

## **On the Foundations of Human Rights**

### **Abstract:**

In this dissertation, current theories of human rights are examined on three basic questions concerning human rights: 1) why people have them; 2) who is included as a subject of human rights; and 3) how they are related to other forms of rights.

Answering why people have them must rely on reasons all could accept, as part of respect for differing comprehensive views. We draw upon the capabilities approach of Martha Nussbaum as an orienting source for universal human rights, and the Universal Declaration of Human Rights as a credible starting point for enumerating them.

The inclusion threshold must not rely on criteria which many human beings cannot meet, because then we will not have human rights at all. We must modify the conception of Alan Gewirth, who affords full human rights only to prospective purposive agents, and proportionally diminished rights to marginal agents, by affirming human rights even for pure recipients.

Conceptions of this kind must not allow subordination of human rights to instrumental concerns, or human dignity will have been sacrificed. This prevents adopting the interest theory of Joseph Raz, who places all rights, including group, corporate and special rights, on a par with human rights, despite recognizing that only humans and their well-being have ultimate value. It also precludes adopting the law of peoples of John Rawls, which limits access for many peoples to the procedures by which the basic structure of society is agreed upon, and subordinates human rights at times to instrumental interests of nations.

Our view extends Gewirth's holders of rights from agents to include recipients, and restricts the scope of rights as defined by Raz by distinguishing between artificial and natural persons. Whereas for Rawls only certain basic liberties have their fair value protected, here we aim to protect the fair value of all human rights strictly considered. In ending we analyze unresolved conflicts in the United Nations human rights regime. We find the major fault lines all involve prioritization of rights of nations over rights of their subjects. Resolving them strengthens our call for a reduced Westphalian order.

## ON THE FOUNDATIONS OF HUMAN RIGHTS

### INTRODUCTION

What grounds are there for human rights? Different conceptions of the foundations of universal human rights as well as moral and legal rights have been prominent in recent thinking. We will here invoke the taxonomy of Marie-Bénédicte Dembour in *Who Believes in Human Rights?* by observing that some think human rights are given, or can be discovered, others claim they can be rationally constructed, or agreed upon, still others that they must be contested and struggled over, and certainly if nothing else, they can be proclaimed and denied. In this project, we seek agreement on a political conception of human rights drawing on the capabilities approach as a source and seeking to respect differing comprehensive views. Even if there is skepticism and disagreement about foundations, human rights discourse will still go on. By seeking consensus, and building on what we find, the framework of human rights may become less contested and more stable.

As we proceed, a theory of human rights will emerge, intended as suitable to be part of an overlapping consensus, while identifying areas where human rights thinking needs clarification and augmentation. Earlier theories are first examined by focusing on their strongest adherents. The main argument of Alan Gewirth for the rational justification of human rights is qualified through a renewed focus on the role of the recipient, questioning the attribution of diminished rights to marginal agents. The interest theory of rights as expressed by Joseph Raz is critiqued as insufficiently discriminating in terms of his categories of rights holders. While John Rawls grants a limited set of human rights, his law of peoples is shown to be unable to serve as a foundation for universal rights because of its inherent architecture. In light of the deficiencies of these views, I then draw upon the capabilities

approach, taken as a self-standing module and not as a comprehensive view, to evaluate the 1948 Universal Declaration of Human Rights (UDHR). This enables identification of its major accomplishments, while exposing fault lines needing to be addressed. The stage is then set to present a theory of human rights grounded in the need for all to be able to express central human capabilities, giving priority to rights of humans *qua* humans and as members of protected groups in relation to rights of groups, corporate rights, and other special rights. In constructing this theory, we can gain insights into the role of reason in ethics and also the limitations of this role.

