

In Defense of Traditional Human Rights

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Introduction

In transitioning from a normative theory of global justice to consideration of human rights policies of a sovereign, a functional definition of *human rights* is necessary. Definitions will facilitate or limit consensus of sovereigns. Lack of consensus compels further investigation, inquiry, and debate. Whether an event has violated human rights must be established. Recognized consensus on the definition of human rights allows for more immediate consideration of ethical and moral implications of action or inaction. Whether an event has violated human rights becomes *per se*. In theory and logic, recognized consensus allows for expedited determinations by sovereigns regarding need for intervention and form of intervention (e.g. economic sanction, military response). Although relative responsibility of sovereigns, such as the response of the United States versus the response of Ghana to international crisis, may require additional political determinations, the primacy of action is not lost.

In this paper, I will critique Jack Donnelly's emphasis on positive rights in formulating a comprehensive doctrine of human rights. This critique forms the thesis of traditional human rights, or negative rights, as *most* essential to the definition of human rights in limiting future genocide or atrocity assuming a pluralistic society. By defining human rights within the context of traditional negative rights, greater consensus is possible among and between sovereigns allowing prompt action and greater protection of human life. This quasi-*statist* position will be defended employing supporting philosophies of Thomas Hobbes, Maurice Cranston, John Rawls, Thomas Nagel, and Joshua Cohen.

Critique of Donnelly

When considering *rights*, a common philosophical distinction exists between *positive rights* and *negative rights*. There is a qualitative difference between these types of rights when viewed from the perspective of the individual. Positive rights commonly refer to participatory rights of citizens. An example of an American positive right is the right to education. Examples of positive rights often challenged by American and British conservatives include the right to food, healthcare, or housing. These positive rights require more than mere recognition and compliance by others but active participation. Jack Donnelly holds these positive rights to be

economic and social in nature, extending to even cultural rights.¹ Ultimately, it is these rights which lend toward entitlements to socially provided goods, services, and opportunities.² Positive rights require that others provide active support. Hence, a violation of a positive right involves “only failing to provide assistance, a (presumably lesser) sin of omission.”³

Conversely, negative rights commonly refer to freedoms from encroachment by the government or others. They prohibit intrusion on individuals. Essentially, these negative rights are certain liberties which afford redress or sanction if unfairly encroached. In American constitutional theory, negative rights are found in many protections afforded by the Bill of Rights. These include First Amendment freedoms such as speech and free exercise of religion. “Negative rights require only the forbearance of others to be realized”.⁴ Thereby, violation of a negative right “involves actively causing harm, a sin of commission”.⁵

In *International Human Rights*, Jack Donnelly offers a modernity argument for the development of human rights citing massive development post-World War I with the Jewish Holocaust serving as the catalyst. Donnelly also refutes the qualitative difference between negative and positive rights.⁶ Donnelly maintains that negative rights are essentially civil and political rights; whereas positive rights are economic and social rights.⁷ Donnelly argues all human rights “require both positive action and restraint by the state if they are to effectively implemented”.⁸ Therefore, both require endeavoring and forbearance. Donnelly cites examples of the right to vote, due process, and trial by jury as common civil and political, or negative, rights. Furthermore, “[s]ome rights, of course, are relatively positive. Others are relatively negative. But this distinction does not correspond to the division between civil and political rights and economic and social rights.”⁹ Donnelly’s analysis attempts to destroy fundamental distinctions between positive and negative rights by analyzing the role of government in enforcing these rights. This perspective, however, is decided government-centric and western. A right to democratically elected representation is assumed as are standards of western legal

¹ Donnelly, Jack, *International Human Rights, Third Edition* (Westview Press, 2007) at 25

² *Ibid*

³ *Ibid*

⁴ Donnelly, Jack, *International Human Rights, Third Edition* (Westview Press, 2007) at 26

⁵ *Ibid*

⁶ *Ibid*

⁷ *Ibid*

⁸ *Ibid*

⁹ *Ibid*

procedure. Most notably, an expansive definition of negative rights is treated. The analysis is based on government action or inaction, not the subject. It is the action, or restraint, of government which determines the qualitative character of the right as opposed to the impact on the subject. This treatment of government as separate from the citizenry contradicts the basis of governmental legitimacy. The basis of legitimacy being development of laws by the citizenry themselves.

