

## Human Rights: The Philosophical Issues

What follows is not a “neutral” account of the problems associated with the idea of human rights, even if, as I doubt, such is possible. While I try to identify most of the major positions and the literature associated with these positions, both my organization of these, the way that I articulate them, and my judgments about them, reflect a distinct theoretical orientation. The account is but a sketch. For me, it is critical to distinguish a number of different questions.

### Question 1

What is one claiming when one claims that there are human rights?

To say that there are human rights is to say that irrespective of time, place, ethnicity, gender or condition, there are morally compelling claims that persons can make on their behalf. Human rights are thus “universal” and people have them whether or not they acknowledge having them or seek to exercise them. That there are such rights may be nonsense for some, but before considering this, some clarification seems called for.

(1) Human rights discourse is moral and political, and not as such, legal. We need to distinguish human (or natural) rights which all humans have, and legal rights which exist only by virtue of the state and are held only by members of the state.

(2) Human rights are not simply needs (e.g., children need balanced diets) but are valid claims in the sense that they ground other people’s duties. Thus, if children have a human right to a balanced diet, then some others (to be determined) have a duty to provide food. These are, accordingly, “natural obligations” in the sense that such duties are not “voluntarily incurred” (like the duties which attend roles voluntarily incurred) and people have them whether or not they acknowledge them. Parents surely do have such a duty, but if this is a human right, the obligation can not end with them.

It is plausible to insist that there are no rights (human or otherwise) without obligations. But the relation of rights and duties may not be symmetrical. That is, it may well be that there are obligations (natural or otherwise) without a corresponding right, e.g., the duty to be charitable.

(3) As morally compelling claims, rights are claims of justice, not charity.

(4) When writers assert that people have some human right, the force of the utterance is not that people (or the state) in fact acknowledge the duty by acting on it, but that it *ought to be recognized and acted on*.

(5) Who has the duty is a separate issue not always easily determined. Feinberg notes that some of the articles of the Declaration of Human Rights “impose duties upon others that are so difficult that they may, under widely prevalent conditions of scarcity and conflict, be impossible for *anyone* to discharge.”<sup>1</sup> I doubt this. But even if this is the case, it does not make the claim, if it is morally compelling, null and void.

(6) But determining who is obliged is not the only problem; how the obligation is secured remains a problem.

There is a version of what is sometimes called “positivism” which holds that there are neither rights nor obligations unless sanctions are available to enforce the requirements. But this (Hobbesian view) confuses moral issues and institutional (sociological and legal) issues. The confusion surfaces, e.g., when it is held (as by Richard Nixon) that if no law is broken, the act is morally permissible. To be sure, the payoff of having a right is that it be secured, but seeing how this is to be accomplished is the problem, I suspect, of many future meetings of the seminar.

(7) It may not be easy to determine if a claim is morally compelling. Since my defense of human rights (below) assumes that intercultural conversation is possible and necessary, the moral argument will need to take place in what Seyla Benhabib has called “the global dialogical community.”<sup>2</sup>

## Question 2

How does one justify the assertion that there are universally held human rights?

There are a number of theories of justification. I sketch only three.

(a) Theological theories. The idea of rights emerged in Western civilization and accordingly, Christian versions of natural rights theory have a large legacy. A very recent statement of this view is by Vaclav Havel. He wrote:

I have often asked myself why human beings have any rights at all. I always come to the conclusion that human rights, human freedom, and human dignity have their deepest roots somewhere outside the perceptible world. These values are as powerful as they are because, under certain circumstances, people accept them without compulsion and are willing to die for them, and they make sense only in the perspective of the infinite and the eternal...

Allow me to conclude my remarks on the state and its probably role in the future with the assertion that, while the state is a human creation, human beings are the creation of God.<sup>3</sup>

It is just this perspective, of course, which leads less religiously inclined thinkers to reject the very idea of human rights. Worse, it also confirms the view that human rights is an Eurocentric prejudice.

