

# Theoretically Justifying Human Rights: A Critical Analysis

Written by Nicola-Ann Hardwick

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<https://www.e-ir.info/2012/08/05/theoretically-justifying-human-rights-a-critical-analysis/>

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Since the proclamation of the Universal Declaration of Human Rights in 1948, human rights have become a widely accepted global norm, encoded in United Nations documents, regional agreements and many national constitutions. Nonetheless, the world still fails to fully abide by the provisions in the Declaration, and human rights violations continue across the globe. While international politics remain ultimately dominated by power relations, the world has become more hypocritical. The term human rights is thus used frequently and understood rarely. In principle, although not in practice, human rights are not subject to any political forces, and seek to protect the inherent dignity of each human being at all times and in all places. Yet, the concept of human rights remains essentially contested. Thus, there is significant disagreement on how to theoretically justify that all human beings have rights by virtue of their being human. As Michael Perry argues, “the fundamental challenge to each and every human rights claim ... is a demand for reasons.” (1998: 30-31) Most religious and liberal philosophers emphasize the importance of theoretically grounding human rights, or at least, of achieving a political or legal consensus for them. ‘Postmodern’ thinkers, however, take an antifoundationalist approach, undercutting the supposedly firm grounds on which the idea of human rights rests, by challenging some of its main elements, such as universality and absoluteness (Arslan, 1999: 203).

This dissertation intends to assess critically various approaches towards theoretical justifications of human rights, arguing that there can be no grand synthesis thereof. In doing so, it aims to show that the concept of rights is inherently paradoxical, aiming to achieve a utopian ideal, yet, simultaneously, resorting to new forms of domination. It tries to demonstrate that in attempting to achieve equality, endorsing values such as ‘sameness’ and purity, the human rights discourse has led to an intolerance of difference. The study concludes by calling for a reevaluation of human rights in terms of affirming the principle of difference, instead of equality.

Chapter One takes a genealogical approach towards the concept of human rights, seeking to reveal its philosophical origins, how it has changed over time, and to shed light on its inherent paradoxes and major critiques. It argues that while the human rights discourse originated as a form of resistance with the aim of liberation from oppression, it has, in fact, developed its own power relations, which produce inequalities. The chapter concludes that Nietzsche’s philosophy, although inherently opposed to the idea of equal rights, offers a basis to rethink the concept.

Chapter Two assesses critically the theories of Michael Perry, Alan Gewirth, Ronald Dworkin, John Rawls, Jacques Maritain, and Ari Kohen, dividing them into three major fields: religious, human agency, and political consensus-based approaches, respectively. It attempts to show that while claiming universality, these theories are mutually incompatible and each of them can lead to an exclusion of human beings, who are considered as different.

Chapter 3, drawing upon the findings of the previous chapters, agrees with Richard Rorty that we should move on from the obsession of trying to ground human rights. However, it also holds that the many paradoxes inherent in human rights suggest they are ultimately neither ‘good’ nor ‘evil’. Hence, it examines the central problem that rights depend on the idea that ‘Others are the Same’, which leads to an exclusion of difference. It thus sketches a brief proposal for a reevaluation of human rights based on the inherent differences between human beings.

### CHAPTER 1: A GENEALOGY OF HUMAN RIGHTS

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## *The Development of Natural Law and Natural Rights*

The foundations of the modern human rights discourse can be traced back to the natural law tradition and its heritage from classical antiquity, if not before. Plato developed one of the earliest defences of universal ethical standards by separating good and evil, truth and untruth, as just and unjust. For Plato, a just community can be formed by linking human rationality and the nature of the good, found in the soul (Hayden, 2000: 13). Plato's views on justice thus represent a form of resistance to the customs and traditional views of his epoch, which held that justice is always in the interest of the stronger party. On the other hand, Plato is also responsible for the creation of an ethics that would develop new forms of domination and repression by insisting on the value of truth, thus excluding anything perceived as different therefrom. The natural law tradition was further influenced by Aristotle, who examined the value of virtue and justice in the political community, and by the Greek and Roman Stoics, notably Cicero and Seneca, who developed the idea of a universal community of world citizens.

Thomas Aquinas, by common consent the most prominent thinker of the natural law tradition, was strongly influenced by the Ancient Greeks and Romans. Notably, his definition of justice was similar to that of Aristotle, who considered it just that people who were alike be treated alike, and that 'unalikes' be treated differently:

[T]hat which is correct in the works of justice ... is constituted by a reference to the other person. It is the case therefore, that in our works, what responds to the other, according to the demands of a certain equality *aequalitatem* is what is called *justum*. (1988: 137)

Aquinas thus affirmed universal laws and the equality of humans before God. In attempting to interlink faith and rationality, and in viewing human nature as directed by God towards doing good and avoiding evil, his theory of natural law helped justify the supremacy of the Catholic Church (O'Connor, 1967: 7). It thus served to reinforce the dominant rulers of the medieval order, as long as they recognised the authority of the Church.

