Defending and Disputing Human Rights

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This article demonstrates how ethics, understood as the theoretical analysis of morality, contribute to the discussion of disagreements over human rights. It starts with an elaboration on the disagreements between proponents of human rights and proceeds to disagreements between human rights proponents and sceptics. It is argued that there are strong reasons to endorse pluralism of human rights. This endorsement includes both ideational disagreements and material conflicts. However, it does not prevent us from defending human rights as a powerful emancipatory project. Open normative universalism, which views moral as well as legal human rights as socially constructed, is presented as an ethical position that secures the democratic dimension of human rights.

Introduction

Those of us who agree that human rights matter disagree about how and why. Most importantly, we disagree about the moral justification of human rights. While there are those who believe that human rights protect individuals from severe power abuse on behalf of states, others claim that human rights are a matter of justice, nationally or internationally. Understandably, the meaning of justice is contested among proponents of human rights.

Human rights sceptics offer different types of critique of the project. Many political realists argue that human rights are used by states only when it suits them, that is, as an ideological instrument for wielding power.[1] Marxian perspectives regard human rights as a historically progressive but limited instrument of human emancipation. Additionally, there are important post-colonial voices which claim that human rights, though an attractive political morality in many regards, are deeply inflected by the cultural and political imperialisms of the Global North.[2] How should we approach these disagreements?

Just a decade ago most scholars of human rights contended that if we agree that human rights matter, our disagreements about why they matter are irrelevant for politics

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[1] For a nuanced account of realism on rights see for example William E. Scheuerman, "Reconsidering Realism on Rights". In Claudio Corradetti (ed.), *Philosophical Dimensions of Human Rights. Some Contemporary Views* (Dordrecht Heidelberg London New York: Springer, 2012), pp. 45-60.

[2] Balakrishnan Rajagopal, *International Law from Below. Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003), pp. 163-232.

and law. Accordingly, the correct response to those who question the importance of human rights should be a firm endorsement of international human rights law as law, that is, as authoritatively binding regardless of disagreements.[3]

The situation today is different, in my view. Disagreements about human rights – both among proponents and between proponents and sceptics – are seen as significant. For example, differing justifications of human rights on behalf of those who endorse such rights lead to differing interpretations of rights as well as to different priorities between recognized rights.[4] Differing explanations of ideological usage of human rights imply differing evaluations of responses to human rights as ideology.

Disagreements are not a purely theoretical enterprise, therefore, but both reflect and impact political developments.

How then should we approach these differences? Scholars of law and politics have discussed this question as an issue of the future of human rights. How much disagreement is compatible with functional human rights regimes? Do disagreements among proponents of human rights present a threat to the universality claim of human rights? How serious is the sceptics' critique, and how should we react?

I believe that ethics, understood as the theoretical analysis of morality, can contribute to the discussion of disagreements over human rights. In what follows I demonstrate how this can be done. I start with a short elaboration on the first type of disagreements, those between proponents of human rights. I then proceed to disagreements between human rights proponents and sceptics. In the final sections, I present a view of human rights that I believe is theoretically plausible and politically potent. This view combines an understanding of human rights as socially constructed with open normative universalism. Social constructivism allows for the recognition of reasonable disagreements about human rights, while open normative universalism sustains human rights' claim to universality.

Justifications of human rights

Human rights are legitimate claims to which all humans are entitled with regard to power and, above all state power. Many people would add "without discrimination" and argue that the universalism of human rights cannot be secured without strong anti-discrimination laws. However, there is a significant variety of perspectives on human rights among those who agree that "human rights law concerns the relationship between the individual and the state, which constrains the state in what it can do and how it should use its resources."[5]

Proponents of human rights disagree about which claims should be regarded as human rights and how human rights should be prioritized. There are liberal perspectives on human rights that emphasize the importance of individuals' freedom from coersion. For example, Michael Ignatieff and David Miller believe that human rights should be an instrument to protect individuals from the most severe abuses of power by states. The list of human rights should be kept short so that the international community can act when those rights are violated. In their view, human rights protect a very basic level of individual

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[3] Jack Donnelly, *International Human Rights*. Third edition (Boulder: Westview Press, 2007), p. 24.

[4] Elena Namli, *Human Rights as Ethics, Politics, and Law* (Uppsala: Acta Universitatis Upsaliensis, 2014).

