

HUMAN RIGHTS AND CORRELATIVE DUTIES

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INTRODUCTION

HUMAN RIGHTS HAVE become a dominant reference point for a variety of international and transnational discourses. It is therefore all the more surprising that in the end, there is a huge amount of unclarity in these discourses. It is, firstly, contested what the *conception* of human rights is: what is one saying when one claims that human rights are or are not at stake? Secondly, there is the question of the *content* of human rights: what possible rights should be included in the protection of human rights? Thirdly, how is the idea of human rights connected to corresponding (or correlative) *duties*? And fourthly, more specifically, *who* bears which correlative duties in relation to which human rights? On a more general level we could identify behind all these four dimensions the question *why* we should assume that there are human rights (the question of *justification*).

Our essay will concern mainly questions of correlative duties and the determination of duty-bearers. Nevertheless we will start with the discussion of some general conceptual questions. This essay begins with an elaboration on the *importance* of clarifying the duties that correlate to human rights followed by some general remarks on the nature of human rights, especially the relationships between the

moral, legal and political dimension of human rights. In the core of the paper *different kinds of accounts of how human rights-theories relate to the determination of duty-bearers* are proposed and critically investigated. Finally we summarize, and briefly consider the *implications* of our findings for future research as well as their practical implications.

→ | ETHICS

“No free man shall be taken or imprisoned or dispossessed, or outlawed or exiled, or in any way destroyed, nor will we go upon him, nor will we send against him except by the lawful judgement of his peers or by law of the land.”

MAGNA CARTA (1215 AD)

1 ~ THE IMPORTANCE OF CLARIFYING DUTIES

There seems to be a consensus that without clarification about corresponding or correlative duties – whether there are any, and if so, which ones and who bears them –, talk about human rights would be rather *meaningless*, since we would have no way to determine what concrete actors would have to do. Some worry that human rights even would be *conceptually incoherent* if there is no clarity about correlative duties. We can reconstruct this worry as follows: references to human rights are used to make forceful claims. Those claims aim at overriding or ‘trumping’ (Ronald Dworkin) other considerations. But it seems that making claims is only sensible if there is someone to whom these claims can be addressed.

National legal regulations are normally specifying who the right-holder and the duty-bearer is and what the normative content of a right is, meaning: what liberty I have, what claim I am allowed to make or which entitlement I have, when I have a right to something (see Hohfeld). It is a feature of human rights that specific discussion is needed concerning the question of who bears the correlative duties. Following older opinions the human rights are only obligating the national states that have committed themselves to the human-rights-regime. Nowadays it is often defended that human rights also have horizontal effects (Pattinson and Beyleveld), meaning that they are also generating duties between citizens or even between all human beings. Furthermore, rights are often not only seen as negative rights (protection of negative liberty of all agents) but as positive rights as well, that is rights to support and empowerment, especially social and cultural rights (see Gewirth 1996, 31-70). However, the growth of possible contents of rights and the broadening of the scope of possible

duty-bearers, make the question more urgent towards whom those rights are addressed.

Some see this as a reason for holding that we can only speak of a right if we can *identify* certain institutional or other agents that bear a duty to fulfill this right (cf. O'Neill). Some go even further and say that we can only speak of a right if it can be *enforced* that some party or parties carry out a duty to fulfill that right (Susan James). In the end, the worry here is that there is a risk of an *inflation* of rights language as such. Rights are fundamentally different from e.g. ideals. If we speak about rights without identifying the duty-bearers, this could have the danger of blurring the borderline between a right and an ideal. On the other hand one can hold the position that it is necessary first to determine what agents may claim or to which goods they are entitled before one can ask who the addressee of the corresponding duties is. As long as we have no idea about legitimate claims or entitlements there is no reason to search for duty-bearers in the first place. When we see human rights as those liberties that all humans should have or as those goods to which all humans should be entitled, independently from the society they belong to, then it could make sense first to find out what those fundamental rights are, before we ask who the responsibility for the fulfillment of the corresponding duties lies with.

But in any case, the point that right claims are rather *meaningless* if there is no way to gain clarity about the duty-bearer, suffices to motivate a search for correlative duties and to set this question highly on the agenda.

