of equality that counts as a good in itself. The hard and classical libertarians reject even that threshold equality on deontological grounds, calling it an illegitimate transfer of wealth; by contrast, the neo-classicals can concede it on consequentialist grounds, as a helpful by-product of freedom-promoting living standards, yet still do not admit it on deontological grounds. In other words, they do not admit even minimal equality as a good that would justify states in agreeing to be bound by social and economic rights.[27]

That consequentialist outlook sheds further light on why even the neo-classicals have paid little attention to international human rights. Following the *Democracy Index* and similar reports, neo-classicals and human rights advocates might easily agree on, say, ten or fifteen of the countries that provide the greatest overall levels of individual freedom and prosperity. Yet their respective reasons for reaching that conclusion would differ. Social-welfare democracies have welcomed internationally recognised social and economic rights on deontological grounds, that is, on grounds of moral and political principle; libertarianism

[25] On the character of social, economic and cultural rights as 'relative and progressive', see, ICESCR art. 2(1).

[26] See, e.g., Préposiet 2002.

[27] See, e.g., Arneson 2019, 59-64; Brennan 2012, 129-49; Conly 2019; Huemer 2019; Miller 2019, 4-6; Zwolinski 2019.

cannot go so far, since that approach would sacrifice its essential tenets. For all libertarians, only traditional civil rights are strictly necessary to achieve a just legal order, therefore only those rights command the deontological commitment characteristic of fundamental or higher-order legal rights.

Some libertarians might insist upon what could be called a Strong Libertarian Principle (SLP), along the following lines: *The only justifications for limiting individual civil rights and liberties are those that prevent the violation of, or those that prevent a net reduction in, individual civil rights and liberties.* SLP certainly chimes with hard libertarianism, and largely restates the classical school as well. They view individual freedom as reduced whenever SLP is violated. By contrast, neo-classicals admit at least one utilitarian calculus: government limits upon individual civil rights and liberties are justified if they produce a net *enhancement* of individual liberty across a population. However, neo-classicals decline to translate that utilitarian balance-sheet into a deontological imperative in the way international human rights have done. So an important gap between libertarianism and international human rights still persists. The question that must be resolved in this article is whether they nevertheless overlap in more than incidental or tangential ways.

3. Doubts about Libertarianism from a Human Rights Perspective

In a 1989 article entitled "Interpreting Rights," Harvard Law Professor Martha Minow notes that both right-wing and left-wing sceptics often reject civil rights and liberties. They do so, she argues, on grounds that those rights presuppose an ethos of individual autonomy that undermines inter-personal and community bonds. Such individualism is, of course, notoriously associated with libertarianism; yet Minow joins other feminist scholars in challenging the assumption that civil rights and liberties *are* fundamentally individualist.[28]

[28] Minow 1989. See also, e.g., Minow 1986; Nedelsky 2012.

Minow reminds us that inter-personal and communal ties have traditionally thrived upon unequal power, through hierarchies such as rich over poor, white over black, or husbands over wives. Certainly, in their older forms, rights regimes often served to entrench those inequalities, for example, by affirming masters' property rights to hold slaves[29], whites' rights to enjoy public services that exclude blacks[30], or states' powers to interpret rights so as to maintain women in subordinated roles.[31] In that and other writings, Minow retorts that the value of civil rights and liberties, as they have increasingly come to be understood and interpreted today, lies in their capacity to strengthen inter-personal and communal relationships, by offering a more equal footing to those who have traditionally faced repression and discrimination. Minow suggests that, within contemporary liberal democracies, freedoms associated with, for example, association, religion, marriage, or contact with family members are "at odds with the claim that rights protect autonomy rather than human relationships."[32]

Yet those two factors, individual autonomy and human relationships, are not mutually exclusive. Another way to phrase the point is to say that human rights *reconcile* individual autonomy with human relationships. Germane to Minow's analysis, although she does not make the point expressly, is that civil rights and liberties claim legitimacy insofar as they push human and community relationships towards greater mutual equality by rendering them more voluntarist. Contemporary rights regimes provide tools for historically disempowered actors to maintain inter-personal and communal relationships without the fear of vetoes imposed by the traditional, often male or otherwise privileged power-holders in those relationships, such as fathers, husbands, chieftains, employers, clerics, or political office-

[29] See, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[30] See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896).

[31] See, e.g., Bradwell v. State of Illinois, 83 U.S. (16 Wall.) 130 (1873).

[32] Minow, 1986, 16.

holders. For Minow, human rights certainly do lay a claim to legitimacy by promoting inter-personal and communal relationships, but, we would have to add, only insofar as those relationships rest upon a principle of individual autonomy.

For Minow, the individualism of civil rights and liberties seems justified as a means of equalising inter-personal and communal relationships, yet human rights advocates might still look warily upon libertarianism. It has long been argued that, even if civil rights and liberties are necessary, they are not sufficient for promoting such equality. For example, following the end of the Cold War, the World Conference on Human Rights adopted a comprehensive summation of the movement, the 1993 Vienna Declaration and Programme of Action (VDPA). Like the Universal Declaration, the Vienna Declaration is not a treaty and has no binding status, but has commanded great authority for its oft-quoted "indivisibility" principle, which runs as follows: "All human rights are universal, indivisible and interdependent and interrelated."[33]

Much ink has been spilled on those four adjectives. Like many human rights concepts, such open-textured terms seem almost designed to produce disagreement. Some specialists read them as synonymous and even ornamental, merely underscoring the value of all human rights.[34] Yet others insist that each word bears a distinct meaning. For example, Donnelly and Whelan attribute variability and flexibility to the words "interdependent" and "interrelated," noting that the degree of linkage between two or more rights depends on the rights and contexts in question.[35] By contrast, they find "indivisible" to be not only "the most difficult to pin down"[36] but also – like "universal"[37] – more imbued with "conceptual and

[33] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna (1993), para. 5.