Influenced by Hobbes and Locke, natural law gradually evolved into natural rights of the individual, grounded in human nature, rather than in a purposeful cosmos or God. According to Hobbes, pre-social man lives in a "state of nature", where man is free to do what he wants, even to harm others, since there are no laws and no "notions of right and wrong, justice and injustice." (1958: 108) Man thus agrees to a social contract, surrendering his unlimited freedoms to a sovereign, to fulfil his desire for self-preservation. This defence of an absolute regime is based on both the idea that individuals surrender their right to resistance and on the recognition of a basic right, the individual's *right to security*. John Locke imagines a similar state of nature to that of Hobbes – a dangerous place, without laws, where men may do as they "think fit" (1994: sec. 4). Unlike Hobbes, however, Locke views man as peaceful in nature and his desire for happiness and safety motivate him to form a civil society or government, putting every man "under an obligation to everyone of that society to submit to the determination of the majority, and to be concluded by it." (ibid: sec. 97) Locke's social contract is thus ultimately also one of subjection and the exclusion of the minority, although he advocates a weak government that is subordinate to the law. For Hobbes and Locke, politics is no longer based on a conception of the 'good' (Douzinas, 2000: 84). Instead, a social contract is formed by the desire to escape evil (death) (ibid.). Rights are thus paradoxically trapped between their initial hope for a utopian 'good society' and the realisation that such a society is impossible to achieve. Hobbes and Locke recognise that anarchy is ultimate freedom, yet at the same time dangerous; therefore requiring some form of law or sovereign. Hence, any type of non-anarchical system inevitably contains certain elements of oppression, for people must accept laws and the government above them.

## *From Revolutions and Declarations to an International Human Rights Regime*

The ideas of Hobbes and Locke were *philosophical*, and thus never formalised into law. Two major revolutions were needed in America and France to legally and positively enshrine individual rights. The French *Déclaration des Droits de l'Homme et du Citoyen* (1789) proclaimed that "in respect of their rights men are born free and equal" and that the "aim of every political association is to preserve the natural and inalienable rights of man ... liberty, property, security and resistance to oppression." (Art. 1, 2) The American Declaration of Independence (1776), on the other hand, robustly grounded natural rights in divine will, by claiming that:

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“all men are created equal and are endowed by their creator certain inalienable rights, that among these are Life, Liberty and the pursuit of Happiness. To secure these rights Governments are instituted among Men deriving their just powers from the consent of the governed.”

Both declarations claimed inalienable and universal rights, while including certain limitations on rights to be regulated by laws passed by democratically-elected institutions.

This paradox – that rights can simultaneously be both liberating and restrictive – had been anticipated by Jean-Jacques Rousseau, who famously claimed that “man was born free, and everywhere he is in chains.” (1986: 3) Thus, the very idea of inalienable and universal rights implied independence from governments. America and France had both suffered from the rule of regimes, which violated many of their citizens’ rights. Yet, whilst the rights declarations of the eighteenth century emerged from critiques of forms of state oppression, they themselves, through the positivization of rights, bound the individual to the state, thus reinforcing its legitimacy. Additionally, the act of proclaiming the rights of man implied that ultimately nothing but humanity itself could be referred to in order to guarantee them (Douzinas, 2000: 93). Accordingly, man replaces God and asserts himself as the new source of being and meaning (ibid.). At the same time, however, human rights also construct ‘man’. The ‘universal’ man of the declarations is, in fact, as Hannah Arendt argues, a ‘particular’ man – a national citizen (hence excluding foreigners, refugees, stateless persons and so on.) (Arendt, 1966: 300). Seen thus, the affirmation of equality of the rights declarations actually led to the exclusion of those ‘Others’ that were not regarded as the ‘Same’.

In the years following these major rights declarations, the interest in natural rights declined profoundly. Their use in political discourse was restricted, for the memories of the eighteenth century revolutions were still vivid, and the great European monarchies and newly dominant political and social forces in France and America, feared the incendiary potential of rights (Douzinas, 2000: 109). Thinkers like Hegel, Comte, Marx, Weber, and Freud, became more interested in social processes and structures, rather than individual rights, and increased nationalism also shifted the emphasis away from the individual and to the nation (ibid: 112). It took the horrors of two World Wars and the Holocaust, to fully revive the idea of rights. The post-Second World War period was led by legal optimism resulting in the Nuremberg Trials, the creation of the United Nations, the adoption of the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide. Yet, these promises of universalism would prove hollow. The newly-developed concept of international law was paradoxical and internally flawed. Similar to its failed predecessor, the League of Nations, the United Nations was founded upon the contradictory liberal and realist principles of safeguarding universal human rights, state sovereignty, and a great power hierarchy. (Brown & Ainley, 2009: 146). The genocides that followed the Holocaust in the second half of the twentieth century (i.e. Bangladesh, Cambodia, Guatemala, Biafra, Yugoslavia and Rwanda) indicated that universalism came with an opt-out facility when in conflict with national state interests. The so-called International Bill of Human Rights had re-launched the principles of the eighteenth century rights declarations, creating an era of the individual, but also of the state – one of the most troubling contradictions within international politics.

## *Fundamental Critiques of Human Rights*

Given all these paradoxes, it is hardly surprising that not all philosophers have embraced the idea of rights. Indeed, many have voiced deep criticisms thereof. Jeremy Bentham famously rejects rights as “nonsense on stilts”, criticizing them for being neither observable nor enforceable (1843: 491ff.). As a utilitarian, he holds that qualities such as goodness or truth depend on context, on real situations, rather than on abstract principles. Edmund Burke similarly rejects the concept of natural rights, dismissing their metaphysical idealism and rationalism as mere speculation (1987: 51). For Burke, politics are much rather determined by contingent events, context and chance, whilst abstract concepts blind the politician from reality:

Circumstances (which with some gentlemen pass for nothing) give in reality to every political principle its distinguishing colour, and discriminating effect. The circumstances are what render every civil and political scheme beneficial or noxious to mankind. (ibid: 7)

As a communitarian, Burke emphasises that humans are determined and constructed through the type of society

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they live in, rendering rights dependent on particular traditions and cultures. Moreover, as an ultra-conservative, he fears that the rights discourse could bring chaos and revolutionary terror to local traditions such as those of the English (ibid: 68). Karl Marx also provides a pragmatic critique of human rights. His experience of the persecution of the Jews in Germany makes him question the extent to which the French Declaration of the Rights of Man can protect the rights of Jews like himself: “[T]he rights of man as distinct from the rights of the citizen are nothing but the rights of the member of bourgeois society, i.e. egoistic man, man separated from other man and the community.” (1977: 102) For Marx, the Declaration implies that human beings are bourgeois individuals, separated through their respective communities. Accordingly, rights are both political and social creations of the state and law. Far from establishing equality, they promote narrow class interests and subject the working classes.