Consider this last first. It is true and important to notice that rights-talk is an European invention, that it was strongly propelled by Christian thinkers, and, more important, that it was part and parcel of the rise of modernity in the West. We can think of “modernity” in terms of two remarkable shifts: the shift to capitalism and to the modern state. Both presupposed a concept of the individual as having rights. This is hardly contestable. More contestable, perhaps, is the argument (made by C.B. Macpherson<sup>4</sup>) that the “individualism” so represented is indeed “possessive.” Hobbes, it may be remembered held that individuals “in the natural condition of mankind” had “a right to all things.” Locke held that individuals in the “state of nature” should be guided by the moral law, but he offered an ingenious argument that individuals had also a “natural right to property” which, to be sure, it was *the* aim of “civil society” (defined as having a system of statutory law with enforceable sanctions) to protect.

But this same history which generated the legitimating ideas of capitalism also generated some potentially emancipating moral ideas. Indeed, historical experience may enable us to separate the wheat from the chaff. Moreover, even if we accept that there is a convincing moral argument that there are human rights, a number of critical additional questions remain: What exactly does agreement on the right settle? What is to be included as rights? Are they absolute and can they can be over-ridden? The answer to these questions will, I think, critically depend on the argument which justifies the idea of such rights.

(b) Enlightenment Theories: On this view, both in its natural law and Kantian variety, there are certain principles of true morality which may or may not have a divine origin, but which are discoverable by reason.<sup>5</sup> These ground obligations which in turn justify rights-claims. (A version of this is found, perhaps, in Article One of the Universal Declaration of Human Rights.)

But moral scepticism, especially as regards the omni-competence of “reason” and recognition of the Eurocentric and imperializing origins and claims of these theories has made them unconvincing.

Before turning to the theory of justification which I think can be sustained, let us consider, if briefly, currently fashionable “historicist” or “relativist” moral theories.<sup>6</sup> From the present point of view, what is most critical here is rejection of the idea that there is some set of rights which are

held universally. On this view, in every viable “community” (I use the term advisedly), there are social rules which, accepted by those who live and work in the society, govern the moral life of the community. It is held then, that there is no Archimedean point from which to judge the rightness or wrongness of these systems of social rules and the attending duties and rights, if there are such. Indeed, at the extreme, the rules of some society may even exclude the concept of a personal right.

It is unhistorical to suppose otherwise. Similarly, I would agree that it is anachronistic and provincial to suppose that such communities were (or are) morally meritless. Still, the problem is not to judge such societies but to ask whether human societies are capable of moral progress and if so, on what grounds can this be judged?

Feinberg has considered what is missing in a society which lacks the concept of a right. What is missing is *the absence of a ground to make claims*. “Rights,” he remarks, “are especially sturdy objects to ‘stand upon,’ a most useful sort of moral furniture. Put in other terms, rights are *politically* critical, forcing reconsideration of the status quo, e.g., the condition of slaves or women, or suppressed minorities. Moreover, there is a rhetorical link between having rights, making claims, and “the customary rhetoric about what it is to be a human being.” He continues: “Having rights enables us to ‘stand up...,’ to look others in the eye, and to feel in some fundamental way the equal of anyone...Indeed, respect for persons... may be simply be respect for their rights...and ‘human dignity’ may simply be the recognizable capacity to assert claims”<sup>7</sup> Dworkin concurs, noting that “anyone who professes to take rights seriously...must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity...The second is the more familiar idea of political equality”<sup>8</sup> One can concur with this, but we need to notice that here as typically among most liberal theorists, there is no explicit justification for either idea. They are simply assumed.

Indeed, arguing that rights-talk is politically significant in the foregoing sense is consistent with a relativist moral philosophy. Margaret MacDonald, e.g., has argued that “assertions about natural rights...are assertions of what ought to be as the result of human choice.” This makes them, for her, “value judgments” which lack cognitive content. “To assert that ‘Freedom is better than slavery’...is not to state a fact but *to choose a side*.”<sup>9</sup> The assertion cannot be determined to be either true or false and hence all that can one can be doing is expressing one’s personal preference. For those who choose otherwise, you may hope to persuade them. For this purpose, of course, the use of solid rhetorical techniques are to be recommended. But do not think, that somehow or other, you are right. As Thrasymachus insisted (against Socrates in Plato’s *Republic*), the rhetorical struggle over competing conceptions of morality is just that: As with Rorty, it has no consequences as regards even little “t” truth and little “j” justice.