2 - THE NATURE OF OUR INVESTIGATION

Before getting to the different ways to specify corresponding duties, it is necessary to say something about the nature of our investigation and the status we attribute to human rights. These clarifications are necessary because human rights are on the one hand regulated in international contracts; but they are not only legal entities. Most codifications of human rights are presupposing some pre-legal normativity of those rights. One position would be that the codification of human rights is grounded in moral rights, rights that humans should attribute to each other (for the history of this concept see Tuck 1979 and Tierney 1997). Another position would be to see human rights as grounded in general moral commitments (concepts of justice, equality etc.). However, there are also attempts to defend a non-moral political justification for human rights. But it seems very likely that human rights cannot be reduced to legal commitments. For such rights function partly (or even mainly) as enforcement for legal regulations: reference to human rights expresses the conviction that legal regulations *should* ensure them; human rights are saying something about what law *should* contain and states that lack a commitment to human rights are normally condemned or even put under pressure. However, it is contested how that pre-legal normativity should be conceptualized. Some see human rights (and here many specifically refer to those things listed in the Universal Declaration of Human Rights) as specifying 'substances' the enjoyment of which should be socially guaranteed for everyone everywhere; others see human rights (and here

they may well refer to lists different than the one provided by the UDHR) as foreign policy standards, in the sense that fulfillment of these standards in certain societies is sufficient for making foreign intervention unwarranted. Still others hold other views yet. It is clear that all reference to a pre-legal normativity of human rights is in need of strong justification: Why should we assume that we are normatively committed in this way?

We cannot discuss those questions in detail here but it seems obvious that the legal human rights discourse is referring to a pre-legal normativity of human rights. We are analyzing human rights therefore in some normative function that differs from the normative function that law has. But even if there is disagreement about what non-legal human rights standards express, those rights cannot be understood without telling a story about how (non-legal) human rights relate to (non-legal) duties of institutional and/or individual agents.

3 - TWO KINDS OF ACCOUNTS OF HUMAN RIGHTS

The main focus of this article, as said before, is on the question of who bears the duties that correlate with human rights. At the beginning of the article, we identified four types of issues related to human rights that require clarification: (1) the *conception* of human rights, i.e., the question of what human rights *are*; (2) the more specific question of *which* human rights there are; (3) the clarification of the relationship between human rights and correlative *duties*; (4) and the more specific issue of *who* bears the duties that can be said to correlate with human rights. With all these questions, we may add, come related questions to *justify* the positions that are taken: Why should there be something like human rights? Several theories of human rights are incomplete in the sense that they do not provide much in the way of justifications, or in the way of clarifying the relationship between duties and rights; some theories are even incomplete in the sense they do not have much to say on the question of specifically which human rights there are. One can have doubts whether that is acceptable for a theory of human rights or not. But if they are to be theories of human rights at all, they have to provide some clarity on the question of what human rights *are*; in other words, these theories *have* to provide a *conception* of human rights, or, in still other words, they *have* to provide an account of the *role* of human rights.

With this as a background, it is possible to propose a subdivision of human rights theories that pertains to the question that interests us, namely, *who* more specifically are the duty-bearers with regard to human rights. It will be introduced and developed now, and only after this we go into existing theories of human rights. The subdivision is as follows. On the one hand, there are human rights theories whose conception of human rights – in other words, whose accounts of what human rights are - determines *conceptually* who, specifically, are the main duty-bearers in relation to human rights. On the other hand, there are human rights theories whose conception of human rights does *not* in the definition of human rights determine who, specifically, are the main duty-bearers in relation to human rights. Let us call, even if the labels

may be somewhat awkward (and are surely ugly), the first kind of theories ‘*duty-bearer-fixed* theories of human rights’ and the second kind of theories – which we have characterized in a *negative* way – ‘*duty-bearer-open* theories of human rights’.

