

## HUMAN RIGHTS THEORIES\*

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I am very much honored to present a paper on the topic of human rights before such a distinguished audience. Indeed I feel a little embarrassed to speak here, because unlike other speakers I am not a researcher in human rights in Europe. I am a legal philosopher interested in the theoretical foundations of human rights, and my interests are on quite an abstract level. But I am sure that theoretical inquiries into the nature of human rights are not only beneficial to but also necessary for fruitful discussion about human rights. And in this talk I will examine human rights theories through their own problems, because I think this approach is instructive in that it can make us see the theories in perspective.

Having said this, I want to begin with what I suppose to be a fundamental problem facing human rights theories: Why should we hold at all that every human being has some basic inviolable rights? After all, rights, including human rights, are not natural objects whose existence can be objectively confirmed independently of human arrangements. And the idea of human rights is not ubiquitous in human history, either. The concept of rights, especially property rights, may well be universal. Many premodern societies, for example ancient Rome and medieval England, developed elaborate legal systems which consist of various kinds of rights and duties. And the sense of human dignity was entertained in various cultures, too, though it was seldom defined in terms of rights. But the distinct idea that every person, male or female, young or old, highborn or lowborn, smart or stupid, has some inalienable inborn rights only because of being a human being is relatively modern. It was first articulated in early modern Europe by political and legal theorists and later found expression in a number of constitutional declarations of rights. And despite ups and downs until the first half of this century, nowadays the idea of human rights seems to be almost universally accepted as a legitimate political institution. Even those countries that violate human rights pay lip service to them. But why and how should we commit ourselves to that idea? We cannot take it for granted, because the concept of human rights is not necessarily self-evident to all people unless there is some reason for it.

An obvious reason for human rights is the protection of basic individual interests, including some freedoms. Some individual interests are so essential to our decent lives that they must be upheld against every interference, even against democratic or majoritarian decisions or against the non-basic interests of others. We would be able to live better lives when we accept the idea of human rights than when we accept other types of social morality or when we do not have any public moral principle and negotiate on a case-by-case basis.

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I am not claiming this is a knockdown argument for every rational person. For example, those who believe that we have an obligation to obey the teaching of some sacred texts or that all moralities are irrational humbug may consistently reject the idea of human rights. But I suppose most people today admit that the protection of basic individual interests is a sufficient reason for positing human rights.

Still, even though we all accept the idea of human rights, there are a number of knotty problems concerning them. For example: What are the contents of basic rights? What weight should they have in political discourse? Are the bearers of basic rights necessarily human individuals? Cannot a group have some basic rights as well as a person? If so, what groups have what rights? I cannot directly address those questions now. Instead I would rather limit myself to the examination of some criticisms of human rights theories. But I hope my examination is also helpful in answering the questions I mentioned just now.

Some critics of human rights theories argue that rights talk encourages selfishness and makes people more litigious than they should be. In their opinion, what is needed in solving social problems is not the appeal to some abstract rights but sympathetic mutual understanding and sensitivity. Rights talk is regarded as liable to produce and aggravate, rather than solve, interpersonal conflicts. It is also said that persons presupposed in human rights theories are little more than selfish non-social rootless atoms and that we can really flourish only as active participants in a community where our happiness is inseparably connected with that of our fellow members. This argument can be called a communitarian criticism of human rights. The classical example of this position was already found in the writings of Marx, but such criticism is still stated, sometimes articulately, sometimes vaguely, by people of greatly different persuasions.

I think this criticism has some force, especially if it is addressed to an inflated view of human rights. It must be admitted that not all moral problems can be solved in terms of rights and correlative duties. This is obvious in private spheres of morality; family relations and friendship need mutual concern and place people under some responsibility, but it cannot be reduced to a set of particular rights, duties and obligations. Furthermore, even in spheres of social and political morality the idea of human rights is not always omnipotent. For example let's consider the case of economic rights. They are different from rights of economic freedom; they are positive claims against the state for economic goods or some standard of living or welfare. Economic freedom can be protected by non-interference from the state with economic activities and by the enforcement of the rules of property and contract law. But we cannot actually protect economic claim rights merely by conferring them on the citizens. We need sufficient economic goods for the realization of economic claims. Maybe it is not an empty declaration of economic rights but economic prosperity that makes it possible for the citizens to live decent lives. And economic prosperity is not something rights talk can bring into existence. This example suggests, I suppose, that the need for some human rights requires not only a constitutional declaration of human rights but also economic conditions that enable a country to confirm concretely those rights. Moreover such economic conditions cannot materialize without some social factors, say honest business and an industrious work force.