There is, however, a third line of argument in defense of the idea that there are human rights. It will not, to be sure, convince those who will insist that there can be no “naturalistic” (and *a fortiori*, metaphysical or religious) grounding for moral assertions. Nor perhaps in the form which is defensible will human rights give all that many defenders of human rights wish to have.

(c) Martha Nussbaum<sup>10</sup> gives a fairly well developed version of an older idea: there are certain simple truisms which give rise to a conception of what it means to live a human life (to be a human). Comparable in many ways to what H.L. A. Hart called “the minimum content of natural law,”<sup>11</sup> these “simple truisms” include our mortality and vulnerability, our approximate “natural” equality (as recognized by Hobbes and Adam Smith), our capacity for pleasure and pain, humor and play, our cognitive capacities: perceiving, imagining, speaking, our capacities to plan and establish for ourselves goals, our “natural” affiliation and need for other human beings (as emphasized by Rousseau, Hegel, Marx, and Dewey, e.g.).

These capacities (and liabilities) are constitutive of human potential wherever we find human beings, even if, of course, there is both enormous variations in the ways that human

potentialities are realized--*when* they are realized (e.g., a host of languages are spoken), and a very wide range of social norms and institutions which are consistent with their realization—at least for some segment of the society. Indeed, as a function of persons places in history and society there are huge differences in the degree of realization of their potentialities as humans, including pointedly, preventable premature death and including illiteracy and other obvious dis-enablements.

Just as obvious, in a world where resources requisite to realizing these capacities are not available to all—for good and bad reasons, where altruism is profoundly limited, where coercion rather than voluntary cooperation is the rule, where violence is an ever present reality, countless humans will lack even the minimum conditions for realizing a human life. It is just these minimum conditions, accordingly, which suggest the basis of the idea of human rights. For example, Amartya Sen writes:

...Minimal demands of well-being (in the form of basic functionings, e.g., not to be hungry) and of well-being freedom (in the form of minimal capabilities, e.g., having the means of avoiding hunger), can be seen as rights that command our attention and call for support.

As summarized by Crocker:

Rights, then, are defined as basic not because they are indispensable to the fulfilment (sic) of any other right but because they are a way of formulating the urgency of minimal levels of eminently human (actual and possible) functionings.<sup>12</sup>

It would be correct to say, accordingly, that claims to human rights are claims to realize the conditions of minimally decent society, not, as some suppose, the good society. As the critics of “universalism” rightly see, contrary to well-established traditions in political theory, there is no reason to believe that either the standards for assessing the good society nor the arrangements of the good society are universal. But we rightly condemn policy-driven starvation, and reject slavery and the mutilation of women because these outcomes violate basic human rights.<sup>13</sup> Similarly, moral progress may be measured in terms of the degree to which these basic human rights are guaranteed.

### **Question 3**

What are to be included as human rights?

It is not my purpose here to provide a list, in part for reasons offered in answer to the question which follows this one. But the foregoing justification for the idea suggests both the obvious candidates and also the sort of claims that could not bear the weight of justification. Thus, one can list “the right to life” and “the right to an education,” and many others which seem grounded in the idea of securing conditions for the realization of human capacities. Others would obviously be excluded, e.g., “the right to court-side seats in Madison Square Garden,” “the right to a forty-hour work week.”

But it will be worthwhile to identify the sorts of rights associated with what is most lately called, “rights-based liberalism” and to note that the present view should be sharply distinguished from this view.