By emphasizing the citizenry and limited rights, the distinction between positive and negative right is better applied to the study of international human rights. It is the impact upon the subject, or citizen, which is the core of human rights and related violations. Whatever the philosophical perspective regarding the origin of human rights – religious or secular – the impact upon the individual, or collection of individuals, is the catalyst for action by sovereigns. In limiting the purview of international human rights to essential negative rights agreed upon by most liberal societies (i.e. right to life), a more apolitical standard for human rights enforcement is possible. When these fundamental negative rights, or liberties, are violated by a government or citizenry the world community is able to react in a timely manner. In considering the post-World War I context given by Donnelly, the Armenian, Jewish, Yugoslavian, Rwandan, and Sudanese genocides share the common characteristic of a grossly negligent response time by the international community. As human life is systematically destroyed, the international community confers.

Donnelly then proceeds to draw moral equivalence between violations of positive and negative rights. Does it really make a moral difference if one kills someone through neglect or by positive action?¹⁰ The answer is yes. Neglect assumes a more expansive definition of duty than a positive act. Determination of duty is based on relationships and is therefore political. Determination of duty is also based on understanding of the self. In a pluralist society, duty is often determined by theological perspective or personal philosophy. Even assuming a common religion, the understanding of duty therein may differ. The understanding of duty varies widely within segments of the major religions – Judaism, Islam, and Christianity – despite a fundamental recognition of some form of relationship between God and Man. The secularist, humanist, agnostic, and atheist are similar in varying determinations of duty. Ultimately,

¹⁰ *Ibid* at 27

pluralism makes the determination of duty a significant obstacle. An expansive definition of duty promotes greater disagreement.

Alternatively, limiting the human rights question to one of response to positive action serves to more clearly define duty. Prohibited actions, such as the direct taking of life, are more easily recognized and addressed. Political determinations by sovereigns regarding duty, which require time and deliberation, are also limited. The economic and social model of positive rights advanced by Donnelly results in lost lives based on lack of consensus. A traditional negative rights model is most appropriate based on the contemporary politics and inability to prevent genocide since the drafting of the Uniform Declaration of Human Rights (UDHR).

Traditional Negative Rights as Most Essential

The critique of Jack Donnelly serves as the basis for a limited definition of human rights whereby traditional negative rights are found to be *most* essential. As a normative theory, placing limits on what constitutes human rights does not prohibit future growth or breadth of the definition. In considering how human rights should or ought to be defined, we tailor definition based on realities of history and contemporary politics. The potential for development toward a more liberal, progressive, or Marxist ideal is not impossible. This determination is for future analysis. Instead, the foundation is established to preserve the most fundamental human rights by recognizing the continued inability to respond effectively to genocide and other human rights violations.

Hobbesian Assumption

In considering international reaction to human rights issues, I will assume a Hobbesian position that international relations are a state of nature which then requires a realist political theory. This position serves as the most powerful argument for international skepticism regarding international relations.¹¹ Nonetheless, Hobbes philosophy of the state of nature being a state of war is particularly prescient given the current wars in Iraq, Afghanistan, Sudan, continued Middle East conflict, and military posturing of a resurgent Russia. This state of the nature argument allows for a right of nature as well. This is the right to self-sufficient being with the ability to protect oneself. Hobbes holds states are autonomous because people are

¹¹ Beitz, Charles, *Political Theory and International Relations* (Princeton University Press, 1970) at 28

autonomous; thereby a sovereign is necessary to establish justice. Hobbes extends this analysis to the international scene. Internationally, a state of nature exists because there is no sovereign to establish justice.

As a result, the response to any international humanitarian crisis requires a political determination by the sovereign to ensure any relief does not adversely impact their self-sufficiency financially or otherwise. Despite the crisis, the state of nature still exists. Therefore, to preserve the most basic liberties, such as a right to life, one must attempt to limit the Hobbesian argument. The state of nature assumption is best limited by reducing application. This is accomplished by limiting the need for determination of relief through a narrow understanding of when relief is appropriate. A traditional definition of human rights as traditional negative rights best removes Hobbes assumption. Maurice Cranston, the British philosopher and economist, provides support for this position.