[5] Mark Klamberg, *Power and Law in International Society. International Relations as the Sociology of International Law* (London: Routledge, 2015), p. 89.

agency.[6] Other liberals, such as John Rawls and Ronald Dworkin, disagree and instead claim that human rights cannot be reduced to a short list of negative rights. They take the view that the function of human rights is to realize the constitutional principle of equal respect and concern. Through human rights legislation the state recognizes its duty to treat all citizens with equal respect and concern.[7]

Liberal perspectives – egalitarian as well as non-egalitarian – are challenged by those who endorse human rights but envision them differently. One such challenge originates from the minority movement, which has succeeded in incorporating the collective rights of some minorities into the human rights law. In turn, minority rights are a source of frequent disagreement, not least because they affect our view of what kind of democratic model is compatible with human rights protection. Some commentators argue that the human rights of minorities do not include collective self-determination; others hold that self-determination should be recognized as a human right for minorities.[8]

Related to but not identical with the "minority challenge" is the relationship between universal human rights – understood in this particular context as rights recognized in the international law – and various other traditions. A frequent disagreement among proponents of human rights arises between those who believe that human rights can and should be articulated and implemented uniformly, and those who believe that contextual differences justify significant variations in how human rights are interpreted and prioritized. Contextual variations naturally take different forms: some are related to material positions, some to cultures, and some to both.

For example, many Christian and Muslim defenders of human rights claim that international human rights law should be implemented as uniformly as possible, a view which implies that Christian and Islamic theology should be adjusted to human rights norms.[9] Others argue that Christian and Islamic theology offer unique and democratically potent resources for human rights, something that justifies a significant plurality of human rights regimes. Ali Shariati, a famous Muslim liberation theologian, has defended such a view on the grounds that the principle of *tawhid* prohibits humans from demanding the subjugation of other humans. According to Shariati, the moral dimension of Islamic monotheism is the belief that God alone is justified in demanding the subjugation of human beings. Whenever humans dominate other humans, they are therefore violating the core Islamic norm, namely monotheism.[10] An instance of this interpretation of monotheism is offered by the Cairo Declaration's prohibition of corruption as a form of human rights violation.[11]

These and other approaches offer different understandings of the substance of human rights and priorities between rights. Miller and Ignatieff argue in favor of a short list of negative rights. Egalitarian liberals defend a long list on the principle of equal respect and concern. And the defenders of collective rights argue that minorities' rights cannot be

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[6] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001); David Miller, "The Responsibility to Protect Human Rights". Working Paper Series, Center for the Study of Social Justice SJ006 May 2007.

[7] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), p. 273.

[8] See for example Fernando R. Teson, (ed.): *The Theory of Self-Determination* (Cambridge: Cambridge University Press, 2016).

[9] See for example Abdullahi Ahmed An-Na'im, *Islam and the Secular State. Negotiating the Future of Sharia* (Cambridge, Mass.: Harvard University Press, 2008).

[10] Teresa Callewaert, *Theologies Speak of Justice. A Study of Islamic and Christian Social Ethics* (Uppsala: Acta Universitatis Upsaliensis, 2017), pp. 163-204.

[11] *Cairo Declaration on Human Rights in Islam,* art. 11 and art. 23.

protected within a pure liberal paradigm. Most importantly, these disagreements over the substance and prioritization of rights are related to the fundamental disagreement between human rights proponents, that is, disagreement over the issue of justification. As L. W. Sumner has demonstrated in his seminal work *The Moral Foundation of Rights*,[12] any coherent concept of right that recognizes the possibility of conflicting rights implies a clearly articulated moral justification. Put simply, any list of substantial rights needs to include a model for justification as an instrument to prioritize between these rights when they conflict.

As is well known, Sumner defends a utilitarian justification of human rights, which, he believes, allows for a transparent account of strength of rights, that is, their ability to resist "rival considerations (whether rights or other factors)."[13] Herbert L. A. Hart takes a similar approach to rights in claiming that utilitarianism has been and remains the most democratic approach to legitimate claims, i.e. the subjective rights of citizens. Hart repeats and develops Bentham's critique of moral rights in favor of political rights as derivative of utilitarian justification, for instance by balancing the actual interests of people. According to Hart, traditional deontological theory is false in that it regards human rights as morally fundamental and therefore *pre-political*. While in practice morality is conventional, those who hold more power tend to present their morality as natural and therefore above democratic critique. In Hart's critique of deontological theory, every catalogue of "natural rights" risks excluding some conventional norms from social critique. The utilitarian approach rejects the very existence of natural rights, offering instead a justification based upon a transparent analysis of people's actual interests.[14]

The utilitarian critique of the naturalistic deontology of moral rights, as being a notoriously anti-democratic project, is reasonable. Yet utilitarian approaches to human rights are limited by their inability to explain how human rights can be constructed in a way that restricts the power of majorities. I therefore believe that we should look for a justification of human rights that is neither naturalistic nor utilitarian. It should recognize the sociality of rights while simultaneously offering resources for the critique of moral and legal conventions. In other words, we are looking for a model that connects human rights to democracy more substantially than the mere rhetorical proclamation of a unity between them.