Robert Nozick and Ronald Dworkin are good examples of “rights-based liberalism.” Both defend “rights” and neither provide any sort of argument for the particular rights they assert. More important, both are concerned only with what are often called “negative rights,” more lately called “first generation rights,” the idea that rights are claims *against* interference, but especially by the state. As regards moral philosophy both argue against utilitarian justifications for political decisions which appeal to the general welfare, for example, as in Nozick, violation of the “right to private property” is not justified by considerations of social welfare. For Dworkin, rights are “claims of a trump.” Human rights, accordingly, are just those where “arguments are available in favor of

those rights against any collective justification in any circumstances reasonably likely to be found in political society” (p. 364).

This is an extremely narrow conception of human rights. Not only does it pose the critical issues in possessively individualistic terms: the individual *against* the community or state, but it has no room for what are sometimes called positive (and more lately “second-generation”) rights, rights which make claims for resources necessary to realize one’s human capacities. The problem is captured neatly in the quip that for many, “the right to life” ends at birth! On the view suggested here, the distinction between first and second rights is blurred, so that economic welfare and cultural development become available as claims to rights.<sup>14</sup>

#### **Question 4**

Finally, are human rights absolute and may they be over-ridden.

By “absolute” I mean exceptionless. Thus, the right to free speech would be absolute if, in all circumstances, all speech was protected. By over-ridden, I mean that they can, in Dworkin’s term, be “trumped.” Personally, I doubt that there is any right which can be non-trivially stated as exceptionless, and all are, I think, over-rideable. This is straight result of the fact all statements of right are abstractions which must be concretely applied (and thus are open to interpretation), and because well-justified claims can conflict.

One should think of morally compelling rights claims as “principles” in Dewey’s sense.<sup>15</sup> First, like the familiar moral principles, the Golden Rule, they are grounded in truisms about human life drawn from the hard lessons of human history. They reflect what we have learned about human life and about human capacities and the relations of humans in societies.<sup>16</sup> Second, they do not prescribe a specific course of action. One cannot assert the right and deduce what has to be done. But, third, principles are not empty formalisms either. Claims to rights are not trumps, but are *presumptions* which guide moral inquiry and decision-making. As Feinberg writes, human rights may be thought of as “ideal directives” which enjoin us to “do our best under the circumstances” to realize the values involved.

The defense of human rights suggested here is neither Kantian nor utilitarian in the relevant senses. It denies that either the right or the good has priority, that either rights or considerations of social welfare can serve as “trumps.” It is not Kantian in that (versus, e.g., Rawls), it does not require that principles of justice be neutral as regards a particular vision of the good life. Nor is it Kantian in assuming what is called, oddly, “an autonomous self,” in Kant’s terms, a self which gives laws to itself, and in the current sense, a self which is “unencumbered,” or “wholly detached from our aims and attachments.” It is not utilitarian in that “goods” are not reduced to preferences and desires, and in that human rights are not to be defended on grounds that securing them will serve the general welfare, either in the short or long run.

Finally, the foregoing is not either a version of so-called “communitarianism” since it rejects as spurious the dichotomies which have fostered the debate between “communitarians and “rights-based liberals.” First, rights can be defended without selves being “unencumbered.” Second, while political discourse must proceed from common meanings and traditions and there is no standpoint “wholly external to these meanings,” “communities” are no more autonomous than selves and both change, possibly even progressively. Finally, since there is no priority between the right and the good, any viable morality or politics must be sensitive to both and must be situational and concrete.<sup>17</sup>

#### **The Role of Rights Discourse in the Context of Globalization**

With reference the “self-destructive character of the market mechanism,” Karl Polanyi argued that:

...human society would have been annihilated but for protective countermoves which blunted the actions of this self-destructive mechanism. Social history in the nineteenth century was thus the result of a double movement: the extension of the market organization in respect to genuine commodities was accompanied by its restriction in respect to fictitious ones. While on the one hand markets spread all over the face of the globe and the amount of goods involved grew to unbelievable proportions, on the other hand a network of measures and policies was integrated into powerful institutions designed to check the actions of the market relative to labor, land and money (*The Great Transformation*, p. 76).