But let's leave the preconditions of human rights for the present. Suppose those conditions are satisfied. Then, is it true, as communitarian critics argue, that the idea of human rights is selfishly individualistic and hence disruptive of a society, or even detrimental

to each individual thereof? I think their claims are too exaggerated to be plausible. Let me explain why I consider them unconvincing.

First, the idea of human rights is incompatible with egoism as it is usually understood, namely, as unfair partiality to one's own interests. Rather the idea of human rights demands everyone to respect others as equals in terms of basic rights and to accept the duties and obligations that result, directly or indirectly, from other persons' rights. I admit, however, that the very concept of rights permits, if not encourages, a certain kind of egoism, because it enables a rightholder to pursue his or her own interests in preference to those of other persons within a limit. This sort of egoism can be called universalistic in that it gives everyone liberties to behave egoistically in certain spheres. It is true one can exercise his own rights altruistically: one can be a miser, but he can also donate his fortune for philanthropic or cultural causes. And no one is required to use his rights to maximize his interests. Yet we cannot deny the fact that we are far more likely to make use of our rights for our self-interest than for other people's sake. I presume it is true not only in contemporary societies but also throughout human history since the concept of rights existed.

Then the problem is: Should we denounce the universalistic version of egoism which the very concept of rights permits? I answer this question in the negative. Actually, I think universalistic egoism is inevitable in any practical social morality for the following reasons.

First, it is necessary for us to be such autonomous agents that each of us has an exclusive power over his or her own activities and interests. Let's suppose a society where every member has some equal partial control not only over his way of living but also over that of every other member. I am sure it would be unbearable to live in that society because of the lack of privacy and autonomy. Then, what is the extent of the realm of an individual's autonomy and privacy? It is a difficult problem. But I suppose almost every reasonable person will agree that the realm includes at least a person's body. In order to examine this claim let's suppose such a society where no one has an exclusive right to his body parts and where a person randomly selected by compulsory lottery is obliged to give some healthy body part, say one kidney, to a seriously ill patient. The discrepancy of the levels of health among the members of this society would be much smaller than that in our more individualistic societies. That society would be better than ours at least in one aspect, namely, the equality of health of its members. But I think most of us would prefer not to live there. It is because we regard our bodies as inviolable and integral to our personhood and have an intuitive idea of what constitute the realm of autonomy: At least the body is within the realm.

The second reason why universalistic egoism is inevitable in practical morality is this: In most cases the interests of each person are better known, better cared for, and more easily realizable by that particular person than by any other one.

These two considerations suggest that everyone should have some exclusive rights to his or her own interests and liberties and that rights to other persons' interests should be exceptions, for example, parents' rights on behalf of their young children.

As I said, we tend to exercise our rights in preference of our interest to those of others, since we actually have partiality to our specific interests. I admit we should try to rein our partiality and to reform our values to include more impartial considerations for fellow

human beings, but I also think self-centered partiality is an inevitable fact of human nature. The idea of human rights has one practical advantage. It can tame selfishness by reforming amoral brute egoism to universalistic egoism and restricting its legitimate area to some basic liberties and interests. I can hardly imagine how we could cope with many kinds of egoism in resolving social conflicts, if we were to dispense with the idea of basic rights.

Communitarian critics of human rights theories have another line of criticism. They point out that there are such things as public goods, which cannot be enjoyed exclusively by anyone. Probably some public goods such as law and order, cultural opportunities and public roads are indispensable to decent life in modern world. But since public goods are indivisible, they are collective goods of a society rather than objects of individual citizens' rights. So, the critics argue, the human rights theorists cannot adequately explain the importance of public goods. But I think it is conceivable that each and every citizen should have a right to public goods. For example everyone may have a right to demand some public goods, say unpolluted air, from authorities by reason that those goods are necessary for or constitutive of individual basic rights. It does not follow from some goods being collective that they cannot be claimed by an individual.