The most fully elaborated candidate for such a model is Jürgen Habermas's understanding of human rights and democracy as a dialectic of private liberties and civic autonomy. Habermas makes a crucial revision of Kant in order to address human rights as an issue of social status:

> In Kant, too, human rights derive their moral content, which they spell out in the language of positive laws, from a universalistic and individualistic conception of human dignity. However, the latter is assimilated to an intelligible freedom beyond time and space, and loses precisely those connotations of status that qualify it as the conceptual link between morality and human rights. Thus the point of the *legal character* of human rights gets lost, namely, that they protect a human dignity that

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[12] L. W Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987).

[13] Op. cit., p. 12.

[14] Herbert L. A. Hart, "The Demystification of the Law". In Hart, *Essays on Bentham. Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), pp. 25-26.

> derives its connotations of self-respect and social recognition from a status in space
> and time – that of democratic citizenship.[15]

In Habermas's view, Kant becomes political if one redefines the moral principle of universalization from being a philosophical enterprise to a practical discourse, one in which actual agents justify norms and relate to others' justifications. Habermas does not interpret human rights as a pre-given natural morality that should be incorporated in law. In his view, rights are both the product and the precondition of democratic deliberation. As Habermas frames it, popular sovereignty and human rights are mutually constitutive. For example, basic political rights (which in turn entail social rights) "to equal opportunities to participate in processes of opinion- and will-formation" create citizens as the subject of law and are simultaneously the products of democratic practices.[16] Private liberty is secured by human rights, but in order to exist this liberty requires that civic autonomy constructs rights in political terms.

In this article, I argue in favor of this Habermasian view of human rights precisely because it accounts for reasonable disagreements about human rights. Rational discussion of human rights is possible since it is possible to dismiss some perspectives on human rights. However, there is no particular justification of human rights that can be described as exclusively valid.

This endorsement of a pluralism of human rights that includes both disagreements and conflicts does not prevent us from defending human rights as a powerful moral and political project. On the contrary, different approaches to human rights and, above all, to the moral justification of human rights make possible the political account of human rights that is necessary if the human rights project is to have a future. Such an account represents an appropriate response to the critique of human rights as an ideology of power, something that I believe should be taken very seriously. Let me now summarize the most important forms of this critique.

Human rights and power

Human rights, if understood as an instrument to frame power exercise, is a revolutionary political and legal project. Whereas historically dominant models of social organization ascribe duties to people, thereby reserving social dignity (freedoms and rights) to particular positions within society, human rights aspire to guarantee rights to people by prescribing *duties* to states.

This explains why those who yearn for unrestricted power over other people tend to question human rights or intentionally reinterpret them as an ideology of power. A recent example of this interpretation is the way in which human rights are used by ideologists of ethno-nationalism. In many European countries, human rights are used in order to present migrants and minorities, most frequently Muslim minorities and migrants from Muslim countries, as a threat to human rights and democracy.[17] Instead of implementing human rights as the constitutional rules for exercising power on behalf of

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[15] Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights". In Corradetti, *Philosophical Dimensions of Human Rights*, p. 73.
[16] Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996), p. 123.
[17] Kaius Tuori and Iida Karjalainen, "The European far right and human rights language," *The International Journal of Human Rights* 29, no. 1, 2025, pp. 1-21.

states, European nationalists present human rights as personal moral values by which citizens – particularly minorities – are bound. Accordingly, the state is viewed as a guardian of such values. For example, in the rhetoric of Sweden Democrats human rights become an instrument for controlling individuals and groups rather than for framing the exercise of state power. Sweden Democrats argue that Muslims, who they presume do not endorse human rights, can be legitimately excluded from the protections offered by political and social rights.