This distinction is not common, so it is incumbent on us to explain why we make it, what its status is, and how extant theories fall in or fail to fall in with this distinction. But let us first give a few examples to clarify the distinction. A prime example of a *duty-bearer-fixed* theory of human rights would be a theory that defines human rights as those standards that ought to be socially guaranteed to individuals in a certain country as a necessary and sufficient condition for making foreign intervention in that country’s affairs unwarranted. If something like this is what human rights are, or what their role is, then it follows almost by definition that they are primarily addressed to governments – who, on the one hand, may or must intervene in a country if certain standards are not fulfilled, or who must act so as to prevent (grounds for) foreign intervention on their territory. By contrast, a theory that would, for example, hold that human rights are the justified claims that humans can make in virtue of being human then it is quite clear that such a theory of human rights does not by definition point to certain specific duty-bearers, thus that it is *duty-bearer-open* in our sense of that expression.

The distinction has only the function to point to a specific problem and necessarily it will not cover all aspects of human-rights theories. Furthermore, there is a respect in which the *great majority* of plausible theories will be *duty-bearer-fixed*: they will hold that certain rights imply certain *negative* duties (whether or not they also imply certain other duties), e.g. the negative duty not to murder a human being; and it is immediately clear to whom these *negative* duties are addressed, namely to everyone (nobody is allowed to murder someone). This point will be taken up again shortly.

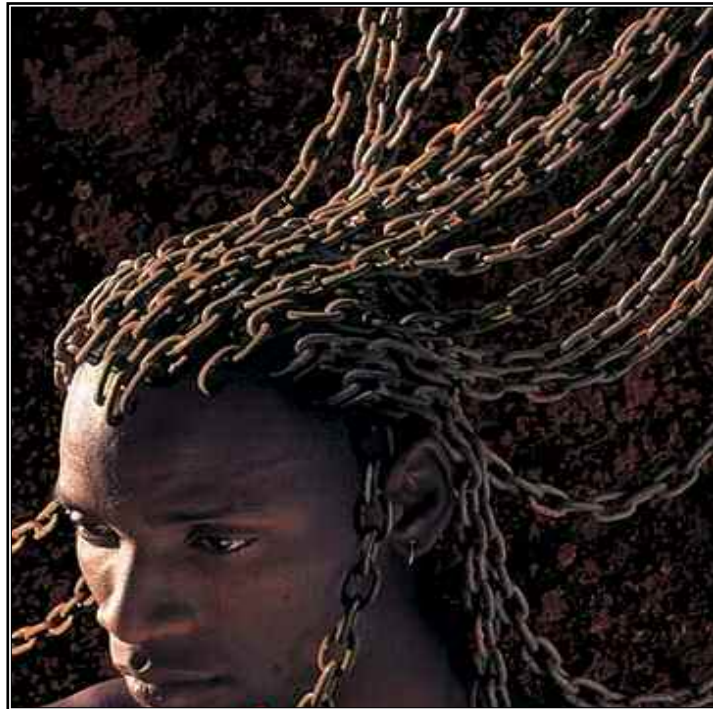
Given that there are many ways to classify or make a typology of theories of human rights, it may be asked what can be learned from grouping them as either *duty-bearer-fixed* or as *duty-bearer-open*. An answer is that, as remarked above, talk of human rights is rather meaningless if it is not clear who bears the duties that need to be fulfilled in order to realize the commitments those rights ask for. Against this

background, one may look for an account of human rights that is in a good position to make clear who, more specifically, the duty-bearers in relation to human rights are. Identifying which theories of human rights can count as *duty-bearer-fixed* is also interesting because, even if the distinction between *duty-bearer-fixed* and *duty-bearer-open* is not common, it is not far-fetched, but does have a foothold both in the history and in the existing theoretical accounts of human rights. The distinction is not far-fetched, that is, if we take it as a distinction that can function as an ideal-typical one and/or that is considered of heuristic value, rather than as a distinction that can serve to neatly, exactly, and one-to-one categorize actual accounts of human rights into two camps.