[34] See, e.g., Donnelly & Whelan 2020, 74.

[35] Donnelly and Whelan 2020, 74-76 On the adjective 'universal', see, e.g., Donnelly and Whelan 2020, 49-63.

[36] Donnelly and Whelan 2020, 76.

[37] Donnelly and Whelan 2020, 49-63.

symbolic weight."[38] Unlike interrelatedness and interdependency, indivisibility suggests that all human rights somehow represent one and the same thing – just so many aspects of the same unified element of human dignity. On that reading, I can no more realise full human existence when the state deprives me of a fair trial or religious freedom than when it deprives me of food. For raw survival I may require only the latter, but human rights presuppose that fully-realised humanity involves more than sheer survival.

Once we take that holistic view, we can appreciate why human rights advocates would hesitate to embrace libertarianism. Again, for Minow rights support not only individuals but also relationships and communities, and yet, following the Vienna Declaration, they do so only when social and economic rights enjoy a status equal to that of civil and political rights. On that view, our lives are not lived in boxes, so the very labels "civil," "political," "social," "economic," and "cultural" remain partial and contingent, perfectly serviceable for identifying particular problems or disputes, but ultimately meaningful only insofar as each sphere presupposes the others. A single mother living in poverty will certainly benefit from a fair criminal trial, but will scarcely enjoy the panoply of human rights if she must then return to the daily precarity of paying her rent and feeding her children.

Yet even if we assume such holistic human rights, they by no means preclude LPHR; indeed, they strongly entail it. Hierarchical and repressive structures of family and community have often thrived under authoritarian government, but voluntarist models of inter-personal and communal relationships oppose such hierarchies. Human rights wage that opposition only when they assume the kind of anti-authoritarian precept for which LPHR stands. By extension, even if one adheres to a strong version of the indivisibility principle,

[38] Donnelly and Whelan 2020, 76. On precedents and current debates, see, e.g., Donnelly and Whelan 2020, 73-87; Gilabert 2009-2010; Nickel, 2008; Nickel, 2009-2010; Whelan, 2010.

there is no sense in which *any* human rights regime, including one that demands social and economic rights, can seriously allow abridgements imposed solely through appeals to public morals. In sum, libertarians may well reject social and economic rights; however, once we assume the international human rights system, then LPHR bars states from invoking purely moral appeals to abridge *any* individual rights. That is all the libertarianism which LPHR imposes, and it is hard to see why any human rights advocate would resist it.

From the holistic perspective, LPHR serves not only to strengthen existing rights but supplies an argument for extending them. For example, the right to terminate pregnancy can certainly be construed as a civil right to bodily autonomy, and yet it has not thus far been adopted within international law. Conflicting rights claims can be made between, on the one hand, psychological, physical or other practical harm to women forced to carry pregnancies to term against their will and, on the other hand, the death of a foetus, insofar as it is deemed by some to be a human life. Within the conventional language of civil rights and liberties, those claims can lead to a standoff, yet on Minow's approach there is no standoff at all: any denial that the choice must remain with the woman reflects histories of patriarchal control over the woman's body and sexuality.[39]

Admittedly, the question whether a woman's right to choose follows solely or strictly from LPHR would entail too many complexities to examine here. At the very least, however, LPHR precludes governments from invoking solely moral, religious, customary, or majoritarian values as sufficient grounds for abrogating women's bodily autonomy.[40] Still, it remains questionable whether any other grounds exist, including those referring to empirical data[41], for attributing human life to the foetus in the first weeks of pregnancy. By extension, even if libertarianism itself does not require that the state financially or materially support

[39] See, e.g., Markowitz 1990.

[40] See, e.g., Brennan 2012, 83.

[41] See, e.g., Baran, Goldman, and Zelikova 2019.

women's choices, where states do otherwise commit themselves to respecting rights of health care, LPHR bars government from reciting moral, religious, customary, or majoritarian grounds for removing abortion rights from such care. Debates continue about which rights properly belong in a human rights corpus, but the salient point is that LPHR applies irrespective of which rights one prefers to include, since, as mentioned, LPHR applies to human rights *as* individual rights.

4. Doubts about Classical Liberalism from a Libertarian Perspective

Returning now to a point broached earlier, LPHR certainly seems to bear all the hallmarks of what we would call "classical" liberalism, so why not just stick to that description? Does the libertarian label add any greater insight? The problem is that there is nothing classically liberal about LPHR, certainly not if a movement's classical version correlates to one of its archetypal historical moments. Only libertarianism can be said, throughout its history, to have laid an archetypal claim to LPHR.[42]

One strand of libertarianism has sought not merely to return to John Locke's limited rights of life, liberty, and property, but to "out-Locke Locke," to "return" to a purer liberal philosophy that the Enlightenment never really knew. Contemporary libertarians have re-defined liberal rights that, in their concrete interpretations, had long tumbled into contradictions and proved inadequate to respond to contemporary concerns.[43] From the eighteenth through to the early nineteenth centuries, liberal principles had been deemed to be compatible with racial, gender and other grounds of discrimination[44]; but also with

[42] See generally, e.g., Préposiet 2002.

[43] See Levy 2019 (critically examining the foundation of contemporary libertarianism in Locke's philosophy).