Friedrich Nietzsche takes the critique of human rights a step further. Famous for his proclamation that “God is dead” (1974: §125), Nietzsche holds that through man’s loss of faith, God has been replaced by man. However, man has not yet realized the consequences of this. In the absence of God, the foundations for our values, beliefs and thoughts based on Christian and Platonic ideals, such as the good, simple, pure, universal, and progressive have been lost, threatening us with a complete loss of significance of everything we believe in. Man has thus entered an age of nihilism, the belief in ultimate nothingness, resulting from the failure of humanity to overcome the devaluation of religion and rationalism. Indeed, for Nietzsche, one of the main problems with modern liberal society is the sense of security it provides its citizens with, rendering them nothing more than happy slaves, who continue their work because they blindly believe in progress:

[...] what they sing – ‘equal rights’, ‘free society’, ‘no more masters and no more servants’ – has no allure for us. We hold it absolutely undesirable that a realm of justice and concord should be established on earth (because it would certainly be the realm of the most profound levelling down to mediocrity and chinoiserie); we are delighted by all who love, as we do, danger, war, and adventure; who refuse to compromise, to be captured, to reconcile, to be castrated; we consider ourselves conquerors [...] (1974: §377)

Equality, Nietzsche argues, is invented by the weak to subject the strong. Thus, he calls upon strong individuals to recognize that there are no universal, God-given values, and to embrace the task of *value-creating* (1992: 395). Yet, while Nietzsche himself was certainly not a democrat or an advocate of human rights, his works should not be misread as endorsing an ‘anything goes morality’ with no limits to our actions:

It goes without saying that I do not deny – unless I am a fool – that many actions called immoral ought to be avoided and resisted, and many called moral ought to be done and encouraged – but I think the one should be encouraged and the other avoided *for other reasons than hitherto*. We have to *learn to think differently* – in order, at last, perhaps very late on, to attain even more: *to feel differently*. (Nietzsche, 1982: §103)

Seen thus, Nietzsche’s thought appears very relevant to the human rights discourse. Indeed, if Nietzsche is right about the death of God and the consequent devaluation of our values, his philosophy can be understood as a call to reassess human rights.

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This chapter has aimed to show that based upon the Aristotelian principle of equality, implying that we should treat those who resemble us with respect, and those who differ from us differently, human rights are founded upon exclusiveness, rather than inclusiveness. It could be argued that Nietzsche’s suspicion that “our morality is”, in fact, “by its own standards, poisonously immoral” (2007: 113), is reflected in the history of human rights discourse which, by attempting to create equality, promotes ‘sameness’ (which Nietzsche would perceive as ‘slavishness’) and rejects difference. To paraphrase George Orwell, it appears that “some human beings possess more equal rights than others”.

While this chapter has examined the development and major critiques of human rights, the next assesses major contemporary views on human rights justifications in the light of the above criticisms, with particular attention to the question of whether they can succeed to demonstrate a universalism that is inclusive, avoiding the exclusion of

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difference.

## CHAPTER 2: CONTEMPORARY PERSPECTIVES ON THEORETICAL JUSTIFICATIONS OF HUMAN RIGHTS

### *Religious Justifications of Human Rights*

Michael Perry opposes the nihilism of Nietzsche, arguing that human rights can only survive if we adopt a religious world view or a deep faith, defined as holding human life to be ultimately meaningful (1998: 13). Many other religious scholars such as Hans Küng, Max Stackhouse, and Nicholas Wolterstorff broadly agree with this claim (Kao, 2011: 35f). Indeed, historically, rights have often been grounded in religion, and the Decalogue might be viewed as one of the earliest rights declarations, for “Though shalt not kill” appears to imply a negative right to life (Robertson, 2000: 1). More recent religious declarations of rights, such as the Cairo Declaration on Human Rights in Islam of 1990, and the papal encyclical, *Pacem in terris* of 1963, demonstrate considerable disagreement, even among those who agree that human rights are religious (Kao, 2011: 32f.). Hence, while the former grounds human rights in Islamic Shariah, the latter holds that rights are naturally revealed to us through our conscience (ibid).

In attempting to find a universal religious ground for human rights, Perry describes the belief system of a Christian woman named Sarah, who lives according to Jesus’ commandment to “love one another just as I have loved you” and for whom inherent dignity and sacredness are “fully equivalent to each other” (2007: 8): “[Sarah] loves all human beings ... even “the Other”: She loves not only those for whom she has personal affection ... Sarah loves even her enemies.” (ibid: 10) Viewed thus, every human being “is a beloved child of God.” (ibid: 8) Sarah acts the way she does for two main reasons: she regards all other human beings as her brothers and sisters, while, at the same time, loving the other “just as I have loved you”, makes her a happy person (ibid: 11). Perry also holds that other religious traditions like Judaism and Islam could be similarly interpreted.