## **1 GEWIRTH AND MARGINAL AGENTS**

In the theory of Alan Gewirth, agency, as the capacity for voluntary and purposive action, is claimed to be what differentiates humans from other potential rights holders, and grounds generic rights to freedom and well-being. We do not focus here on Gewirth's main argument, which finds a reciprocal and mutual basis for rights in his Principle of Generic Consistency (PGC). Instead we take up the human rights of marginal agents, who approach but do not attain the status of Prospective Purposive Agent (PPA) entitling them to full generic rights to freedom and well-being. Gewirth evaluates marginal agents with a Principle of Proportionality, which we show does not correspond to the way such people are usually treated. People who may not be fully PPAs, and in fact may not be agents at all, we argue, qualify for rights as recipients.

Gewirth could not do without recipients, because they are indispensable to his main argument. But recipients play an attenuated role in his thinking. He deploys them only to enable reciprocity with agents, by exchanging roles. He does not take full account of recipients who cannot fully attain reciprocity, or remain only as recipients. We argue that humans have rights as recipients, even if they lack the status of agents in whole or in part. For Gewirth the concept of the recipient is

underdeveloped, whereas for us it is indispensable to provide for universal human rights for all humans without exception. To sum up, Gewirth is too restrictive in founding human rights on agency alone, and not on the inclusive combination of agency and reciprocity.

In order to more precisely define the scope of those entitled to human rights, we propose a second iteration of the principle of similar treatment of similar cases, so that not only is the role of the agent subject to logical universalization governed by norms of reciprocity, as Gewirth holds, but also the role of the recipient is subject to moral universalization governed by norms of dignity. To take this step we need to extend in a small way Gewirth's concept of recipient, which presumes symmetry and interaction. By recognizing an asymmetric status of recipients who may no longer qualify or may never have qualified as agents, the way is opened for consideration of the human rights of marginal agents in a way that is broader than what Gewirth can provide.

## **2 GEWIRTH'S MAIN ARGUMENT FOR HUMAN RIGHTS**

Having what amounts to an amendment to Gewirth's view on the rights of marginal agents who lack some or all of the characteristics of Prospective Purposive Agents (PPAs), we will examine Gewirth's main argument for rights based on agency to see the extent to which it can be incorporated in a broader account of the foundations of human rights. It turns out that we can make use of several of Gewirth's insights and principles, provided that they are seen as morally justified rather than logically inescapable. To recognize human rights of recipients is not logically inescapable, but it is essential to conceiving human rights as universal.

We analyze the main argument, finding that objections may be raised at any of three main stages. First, Gewirth claims that in voluntary and purposive action, each agent must consider freedom and well-being as necessary goods. Second, he argues that because of this, each agent must claim

rights to freedom and well-being. Third, each agent must affirm that the grounds of such a claim are based on being a prospective agent with purposes to fulfill, and since this is true of every agent, all agents must recognize that all agents have rights to freedom and well-being. We defend our view that there are difficulties in the first two stages that prevent the affirmation of the conclusion of the last stage as logically inescapable. Still we think the conclusion that all agents have basic rights is sound as far as it goes and that human agency is sufficient, though not necessary, for human rights.

No lack of logical necessity can prevent us from upholding the view that prospective agents ought to respect the generic rights of recipients as long as we do so on moral grounds that are not logically mandatory. For Gewirth, a moral principle must be other-regarding, prescriptive, egalitarian, determinate, and categorical. Our view satisfies the first three of these criteria. It is more extensively other-regarding by including recipients, it is prescriptive in grounding rights, and it is more broadly egalitarian than the PGC because it assigns human rights to all human persons, agents or recipients. However, it is not fully determinate, and not being logically mandatory, it is not categorical, though we think that is too much to expect, and also hold that Gewirth himself does not satisfy those criteria.

### **3 RAZ AND THE INTEREST THEORY OF RIGHTS**

Next, the interest theory of rights is represented by the work of Joseph Raz. Raz recognizes rights of persons as well as rights of groups of different kinds, and takes up rights of animals. A rights holder can be any entity that can have interests sufficient to call for protection. Raz posits that rights of humans, corporations, and groups are all rights in the same sense, and this parity is central to his theory. We argue that human rights, animal rights and group rights are distinct categories that ought not be conflated in a philosophical account. We find differences between the rights of corporations and groups on the one hand, and the those of human beings and sentient beings in general on the other,

that are not recognized by the interest theory. To show that, we survey the rights in human rights documents to see which can and which cannot apply to corporations and associations. It turns out that at times there is an analogy between the life of a natural person and the existence of an artificial person, but we think it is clear enough that only the natural person can hold human rights.