[44] See above text accompanying notes 29-31.

blasphemy laws[45], censorship of "indecent" publications[46], and broadly applied public order offenses[47]. None of these policies accord with what we today call "classical" liberalism.

Long after the Enlightenment it remained standard doctrine that public morals and community sentiments counted as social goods that the law rightly protected, and which had to be taken into account in the interpretation of civil rights and liberties.[48] Rejecting that assumption and opposing such restrictions, libertarians seek a "return," yet which is un-originalist, far more preoccupied with the present, as reinventions of tradition commonly are. LPHR is best described as libertarian, then, lest we confuse classical liberalism with liberalism's more recent – libertarian – revisions.

Libertarians are certainly not the only ones who have re-interpreted classical liberalism so as to bar government from reciting public morals as grounds for limiting civil liberties, since many mainstream liberals today take the same view. However, to call LPHR straightforwardly "liberal" or "classically liberal" would entail two problems. First, it would merely beg the question about which version of liberalism, and which history of liberalism, we are assuming. Second, it would perennially invite those seeking to curtail rights to recite both framers' original understandings and subsequent interpretative histories as authoritative, so as to trump or to relativize LPHR. The libertarian tag bears no such burden and its history issues no such invitation. It is justified to identify LPHR as distinctly libertarian since, in the more recent history of philosophical libertarianism, we find no such deviation as we do throughout the history of liberalism. We find the unwavering, anti-authoritarian view that a

[45] See, e.g., Roth v. United States, 354 U.S. 476, 482 (1957) (noting that the norm of blasphemy laws at the time the US Constitution was adopted).

[46] See, e.g., Roth, 354 U.S. at 489 (recognizing prevailing community standards among the grounds for prohibiting obscene publications).

[47] See, e.g., Feiner v. New York, 240 U.S. 315 (1951) (upholding conviction of an impromptu public speaker whose views critical of government had provoked some members of the public).

[48] See, e.g., Stephen 1993 [1873]; Devlin 1959.

state may never legitimately recite public morals as a sole ground for limiting fundamental individual rights.

Two very different models of "classical" liberalism are relevant to the relationship of individual rights to public morality. One is Nozick's general philosophy of "classical" libertarianism, the other arises out of the concrete interpretations of liberal rights by governments, legislatures and courts throughout the past few centuries. Nozick can be called a "non-contextualist," as the history of on-the-ground precedents plays no decisive role in his model. Nozick applies libertarian interpretations of classically liberal civil rights, irrespective of how those rights' original framers, and subsequent generations, might have construed them. Meanwhile, many liberals over the past few centuries could be called "contextualist," insofar as they have taken into account either historical evidence of framers' understandings, or evidence from subsequent legislation or prevailing community standards. From a contextualist standpoint, then, the positions of "classical" liberalism and of "classical" libertarianism clearly diverge.

None of the landmark eighteenth to twentieth century liberal philosophers defended the contextualist model in any striking way, presumably because it already reflected much established thinking. Nevertheless, prominent voices in the Anglosphere included James Fitzjames Stephen in the nineteenth century and Sir Patrick Devlin in the twentieth. Both of them can be called "anti-libertarian," but by no means "anti-liberal." Both largely accepted liberal norms, but argued that they must be interpreted in the light of prevailing community values. Stephen's *Liberty, Equality, Fraternity*[49] was penned largely in rebuttal to Mill's *On Liberty*[50], just as Devlin's *The Enforcement of Morals*[51] challenged H.L.A. Hart's *Law,*

[49] Stephen 1993 [1873].

[50] Mill 1859.

[51] Devlin 1959.

Liberty and Morality[52]. In the case of Devlin and Hart, their dispute focussed on the 1957 UK government Wolfenden Report, which had first proposed the de-criminalisation of homosexual acts between competently consenting adults. Nevertheless, these all became debates *within* liberalism, among protagonists who all broadly accepted liberal principles of constitutionalism, fundamental rights, and the rule of law. By contrast, libertarian theory has known no such compromises between individual civil liberties and state endorsements of public morals.

In our own time, Nozick has furnished a non-contextualist libertarianism within philosophical thought by straightforwardly revising older Lockean precepts. Along parallel lines, my thesis is that LPHR points towards the same shift within the contextualist interpretation of internationally recognised rights and liberties: the shift from an earlier liberalism that often accepted recitations of public morality as grounds for limiting civil rights and liberties, to a position opposed to such limits. Whilst Nozick shifts liberalism with the stroke of a pen, that contextualist shift has manifested as a progressive evolution reflecting developments at national and regional as well as international levels.

Both contextualist and non-contextualist libertarians must take as their starting points liberal rights that have been interpreted in ways very different from what libertarians would accept today. A non-contextualist like Nozick solves that problem by directly re-defining those rights. The contextualist, by contrast, must take institutional practice into account, recognising that most of the history of liberal rights since the Enlightenment has admitted interpretations incompatible with libertarian precepts today. That is why, for the remainder of this article, I shall explore LPHR as it has emerged in recent years. I am arguing that it provides the only plausible way of interpreting individual human rights. *The very concept of a human right becomes meaningless when either government or other citizens can veto it*

[52] Hart 1963.

solely on grounds of public morality. A distinctly libertarian principle emerges within human rights for the same reason that it emerged in political philosophy, namely, as a corrective for and revision of interpretations of liberal rights that had dominated for centuries.