Such a revision of human rights should be rejected. However, there are other forms of critique of human rights that deserve serious attention and adequate response. Unlike ethno-nationalist revisions of the meaning of human rights, these critiques point to potential limitations of human rights as a political project of social emancipation. The Marxian critique of the liberal form of human rights is a good example. In the Marxian account, liberal human rights are progressive to the extent that capitalist society is progressive in comparison to feudal social structures. As some contemporary Marxists have argued, Marx endorsed human rights as progressive because they unquestionably secured a significant level of human emancipation. In his most illuminative analysis of the Marxian critique of liberalism, Igor Shoikhedbrod writes:

> Marx saw liberal rights as the historical achievements of the seventeenth and especially eighteenth-century bourgeois revolutions, and he took the American and French revolutions as historical exemplars. Such liberal rights included the right to life, liberty, and security of the person, the right to own property, equality before the law, universal (male) suffrage, freedom of conscience, expression, and movement, due process, as well as rights against seizure of property and goods. […] The decisive difference between feudalism and capitalism, for Marx, is that whereas the former was based on a hierarchy of privilege and on direct domination, the latter is characterized by legal equality and formal freedom.[18]

The Marxian critique of human rights is therefore not an anti-liberal rejection of political rights. What Marx instead offers is a materialist conception of rights that states that "different modes of production give rise to different legal relations."[19] This conception of rights as legal relations that correspond to how society is structured was articulated in "On the Jewish Question" and further nuanced in both the *Grundrisse* and the *Critique of the Gotha Program*. Here, Marx is critical of the abstract "rights of man" and turns to historical analysis in order to demonstrate that the emancipation achieved by bourgeois revolutions is conditioned by material relations of power, above all economic production. Liberal rights are progressive but limited. To attain a higher level of human emancipation, it is necessary to recognize *how* the emancipatory potential of historically progressive subjective rights are limited by capitalist property relations. Moreover, any particular set of rights can serve an ideological function if it is presented as the highest level of human freedom.

The Marxian materialist concept of rights as conditioned by economic structures is associated with a particular view of humanity. Unlike most contemporary political realists, Marx believes that although social progress is conditioned by material factors, it remains possible to establish just social relations. These relations will truly emancipate humanity, which has hitherto been deformed by social relations that alienate human beings from each

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[18] Igor Shoikhedbrod, *Revisiting Marx's Critique of Liberalism. Rethinking Justice, Legality and Rights* (London: Palgrave Macmillan 2019), pp. 56-57.
[19] Op. cit., p. 85.

other. Most importantly, he believes that we can emancipate ourselves from the selfishness of capitalist market society and achieve a truly free sociality.

To what extent does the Marxian concept of rights offer a relevant critique of contemporary versions of human rights? In my view, proponents of human rights can utilize the Marxian critique if they admit that any particular regime of human rights is related to existing social structures and types of social agency. Jürgen Habermas's republican account of human rights, which I mentioned in the previous section, is inspired by the Marxian critique of the liberal "rights of man." Human rights in their legal form – that is, norms posited as valid law – are the products of democratic agency and, in turn, are the instruments of that agency. When Habermas calls human rights "constitutional," he is usually implying that they are a crucial element of the basic and legally regulated *structure of the society*.

Furthermore, human rights are revolutionary (and here Habermas allies himself with Ernst Bloch) because they potentially offer a legal form for a radically new *constitution* of the society. Historically, human rights have transformed the relations of power by assigning duties to states and legitimate claims to people. Hopefully they still contain this transformative potential.[20] In this particular understanding of politics and democracy, what is "constitutional" lies very far from that which is "secret and unchangeable." On the contrary, human rights can constitute a new form of social organization by means of revolutionary changes in the structure of power.

Habermas endorses the Marxian historical view of human rights, arguing that human rights, precisely because they have legal form, should be related to the moral principle of human dignity. Later in this essay, we will consider different interpretations of this principle. For now, it is crucial to recognize that, for Habermas, human rights are *legal* relations and therefore human-made and changeable.

Classical political realists such as Hans Morgenthau and Reinhold Niebuhr have been influenced by some elements of the Marxian critique of idealism on rights. However, whereas the Marxian analysis of liberal rights that I have presented here is focused on revolutionary changes of social structures, political realism focuses on modern states as the main agents of international politics. Moreover, it does not share Marx's optimistic view of humans and sees selfishness as unavoidable. This implies that, for most forms of political realism, human rights politics – like any other politics – should be understood as a means for states to promote their particular interests, ultimately by maintaining and extending their power.

