

THE GOOD NEWS ABOUT THE MISFIT BETWEEN HUMAN RIGHTS AND THEORIES OF JUSTICE

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1. Introduction

It is a common understanding that only he or she who has *experienced* injustice and human rights abuse has a moral right to talk about the real meaning of those ideas. I cannot claim such experience. I was born after the Second World War in a country where at that time true poverty and exploitation were considered a thing from the past, and where the rubble of the war had been cleaned away for the most part. The only disturbing factor in life was the existence of those two little red buttons in Moscow and Washington, and they seemed to have little to do with injustice or human rights violations. They were far beyond that, the absolute climax of the perversity to which mankind was capable - the instruments of a war that would forever end war, poverty and injustice, all in less than an hour.

As a consequence, the best I can offer is a second best solution. Instead of pretending to understand injustice, I shall offer an abstract, genuinely academic, analysis of human rights from the point of view of a theorist of justice, a theorist operating from a comfortable distance. Like a hairdresser, all I can contribute to human rights are my skill and the tools of my trade.

The theme of my presentation will be the question what modern theorists of justice can mean to the development and implementation of human rights. I shall answer this question in three steps. Firstly, I shall introduce what I believe is a central idea in modern theories of justice: the notion of *impartiality*. Modern theorists of justice are not primarily interested in the common good or in the constitution for the best of all states. Rather, it is the intention of each and every one of them to assure that justice is in some way or other impartial with regard to ideas about the good life and the best society.

Then, secondly, I shall investigate whether human rights as described in the United Nations Universal Declaration of Human Rights live up to this criterion of impartiality. I

conclude that they do not, and that therefore theorists of justice cannot unequivocally support these human rights. There is a misfit between human rights and theories of justice.

Thirdly, I shall present the good news. The lack of compatibility I just talked about does *not* mean that human rights cannot be defended in terms of justice. On the contrary. It means, on the one hand, that our understanding of human rights is not yet complete, that the Universal Declaration is not perfect and probably never can be. And it means, on the other hand, that theories of justice need to be corrected so as to become more sensitive to the needs of real human beings rather than the abstract entities in which theorists of justice now see the "essence" of humanity. In that way, theories of justice can help clarify the meaning of human rights. I end with an outline of a theory of justice that can do all these things, that is, be impartial, be sensitive to the needs of concrete humans, and sustain the idea of basic and inviolable human rights.

2. Impartiality in modern theories of justice

Over the last twenty years or so, political theorists and philosophers have turned their attention to the question of social justice. To be precise, they have discussed the just distribution of burdens and benefits in relatively stable and affluent societies made up of ordinary and basically upright individuals. This debate was first and foremost one of Anglo-Saxon philosophers and of others working in the analytical school of philosophy, but it should be remarked that some of the notions developed in this debate have also played an important role in the two other major schools, i.e., the German and French traditions. And one of these notions is impartiality.

Now this debate on justice has resulted in a wide range of theories, the implications of which go far beyond the limited issue of distributive justice in well-ordered stable Western societies. Most of the philosophers who built systems of justice claimed *universal* validity for at least part of their theories, in other words, they asserted that bits of their conception of justice could be applied to everyone, everywhere, every time. And the basis for this assertion was that they considered their theories to be *impartial* in some ways.

That impartiality has something to do with justice is simple to understand. According to two very old definitions of justice, justice means "giving each his due" (Justinian) or "treating equal cases equally and unequal cases in proportion to their inequality" (Aristotle). It does not mean: giving what you like, treating cases arbitrarily, or favouring your friends at the expense of others. Justice means - if you are the one portioning out justice - that you put aside your personal likes and dislikes and subject yourself to a rule, a principle of justice. This is one, very obvious way in which justice presupposes impartiality.