We already find the first signs of that shift within the Universal Declaration. When article 2 states that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," it introduces a norm originating in earlier notions of equal protection before the law. Yet rarely if ever had liberal regimes strictly observed any such comprehensive application before 1948, given what were still ongoing practices of legally sanctioned racial discrimination within many nations and colonies. Equally momentous was the reference to sex discrimination. At that time, gender equality still implied radical consequences for the social and legal conventions of every nation on earth – even if those consequences would take decades to be realised, and indeed, as with racial discrimination, still remain unrealised in many crucial respects.

Consider the following comparison. As the twentieth century progressed, it would have been difficult for states to oppose racial equality within major international forums on grounds of public morals. Indeed, the International Convention on the Elimination of All Forms of Racial Discrimination attracted widespread adherence.[53] By contrast, the notion of gender equality witnessed no such reluctance. To appeal to traditional customs and practices as grounds for maintaining women's subordination was commonplace, and remains so today

[53] International Convention on the Elimination of All Forms of Racial Discrimination [ICERD], 21 Dec. 1965 entry into force 4 Jan. 1969. For periodically updated information on state adherence, see OHCHR (n.d.).

in many places.[54] Certainly, the strict logic of a comprehensive norm forbidding sex discrimination was unmistakable: if public morals no longer supplied adequate grounds for upholding legal restrictions on individual action based solely upon gender, then freedom to choose sexual partners irrespective of gender would have to follow ineluctably.[55] Yet few if any UN delegates appear to have drawn any such conclusion in 1948 – testimony again that liberal values were not deemed to stand in any fatal conflict with public morals.

5. A Test for LPHR: LGBTQ+ Rights

Strictly speaking that logic was irrefutable. Yet early cases for gay rights under the European Convention – which had been drafted and adopted in tandem with the Universal Declaration – were unsuccessful[56], and for decades the question remained taboo at the UN. Only after the Cold War did global attitudes begin to show a marked change[57], but still in the face of bitter opposition.[58] The UDHR and other leading instruments had contained no specific reference to sexual orientation or gender identity, which reinforced resistance to any corresponding rights.

In 2007 a group of experts drafted the influential Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, which certainly presupposes the indivisibility of human rights, but nevertheless

[54] See, e.g., reservations and interpretive declarations deposited with ratifications to the Convention on the Elimination of all Forms of Discrimination Against Women. 21 Dec. 1979, 1249 U.N.T.S. 13 (entered into force, 3 Sept. 1981) at OHCHR (n.d.). See also CEDAW (n.d.).

[55] See, e.g., Heinze 1995, 131-52.

[56] See, e.g., W.B. v. Federal Republic of Germany, A No. 104/55, 1955-57 Y.B. Eur. Conv. Hum. Rts. 228 (Eur. Comm'n H.R.); A.S. v the Federal Republic of Germany, A No. 530/59, 1960 Y.B. Eur. Conv. Hum. Rts. 184 (Eur. Comm'n H.R.); G.W. v the Federal Republic of Germany App no 1307/61, 1962 Y.B. Eur. Conv. Hum. Rts. (Eur. Comm'n H.R.).

[57] See, e.g., Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) (rejecting public morals as a sufficient basis for restricting rights to engage in private, consensual homosexual conduct, or for discriminating against those who engage in such conduct). On the shift in the European Court, see *Dudgeon v. UK*, Judgment of 22 Oct. 1981, Series A. no. 45.

[58] See below, text accompanying notes 63 - 68.

includes principles tending to maximise individual liberty as required by LPHR.[59] In 2011 the UN Human Rights Council passed a resolution noting "grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity."[60] The measures the Council resolved to take involved nothing more than to solicit further study[61], which would then be followed by internal discussion.[62]

The Organisation of Islamic Cooperation (OIC) rejected even that minimal initiative. Headquartered in Saudi Arabia, the OIC comprises over fifty UN member states publicly describing themselves as "the collective voice of the Muslim world."[63] Through their force of numbers the OIC has maintained dominance as a voting bloc at the Council.[64] The organisation's Secretary General Iyad Ameen Madani "reiterated OIC's firm stance that the notion of sexual orientation is alien to the international human rights norms and standards as well as against the fundamental precepts of not only Islamic but many other religious and cultural societies." According to Madani,

> Pushing and adoption of this resolution, particularly the establishment of an independent expert to promote and protect this topic, amounts to imposing one set of values and preferences on the rest of the world and counteracts the fundamentals of universal human rights that call for respecting diversity, national and regional particularities and various historical, cultural and religious backgrounds; as clearly set out in various international human rights instruments . . . .[65]

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[59] See Yogyakarta Principles, principles 2 – 11, 19 – 22; Yogyakarta Principles Plus 10, principles 30 – 33. Cf., e.g., Hellum 2017.

[60] UN Human Rights Council, Resolution 17/19 (hereafter HRC 17/19) on 'Human rights, sexual orientation and gender identity', 14 July 2011, UN Doc A/HRC/RES/17/19, preamb. para. 4.

[61] HRC 17/19, art. 1.

[62] HRC 17/19, arts. 2-3.

[63] See Organisation of Islamic Cooperation, n.d.

[64] See, e.g., Freedman 2013.

[65] Organisation of Islamic Cooperation 2016. See critically, e.g., Blitt 2018.

For the OIC, LGBTQ+ claims not only fail as human rights, but recognition of them would itself *violate* "the fundamentals" of human rights. Of course, Muslim traditionalists hold no monopoly on anti-LGBTQ+ outlooks. While those OIC statements only hint at their theological underpinnings[66], the UK lobbying group Christian Concern proclaims its faith unabashedly: "Celebrating the practice of different sexualities and encouraging same-sex attractions and unions are in direct conflict with God's intended purpose for marriage and sexuality as revealed in the Bible." The organisation condemns LGBTQ+ Pride parades, in which people can be seen "promoting sexual acts, showing nudity, [and] flaunting outlandish dress and behaviour."[67] Throughout the world LGBTQ+ claims continue to be maligned as anti-Christian.[68] To be sure, other Muslim[69] and Christian[70] groups reject such views by affirming LGBTQ+ rights.