Although Reinhold Niebuhr concedes that human beings as individuals are able to endorse "the highest ideal" of unselfishness, social morality is another matter entirely. Collective egoism cannot be eliminated and social justice must be envisioned realistically, that is, by recognizing that states and other collective agents always seek power for its own sake.[21]

How should we respond to political realism? In his recent monograph *Critical Political Ethics*, Swedish ethicist Carl-Henric Grenholm suggests that we should discriminate between, on the one hand, a descriptive realism that regards the possession and extension of power as the driving force for any political agency and, on the other hand, a normative realism which claims that political collectives (typically states) are morally

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[20] Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights," p. 73.
[21] For a most nuanced analysis of Niebuhr's political realism and his view of political and personal morality see Carl-Henric Grenholm, *Kritisk politisk etik. Om moralens betydelse inom politiken* (Uppsala: Acta Universitatis Upsaliensis, 2024), pp. 151-184.

justified in seeking power and prioritizing their own interests.[22] This means that endorsement of descriptive realism does not necessarily imply an endorsement of normative realism. Additionally, Grenholm believes that we should discriminate between the political cynicism that claims that moral considerations have no importance for politics, and the political realism that recognizes at least some moral considerations as political factors.[23] Classical political realists, for example, endorse the category of justice as relevant for politics.

In my view, Grenholm's investigation represents the most nuanced approach to the challenge of political realism. Proponents of human rights can and should recognize power, not least as it figures in international relations, as the main driving force behind human rights politics. However, this does not prevent us from defending the thesis that moral considerations should be relevant when political decisions are made and/or evaluated. Domestically as well as internationally, critical morality should be used to resist unjust politics. Yet doing so requires a clear vision of how to discriminate between purely instrumental uses of human rights and morally legitimate discourses on human rights.

I do not believe that there exists only one correct form of such a distinction. Rather, we should be prepared to argue, transparently but tentatively, over the issue. Ethicists can make significant contributions to the quality of such debates. Different forms of justification for human rights become crucial in this particular context. We can never be sure whether those who offer their own specific justification of human rights are motivated by a desire for justice or a desire to use human rights instrumentally, that is, as a way of legitimizing their actions. Even so, we can uncover many forms of ideological legitimization of power that present themselves as moral justifications.

Additionally, if we do not expect any particular moral justification to be final or definitive, we can reasonably endorse a variety of contextual justifications and thereby prevent human rights morality from becoming an anti-democratic enterprise.

Human rights as ethics, politics, and law

In the remainder of this article, I present an understanding of human rights that a) explains the persistence of reasonable disagreements among proponents of human rights; b) offers a plausible response to several forms of human rights' skepticism; and c) endorses human rights universalism. Such an understanding incorporates the insight that human rights, as both law and political morality, do not transcend social, economic, and political power.

I endorse a view of human rights that is a combination of social constructivism and open normative universalism. It stipulates that human rights, both as posited law and as conventional morality, are products of collective agency and material power relations in concrete historical and cultural contexts. To admit this is not to reject human rights as a potentially emancipatory practice. Human rights can be and often are used by progressive political agents in order to reconstruct social relations and make them more just. In such practices, moral universalism on behalf of human rights is transformed from an instrument of legitimization of power into an instrument of critique of power.

I therefore believe that there is a democratically potent form of human rights universalism. In this form, the principle of equal respect for human dignity is central to the justification of particular human rights projects. Although there exists no universal

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22 Op. cit., p. 118.
23 Op. cit., pp. 33-35.

morality (as for example "cosmopolitan rights", which Michael Goodhart has rightly criticized)[24] that follows on from the principle, the principle can assist us in making a critique of any particular moral and political project of human rights.

Importantly, the principle of equal respect for human dignity as a principle of critical ethics does not allow for apolitical generalist approaches to interpretation and prioritizing between human rights. Nor can it eliminate ideological disagreements between proponents of human rights. Rather, it allows for the critical scrutiny of any individual interpretation and prioritization of human rights.

The principle of equal respect for human dignity stipulates that a justified exercise of power respects the humanity of each and every person equally. The principle is moral and does not describe how power *is* exercised. Moreover, it does not say what constitutes a violation of humanity but depends rather upon the experiences of those whose humanity is violated. The very universalism of the principle lies in its being an abstract form awaiting interpretation in a particular social context. This insight is indeed already present in the classical human rights instruments, above all the UDHR and the main UN conventions on human rights. Although these documents stipulate the basic rights that all states should secure, they neither define them trans-contextually nor offer a universally valid ranking.