But, according to modern theorists of justice, impartially *applying* a principle of justice is not enough. The principle *itself* must be impartial as well. Consider a rule of justice which

demands that healthy male blond blue-eyed Caucasians should always get at least twice the amount of advantages anyone else gets and half the amount of disadvantages, because healthy male blond blue-eyed Caucasians are better people. The important word in this rule is "better". The rule presumes the truth of an ethical theory, of a "theory of the good" - and of the worse, of course. Modern theorists of justice do not believe that principles of justice can or should presuppose any theory of the good, either because there is no truth in moral affairs, or because we cannot know this truth for certain, or for numerous other reasons. Hence, they demand that principles of justice are impartial with regard to theories of the good and that they would be chosen under conditions of impartiality.

Allow me to give three illustrations. The best illustration of the importance attached to impartiality in theories of justice is a relatively unknown and certainly underrated theorist, Bruce Ackerman. In his Social Justice in the Liberal State (1980), he developed a test for the impartiality of principles of justice. He asked his readers to imagine a spaceship filled with ordinary people with all their usual virtues and vices, circling a planet they were about to colonize and divide among themselves. All of these people would lay a claim to as much resources as they could get. A just distribution would result if they were all forced to give good reasons for their claims, reasons that met three criteria of which the criterion of neutrality was the most important: no one should claim that he or she was better than anyone else, or that his or her theory of the good was better than anyone else's (Ackerman 1980: 4-11). If the principles of justice that we apply in everyday life conform to the principles these space travellers would chose, then our principles are impartial and just.

Ackerman's theory was a reaction to the theory developed by John Rawls in his A Theory of Justice (1971), one of this century's most influential philosophical works. Rawls went a bit further than Ackerman in his quest for impartiality: Rawls invented the so-called veil of ignorance. According to his theory, the only way to assure that principles of justice would be impartial was by *forcing* imaginary people who choose principles to be impartial - and then, again, compare the results with the principles we use in real life. Rawls then forced his judges to be impartial by demanding that they forgot all the details about their lives that might somehow prejudice them - like religion, sex, age, race, physical and mental capabilities, social position, and so forth.

A totally different reaction to Rawls' theory (as well as Ackerman's) came from what is now known as the communitarian school, of which Michael Walzer is a moderate representative. In his Spheres of Justice (1983), Walzer stated that any attempt to develop principles of justice on the basis of what abstract, idealized persons in abstract, idealized situations would hold to be just would be fruitless. In fact, it would come down to *colonizing* the life-world of real humans in real social life, to *denying* the worth of the theories of the good in which real people believe, and to *favouring* one theory of the good - namely that of people behind a veil of ignorance or in a spaceship - over others. Instead, the theorist of justice should

accept that principles of justice arise only in social interaction, and that they derive their meaning and validity only from the understandings that people within different cultures share. Justice can only be impartial if the theorist of justice accepts that notions of justice differ from time to time, from place to place and from culture to culture. He or she should let a thousand flowers blossom.

Despite the diversity of modern theories of justice - I discuss only three of them here, all in a very unsophisticated manner, but there are scores more to be considered - there is one trait that marks them all. They are all attempts at impartiality. They all demand, first of all, that principles of justice are not based on any one particular theory of the good, and secondly, that principles of justice do not in any arbitrary way favour one person over another, or one theory of the good over another. Let us keep these two criteria in mind when we turn to human rights.

3. Why human rights do not rightly fit in

If, as they often claim to be, modern theories of justice are universally valid, what can they say about the most universal set of principles of justice that we know, the United Nations Universal Declaration of Human Rights?

Theorists of justice, it turns out, have rather serious problems with this declaration, for two kinds of reasons. Firstly, there are some, what I would call, *ordinary* problems, problems that any rational being would perceive; secondly, there are problems that relate specifically to the ideas of justice and impartiality. Before I go into these two types of problem, it should nevertheless be made clear that all these theorists of justice including myself are not opponents but critical *admirers* of the idea of human rights and of the UN Declaration. As a matter of fact, human rights or inalienable rights are, in varying form and content, a basic element of most theories of justice. As a rule, whatever problems theorists of justice have with human rights are problems they have with themselves and their own theories.