Admittedly, interpretations that have crystallised only in the early years of the twenty-first century entail few predictions about those that might be adopted in decades to come. Even if LPHR can be distilled today, we have no guarantee that it will remain intact tomorrow. But my aim is not primarily to report on current developments. I am citing recent reports not as happenstance developments, but as examples of a jurisprudence that the leading monitoring bodies must necessarily uphold if international human rights are to perform their inherently anti-authoritarian tasks. In view of ongoing controversies about LGBTQ+ rights, and given the culturally complex problems they raise, they provide a test case for understanding the emergence and character of LPHR. Accordingly, I propose in this final section an *argumentum a fortiori*: if leading monitoring bodies are now applying LPHR even

[66] Organisation of Islamic Cooperation 2008 (reciting in several passages the primacy of Islam).

[67] Christian Concern 2018.

[68] See, e.g., Faiola and Lopes 2019.

[69] For regular updates from LGBTQ+ Muslim organisations, see, e.g., Imaan n.d.; Hidayah n.d.; Komitid n.d.; Maruf n.d.

[70] For regular updates from LGBTQ+ Christian organisations, see, e.g., European Forum of Lesbian, Gay, Bisexual and Transgender Christian Groups n.d.; Living Out n.d.; Open Table n.d.; Kreuz & Quer n.d.

to civil rights and liberties that have long sparked hefty controversy, then they can be assumed to apply it all the more reliably to well-established rights. Yet I also focus on LGBTQ+ rights to remind us that anti-authoritarianism encompasses more than just conventional political activism. It also includes opportunities to resist codes of conduct imposed in everyday life, often without justification beyond recitations of established public morality. Such codes equally constitute informal yet formidable exercises of power, often more than just coincidentally aligned to government preferences.[71]

The confusing character of LGBTQ+ claims surfaces as soon as they are asserted. Vocabularies of "gender identity," "sexual orientation," "LGBTQ+," and related concepts are recent[72] and remain intra- and inter-culturally fraught, but in this section I shall focus on identities and behaviours broadly construed as non-heteronormative.[73] It has long been recognised that certain freedoms relevant to sexual and gender identity had flourished over millennia throughout much of the world[74] while Western Europe, notably from the late Middle Ages[75] through to the mid-20th century[76], increasingly imposed binary gender and sexual strictures, first at home and then through colonial laws. However, since the late 20th century that picture has inverted. Activists within Western democracies have largely pioneered the definitions and growing acceptance of LGBTQ+ rights.[77] Today, the fiercest opposition often stems from elsewhere[78], often as part of broader challenges to Western

[71] See, e.g., Foucault 1976.

[72] Butler 1990; Foucault 1976; Greenberg 1988; Kimmel 2007.

[73] See Heinze 1995, 44-58.

[74] See generally, e.g., Bullough 1976; Blackwood 1985.

[75] See, e.g., Boswell 1980, 267-334.

[76] See, e.g., Foucault 1976; Greenberg 1988: 397-433.

[77] For historical analyses linking the emergence of non-heteronormative movements to industrial and urban market economies, see, e.g., D'Emilio 1983; Valocchi 2017, 315–331.

[78] For regular updates see International Lesbian and Gay Association (ILGA) n.d. (a); Amnesty International n.d.; Human Rights Watch n.d.

cultural dominance[79], and even from states that only ever inherited their domestic criminal penalties from European colonial powers. To be sure, that picture is not all-or-nothing. Again, sexual and gender minorities in Western states still often face hostilities at home[80], while some non-Western states have accepted LGBTQ+ rights.[81]

Reference is often made to non-heteronormative identities thriving in various societies over centuries during which Western nations adhered to a repressively patriarchal gender dualism, which they then imposed under the guise of introducing "civilisation" through colonial anti-sodomy laws. Frequently studied traditions have included, for example, Indian sub-continental hijra[82] communities as well as berdaches[83] stemming from pre-Colombian America.[84] Those and other non-gender-binary traditions offered outlets increasingly unavailable in a Western world that, in recent centuries, progressively regimented gender and sexual identities, culminating in the comprehensive medicalisation of non-heteronormativity after the Enlightenment.[85]

Non-heteronormative traditions outside the West suggest limits to the historically recent Western lexicons of gender and sexuality. Concepts like "homosexual" and "transgender," or, more popularly, "gay," "trans," or "queer," do not readily transpose onto berdaches and hijras, no more than terms like "berdache" or "hijra" would apply to many twenty-first century Western sexual and gender minorities. The traditional berdache and hijra

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[79] See, e.g., Heinze 2001.

[80] For regular updates on ongoing struggles in Western democracies see, e.g., ILGA, Amnesty International, and Human Rights Watch databases indicated in note 78 above, along with those organisations' national branch websites. See also, e.g., American Civil Liberties Union n.d.; Human Rights Campaign Fund n.d.; Fédération LGBTI n.d.; Lesben- und Schwulenverband in Deutschland n.d.

[81] For regular global updates see ILGA n.d. (b).

[82] Goel 2016; Saria 2019.

[83] Epple 1998; Gilden 2007.

[84] Both terms have been challenged. I retain them here only insofar as they remain widespread in the sociological literature, and alternatives to date command no clear consensus. See generally, e.g., Epple 1998.