Perry’s account depends on an equation of inherent dignity and sacredness, yet he overlooks the fact that these two concepts do not necessarily mean the same thing. Dignity, unlike sacredness, does not invoke a connection to holiness and God; it is a more subjective concept, open to interpretation and reliant upon what others think (Kohen, 2007: 81). Perry’s analysis with regard to Sarah, appears rather speculative. Her intensely profound faith makes her appear more like a saint than a “real person”, and the purity of her motives might be questioned, since failing to extend universal love could have irreparable consequences on her afterlife (ibid 16). Moreover, Perry merely refers the abstract concept of human rights to an even greater abstraction – religion. If we follow the logic that human rights should be theoretically justified, grounding them in religion merely appears to demand questioning the latter’s sources. Notably, Perry’s reading of Nietzsche is very selective. Hence, his quotations derive exclusively from the *Will to Power*, an uncompleted text, which, as Walter Kaufmann argues, is not comparable to Nietzsche’s other works (Kaufmann, 1968: xv-xvi). Perry thus ignores that Nietzsche’s aim is not merely the deconstruction of morality, but the reassessment of our values and the removal from their initial context of *ressentiment*, a state of suppressed envy and hatred towards that which is different.

One of the biggest weaknesses of religious human rights defences in general is that religion itself has not always been exemplary in respecting all human beings, as the countless wars fought in the name of religion, such as the Crusades, remind us. Indeed, throughout the Bible, God himself is often described as jealous and revenge-seeking, tolerating murder, slavery and even genocide (for example, the annihilation of the kingdom of Annalek, the stories of Noah and Abraham) (Kohen, 2007: 21). In practice, religions have often attempted to exclude, and even exterminate others. Grounding human rights in religion may thus seem rather risky, even dangerous. Nevertheless, most of the horrors committed in the name of religion have resulted from the misuse of religious scriptures, and thus do not demonstrate that Perry is off the mark in arguing that human rights are based on a religious world view. Yet, Perry fails to show why persons who do not presuppose an ultimate meaning to life, who are thus different from the Other that Sarah recognizes, or, who in turn would not recognize Sarah as an Other, should respect human rights (i.e. Atheists and Agnostics). Hence, by attempting to assert equality in the sense that “we are all children of God”, those who do not see themselves as such, and are critical of religious faith, are excluded.

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## *Justifying Human Rights through Human Agency*

In a pluralistic world with many different beliefs, not all of which see the world as ultimately meaningful, a religious theory of human rights does not appear to meet the criterion of inclusiveness. Hence, several theorists claim that a viable secular defence of human rights is possible, and more inclusive. Alan Gewirth argues that the criteria of justification for human rights are based on a supreme moral principle, similar to the Golden Rule or the Kantian categorical imperative, which he calls the Principle of Generic Consistency (PGC). (1984: 14) He perceives the verifiability of human rights as an immense challenge: "it is not the case that humans are born having rights in the sense they are born having legs. At least their having legs is empirically verifiable, but this is not the case with their having rights." (ibid: 3) According to Gewirth, the PGC is logically derivable from the nature and structure of the human agency, which enables us to plan and execute an action and is thus an observable feature. Gewirth constructs the PGC through a dialectical mode of argumentation and presents the various stages of his argument as inferences made by an agent. The first, inevitable premise is "I do X for purpose E", followed by the assertion "E is good." (ibid: 14) These two assumptions must be accepted by all agents, provided their actions are voluntary, or they risk contradicting the idea that they are agents: Any agent, simply by virtue of being an agent, must admit, on pain of self-contradiction, that he ought to act in certain determinate ways (Gewirth, 1981: 25-26). While this theory is too long and complex to be considered in detail here, the PGC can be summarized as based on two main components. The first is that

Every agent logically must hold or accept that he has rights to freedom and well-being as the necessary conditions of his action ... for if he denies that he has these rights, then he must accept that other persons may remove or interfere with his freedom and well-being, so that he may not have them, but this would contradict his belief that he must have them. (Gewirth, 1984: 18)

The second component holds that "the agent must logically accept that all other prospective purposive agents have the same rights to freedom and well-being as he claims for himself." (ibid.)

This method of justification, drawing upon human agency, has the major drawback that it can be interpreted as being exclusive, for not every human being actually has the ability to plan or execute an action. Thus the problem remains of whether babies (even unborn babies), young children, mentally disabled persons or euthanasia patients classify as the agents that Gewirth perceives as holding rights. Moreover, as Richard Rorty points out, Gewirth's argument of self-contradiction fails when an agent violates another because he perceives the other as merely "pseudohuman": "We have contrasted us, the real humans, with rudimentary or perverted or deformed examples of humanity." (Rorty, 1993: 126)

Unlike Perry and Gewirth, Ronald Dworkin holds that there is both a "secular as well as a religious interpretation of the idea that human life is sacred." (1994: 195) For Dworkin, it is not difficult to understand a religious version of human sacredness regarding all human beings as 'children of God', yet he claims that an, admittedly more complicated, secular vision of human rights is also possible: "most people who are not religious also have general, instinctive convictions about whether, why and how any human life has intrinsic value." (ibid: 155) Dworkin defines such an intrinsic value as independent of "what people happen to enjoy or want or need or what is good for them." (ibid: 71) According to Dworkin, human sacredness can be perceived as a "secular but deep philosophical belief." (1993: 36) He distinguishes between two different types of sacredness. The first refers to "sacredness by association." Dworkin considers national symbols like the American flag an example of such sacredness: "Many Americans consider the flag sacred because of its conventional association with the life of the nation; the respect they believe is owed to their country is transferred to their flag." (1994: 74) The second form of sacredness is related to creation, linking art and life: "each developed human being is the product not just of natural [divine or evolutionary] creation, but also of the kind of deliberative human creative force that we honour in honouring art." (ibid: 82) In this regard, humans construct themselves.