With all this borne in mind, let us make some observations. Firstly, historically accounts of human rights more often than not bore quite specific relationships to historical events and (national or international) contexts; we can think here of the *American Declaration of Independence*, of the *Déclaration des Droits de l’Homme et du Citoyen*, or of the *Universal Declaration of Human Rights*. In these declarations (although less so in the UDHR) human rights were in an important part conceived as claims that

citizens, or human beings generally, should in certain ways be protected against their government, or against governments more generally. From the outset, then, and closely related to the ideas about what human rights *were* in the first place, governments were conceived as the most important duty-bearers in relation to human rights; and these historic conceptions of human rights therefore were, in the terminology introduced above, to an important extent *duty-bearer-fixed*. Historically this conceptual relationship is related to the context of the declarations: The *American Declaration of Independence* defines human rights in the context of the building of the nation and the UDHR is formulated as the basic document for the building of the United Nations. In both cases, the formulation of human rights has to do with the formulation of basic commitments of states and their governments.

The same is true for various contemporary ideas of what human rights are. John Rawls sees them, in his treatise *The Law of Peoples*, as the standards whose fulfillment is sufficient to make foreign intervention in a country unwarranted. Here, once again, the link to governments as primary duty-bearers in relation to human rights seems fairly direct. Charles Beitz takes up Rawls’s idea and draws it more



broadly when he defends what he terms a 'practical conception' of human rights: in this conception, human rights are *not* seen as claims that *independently* of the international realm and doctrine, every human being is justified in making; but they are seen as standards that are to fulfill certain *practical* roles, in foreign policy, international institutions, aid, intervention etc.. Not all of these practical roles do by their nature point to certain specific duty-bearers, but some do. In the end, a practical conception of human rights in Beitz's sense may often be able to specify to a great degree nearly all duty-bearers for the specific human rights; but the specification may sometimes need additional forms of argumentation that are not directly given with the very concept of human rights.

Thirdly, it is often held (for example, by Thomas Nagel and Ronald Dworkin) that demands of justice are associative in nature, more specifically, that they can justifiably be made where individuals are coerced by certain institutions (and not otherwise), because coercion that is not justified is indeed *mere* coercion. We could try to extend this thought to human rights: we could suggest that human rights are the standards whose fulfillment or non-violation is required if the coercion exercised by certain institutions is not to become mere coercion. However, we should add that Nagel, and probably Dworkin too, would not accept such an account of human rights; but if it could be developed as an acceptable account, it would again be a rather duty-bearer-fixed account.

On the other side, we find for example theories (such as Henry Shue's) saying that human rights claim that certain '*social guarantees* to the actual enjoyment of certain goods' should be provided; and we find theories (e.g. Thomas Pogge's) which conceive of human rights as claims made against *social institutions*, understood in a broad sense (as a society's 'basic structure'). In a sense, both kinds of theories do point to duty-bearers in their explanation of what human rights are; but they do this in a rather vague way, so that they can hardly be said to be duty-bearer-fixed.

Duty-bearer-open, furthermore, are those theories that say that duties in relation to human rights are to be distributed according to the *capacity* of agents to discharge such duties effectively and/or at little cost to themselves (cf. Henry Shue). Also quite duty-bearer-open, lastly, are theories that advocate a distribution of human-right duties according to the degree to which agents were *causally* responsible – whatever exactly that may mean – for the origination of some human-rights problem. This approach is in line with moral theories that give a large place to backward-looking considerations in their account of what agents should do; also, Pogge has considerable affinity with this approach.

One could add that there is the possibility that a theory would be *conceptually* open concerning who are the duty-bearers, while it *would* at the same time *provide clarity* about duty-bearers, and that it would do so by considering the *nature* of specific rights. Such a theory could proceed as follows: negative duties are directed towards all agents (nobody is allowed to murder anybody) and states are obliged to organize adequate provision to ensure that. Positive rights, rights to support for individuals in general (education, shelter) or for individuals with specific needs (e.g. people with

disabilities), have the states as duty-bearer (because no individual can provide them). The international community has subsidiary obligations in relation to their ability to fulfill those obligations. For our context it is important that such a concept would be open on a conceptual level (duty-bearer-open) but it would offer a hermeneutic to determine concrete duty-bearers.

So much for a brief survey of how a number of important theoretical approaches to human rights would fit into the distinction between duty-bearer-fixed and duty-bearer-open – where, once again, this contrast is not intended as hard and fast but as idealtypical and/or heuristic.