Raz supports group rights even where one would not think of the group as an artificial person, such as a right of a people to self-determination. Such rights may be legal and morally justified, or subject to qualifications, and some claims may be contested. We distinguish them from human rights, which are rights of humans as humans, and as members of groups. Rights as members of groups are not the same as collective rights of a group. In contrast to Raz, we see human rights as prior in some strong sense, while group rights comprising otherwise valid claims should be upheld, except when conflicting with human rights. In the case of conflicts between groups and their own members, the “right to exit” needs to be strengthened by covering cases where exit is difficult. Protections such as transparency and redress are also needed to keep recognized group rights from overriding human rights in unwarranted ways.

Raz puts forward a theory of value, which could ground a theory of rights, but we will show that his theory of value is not consistent with his interest theory of rights. Human lives, or in his view, almost all of them, have ultimate value. Ultimate value refers to intrinsic value that is core and not derived. Animals and works of art may have intrinsic value, but not core value, having only derived value, which means they are valuable for us. Corporations, which are artificial persons, do not have intrinsic value and do not have ultimate value though they do have instrumental value. But Raz says that corporations have rights in the same sense that humans do. Just to be clear, he says one should not expect one form of right to always outweigh another, which shows that human rights may have to defer

to legal rights of corporations, at least in some cases. But corporations have only instrumental value, so it seems that the theory of value of Raz is here in conflict with his interest theory of rights.

After examination, we find a basic shortcoming in Raz's interest theory of rights, in that it seeks to put human rights on a par with group rights, including rights of governments, institutions, and nations as well as corporations. This parity principle leads him to the conclusion that human rights need to be balanced off against other kinds of rights. This sounds reasonable, but works to the disadvantage of human rights which often do not have legal force. Moreover, in positing this parity, Raz overlooks his own distinctions between subjects of ultimate value, i.e., non-derivative intrinsic value, and those with only instrumental value. To defend the theory of value of Raz, we have to modify his theory of rights, to give priority to rights of humans *qua* humans, including those based on group membership, in relation to group rights that cannot be reduced to individual rights, corporate rights, legal rights and special rights.

Raz does not construct an account of human rights as distinct from legal rights, but he does recognize an international legal system with sovereign states as its primary constituents. Recently Raz has aligned himself with John Rawls on a conception of human rights which includes the specification of a list of urgent human rights whose sustained violation warrants international intervention. This approach places limits on actions of states but at the same time presupposes some form of national sovereignty. By adopting the limited set of urgent human rights from Rawls, Raz acquires an account of human rights that aims to be independent from any comprehensive view, and seems broadly consistent with the interest theory of rights. Urgent rights may just reflect urgent interests. Though human rights do reflect interests, so do rights of other sentient beings, artificial persons, and some groups, and Raz wants to hold on to the view that these are all rights in the same sense. This makes the interest theory less than well suited to provide for a theory of specifically human rights.

#### 4 RAWLS AS A RIGHTS THEORIST

At this point, we examine the work of John Rawls, who is not typically seen as a rights theorist but nonetheless has been influential in this area. Rawls in *A Theory of Justice* held that certain rights known as basic liberties would be protected in a hypothetical social contract. These include political liberties such as voting and running for office, freedom of thought and conscience, liberty of association, rights to bodily integrity, and the rule of law. For Rawls, these liberties are all required to be equal. In relation to the distribution of resources such as income and wealth, counted by Rawls among the primary goods, Rawls propounds principles of fair equality of opportunity and the difference principle, which says that inequalities, to be considered just, must work for the benefit of the least well off. This is not the same as having protected basic rights, because it could be that there are not enough primary goods to go around. In addition, he seeks to protect the fair value only of a subset of political liberties, counting on this to be enough that the system of basic liberties can be sustained.