Dworkin's argument of sacredness by association would appear to justify local rather than universal principles. Thus, it also suffers from exclusiveness, for one may be inclined to regard all Americans as human, but perceive all non-Americans as less worthy or "pseudohuman" as Rorty might put it. Moreover, human beings may be self-creating, yet

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this does not necessarily render human life sacred; it might just be unique or important (Kohen, 2007: 69). Dworkin's analysis, like that of Perry, also depends on whether human sacredness implies a connection to human rights. As argued above, this is not necessarily the case.

## *Consensus-based Justifications of Human Rights*

It has been argued that the theories of Perry, Gewirth, and Dworkin, while aiming to find a foundation for universal equality, can lead to an exclusion of those, who are not the Same. Hence, some theorists claim that we should abandon philosophical rights foundationalism and focus on finding a practical consensus on human rights. John Rawls' strategy of defending human rights is essentially minimalist, viewing human rights as "political" and conceptually nonreliant upon any religious, philosophical or metaphysical doctrines:

These rights do not depend on any particular comprehensive religious doctrine or philosophical doctrine of human nature. The Law of Peoples does not say, for example, that human beings are moral persons and have equal worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to these rights ... Still, the Law of Peoples does not deny these doctrines. (Rawls, 1999: 68)

Following the Kantian model described in *Perpetual Peace* (1795), Rawls aims to construct a peaceful federation of nations, governed by the "Law of Peoples", a set of international principles of justice. Rawls attempts to avoid a view of human rights that is "peculiarly liberal or special to the Western tradition." (ibid: 65) His rejection of any such form of ethnocentrism leads him to regard only a "special class of urgent rights" as actual human rights, including the individual rights to life, liberty (such as freedom from slavery and forced occupation), personal property and formal equality before the law, as well as group rights to be free from mass murder or genocide (ibid: 65, 78-79).

This approach, however, leaves much to be desired. For at the cost of the individual, Rawls omits certain civil and political rights such as the freedom of opinion, expression, association, political participation, and the principle of non-discrimination of sex or gender (ibid: 75, 111). These omissions would appear to leave societies free to oppress their own people openly and legitimately in many different ways. Moreover, Rawls fails to completely escape ethnocentrism, for he claims that non-liberal societies, which he terms "decent societies", do not hold the same standards of reasonableness as liberal societies. This would appear to depend on a liberal definition of what qualifies as reasonable (Kao, 2011: 72). Furthermore, Rawls' minimalist conception of human rights would not apply outside the international "Society of Peoples" and to what he considers "burdened societies" or "outlaw states", and it would also neglect the problem that most human rights violations occur within sovereign states (i.e. genocides, civil wars), rather than as a result of international conflicts. It thus again represents a narrative that excludes certain human beings because of their differences, such as those that live outside the "Society of Peoples".

Similarly to Rawls, Jacques Maritain argues that attempting to find a common rational justification for human rights is futile, and risks leading to arbitrary dogmatism or irreconcilable differences (1954: 69). For Maritain, this creates a paradox: rational justifications are indispensable since we instinctively believe in truth, yet at the same time we are powerless, for there are so many different attempts at justifying human rights that appear opposed to each other. A philosophical synthesis of all human rights justifications, he argues, would require vast probing and purification, as well as higher intuitions, a new form of systemization and radical criticism of errors and confused ideas (ibid: 72). Even if all of these methodological obstacles could be overcome and a grand theory of human rights was synthesized, it would still only be accepted by some and rejected by others (ibid.). Hence, Maritain's well-known statement at a meeting of the French National Commission of UNESCO: "We agree on these rights, providing *we are not asked why.*" (ibid: 70) Like Maritain, Ari Kohen argues that "[w]e may be unable to come to any agreement where our religious or philosophical traditions are concerned, but this need not prevent us from coming to consensus on a political conception of justice." (Kohen, 2007: 144) For Kohen, the very fact that an international consensus was achieved by the UDHR is enough justification for human rights. While he acknowledges that human rights are socially constructed, he claims that we should act as though our human dignity and rights were 'real' (although they may not be empirically verifiable) "because we agreed to do so." (ibid: 146)

This argument has several weaknesses. The word 'consensus' implies that an agreement is not unanimous, and is

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thus exclusive by nature. Hence, while in 1948 the UDHR was passed without any official objections, there were eight abstentions (O'Byrne, 2003: 85). Moreover, the consensus of international declarations refers to a consensus of *states*. While these states are officially supposed to represent the will of their people, the UDHR did not represent the decisions of all the peoples of UN member states, but rather of the political elite of those countries. Kohen also fails to address the hypocrisy of international institutions and international law, which have not been able to prevent genocides, war crimes and other crimes against humanity – mainly because of the pre-dominance of power politics in international relations. In view of the horrific human rights violations since the adoption of the UDHR in 1948, a really “overwhelming consensus” on human rights seems to be lacking.