We end with some evaluative remarks. Duty-bearer-fixed theories of rights human theories have the advantages that they are the sort of theories that provide relatively much clarity about the question of *who* bears duties in relation to human rights, and doing this prevents human rights talk from descending into meaninglessness. Moreover, many of these duty-bearer-fixed theories, although not all of them, have their origin in a political practice of some kind, and they may therefore seem to be more feasible than duty-bearer-open accounts of human rights – more feasible in the sense that the way in which they conceive of human-rights related duties is closer to how such duties are already being perceived and carried out by various parties, as well as closer to the actual motivations of moral agents.

As for duty-bearer-open theories of human rights, they are obviously a diverse lot (we defined them in a merely negative way), so little if anything can be said in general on whether they fare better than duty-bearer-fixed accounts of human rights. Let us point to some possibly strong points of duty-bearer-open theories.

A preliminary point is that some duty-bearer-open accounts of human rights can ultimately be fleshed out to be rather specific about duty-bearers, too; in other words, we do *not* by definition *need* a duty-bearer-*fixed* account of human rights to save human rights discourses from meaninglessness. Next, there is reason to think that we *are* actually going to need certain elements of duty-bearer-*open* theory: some natural and arguably indispensable thoughts about what human rights are (that they would belong to human beings qua human beings etc.) do seem to point in a quite duty-bearer-open direction; it seems that strongly duty-bearer-fixed accounts of human rights end up doing violence to certain plausible intuitions. Secondly, and relatedly, there seems something unavoidable about such ideas as those that the capacities that agents have, as well as the causal contributions that they made to the origination of a problem, should translate into duties. This is so even if the underlying picture that is suggested here is a controversial one, namely that we can first get clarity about what human rights are, and which human rights there are, and then subsequently attribute the duties that relate to these rights to certain agents on the basis of their capacities or causal contributions to the genesis of a problem. Thirdly and lastly, duty-bearer-open accounts of human rights appear to have as a practical advantage that it looks like they have an easier time attributing human-rights duties to certain prominent global actors such as NGOs and TNCs (Transnational Corporations). These are agents that have great capacities and

sometimes cause great harm, and that for these very reasons seem to have human-rights duties; but duty-bearer-fixed theories frequently point to governments as the primary duty-bearers in relation to human rights, and they can get NGOs and TNCs into the picture only indirectly and secondarily, if at all. To the extent that there seems something amiss with this, and to the extent that duty-bearer-fixed theories cannot change their ways here, duty-bearer-open theories may have a comparative advantage.

A last advantage of duty-bearer-open theories may be that they are better equipped to deal with the empirical changes of the international political order and with different circumstances in different parts of the world. The historical development of human rights was internally connected to the building of the nation state and to a specific constellation of the possible tasks of individuals, nation states and the international order. However, the relationship between citizens and states as well as the relationship between states and supra-national institutions has increasingly been subject to change in the last decades. And it is very likely that changes will further increase in the near future. Theories of human rights will have to be evaluated by looking at the extent to which they are able to take these changes into account.

4 - TO CONCLUDE

As observed at the beginning of this article, the philosophical and ethical research agendas in the field of human rights are very full indeed, in that the contents and justifications of ideas concerning human rights are as yet little understood. The same goes for the relationship between human rights and correlative duties as well as for questions concerning who specifically bears such duties. It is the last question that we have focused on in this essay. Of the two ways to kinds of accounts of human rights that we have distinguished – duty-bearer-fixed accounts and duty-bearer-open accounts - the former may presently hold the most promise. But we have argued that we cannot do entirely without the other kind of accounts either. It may be most important, however, that the complications that we have addressed deserve far more attention, not only to get them out of the way, but also to articulate them more fully in the first place. We take this to be a constructive endeavor, not meant to sidetrack and water down developments in the field of human rights, but to

further and strengthen them. The future of human rights will to a large extent depend on the question whether or not theoretical reflection and political practice will be able to convincingly answer questions that concern the determination of duty-bearers.

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*Under a government which imprisons any unjustly,
true place for a just man is also a prison.*

HENRY DAVID THOREAU