[85] See Foucault 1976.

make sense only as roles within complex networks of social relationships that emerged in their respective societies over centuries. The same has long been observed of concepts like "trans," "gay," or "queer," which, far from universal, equally operate as roles adapted to the contexts of individually preferred lifestyles characteristic of social relationships within post-industrial modernity.[86] Such terms do not readily transplant across cultures and historical periods. Their defining characteristics are often multiple, mutually defining, and of unclear or shifting priority, including, for example, marital and parental customs, sexual conduct, social conduct and roles, dress and attire, linguistic conventions, and other factors.

It would lie beyond the scope of the present analysis to enter the ongoing debates about whether or in what way ancient or other belief systems can be rendered compatible with human rights. Any number of traditions can be interpreted to harmonise with human rights just as readily as they can be interpreted to resist them. LPHR nevertheless clarifies what is required *if* any given tradition is to be deemed as essentially aligned with human rights – namely, they would uniformly have to reject any restrictions based solely on appeals to popular morality. Classical Confucianist, Hindu, Jewish, Christian, Buddhist, or Islamic teachings seem to furnish unlikely breeding grounds for LPHR, but, if they are henceforth to be rendered compatible with internationally recognised civil rights and liberties, then no other version of them is possible.[87]

For better or worse, conceptions of inter-personal relationships within post-industrial modernity have gone increasingly global, as distinctions between "Western" and "non-Western" have eroded. Be it on grounds of principle or strategy, advocacy organisations and movements throughout the world now widely adopt what in the West have become familiar

[86] See D'Emilio 1983.

[87] See, e.g., Heinze 2019; Heinze 2022, ch. 2.

LGBTQ+ terminologies and policies.[88] At the same time, traditional non-heteronormative roles are not necessarily viewed in culturally essentialist terms as isolated in a pre-modern, pre-Western past. Some individuals embrace those earlier traditions, presenting the contemporary LGBTQ+ movements more as the adapted continuation than as the sheer destruction of them.[89] With those caveats in mind, we can briefly review the content and scope of basic LGBTQ+ claims through the LPHR lens.

Rights of privacy. A central claim for sexual minorities has concerned privacy rights, as set forth under UDHR article 12.[90] Such a claim includes the freedom for legally competent and consenting adults to engage in private sexual contact. LPHR is at work here precisely because classical liberalism has *not* historically recognised any such right. It reflects the type of philosophical revision that libertarians have performed more generally on classical liberalism. The UN Human Rights Committee, which has thus far distinguished itself for its expertise and political independence (not to be confused with the highly politicised and oft-criticised Human Rights Council[91]) has rejected opposition to LGBTQ+ rights based on appeals to traditional beliefs and customs.[92]

As with other rights, the privacy right is not absolute. Obviously, no one gains a right to run a paedophile ring simply by doing so within the privacy of the home. More interestingly, the privacy right illustrates how the libertarian principle operates *within* the sphere of internationally recognised human rights. It is from within that intersecting sphere

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[88] See Yogyakarta Principles; Yogyakarta Principles Plus 10. See also regularly updated ILGA, Amnesty International, and Human Rights Watch policies and statements on their websites indicated in notes 78 and 80 above.

[89] See, e.g., Epple 1998, 271.

[90] See Yogyakarta Principles, principle 6.

[91] See, e.g., Freedman 2013.

[92] See, e.g., UN Human Rights Committee, Concluding observations on the sixth periodic report of Tunisia, UN doc. CCPR/C/TUN/CO/6, report of 24 April 2020, para. 19 (criticising bans on consensual same-sex relations between adult males). Cf., e.g., UN Human Rights Committee, Concluding observations on the fifth periodic report of Uzbekistan, UN doc. CCPR/C/UZB/CO/5, report of 1 May 2020, para. 10; UN Human Rights Committee, Concluding observations on Nigeria in the absence of its second periodic report, UN doc. CCPR/C/NGA/CO/2, report of 29 August 2019, paras. 19, 20.

that the most vital cross-fertilisation emerges between libertarianism and human rights. Outside the overlap with human rights, libertarianism often takes positions that seem simplistic or excessive, and command little social consensus. For example, on matters such as using the privacy of the home to collect armaments or to peddle hard drugs, libertarians and human rights advocates diverge, since no rights contained within instruments such as the UDHR extend so far as to protect private gun ownership or the sale of hard drugs. By contrast, *within* the sphere of international human rights, a libertarian principle can command great consensus. The value of identifying libertarian elements within the boundaries of the internationally recognised privacy right lies above all in LPHR's rejection of government overreach into personal life. To take another example, consider regulations arising around intentional infliction of severe physical pain or injury, as in cases of consensual yet extreme sexual sado-masochism.[93] Here again, a stimulating libertarian debate is certainly to be had, yet human rights do not extend so far as to encompass a general right to incur or to inflict physical or psychological harms for their own sake, even with consent.

Rights of free speech, expression, and assembly. Private activities in themselves, however strongly they may be protected, do not suffice to advance a political movement. In socio-political context, LGBTQ+ identities are not primarily about the bedroom. Only free speech – including the freedom to openly communicate and to receive both verbal and non-verbal expression – turns ideas, feelings, and experiences into positions and platforms.[94] For example, from Putin's Russia or Xi Jinping's China we read few if any reports of persons arrested solely for private sexual activity. In that limited sense, strictly private and concealed homosexual conduct can be called legal, or at any rate not illegal. Yet anyone standing in a public place in those countries, displaying a placard that reads: "I engage in private

[93] See, e.g., Laskey, Jaggard, and Brown v. U.K , 24 Eur. H.R. Rep. 39 (1997).