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This chapter has identified exclusion as a major issue of the above approaches to justifying human rights. Thus, grounding human rights in religion can lead to the exclusion of other religious, or non-religious beliefs, and theories based on the human ability to plan and execute actions, or be self-creating, appear to exclude certain groups of people such as babies, mentally disabled people, and euthanasia patients. Moreover, the idea that a consensus on human rights exists is inherently problematic, for the idea of consensus is itself also based on exclusion and mostly based on the decisions of political and diplomatic elites of states.

It thus appears that the above attempts at justifying human rights are not only mutually incompatible, but each unable to defend a truly universal theory of human rights, for in attempting to establish equality, they become exclusive by rejecting differences. In order to defend human rights as *inclusive*, it thus appears necessary to rethink the concept. The next chapter addresses this issue.

## CHAPTER 3: TOWARDS A REVALUATION OF HUMAN RIGHTS

*“Let us wage war on totality, let us be witnesses to the unrepresentable; let us activate the differences and save the honour of the name.” (Lyotard, 1984b: 82)*

### *Abandoning Human Rights Foundationalism*

In the light of the divergent claims and criticisms of human rights, a reconciliation of all different philosophical approaches seems impossible. The challenge is thus whether, without any distinguishable common ground for human rights, we can still defend them. Will adopting the absolute liberal concept of rights, even if we have ceased to believe in any metaphysical or transcendental source, condemn us to eternal cynicism? According to Richard Rorty, there is a pragmatic way of upholding the human rights discourse. For Rorty, morality originates in the heart, rather than the head, and therefore there can be no rational defence for human rights (1993: 119). Instead, he argues that human rights are based on a sentimental view of humanity. Rorty suggests we move beyond epistemological perspectives, which hold that we can learn to know the social world through criticism or reason, and accept that the grand narrative of human rights is predominantly a Western liberal one. He maintains that through “sentimental education” people can be manipulated and converted to “standard liberal values” (ibid: 127). Accordingly, “telling the story” of human rights outside the Western liberal spectrum is not an imposition on the cultural differences of other societies, but indeed a responsibility of Westerners, for only they know that this narrative does not make human rights any less real, or any less of a good thing.

Notwithstanding all this, however, the problem with Rorty’s quest to abandon the search for pointless universals and instead to focus on ‘actively doing good’ through the promotion of human rights, is that it remains questionable to which extent human rights can really be perceived as ‘good’. After all, there have not only been many different philosophical interpretations of human rights, but they have also served different purposes at different points in history, whilst developing their own forms of control and domination. Rorty might be quite right in arguing that human rights should be promoted, yet perhaps they should – in a Nietzschean spirit – be endorsed “for other reasons than hitherto.” (Nietzsche, 1982: §103) For many, questioning the benevolence of human rights is akin to siding with the evil and inhumane. However, ultimately based on values that have become meaningless in an age that has largely lost its faith in a metaphysical or transcendental higher source – the value of human rights would appear to be in need



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of a reassessment.

## *Human Rights and the Value of Paradox*

The need for a reevaluation of human rights is underlined by an understanding that they are essentially paradoxical. The value of paradox is one that goes *beyond good and evil*, it shows that there is no ultimate black or white, but only “various shades of grey”. The concept of paradox has been embraced by ‘postmodern’ thought, which generally holds that necessarily abstract values such as ‘goodness’ or ‘truth’ are merely grand narratives, without any concrete meaning, serving to construct our history (Arslan, 1999: 196). Thus, Jean-Francois Lyotard argues that we should search for examples of paradox, undecidability and incompleteness, rather than universal truths, particularly in science, which is based on the idea that progress makes the world ‘better’ even if it cannot discover truth (1984a: 60). For Lyotard, the ‘Postmodern Condition’ as opposed to ‘modernity’, no longer denies the loss of all certainties, thus seeking to ‘reinvent’ the world.

The central paradox of the discourse of human rights is that it emerged as a critique of forms of oppression, directing us towards a utopian ideal, according to which each and every human being respects each other. Yet, since the main promises of utopia of the twentieth century resulted in genocides and politicides, we have ceased to believe in paradise. As Jacques Derrida argues, “no degree of progress allows one to ignore that never before, in absolute figures, never have so many men, women, and children been subjugated, starved or exterminated on earth ...” (2001 [1994]: 266) Again, this shows the extent to which people are excluded from the supposedly inclusive global narrative of human rights. Theodor Adorno underlines the central paradox of utopian hope: while on the one hand

the only philosophy which can be responsibly practiced in the face of despair is the attempt to contemplate all things as they would present themselves from the point of redemption. Knowledge has no light but that shed on the world by redemption. All else is reconstruction, mere technique.

On the other hand, utopia is

also an utterly impossible thing, because it presupposes a standpoint removed, even though by a hair’s breadth from the scope of existence ... the more passionately thought denies its conditionality for the sake of the unconditional, the more unconsciously, and so calamitously, is delivered up to the world. (Adorno, 1991: 247)

It is thus necessary to hope for utopia, but at the same time to regard it as impossible. We are unable to cease criticizing the present, yet in order to do so we must adopt the position of the future. However, we cannot adequately detach ourselves from our existence, in order to assume the redemptive position (Douzinas, 2000: 340). Similarly, it is believed necessary to believe in the value of human rights, while at the same time through the experience of the hypocrisy of power politics we have become too cynical to expect human rights to effectively change the way the world works.