I admit, however, that an individual citizen's claim for public goods poses some practical difficulties. First, as I already said, the actualization of certain human rights may require economic or social preconditions that do not materialise merely by proclaiming those rights. Second, it is often not clear what amount of what kind of public goods is required for the actualization of a human right. This problem leads to another criticism of human rights theories. That is not necessarily a communitarian criticism, but sometimes accompanies it. It is said that human rights theories are too indeterminate. Indeed we too often disagree as to what basic rights we have and how important they are. For example, in some countries the rights of both economic and political liberties are very highly valued while welfare rights are not legalized, but in other countries a claim to basic welfare is among constitutional human rights while economic freedom is only tepidly protected. Another example: I was recently intrigued to find that right to work is considered as anti-labor union concept in the United States. But, at first, right to work was a socialist slogan, which goes back to the early nineteenth century. It is still interpreted as a pro-labor, anti-employer concept in Japan. It functions as a person's abstract claim-right to employment. I do not mean there is one single universally true interpretation of "right to work"; there may be a number of possible interpretations. But one may suppose those indeterminacies show the fundamental defect of human rights theories. The idea of human rights may be considered too amorphous to guide the conduct of governments and citizens.

This criticism has some force, too. We cannot determine the exact content of human rights simply by *a priori* reasoning, as earlier human rights theorists seemed to presuppose. But we must remember human rights are basic abstract rights rather than concrete specific rights such as a tenant's rights against a landlord. So even if a basic right remains the same, what specific rights and duties and policies are to be derived from it depends upon a number of contingent facts such as natural and economic conditions and historically formed institutions. If the economy of a country is in poor condition, the citizens there may not claim a satisfactory level of welfare as a basic right; actualization of basic rights cannot be otherwise. Still the idea of human rights is useful in social decision-making and morality. It has its *raison d'être* as far as it provides a frame of reference in a public forum of political

discourse. Without the idea of human rights it would be difficult to focus on individuals' needs. But we must pay sufficient attention to the differences in abstraction and practicality among various rights, instead of brandishing the concept of human rights.

There remains another problem: How to solve conflicts of human rights? Of course if the conflicting rights belong to different levels of priority, there are no theoretical difficulties. But I suspect it is almost impossible to formulate an order of priority of rights in an *a priori* way. It is a regrettable fact that many theorists and advocates of human rights seem to pay little attention to this problem and to regard human rights as categorically inviolable. We can understand that when one claims some human right it is often difficult for one to realize there may be opposing legitimate claims of human rights. But actually conflicts of them are most mundane phenomena in social and constitutional problems. Take one example: Is it permissible that the identities of the alleged victim and/or the accused of a certain criminal case be reported by the media? This is a conflict of the public's right to know and the media's freedom of expression on one hand and individuals' privacy right on the other hand. Another kind of conflict occurs when human rights of the same type clash. For example, is it permissible or even obligatory for the authorities to sacrifice some innocent persons in order to save a greater number of other innocent people in a case of emergency?

I am not ready to propose a solution to those conflicts. Neither do I expect there is one clear-cut overall way to solve them. But we must neither despair nor succumb to situation ethics. We may be able to reach a solution which is acceptable to all the reasonable and rational people. To achieve this aim, I think, we must do the following. First, we should identify what interest a particular human right contributes to. A human right must have some distinctive point. Second, we should evaluate the importance and urgency of that interest in comparison with the conflicting interests. Third, we should also consider and compare the further consequences of possible solutions in terms of overall social considerations such as distributive justice, economic efficiency and the consistency of judicial and administrative decisions. And besides we must frankly acknowledge that some amount of reconciliation on both sides may be necessary for solution of any conflict.

In this talk I mentioned some criticisms, especially communitarian ones, of human rights theories, and admitted there are certain problems inherent in those theories. But I argued that we cannot reasonably dispense with the idea of human rights and that the criticisms are considerably exaggerated. I also suggested some general guides to cope with the problems of human rights. Yet I am conscious that we need more detailed, specific examinations of particular human rights in order to solve the problems. Human rights are not a cure-all for all human miseries. Rather we must flesh out and examine human rights to make them help the improvement of social conditions of mankind, for human rights are one of the most precious ideas of modern thought.