Now, what are the ordinary problems surrounding the Universal Declaration? I shall name only five - there are lots and lots more, but our time and space is limited. For one, the Declaration is internally contradictory. For instance, it first gives equal rights to all (Article 1) and declares that human rights apply to each and every person without any distinction like sex (Article 2) - but it also gives special rights and protection to women and children (Article 25.2) and special protection to an institution that is by no means a universal phenomenon, the family (Article 16.3). Or, for another example, the Declaration states that no one may be compelled to belong to an association (Article 20.2). Well, clearly the Declaration does not apply to *all* associations. Article 29.1 presupposes that everyone is and should be a member of a community or state. Or even more obviously, Article 30 compels each and every human being to respect the

UN Declaration. But if you do not have to belong to an association, why should you be obliged to espouse its rules?

Another ordinary problem of the Declaration is that it is incomplete. It does mention some groups that require special care - women, children and those accused of crimes - but not all: the handicapped, the tortured, the starved, the old. And, by the way, why *human* rights - why not rights for all creatures that can suffer and be sentient? Why not animals as well? Moreover, the Declaration lays down rules for the democratic election of parliaments (Article 21), but not for the behaviour of chosen representatives: they are free to decide any issue in any democratic or undemocratic way they want.

A third problem is the vagueness of the Declaration: when exactly is someone's reputation attacked (Article 12), when exactly treated cruelly (Article 5), when arrested arbitrarily (Article 9), and when does he or she have an adequate standard of living (Article 25)?

Ordinary problem number four is that there is no priority ordering in the Declaration. All human rights seem to be of equal importance. But what should we do if, for example, the right to rest and leisure (Article 24) collides with the right to an adequate standard of living (Article 25)? Or what do we do when I exercise *my* right to free speech (Article 19) by expounding you as a corrupt politician, thereby violating *your* right to be free of attacks upon your reputation (Article 12)?

Finally, the Declaration is quite clear in explaining that human rights apply to all humans, but not always clear as to the exact meaning of the word "right". Is it a freedom to choose to do X, not do X, or abstain from choosing? Or is it limited by the rights of others - that is, a freedom to do X or not do X provided others have not already chosen for you? Is your human right something that others should respect, or something they should actively endorse - that is, if you want leisure time, should others make that available to you, and if you want to join a trade union, should others found one for you? When is your human right to, say, social security, violated - when there is no state to secure it, when society cannot afford it, when it is politically infeasible, when your fellow citizens are just plainly greedy and refuse to pay taxes, or when you yourself do little or nothing to get a job?

Apart from these ordinary problems, most of which can of course be solved by slight modifications of or additions to the text of the Declaration, theorists of justice see a deeper problem in the Declaration. They want to know *why* anyone should have inalienable rights, and why precisely these rights. They look for a justification of the universal human rights - but find they cannot come up with a good one.

Remember that there are many modern theories of justice that all defend a wide range of allegedly impartial principles of justice. One of these is an extremely simple, even simplistic rule: *maximize utility*. According to this rule, justice requires that the total amount of happiness

in society, or pleasure or welfare or utility or whatever you call it, is as large as possible. Hence, it would be unjust to totally forbid sexual intercourse, because that is a thing from which some people seem to derive a certain pleasure. On the other hand, it would be just to raise everyone's salary, or even that of one single person, because money is something we never have enough of.

Now consider the right not to be tortured (Article 5 of the Declaration), and imagine that you are the Grand Inquisitor, faced with the choice between either horribly torturing a young and innocent child to death and thereby ensuring eternal peace and happiness for all humanity - or not torturing the child and losing this tremendous reward.

If you adhere to the maximize utility rule, you will torture that child with all the energy you have. The pain that the child will suffer is outweighed millions of times by the pleasure humanity will gain. But then you cannot adhere to Article 5 or any other article of the Human Rights Declaration: there may always be a net gain in violating a human right.