Cranston and Authentic Human Rights

As Maurice Cranston argues in *Political Theory and Rights of Man*, “a philosophically respectable concept of human rights has been muddled, obscured, and debilitated in recent years by an attempt to incorporate into it specific rights of a different logical category”¹² Contrary to Donnelly’s emphasis of positive rights, Cranston maintains the “traditional human rights are political and civil rights such as the right to life, liberty, and a fair trial”.¹³ These rights are contemporary negative rights requiring forbearance of intrusion. Donnelly, and other modern human rights scholars, offer the expansive definition of human rights based on positive right theory including economic and social rights. Cranston responds to this redefinition of human rights with both philosophical and political objections.¹⁴ The philosophical objection is the new theory of human rights is illogical.¹⁵ The political objection is the new theory confuses human rights and hinders protection of more actual human rights.¹⁶

Cranston, writing in 1967, recognizes the then recent evolution of human rights agreed upon by Donnelly. Cranston notes “[t]he reason for the revival is perhaps to be sought in history, first, in the great twentieth century evils, Nazism, fascism, total war, and racialism,

¹² Hayden, Patrick, *The Philosophy of Human Rights: Paragon Issues in Philosophy* (Paragon House, 2001) at 164

¹³ *Ibid*

¹⁴ *Ibid*

¹⁵ *Ibid*

¹⁶ *Ibid*

which have all presented a fierce challenge human rights; and secondly, in an increased belief in, or demand for, equality of men.”¹⁷ Cranston analyzes the historical growth of rights in keeping with the positivist right approach now advocated by Donnelly. This includes the positivist approach followed by Human Rights Commission of the United Nations Economic and Social Council in 1946. This positivist approach resulted in objection by some countries, including the United State and Soviet Union.

In 1948 the Uniform Declaration of Human Rights (UDHR) is drafted to include thirty articles. Cranston correctly recognizes the first twenty articles as traditional negative rights commonly held to be natural rights, or rights of man. However, it is the remaining ten articles which Donnelly’s argument would emphasize. These remaining ten rights are positive rights – economic and social – including a right to education and “periodic holidays with pay” in Article 24 of the UDHR.¹⁸ Cranston maintains such economic and social rights are not human rights as they cannot be translated into political and legal action. More simply, such rights are virtually unenforceable.

In response to this expansive definition of human rights, Cranston bifurcates rights into the categories of legal right and moral right.¹⁹ It is the specific category of “moral rights of all people in all situations” which he holds to be true human rights.²⁰ Universality begs these rights be “few” and “highly generalized”²¹ A limited, generalized understanding allows for greater agreement and further negates the politics of relationship. When considered from a classical perspective, the distributive justice requirement of geometric or arithmetic proportionality, in recognition not response, is effectively removed. The station or situation of the claimants need not be exhaustively considered. In turn, the political differences of conferring sovereigns may be disregarded for action.

Cranston argues for a three-part test to determine authenticity of a human right: *practicability*; *genuine universality*; and *paramount importance*.²² Practicability relates to both rights and duties. The individual cannot be charged with the impossible; nor can they can be guaranteed the impossible. Genuine universality relates to the right apply to everyone not

¹⁷ *Ibid*

¹⁸ *Ibid* at 165

¹⁹ *Ibid* at 167

²⁰ *Ibid* at 168

²¹ *Ibid*

²² *Ibid* at 169

specific classes, groups, or demographics. Finally, paramount importance relies on the “utilitarian philosophy which analyses moral goodness in terms of the greatest happiness for the greatest number”.²³ Cranston notes common sense affords an understanding of the essential services (i.e. ambulance) as opposed to non-essential (i.e. fairs and camps).²⁴

Maurice Cranston ultimately limits the definition of human rights to those traditional negative rights recognized by most countries, including freedom of movement, right to life, right to liberty, and right to fair trial. It is these rights whose violations serve as an “affront to justice”.²⁵ These traditional negative rights also allow for consensus among divergent societies. This overlapping consensus regarding human rights is supported by John Rawls understanding of public reason and related legal theory.

Rawls’ Law of Peoples and Legal Theory Lexicon

The Law of Peoples by John Rawls analyzes justice by construction of the original position where actors choose principles of justice.²⁶ Rawls then extends these individual principles of justice to nations and international law. Rawls philosophy supports the thesis of negative rights as most essential to human rights. The international law envisioned by Rawls is more limited than Seyla Benhabib and Jurgen Habermas. A positive right to democracy is not guaranteed. Moral powers, including a capacity for justice and idea of the good, are deemed necessary for society.²⁷ Although Rawls assumes a pluralistic society, he argues liberal societies with different comprehensive doctrines, such as Judaism, Islam, and Christianity, may find a political element or overlapping consensus. This overlapping consensus then forms a public reason.²⁸ This public reason will be limited which lends more favorably to a limited negative rights definition of human rights. The positive rights emphasis of Donnelly will fail to establish public reason whereas negative rights foster greater universality. Rawls clearly states the law of peoples requires “a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and

²³ *Ibid* at 171

²⁴ *Ibid*

²⁵ *Ibid*

²⁶ Rawls, John, *The Law of Peoples* (Harvard University Press, 1999)

²⁷ *Ibid* at 45

²⁸ *Ibid* at 18

genocide”.²⁹ Violations of these traditional negative rights are “equally condemned by both reasonable liberal peoples and decent hierarchical people”. Therefore, the limited definition affords public reason or consensus; consensus then allows prompt determination of action or inaction.

