CHAPTER TWO

Human Rights: Whose Duties?

What human rights do we have? What, when worked out, are they rights to? And upon whom do the related duties fall? My question is the third – whose duties? – but to answer it requires some idea of the answers to the first two questions.

1. WHAT HUMAN RIGHTS DO WE HAVE?

We need to know what must be shown in order to establish the existence of a human right. We need to know, as one might put it, their existence conditions.

A good way into establishing their existence conditions is through the human rights tradition. There are two approaches to human rights that philosophers adopt. There is a top-down approach: one starts with a highly abstract philosophical principle (or principles), such as the principle of utility or the Categorical Imperative or the contractualist test, and then derives an account of human rights from it (or them). Then there is a bottom-up approach: one starts with the tradition, which is a mixture of philosophical, theological, legal, and practical political concerns. The tradition has its own criteria for its claims, to some extent independent of any of these particular highly abstract moral principles.

I prefer the bottom-up approach. It has pressures on it to rise in abstraction – for instance, in order to explain the moral weight of human rights and to resolve conflict between two rights or between a right and the general welfare. But with the bottom-up approach we do not have to make assumptions about the availability of highly abstract and systematic theory in ethics, and we can wait to see how abstract and systematic our account must become.

A term with our modern sense of ‘a right’ emerged in the late middle ages, probably first in Bologna, in the work of the canonists, experts (mainly clerics) who glossed, commented on, and to some extent brought system to the many, not always consistent, norms of canon and Roman law.¹ In the course of the twelfth and thirteenth centuries the use of the Latin word ius expanded from meaning a law stating what is fair to include also our modern sense of ‘a right’, that is, a power that

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a person possesses to control or claim something. For instance, in this period one finds the transition from the assertion that it is a natural law (ius) that all things are held in common and thus a person in mortal need who takes from a person in surplus does not steal, to the new form of expression, that a person in need has a right (ius) to take from a person in surplus and so does not steal. The prevailing view of the canonists was that this new sort of ius, a right that an individual has, derives from the natural law that human beings are, in a very particular sense, equal: namely, that we are all made in God’s image, that we are free to act for reasons, especially for reasons of good and evil. We are rational agents; we are, more particularly, moral agents.

This link between freedom and dignity became a central theme in the political thought of all subsequent centuries. Pico della Mirandola, an early Renaissance philosopher who studied canon law in Bologna in 1477, gave an influential account of the link. God fixed the nature of all other things but left man alone to determine his own nature. It is given to man ‘to have that which he chooses and be that which he wills’. This freedom constitutes, as it is called in the title of his influential book, ‘the dignity of man’.

This same link between freedom and dignity was at the centre of the early sixteenth century debates about the Spanish colonisation of Latin America. Many canonists argued fiercely that the natives were undeniably moral agents and, therefore, should not be deprived of their autonomy and liberty, which the Spanish government was everywhere doing. The same notion of dignity was also central to political thought in the seventeenth and eighteenth centuries, when it received its most powerful development at the hands of Rousseau and Kant. It came to be accepted that this freedom itself confers dignity, whether or not there is a God who also has it. God became superfluous, and natural law, from which these natural rights were derived – a connection on which Locke still relied – also became superfluous. Thus eventually emerged the secularised Enlightenment notion of a ‘human right’. And this notion of dignity, or at any rate the word ‘dignity’, appears in the most authoritative claims to human rights in the twentieth century. The United Nations says little in its declarations, covenants, conventions, and protocols about the grounds of human rights; it says simply that human rights derive from ‘the inherent dignity of the human person’, but I see no reason to think that their use of ‘dignity’ differs appreciably from that of the philosophers of the Enlightenment.

Now, the human rights tradition, which I have condensed into very few words, does not lead inescapably to a particular substantive account of human rights. There

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2 See Brian Tierney, The Idea of Natural Rights (Atlanta: Scholars Press, 1997), passim but e.g. pp. 42-45.

3 Tierney, op. cit., pp. 72-3.


6 To be found in the Preambles to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both adopted by the General Assembly of the United Nations in 1966.