[94] See Yogyakarta Principles, principle 19(a), (c), (d), (f).

homosexual activity" or "Homosexuality is a human right" is likely to be packed up in short order, as is indeed anyone displaying any number of minimally provocative messages.[95] Speech about conduct is often more provocative than the conduct itself. Yet there is no serious sense in which one can be said to have a human right when one lacks the opportunity to publicly declare that one has it, and to openly criticise government when one, rightly or even wrongly, believes the right to have been violated.[96]

LPHR stands not merely as a *fait accompli*, then, but as necessary on any credible conception of human rights. There is no serious sense in which persons could be said to enjoy their human rights subject to exceptions based solely on grounds of government recited or popular moral beliefs. Contemporary LGBTQ+ rights, taken not in abstraction but within political histories, are nothing *but* the products of free speech, including speech that has often been viewed as immoral and dangerous. Insofar as autocracies shore up their base by pandering to traditionalist prejudices, the public pursuit of LGBTQ+ rights always serves to recall the necessarily anti-authoritarian strand of internationally recognised civil rights and liberties. LPHR empowers citizens to dissent from dominant government and public moral standpoints, which in many societies gets people or their friends and families killed, beaten, imprisoned, or dismissed from employment, through direct or covert state action, or through state insouciance cum approval. On few matters are traditions of public morality, often

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[95] See, e.g., Human Rights Committee, Concluding observations on the seventh periodic report of the Russian Federation, UN Doc. CCPR/C/RUS/CO/7, report of 28 April 2015, para. 10 (enjoining authorities to '[g]uarantee the exercise in practice of the rights to freedom of expression and assembly of LGBT individuals and their supporters'). Cf., e.g., Human Rights Committee, Concluding observations on the fourth periodic report of Lithuania, UN Doc. CCPR/C/LTU/CO/4, report of 29 August 2018, para. 9. See generally, Human Rights Committee, General comment No. 37 – Article 21: Right of Peaceful assembly (advance unedited version), UN Doc. CCPR/C/GC/37 (27 July 2020).

[96] That breadth of free speech entails a philosophical divergence at the outer bounds. Libertarians reject government regulation of extreme or hate speech when the speaker is censored or penalized solely for the philosophical or moral evil of the speech, in contrast to international human rights, which admits such limits. See, e.g., ICCPR art. 20. See also, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, UNGA resolution 2106 (XX) of 21 December 1965 (entry into force 4 January 1969), art. 4. For further discussion see [deleted for peer review].

backed by law, more vigilant than on matters of non-heteronormative identity and conduct. In many places today, as throughout much of history, both within and beyond Western democracies, open defiance of sexual norms is intrinsically anti-authoritarian.

Rights of non-discrimination. Recall article 2 of the Universal Declaration as was set forth above: "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex . . . *or other status*."[97] Leading international human rights bodies have interpreted such "other status" clauses to apply to gender and sexual minorities, irrespective of drafters' possible intentions.[98] Much has been written about the criteria by which an "other status" is to be ascertained; however, indeed as a matter of logic, the foregoing observations about privacy and free speech suggest that once a group can be identified largely with reference to the human rights that it seeks to exercise, then it cannot legitimately be subjected to discrimination for exercising those rights.[99]

Here too, one might certainly wonder whether this element of LPHR can be called distinctly libertarian, given libertarians' scepticism towards laws imposed to equalise conditions among citizens. Clearly that scepticism explains libertarians' rejection of social and economic rights, yet within the scope of civil and political rights the non-discrimination norm simply spells out the implications of the equal protection of all under the law, a principle that libertarianism necessarily endorses as a consequence of the generality of its norms. We must also bear in mind that libertarians might bitterly oppose a law creating

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[97] UDHR art. 2 (emphasis added).

[98] See, e.g., Toonen v Australia (488/1992), UN Doc. CCPR/C/50/D/488/1992 (1994); Joslin and Others v New Zealand (902/1999), CCPR/C/75/D/902/1999. Cf. UN Committee on Economic, Social and Cultural Rights, General Comment No 20 (2009) UN Doc. E/C.12/GC/20; 16 IHRR 925 (2009) at para 32. On divergent rationales, see, e.g., Gerber and Gory 2014: 405.

[99] Cf., e.g., Yogyakarta Principles, principles 1 – 3; United Nations High Commissioner for Human Rights (UNHCHR), 'Discrimination and violence against individuals based on their sexual orientation and gender identity', 4 May 2015, UN Doc A/HRC/29/23; UNHCHR, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity', 15 Dec. 2011, UN Doc A/HRC/19/41.

social-welfare benefits, but once that law is in place then they would unequivocally insist that all citizens enjoy equal protection under it, as under any other law.[100]

Again, international law recognises a broad range of rights that can be more readily balanced against other rights or against government interests, while libertarianism limits the set of rights but then ascribes greater weight to each right. Yet as we have seen, even libertarianism cannot sustain any doctrine of absolute rights or freedoms, and must at times confront the weighing-and-balancing dilemmas that arise under any conception of rights. Accordingly, LPHR cannot resolve disputes that even fully-fledged libertarianism lacks the tools to resolve. For example, LPHR means that governments cannot legitimately bar competent and consenting adults from freely forming otherwise law-abiding households, which could certainly include multiple sexual partners, who might even enter into informal, i.e., non-legal, multiple-partner marriages. However, that possibility would not mean that LPHR would require polygamous, polyandrous, or otherwise multiple-partner legal marriages. Under contemporary human rights systems, marriage is only a facilitative right, a set of administrative arrangements that presuppose state involvement in order to further particular ends deemed propitious by the state. It is not a "negative" or "hands-off" right. It is by no means obvious on what grounds a rigorously libertarian society would even include the institution of legal marriage. In itself, then, LPHR does bar the state from discriminating on gender-based or other grounds as to one's choice of spouse, but cannot bar the state from limiting the numbers of partners who enter into marriage.