## *Human Rights and the ‘Other’: Learning to affirm Difference, instead of Sameness*

Understanding the underlying paradoxes of human rights, leads to the realisation that they are neither ultimately good, nor evil. As has been shown, while striving to achieve equality, the narrative of rights actually create inequality by concealing an intolerance of difference. As Nietzsche argues, “[t]he principle of identity has behind it the “apparent fact” of things that are the same.” (Nietzsche, 1967: §520) This applies to both theory and practice. Thus, Perry’s religious defence of human rights would exclude those persons who differ from the belief in an ultimately meaningful world, and Gewirth’s and Dworkin’s accounts can easily be interpreted as excluding human beings who lack the ability to plan and act, or be creative, such as babies, or euthanasia patients. In practice, as Marx argues, rights have promoted bourgeois class interests, and, as Arendt emphasizes, they have served to protect the citizen. In this regard, a person with rights is a *bourgeois citizen*. However, those who do not fit this definition, such as foreigners, or refugees, are at peril. “It seems that a man who is nothing other but a man has lost the very qualities which make it possible for others to treat him as a fellow man.” (Arendt, 1966: 300) Indeed, some of the greatest acts of violence against humanity have taken place in the name of protecting sameness, including the Holocaust, and

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other horrific genocides and series of ethnic cleansing of the twentieth century, such as Rwanda and Kosovo.

Rights are thus based on the idea of the 'Other as the Same'. Rights claims depend on the acknowledgement of Others and their rights. There can be no rights without a relation to Other rights:

The properties of a thing are effects on other "things":

if one removes other "things," then a thing has no properties,

i.e., there is no thing without other things,

i.e., there is no "thing-in-itself. (Nietzsche, 1967: §557)

Lyotard emphasises that this enslavement to the Other is connected with language (1993: 136f.). The problem arises when a human being is denied the right to speak, for then he ceases to be recognized as an Other, and is therefore estranged from the human community. The victims of such an exclusion are thus not able to report it or make an appeal in their defence (ibid: 144). This was experienced by those who survived extermination camps. Yet, milder forms of such exclusion occur every day, even in Western liberal societies. As Lyotard argues, the exclusion from mutual recognition begins in the playground when one child is told by other children: "We're not playing with you." Through this experience, the child "suffers a wrong equivalent, on its own scale, to a crime against humanity." (ibid: 145) Another example is that of European political parties of the far-right spectrum, which generally treat refugees, other foreigners, or the Roma people as persons to be excluded from society. This also demonstrates a clear link between the narrative of equality, and the nationalist call for purity, identity, and sameness. Viewed thus, democratic equality is paradoxically hierarchical, classifying everything that differs from 'sameness' as inferior or superior. Nietzsche describes this as the 'herd mentality': "[w]herever we encounter a morality, we also encounter valuations and orders of rank of human impulses and actions ... morality trains the individual to be a function of the herd and to ascribe value to himself only as a function." (1974: 116) In this sense, any individual who is not part of the herd, or ceases to be part of the herd by losing his function, is excluded, and thus becomes a "lesser human". As Emmanuel Levinas argues, "[t]he principal task ... consists in thinking of the Other-in-the-Same (*l'Autre dans le Même*) without thinking of the Other (*l'Autre*) as another Same (*Même*)." (Levinas, 2008: 80) In this respect, we should learn to recognize and affirm the differences of all human beings.

This rejection of difference is not only created with regard to human beings, but also against other narratives. Thus, while the concept of rights has developed and changed over time, it has always established itself as superior to alternative systems, whether in aiming to assert the power of the wretched and oppressed, or of the Church or the state. As Foucault argues, "in every society the production of discourse is at once controlled, selected, organized and redistributed by a certain number of procedures." (Foucault, 1984: 109) The standards of normality and discourse itself are controlled by a 'will to truth', assuming the superiority of values such as the universal, simple, and good. This will to truth is a form of control that "increasingly attempts to assimilate the others, both in order to modify them and to provide them with a foundation." (ibid: 113) In this sense, the human rights discourse has been reinforced and renewed by various philosophical traditions, from its origins in Plato, the importance of the value of truth continues in Christianity and telling a lie becomes a sin. During the Enlightenment, the will to truth presents itself differently, no longer nested in God, but in the newly-found faith in science, which aims to observe, measure, and verify objects and is based on the idea of progress. In this respect, Nietzsche writes: "It is still a *metaphysical faith* upon which our faith in science rests [...]" (Nietzsche, 1974: §344) The narrative of human rights has thus generally been conceived as good and true, reinforced by the eighteenth century rights declarations and later by the International Bill of Human Rights. "Thus all that appears to our eyes is a truth conceived as a richness, a fecundity, a gentle and insidiously universal force, and in contrast we are unaware of the will to truth, that prodigious machinery designed to exclude." (Foucault, 1984: 114) Children at school are taught the principle of equality, in the sense of sameness, and questioning this equality and the idea of human rights crosses a taboo, perceived as inhumane or evil. The terms of contestation between different discourses are thus framed, through notions such as good and evil, or normal and abnormal.

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What might a concept of human rights based on affirming difference, rather than sameness thus look like? At first glance, this proposition would surely appear strange to people familiar with Article 1 of the UDHR claiming that “[a]ll human beings are born free and equal in dignity and rights.” A concept of human rights based on difference could be read as follows: All human beings are born different, and the fact that each and every human being is unique in his or her own way, is what makes him or her human. This can be very simply evidenced through DNA. Thus, all human beings are born with different DNA, yet their DNA is also criterion for their being human. Apart from our DNA, we are, of course, also born different in terms of our ethnicity, health, and different social, cultural, political, and religious backgrounds. In nature, there is thus no such thing as the ‘Same’, it is essential to realize that ‘sameness’ is a human construct, an abstract idea. Similarly, human beings can have no ‘pure identity’, for they are by nature diverse and heterogeneous, and ever-changing. Indeed, not even our selves are ever exactly the same as at one particular moment in time, as they are continuously “in flux”, influenced by various different external and internal conditions, such as changing thoughts.