Globalization represents the spread of “the supraterritorial dimension of social relations,” a tendency toward a full commodification of social relations, driven by “a situation in which profitability has truly become a globally defined criteria for capital accumulation.”<sup>18</sup> But as with Polanyi, there is a double movement, most profoundly represented, perhaps, by the emergence, as Garnier says, of “the gradual emergence of a culture of rights that have to be universally observed” and which could “act as the basic general framework of human social life in a particular stage of historical development” (p. 48). To be sure, as Garnier says, “A ‘system of rights’ requires more than the mere conceptualization of rights”—the main task of my effort here, and as Polanyi saw, while ‘a system of rights’ might be in the best interests of societies, globally, “interests, like intents, necessarily remain platonic unless they are translated into politics by means of some social instrumentality” (*Great Transformation*, p. 8). As Garnier concludes:

It is increasingly important...to oppose setbacks in the system of rights at the national level...and any advance at the national level becomes also an advance for the globalization of rights. This should be seen as a process for *the globalization of the criteria for social convivance*, which constitutes the counterpart to the globalization of the criteria for capital accumulation (p. 49).

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#### Endnotes

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<sup>1</sup> Joel Feinberg, *Social Philosophy* (Engelwood Cliffs, N.J.: Prentice Hall, 1973), p. 94. Brief and readable, this is unquestionably the best general treatment of many of the pertinent issues regarding rights, duties, and freedom as they have been discussed in recent “analytic” philosophy. Good bibliography.

<sup>2</sup> Seyla Benhabib, “Cultural Complexity, Moral Interdependence, and The Global Dialogical Community,” in Martha Nussbaum and Jonathan Glover (eds.), *Women, Culture and Development: A Study of Human Capabilities* (Oxford: Clarendon, 1995). She points out that it is not only “universalists” of her variety that acknowledge the possibility of intercultural conversation.” Rorty has argued that “the same Quinean arguments which dispose of the positivist’s distinction between analytic and synthetic truth dispose of the anthropologist’s distinction between the intercultural and the intracultural.” As she rightly remarks, “the consequences of this argument are much more radical for Rorty’s position that he acknowledges” (p. 246). It entails that moral argument –and potential consensus, outreaches ethnic or “national” “communities.” As well, there is, and will likely remain, intracultural conflict and disagreement as well as intercultural conflict and disagreement.

<sup>3</sup> *New York Review of Books*, Vol. XLVI, 10 June 1999. For discussion, see John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980).

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<sup>4</sup> See C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962). For the best general treatment of the nest of issues pertinent here, see Ian Shapiro, *The Evolution of Rights in Liberal Theory* (Cambridge University Press, 1986).

<sup>5</sup> Perhaps Habermas, not to be discussed, should be included here. As Nussbaum notes, there is an important difference between whether priority should be given to a procedural account, shared by neo-Kantian writers as different as Rawls and Habermas or to a substantive account grounded empirically as in the latter day Aristotelians, e.g., Nussbaum, Dewey and Ian Shapiro. See below.

<sup>6</sup> I have in mind here Richard Rorty, *Contingency, Irony and Solidarity* (Cambridge University Press, 1986) and Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983).

For criticism, see Ian Shapiro, *Political Criticism* (Berkeley: University of California Press, 1990, chapters 2, 3; Seyla Benhabib, “Cultural Complexity, Moral Interdependence, and The Global Dialogical Community,” and Jonathan Glover, “The Research Program of Developmental Ethics,” in *ibid.*

<sup>7</sup> Joel Feinberg, *Rights, Justice and The Bounds of Liberty* (Princeton, 1980), p. 151.

<sup>8</sup> Gerald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), p. 1978.

<sup>9</sup> Margaret Macdonald, “Natural Rights,” in Peter Laslett (ed.) *Philosophy, Politics and Society*, First Series (Oxford: Basil Blackwell, 1967), p. 49.