If, on the other hand, you believe that life is too high a price to pay for eternal bliss, you should consider traffic. We allow cars to be used and thereby allow traffic accidents to happen. Each and every day, hundreds of humans are tortured and killed randomly by cars in the pursuit of little more and often less than one single day's salary - and we find that normal.

The problem facing the maximize utility rule is one that in some way or other faces every so-called consequentialist rule of justice, that is, every rule that judges actions by their consequences. The end justifies the means. A consequentialist would sacrifice every human right if the result were worth it. And as we supposed all along that the principles of justice defended by consequentialists are impartial, critique on their principles would be inadmissible critique, as it would be voiced from the point of view of a particular theory of the good. In sum, a consequentialist can never be completely committed to human rights. No surprise then that all through history tyrants preferred to defend their acts in terms of the consequences...

Now there is a second type of rule of justice, one that does not look at the consequences of an action but at its *intrinsic* goodness or badness: deontological rules. According to such rules, there are *duties* that should be performed regardless of their consequences; those duties have priority over all consequentialist rules (cp. Sandel 1982: 6). This sounds perfect, of course: aren't human rights the kind of duties that should have priority over any other rule? Well, no, not exactly.

The problem is that if you want to avoid the dangers of consequentialism, a deontological rule cannot contain any reference to concrete aims and ends. You cannot say, for instance, that we have a universal duty to respect the life of others, because that immediately raises the question why other lives are so valuable or good - and then you end up in the same traffic jam in which we found ourselves earlier. Deontological rules that do *not* refer to any theory of the good, on the other hand, have hardly any substantial content. They look like Immanuel Kant's first and second categorical imperatives: Do what you would want to be the law of nature, and do what you would want to be the law of the land (Kant 1974: BA52).

So we come to the conclusion that there is a misfit between human rights and theories of justice. Theorists of justice, whether consequentialists or deontologists, cannot wholeheartedly defend the Universal Declaration of Human Rights. The Declaration does not meet the allegedly impartial criteria for justice set out by these theories; by their standards, the Declaration is not impartial enough. I do not think I need to remind you that this is also the kind of critique that the Western world received on its human rights policies: the West would not understand the differences in culture, it would derive its policies from a typically European-American understanding of human rights, and so on and so forth. Let us now see if there is any truth in this.

4. How they might fit in

I now come to the good news. The incompatibility of human rights and modern theories of justice does *not* mean, firstly, that the fault lies primarily with the authors of the Declaration, nor, secondly, that human rights cannot be defended in terms of justice. I submit that the source of our problem is located in the theories of justice: *they* are not impartial enough. What we need is a new conception of impartiality, one that will do three things:

1. It will give a special place to basic human rights or needs by giving them priority over less fundamental human wants;
2. It will do so without favouring one theory of the good over another;
3. And it will do so without falling in the traps of consequentialism and deontology.

Allow me to sketch the outlines of such a conception (for details see Wissenburg 1994). If we cannot be impartial with regard to consequences without falling in one trap, and if we cannot be impartial with regard to the intrinsic value of acts without falling in another trap, then what is left is impartiality with regard to *intentions*, with regard to the reasons people have for actions.

Now I am not saying that any reason is a good as any other. Reasons can be criticized in many ways - because they are based on an irrational belief, because they are contradicted by known facts, because they are mutually incompatible, because they are not supported by good deeper reasons, whatever. But there is one kind of reason towards which we can and should be impartial, a kind of reason that we should not criticize, or at least not punish or reward in political life. I call these reasons HIS-reasons: HIS for Here I Stand - here I stand, I can do no other, the words that, according to popular belief, Martin Luther spoke to the Emperor when he refused to forswear his heretical beliefs.

If we believe - and I think no one interested in the advancement of human rights can do anything else - if we believe that humans are born as free and sensible human beings, endowed

with a mind of their own, then we must also believe that, ideally, at least some of the reasons they have for their actions are ultimately their *own* and not caused by some external force. These reasons are the basic motivation, the basic moral force, behind our actions. Denying them is like denying ourselves, being untrue to ourselves, betraying ourselves - we cannot honestly deny them. They are of the Here I Stand type.