In *Political Liberalism* and subsequent works Rawls argued that comprehensive secular and religious doctrines need either to be set to one side or at least to play a circumscribed role in a political conception of justice. For Rawls this falls under what he considers the requirements of reasonable pluralism. Human rights are necessary conditions of social cooperation, but do not depend upon prior religious or ethical foundations. Such religious or ethical foundations might not be subject to universal agreement, and particularly so if they depend on comprehensive moral viewpoints. The political conception is designed to be suitable for an overlapping consensus encompassing multiple comprehensive viewpoints, which may be secular or religious.

In his concept of “the law of peoples”, despite the distinction between states, which can be rational, and “peoples”, who can be reasonable, decisions made by sovereign entities retain substantial

force. This places some constraints on the international application of redistributive norms. Further, we claim that the structure of the law of peoples is inconsistent with a universal approach, because many peoples, along with their constituents, are excluded from participating in an original position. Nonetheless Rawls is able to put forward a limited view of human rights as urgent rights. Agreement on this short list of rights limits the autonomy of states by specifying when conditions are appropriate for international intervention.

## **5 THE CAPABILITIES APPROACH AND HUMAN RIGHTS**

Here we try to show how the capabilities approach of Martha Nussbaum, deployed as a self-standing module and not as a comprehensive viewpoint, can ground a political conception of human rights. This is a normative construct, but it limits foundational commitments to stay compatible with diverse comprehensive views, religious and nonreligious. We analyze the Universal Declaration of Human Rights (UDHR) and subsequent documents using the capabilities approach as a benchmark. We examine where the human rights standards may fall short or overshoot, or may be too abstract or too specific, and we note what fault lines are exposed in the analysis. We will also examine how the capabilities approach got to be the way it is and how it might continue to develop as humanity evolves.

We will take up the question of eligibility for human rights by recalling the distinction drawn in the analysis of Gewirth between agents and recipients, and review his requirement of prospective purposive agency (PPA) status as the threshold for undiminished rights. We then examine what the capabilities approach implies about eligibility for human rights, which is much broader and includes all of the marginal agents without subordinating them. The remaining issue concerns those who are pure recipients, such as a person in a persistent vegetative state or an anencephalic child. A way is sought,

and several options are put forward, to attribute equal human rights on a universal basis to everyone while retaining the idea that it is human capabilities that ground human rights.

As compared to the UDHR, which employs a concept of human dignity as more or less an undefined placeholder, the capabilities approach enables us to elucidate the concept of human dignity in a way that is open rather than closed, and many-sided rather than one-sided, in order to best serve as a basis for human rights. The enumeration of the rights is initially derived from the UDHR, with interpretations and extensions suggested by the capabilities approach. The resulting theory aims to qualify as one example, among others that might be presented, of a political conception of human rights which is potentially part of a broad overlapping consensus. Further, by connecting the capabilities approach to a specific content that modifies and extends the UDHR, we hope to further delineate the scope of human rights beyond what is already found. This will be specified more fully in the remaining chapters.

## **6 A CONCEPTION OF HUMAN RIGHTS**

We seek to present a theory of human rights that does not depend on a comprehensive moral viewpoint and does not presume some special epistemic position not generally available to everyone. We put forward a version of such a theory, including criteria of eligibility, classifications of rights, and priorities for different kinds of rights, and intended as one possible way to build upon what is already found in the human rights tradition.

We distinguish human rights strictly considered, including rights of humans *qua* humans and rights of humans as members of protected groups, from legal and moral rights, including non-reducible group rights, corporate rights, and special rights. For our view, there should be some form of

precedence given for human rights, with the other rights of humans justified only insofar as they do not violate human rights in the strict sense.

Our definition of a human right is modeled on the definition of a basic right presented by Henry Shue. For the view here presented, a human right is a basis for a justified demand that its fair value be socially guaranteed to everyone. Fair value is stipulated rather than fulfillment because for human rights that are more specific than Shue's basic rights, what fulfillment means varies from case to case. Fair value, once it is properly determined as part of an overlapping consensus, is able to let us pursue the question, for example, of what constitutes the fulfillment of a right to own property.