A new definition of human rights would thus be based on an ‘equality’, not in the Aristotelian sense of sameness, but founded upon the idea of difference and diversity, moving *beyond good and evil*. We are equal only in the sense that we are all human beings because of our differences, because each and every one of us is unique. *We are equal because we are not the same*. Rethinking human rights in this way would not necessarily mean that all human beings cannot share the same basic rights, such as the right to life, liberty and security; for together with social and welfare rights, these could thus all be affirmed in such a framework.

It remains, however, important to note that in certain circumstances the notions of specificity and context may also play a significant role in rethinking rights. Of course, human rights based on an affirmation of difference would naturally stand in opposition to political and cultural forms of oppression which sanction those who are not considered the Same. Yet, there are contingent circumstances in which the absoluteness of human rights (which is again, only a human construct) may have to be comprised. Indeed, proclaiming the absoluteness and universality of rights can, in fact, be dangerous. As Michael Ignatieff argues, an oppressive military regime, which regularly violates human rights, might sometimes be preferable to the alternative of anarchy or long-term civil war (2001: 5f.). This by no means justifies oppression and domination, but it is paramount to realize that attempting to impose the value of human rights on other cultures by forcing a regime change might backlash heavily. A different example is the famous ‘ticking bomb’ problem. This is an imaginary scenario that describes a situation in which a terrorist has placed a nuclear bomb somewhere that could kill thousands of people. Torture is guaranteed to produce the information needed, in order to detain the bomb and save lives (this is actually not the case, but a necessary premise that must be accepted for this mindplay). This is, without doubt, a controversial example, but one could argue that while it may be unethical to torture the terrorist, it might be the ‘right thing to do’ in these circumstances.

In this respect, the concept of human rights must shift away from the ideas of sameness, purity, and absoluteness and towards a recognition of difference, diversity, context and contingency.

## CONCLUSION

By examining how the idea of rights has changed over time, and various different attempts towards justifying the same, this dissertation has emphasised that there can be no grand synthesis of theoretical human rights defences. It has endeavoured to show that each of the examples studied, of religious, human-agency, and politico-legal consensus-based approaches towards human rights, appeared to be exclusive of certain groups of human beings. This study has thus argued that the quest for human rights foundationalism should be abandoned, for a single theory of human rights is highly unlikely to be found, and even less likely to be universally accepted. Moreover, in the light of the key paradox that having originated as a form of resistance and rebellion to protect the wretched and the poor, the human rights discourse has created its own forces of subjugation and exclusion, the assumption that human rights are inherently ‘good’ should be treated critically. Indeed, this dissertation has argued that we must move beyond oppositional thinking in terms of good and evil in seeking a reevaluation of the concept of human rights.

The study has found that the Aristotelian conception of equality, based on the principle of sameness, is the root of the problem. In this view, a human being has rights only if he carries within him the idea of the ‘Other’ human being, so

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that he, in turn, can be treated as a human being by 'the Others'. Hence, rights depend on 'Others as the Same'. Therefore, any person that fails to be recognized as an Other is deemed to be 'lesser human', or a 'human animal' at best. Such persons, who often happen to be women, children, stateless persons, refugees, or foreigners, are thus subjugated. This demonstrates that equality, while intended to promote the idea that all human beings are the same, excludes those who are considered different.

In drawing upon Nietzsche's criticisms of morality in general, and equality in particular, it has been argued that in focusing on sameness, a hatred of everything that is different is concealed. Thus, in the name of human equality, human rights end up being disciplinary in nature, at the expense of those who are not recognised as the Same. It is thus suggested that the value of human rights should be re-explored and recreated by affirming the differences between human beings, in acknowledging that we are all influenced by a myriad of different factors, such as our DNA, and our social, political, and cultural backgrounds. Indeed, instead of focussing on similarities, human rights could be established based on the uniqueness of each and every human being, rather than on resemblances and similarities. In this respect, it is important to deconstruct the ideas of sameness, a 'pure identity' and oppositional values, and instead affirm diversity and discontinuity. Additionally, it has been argued that a reconsideration of human rights should also involve context and contingency. Thus, depending on the context, an oppressive regime may be preferable to attempts at change that could lead to long-lasting conflicts in which human rights are violated to an even worse extent than before.

This study has thus put forward a very brief proposal of how human rights could be reevaluated by moving away from oppositional thinking, and accepting difference, yet it is important to continue research in this field, and work towards achieving a more complete framework for reassessing human rights in terms of difference, discontinuity and contingency. Moving towards affirming difference in theory is a crucial step towards making the idea of human rights more inclusive. It is important to keep in mind, however, that in practice it is much harder to overcome the boundaries that have been created within people's minds, rejecting anything that is unknown, unusual and different. The rigid structure of the international community, based on a great power hierarchy, state sovereignty, and liberal ideals, is unlikely to change in the near future and thus, neither is the concept of human rights, which has become encoded within the treaties of this international system.

In a nutshell, human rights thus have a very long way to go, if their goal is to achieve a universality that is inclusive, rather than exclusive. Hence, the revolution of human rights needs to begin from within: the very foundations upon which rights are based must be re-examined.

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*Date written: April 2012*