Rights of bodily autonomy. The foregoing rights of privacy and free expression remain insecure, then, unless the state undertakes adequate measures to prevent and to redress anti-LGBTQ+ discrimination. By extension, trans people with limited financial means may seek monetary or other material support to ensure access to medical services, which, in

[100] See Brennan 2012, 129-49; Machan 2006, 313-17.

poorer countries suffering overall deficiencies in health care delivery, may raise further difficult questions about setting priorities and ensuring fairness. Nevertheless, the example of assisted medical access does point to a further civil liberty, namely, of general bodily autonomy including gender re-assignment and corresponding medical procedures.[101]

In other words, libertarians may reject rights to health care, but would not reject an individual right to choose such a procedure. Ensuring universal access to gender transitioning procedures certainly raises questions about access and resources; however, as to the question of individual autonomy, the expectation that states ought not to actively prohibit or impede individuals' freedoms to avail themselves of gender-transitioning services solely on grounds of conventional morality is increasingly widespread.[102] Similarly, on the aforementioned holistic view, the fact that the HIV/AIDS virus has disproportionately affected gay men would mean that they can enjoy equality with heterosexuals only if antiretroviral treatments are available to the entire population – again, a measure that libertarians would favour through market forces, but not necessarily through social and economic rights. Here too, however, where a national health service is already generally distributing necessary medications, LPHR would mean that moral disapproval of gay sex could not stand as a legitimate rationale for refusing to provide antiretrovirals, or for providing them only to married heterosexual couples.

Once again, however, LPHR cannot solve more than fully-fledged libertarianism can solve. For example, debates have raged about whether trans women ought to have full access to women's toilet facilities, hospital wards, prisons, sporting competitions, and other single-sex environments or activities. Many trans activists argue that there is little if any evidence of serious harm caused by such access. Meanwhile, some feminists respond that gender

[101] See, e.g., Yogyakarta Principles Plus 10, principle 32.

[102] For regular updates see, e.g., International Lesbian and Gay Association (ILGA) n.d. (c); Transgender Europe n.d.

differences cannot be fully eliminated, therefore that kind of access would violate necessary protections of women's safety or integrity.[103] Yet just as libertarian philosophy in itself lacks sufficient principles for determining when human life begins, so does it lack sufficient principles for selecting the criteria that would determine gender. LPHR resolves a great variety of human rights problems, but not all of them; and, as was noted from the outset, international norm creation, interpretation, and monitoring are one thing – actual implementation is another, and no better for LGBTQ+ rights than for countless other human rights.

6. Conclusion

Libertarians advocate a limited set of fundamental rights, each being highly individualistic and carrying great weight. Above all, these include rights to life, liberty and property. Such a stance contrasts with the approach of international human rights law, which encompasses a wide range of rights, including social and economic rights, and emphasises the compatibility of human rights with traditionally communal belief systems. However, the gap between libertarianism and international human rights is not as wide as it appears. Theorists like Martha Minow observe the inter-personal and communal underpinnings of rights; yet far from precluding the individualism of LPHR, those underpinnings presuppose it through their voluntarist assumptions. Meanwhile, even if libertarians reject the indivisibility principle, that principle, too, presupposes LPHR insofar as LPHR applies to all individually held human rights.

From today's perspective, it is easy to take for granted that classical liberalism bars governments from reciting public morals as sole grounds for limiting civil rights and liberties. However, throughout most of the history of liberalism, public morals were in fact deemed to

[103] See, e.g., Zanghellini 2020.

suffice as grounds for limiting civil rights and liberties. Any "classical" liberalism that holds otherwise is a recent invention – certainly shared today by mainstream liberals, and yet unequivocal within libertarianism since its inception. The example of LGBTQ+ rights has served to demonstrate LPHR through an *argumentum a fortiori*: if LPHR applies to such culturally and politically controversial rights, then it applies all the more to well-settled rights. To be sure, LGBTQ+ claims spark controversy in several ways. Notions of LGBTQ+ identities have emerged only in recent decades, often seemingly at odds with countless cultures, for which no such identities ever existed. That problem of sheer novelty is compounded by the fact that the drafters of leading international human rights instruments made no mention of LGBTQ+ identities, raising questions as to the legal basis for their inclusion. The perceived affront of such identities to various traditional beliefs has prompted vigorous opposition to LGBTQ+ rights from many governments.

Yet many of the culturally or morally based objections to LGBTQ+ rights apply to human rights as a whole. The very concept and vocabularies of individual legal rights against government is alien to most traditions, which, today, is not necessarily perceived as fatal to the movement as a whole. Similarly, even if the concepts and vocabularies of LGBTQ+ identities appear strange within a range of cultural traditions, their novelty has not deterred individuals in many countries from embracing LGBTQ+ identities as a basis for claiming LGBTQ+ rights. In recent years, interpretations of leading human rights bodies have uniformly confirmed that governments cannot legitimately recite public morals as sole justification for abridging LGBTQ+ civil rights and liberties. It comes as no surprise, then, that such recitations would be rejected if they were invoked to justify violations of civil rights that have long been well established within the international corpus.

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