It is the principle of toleration which serves as Rawls underlying philosophy regarding global justice.³⁰ Toleration affords a more limited approach to intervention as opposed to a cosmopolitan position. The toleration principle, itself, trumps a cosmopolitan position which may require intervention. Rawls holds intervention is not permitted among and between liberal societies. Therefore, failure to secure positive rights, social or economic, does not allow intervention. In fact, Rawls precludes interventionist approach in the international sphere assuming basic human rights and a system of law, namely a decent hierarchical system of justice, exist. Note Rawls conception of rights is once again basic and not expansive. These basic rights and system of law are most similar to a traditional negative rights approach in coordination with Hobbes and Cranston. Action of a sovereign is warranted on a limited basis contrary to cosmopolitan approach holding a country failing to adhere to democratic principles may be subject to sanction.

This understanding of limited, or basic, human rights and limited intervention is further supported by Rawls’ legal theory lexicon. In *A Theory of Justice*, Rawls maintains his premise of justice as fairness as being applicable to international law³¹. This theory evolves from the same Hobbesian presumption regarding social contract theory, namely state of nature as a state of war. Once again, the Rawlsian evolution derives from construction of the original position and veil of ignorance. The result being two specific principles of distributive justice: the *equal liberty principle* and the *difference principle*.

The equal liberty principle holds individuals have equal claim to a scheme of basic human rights and liberties. This schedule of basic human rights and liberties is compatible with the same schedule for all others individuals. In this scheme, only the equal political liberties are to be guaranteed their value. The difference principle relates to social and economic inequalities. The equal liberty is superior to the difference principle in cases of conflict. Therefore, to protect the interest of the worst off, everyone’s basic human rights, including traditional negative rights

²⁹ *Ibid* at 79

³⁰ *Ibid*

³¹ *Ibid* at 4

and liberties including speech and due process, must first be protected. It is the equal liberty principle which ensures these basic rights.

Practically speaking, Rawls lexicon prioritizes the establishment of basic human rights. Once these basic human rights are satisfied, questions regarding social and economic inequality may be considered so long as the first principle is not sacrificed. This is analogous to the relationship of negative rights to positive rights. Negative rights, similar to the equal liberty principle, are most essential. Once the negative rights are established more complex questions relating to positive rights may be treated. For instance, once the right of life is established as a prohibition against genocide or ethnic cleansing, the positive right of a housing, food, or healthcare may be considered. This lexicon allows survives Thomas Nagel's distinction between justice and humanitarian duty.

Nagel and Humanitarian Duty

In considering the prospect of global justice, Thomas Nagel differentiates between justice and humanitarian duty.³² This distinction advances the thesis of negative rights as most essential by transforming the Rawls philosophy of global justice into a moral position. A principle of humanitarian duty, not global justice, is possible according to Nagel.

Nagel makes a distinction between negative rights and associative rights. The former relate to the international and the latter to national sovereignty. Nagel lists among negative rights "those that are supposedly not dependent on a specific form of membership in a specific political society. These include freedom of expression, freedom of religion, pre-political limits to the legitimate use of power independent of special forms of association. Presumably these rights are not to be associated with socio-economic justice and can be realized voluntarily. Not so with rights of association. These rights emerge only because a political society is brought together under a strong, coercive form of centralized control. Here Nagel wants to include a right to democracy, the right to equal citizenship, the right to non-discrimination, the right to equality of opportunity and the right to be treated fairly in the distribution of socio-economic goods."³³

Negative rights did not clearly relate to a theory of justice because actions relating to human rights are humanitarian duties. Associative rights are based in the Rawlsian approach to

³² Nagel, Thomas, *The Problem of Global Justice* (Blackwell Publishing, 2005) at 119