<sup>10</sup> Martha Nussbaum, “Human Capabilities, Female Human Beings,” in Nussbaum and Jonathan Glover (eds.), *Women, Culture and Development: A Study of Human Capabilities*,

In his *Political Criticism*, Ian Shapiro offers a sophisticated defense of what he calls “critical naturalism,” an updated version of Aristotle, influenced by Dewey and drawing critically on recent work of Alasdair MacIntyre, *After Virtue* (1984) and Michael Walzer, *Interpretation and Social Criticism* (1987).

<sup>11</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

<sup>12</sup> David A. Crocker, “Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic, in Nussbaum and Glover, p. 186.

<sup>13</sup> In my view, many critics of any variety of universalism are ultimately incoherent in that they fail to draw the full consequences of their position. Stuart Hampshire (as cited by Stanley Tambiah) puts his hand on the critical point. Hampshire writes:

Argument might show that a custom does offend against some entirely general principles of fairness and justice, and this is a very strong ground for condemning it. But the custom might be one of a network of interconnected customary family relationships which could not be radically disturbed without undermining a whole way of life (*Morality and Conflict*, Harvard University Press, 1983).

One here must say, “So what?” From the present point of view, if there is a violation of a human right, and if correcting it does unravel the interconnected set of social norms, so be it. Every moral

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advance in society, e.g., ending slavery, has had some unintended consequences on the existing set of norms which, accordingly, adjusted.

As regards Hampshire's remark, Tambiah comments:

These cautions should be borne in mind when social scientists try to understand the attitudes of Muslims in veiling their women, of Hindus in the sacrificing of animals to Durga, of fundamentalist Mormons to polygyny, and so on (*Magic, Science, Religion, and the Scope of Morality* (Cambridge University of Press, 1990).

This is good advice for social scientists "trying to understand" attitudes. But what follows morally and politically? Tambiah's examples are probably carefully chosen and are, at the very least, contestable as violations of a human right. Nor, as Walzer suggests (in a oft-quoted example regarding caste inequality in India), is the choice between moral relativism and moral imperialism: *forcing* a change on the community. As Glover writes:

...To say that justice 'requires' the redesign of the village is simply to say that, without redesign, the village remains unjust. To say that the claim fails where it goes against shared understanding is to adopt a relativist stance ("Development Ethics," in Nussbaum, p. 127).

As he says, "communitarians," including those who deny relativism, seem "to suggest that only very restricted kinds of external criticism can be made of the norms of a society" (p. 127).

<sup>14</sup> This is related to the misformulated, but widely held liberal conception of freedom, defined "negatively." But surely freedom is a triadic relationship: Some person A is free from F to do (be or have) G, where F specifies conditions, from threats to lack of resources, which keep A from doing, being or having G. See Feinberg, *Social Philosophy* and Ian Shapiro, *The Evolution of Rights in Liberal Theory*.

<sup>15</sup> See his largely ignored but remarkable, *Theory of the Moral Life* (New York: Holt, Rinehart and Winston, 1960) which treats all the critical questions, the right and the good, rights and duties, motives and consequences, means, ends and standards, the self, society and moral judgment.

<sup>16</sup> Dewey notes that because "the human being is an individual because of and in relations to others," and because these situated relations carry intrinsic responsibilities, rights and duties have "a natural basis and inevitable role" (*Theory of the Moral Life*, p. 81). "The fact that the idea or principle of Right has such a natural basis and inevitable role does not, however, signify that it will not conflict with what an individual judges to be his good and his end, nor does it guarantee the rightfulness of all claims and demands that are put forth in its name" (*ibid.*).

<sup>17</sup> A brief critique of communitarianism along the foregoing lines is in Shapiro, *Political Criticism*, Chapter 7. As he suggests, the turn away from neo-Kantian theory replaces the abstraction "community" for the abstraction "autonomy." At the same, each introduce, implicitly or if explicitly, without argument, preferred versions of "freedom," "bourgeois" for the liberals, and of "community," "nostalgic" for the communitarians. Also see my "Liberalism's Discontent: America in Search of a Past that Never Was," manuscript available upon request.

<sup>18</sup> Leonardo Garnier, "Globalization: In Search of a Human Face," ms (1999)