The resulting theory posits a reduced Westphalian order in which nations and states do not have or need human rights exemptions in their constitutions and some of their powers devolve upon other units of government, sometimes more local, other times regional or global, or to individuals. It calls for adding a right to emigration to the UDHR. It tries to say more about what sort of property may be owned and by whom. It seeks an interpretation that mutual international cooperation involves sharing in the value of extracted global resources. It would restrain states from regulating voluntary conduct by adults that does not violate the rights of others and does not harm anyone. It would stipulate the conditions in which serious and sustained human rights violations call for some form of intervention from the international community, with a high bar to clear for armed intervention.

## **7 FAULT LINES IN THE HUMAN RIGHTS REGIME**

We propose to evaluate significant proclamations and covenants of human rights from 1948 onward to see how they compare to what we think a political conception of human rights guided by the capabilities approach calls for. Our analysis will focus on key fault lines in the United Nations human rights regime, that is, areas of ethical and political concern where disagreement is entrenched and

meaningful agreement hard to come by. By their nature, fault lines will be issues of long standing whose intractability does not come as a surprise. If there are too many of them, an overlapping consensus on a political conception will be too narrow to support the basic structure of society. We identify some of the most significant fault lines in the United Nations human rights regime and discuss how they might be reconstructed. Holding in view the capabilities approach and our conception of human rights, we expect to be able to shed some light on these problematic issues.

From the account developed earlier of human rights and group rights, we argue that the rights of states come afterward from a human rights standpoint, and that it is the rights of their citizens and inhabitants which have priority. States are necessary instrumentalities, but mere instrumentalities. This will lead us through steps of argument toward gradual limits on the rights of states, while preserving a reduced Westphalian framework. Specifically, we postulate stronger rights to emigration, immigration and asylum. This is intended to challenge the law of peoples as formulated by Rawls.

We recognize the need, beyond human rights, to address issues of social justice, both in a national and an international perspective. To achieve stability without relying on oppression, some limitation of social inequality is essential. A system of property rights may exist, but not be stable without the members of the community being assured the fair value of their basic human rights.

Another issue within the scope of a theory of human rights is the principle in the UN covenants that assigns full ownership of natural resources to the state in which they are located. This is a vestigial Westphalian principle that needs to be modified to take account of those living in areas deprived of certain resources, who do not deserve to be entirely excluded from any share in the essential resources, such as water and energy sources, elsewhere on the planet.

The categories of sexual orientation and gender identity and the issue of same-sex marriage have human rights implications. Sex as a category is already among protected classifications subject to

heightened scrutiny, and an undefined reference to "other status" is also included, so it could be contended that in one way or another, these categories are already covered. Similarly, the reference to "men and women of full age" having the right to marry can be interpreted to encompass same-sex marriage. But this certainly was not how those words were taken historically, and for that reason among others, those of us who seek equal rights without discrimination based on sexual orientation and gender identity should work toward including this in the UDHR one way or another.

Ultimately, we see human rights as grounded by broadly defined human capabilities which are filtered by ethical norms. This position can be justified by public reason and can function as part of an overlapping consensus. We distinguish between human rights in the strict sense and rights of groups, based on affiliations and interests, which may be legal and moral rights, as well as corporate and special rights. The aim is that human rights in the strict sense not be sacrificed to rights and interests based on instrumental considerations. Our conception of human rights extends the range of Gewirth from agents to agents plus recipients, and restricts Raz by distinguishing between artificial and natural persons. Whereas for Rawls only certain basic liberties have their fair value protected, here the aim is to protect the fair value of all human rights strictly considered. This includes rights against unfair discrimination, rights of democratic participation, social and economic rights, rights related to asylum and emigration, and property rights, though in certain cases some rights may be restricted and others may not be exercised. Not just urgent rights violations but also pervasive rights violations must be challenged, and it must be recognized that human rights concerns need to be addressed not only among states but within them.