Two remarks about HIS-reasons. Firstly, HIS-reasons are criteria for our life and behaviour *regardless of all external circumstances*. Reasons like "I want my life to lead to riches", "I want to be a monk" or "I want what my government wants" cannot be basic reasons because their content depends on, is determined by, external circumstances. HIS-reasons are more like virtues or categorical imperatives.

Secondly: there is no standard to judge HIS-reasons by. We cannot say that one is better than the other, precisely because they are basic reasons. All the reasons we have to criticize someone's HIS-reasons are HIS-reasons themselves. There is no higher standard. Therefore, every judgement on HIS-reasons, every attempt in social or political life to advance or hinder the realization of someone's HIS-reasons constitutes a violation of impartiality.

The notion of impartiality with regard to HIS-reasons can be made very useful in defending human rights. Human rights are not about the protection of minor desires like this or that type of car, the freedom to wear purple shoestrings or the opportunity to have one more drink. Human rights are there to protect your most basic needs, regardless of the society and culture you live in, regardless of your wealth and capacities, race, sex and hair colour. Human rights are meant to be *universally* valid. And HIS-reasons define exactly what is at stake in human rights: if you cannot live according to your HIS-reasons, your most basic needs are unsatisfied. If you cannot live according to your HIS-reasons because of the actions of the state or your equals, you are not treated impartially; you are *deliberately* been denied your most basic needs; you are being treated unjustly.

What I have done in this short monologue is show that it is possible to defend human rights as just, provided we defend it in terms of impartial respect for the fundamental reasons that humans can give for their behaviour and desires. However, that does not place the Universal Declaration itself beyond criticism. HIS-reasons, and therefore basic needs as well, differ from person to person. Of course *nearly* everyone *nearly* always needs *nearly* every right mentioned in the Declaration - but we have to be open to the possibility that some may really need less and that others really need things that are not yet mentioned in the Declaration. Our understanding of human rights is not complete; therefore the Universal Declaration is not perfect and it probably never can be. Hence, it may need revision, sophistication - but let us not confuse improvement with relaxation.

Human rights are meant to be universally valid, not valid at the discretion of this or that tyrannical government or religious authority. I do not pretend that the conception of impartiality I sketched will convince either them or the philosophical critics of human rights, the so-called

cultural relativists, but I do believe it gives us a chance. Openness to change and adaptation means that we encourage discussion and are *seen* to take the arguments of opponents seriously. There are, of course, limits to openness: one cannot talk with those who will not talk.

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SUMMARY

The theme of my presentation will be the question what theorists of justice can contribute to the development and implementation of human rights. I shall answer this question in three steps. Firstly, I shall introduce what I believe is a central idea in modern theories of justice: the notion of *impartiality*. Modern theorists of justice are not primarily interested in the common good or in the constitution for the best of all states. Rather, it is the intention of each and every one of them to assure that justice is in some way or other impartial with regard to ideas about the good life and the best society.

Then, secondly, I shall investigate whether human rights as described in the United Nations Universal Declaration of Human Rights live up to this criterion of impartiality. I conclude - surprisingly - that they do not. Therefore theorists of justice cannot unequivocally support these human rights. There is a misfit between human rights and theories of justice.

Thirdly, I shall present the good news. This alleged lack of compatibility does *not* mean that human rights cannot be defended in terms of justice. On the contrary. It means, on the one hand, that our understanding of human rights is not yet complete, that the Universal Declaration is not perfect and probably never can be. And it means, on the other hand, that theories of justice ought to be amended so as to become more sensitive to the needs of real human beings rather than the abstract entities in which theorists of justice now see the "essence" of humanity. In that way, theories of justice can help clarify the meaning of human rights. I shall give an outline of a theory of justice that can do all these things, that is, be impartial, be sensitive to the needs of concrete humans, and sustain the idea of basic and inviolable human rights. Finally, I briefly discuss the small but vital difference between openness towards new ideas about human rights - and relaxing our commitment to human rights.

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