³³ Rasmussen, David, *The Possibility of Global Justice: Kant, Rawls, and the Critique of Cosmopolitanism* at 5

justice as fairness. These are essentially social rights. Although Nagel categorizes actions relating to human rights as humanitarian duty, the result is no different than Cranston or Rawls. The consideration is one of the moral minimum well grounded in a limited definition of human rights. In considering the most traditional negative rights of life, liberty, and security, Nagel holds “[t]he normative force of the most basic human rights against violence, enslavement, and coercion, and of the most basic humanitarian duties of rescue from immediate danger, depends on our capacity to put ourselves in other peoples shoes.”³⁴ This relates to both Cranston’s genuine universality and Rawls’ equal liberty principle. Nagel continues, “[t]he interests protected by such moral requirements are so fundamental, and the burdens they impose, considered statistically, so much slighter, that a criterion of universalizability of the Kantian type clearly supports them.”³⁵

Therefore, intervention by a state or institution, such as the United Nations, is not a matter of global justice but humanitarian duty. However, as states participation in this humanitarian duty is voluntary, it will also be based on a limited conception of negative rights or moral minimum. A similar approach is considered by Joshua Cohen in his development of global public reason.

Cohen and the Global Public Reason

In *The Egalitarian Conscience*, Joshua Cohen offers a political argument as opposed to a normative theory for global justice. In the vein of Hobbes, Cranston, Rawls, and Nagel, a limited approach to human rights is offered. The cosmopolitan approach calling for expansive positive rights, such as a right to democracy, is not advanced.

Cohen offers an argument in line with Rawls overlapping consensus and public reason. “A conception of human rights is part of an ideal of global public reason: a shared basis for political argument that expresses a *common reason* that adherents of conflicting religious, philosophical, and ethical traditions can reasonably be expected to share.”³⁶ The definition of human rights must be limited to allowing this sharing. It cannot be formulated by reference to particular religious or secular morality.³⁷

³⁴ Nagel, Thomas, *The Problem of Global Justice* (Blackwell Publishing, 2005) at 131

³⁵ *Ibid*

³⁶ Cohen, Joshua, *The Egalitarian Conscience: Essays in Honour of G.A. Cohen*, (Oxford University Press) at 226

³⁷ *Ibid* at 237

Cohen argues for this same notion of universality cited above coupled with the appeal to morality of Nagel. Cohen maintains human rights have three features. First, they are “universal in being owed by every political society, and owed to all individuals”.³⁸ As they are owed to all individuals, Cohen maintains human rights as entitlements. These entitlements of human rights then serve to ensure the qualification for membership.³⁹ Furthermore, human rights may command universal assent “only as a decidedly thin theory of what is right, a definition of the minimal conditions for any life at all.”⁴⁰ Second, human rights are “requirements of political morality whose force as such does not depend on their expression in enforceable law.”⁴¹ Third, they are “especially urgent requirements of political morality”.⁴² These requirements allow for a minimalist definition when considering application.

Cohen also recognizes specific traditional negative rights, including life and security, as associated with demands of basic humanity regardless of membership in an organized political society.⁴³ These threshold rights, as recognized by Cranston, Rawls, and Nagel, must first be achieved. Cohen argues the protection of human rights as a “less demanding standard than assuring justice” and the related positive rights including a democracy⁴⁴. Cohen continues “[l]ess demanding, but let us not forget that world would be unimaginably different – many hundreds of millions of lives would immeasurably better – if this less demanding but exacting standard were ever achieved.”⁴⁵

Conclusion

In conclusion, the Universal Declaration of Human Rights states that human rights are “a common standard of achievement for all peoples and all nations”.⁴⁶ Unfortunately, the UDHR then expansively defines human rights by employing a positive rights standard advocated by Jack Donnelly. This expansive definition allows for the infusion of philosophical and political principles relating to justice not shared by all countries and societies. This creates a lack of

³⁸ *Ibid* at 229

³⁹ *Ibid* at 226

⁴⁰ *Ibid* at 230

⁴¹ *Ibid*

⁴² *Ibid*

⁴³ *Ibid* at 238

⁴⁴ *Ibid* at 246

⁴⁵ *Ibid*

⁴⁶ *Ibid* at 230

consensus among and between countries. This lack of consensus results in a decreased ability to react swiftly and appropriately to per se human right violations, including genocide and ethnic cleansing.

A more narrowly tailored understanding of human rights allows for a recognized consensus. Given the millions of lives lost in various countries through institutionalized murder since the development of the Universal Declaration of Human Rights, a realist perspective regarding human rights is appropriate. A limited definition of human rights based on a traditional negative rights approach is necessary to ensure recognized consensus and limit future atrocity. This standard may not serve as a perfect normative theory of global justice. However, the functionality of a traditional human rights approach far outweighs - in human life - the philosophical and political jousting of the global justice questions.