The principle of human dignity in the form I am defending here is constitutional and democratic. It is constitutional, primarily not because it is inscribed in written constitutions but because it potentially allows for the emergence of democratic developments that can result in more progressive, albeit never final, law. Let me explain this difference by considering two famous interpretations of the principle, one egalitarian-liberal and the other republican-critical.

The principle of equal respect for human dignity has been interpreted as a form of egalitarian liberalism. John Rawls and Ronald Dworkin offer such a liberal interpretation in their attempts to politicize Kant. Both Rawls and Dworkin believe that the moral principle of equal respect and concern is the most plausible understanding of the Kantian principle of equal respect for human dignity. Moreover, in their view, the principle of equal respect and concern informs the United States Constitution and should guide legal and political practice under its aegis. Dworkin has demonstrated how the constitutional principle of equal respect and concern is used in legal practice as a way to strengthen human rights. To take human rights seriously, he famously argued, is to frame the exercise of state power in terms of the principle of equal respect and concern. In his later writings Dworkin developed an interpretative theory of adjudication and argued that legal norms should be interpreted by judges in light of the principle of equal respect and concern.[25]

A clear advantage of Dworkin's suggestion for how the political morality of human rights should be interpreted and adjudicated is the power analysis that Dworkin includes in his liberal version of egalitarianism. Let us recall how Dworkin argues in favor of affirmative action.[26] Affirmative action is justified (and this justification is similar to the justification in the United Nations Convention on the Elimination of All Forms of Racial Discrimination, CERD) if it contributes to a society with a higher level of equality. This means that in order to find out whether any particular group is qualified for affirmative action we must investigate whether formal equal treatment actually constitutes the treatment of people as equals. Significant levels of racial discrimination in American

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[24] See Goodhart's article in this issue.

[25] Ronald Dworkin, *Justice in Robes* (Cambridge, Mass.: The Belknap Press of Harvard University, 2006).

[26] Ronald Dworkin, "Reverse Discrimination." In Dworkin: *Taking rights seriously*, pp. 221-239.

society, for example, explain why discrimination of African-Americans continues even when applicants to highly desirable educational programs are treated equally. Affirmative action is a way to promote social equality, which demands treatment as equals and not just equal treatment.

For both Rawls and Dworkin, then, human rights are a legal instrument whose main function is to enact the fundamental moral principle of equal respect and concern. Kant's pure moral principle becomes a principle of social and political morality.

Nonetheless, I do not believe that Rawls and Dworkin offer "the most we can hope for" if we are looking for a critical moral principle that is sensitive to concrete political and economic structures. Like other liberals, they reduce human rights to legal instruments that states should use in their treatment of people. Such a reduction weakens the democratic potential of human rights. States are bound, or should be bound, by human rights obligations. But human rights agency is here reduced to that of state officials. Citizens – individuals as well as groups – are the objects of state policies that should ideally comply with human rights law.

Although legal practice is crucial for all human rights regimes, democratic agency on behalf of the unprivileged is needed in order to create and re-create a human rights regime. Human rights in liberal interpretations protect people against power but they also reduce people to the status of subjects of law. We therefore need an interpretation of human rights that does not downplay people's status as the legitimate authors of law.

I believe that Habermas's view of human rights as a dialectics of private freedom and civic autonomy offers a more cogent understanding of how the principle of equal respect for human dignity should be interpreted. According to Habermas, this principle is constitutional because it allows for an ongoing and never finalized constitutive *political practice*. A democratic society constitutes itself through ongoing democratic will-formation and a formalized process of legislation. Human rights, if they function properly, are always the product of this constitutional practice, not just the legal implementation of pre-existing international norms. People who *experience* as unjust a society that endorses equal respect for human dignity in its constitution are the most important democratic agents of human rights. This conclusion is a major insight of Habermas's interpretation of human dignity and human rights. Let me illustrate this point by means of the example of contemporary Islamophobia.

We expect human rights to protect people from racism. In contemporary Europe, however, human rights are frequently used in order to legitimize the discrimination of Muslims. Muslim cultures are presumed to be undemocratic and incompatible with human rights, a view which serves to legitimize regulations that weaken the rights of Muslims. From the egalitarian-liberal point of view, such a deformed legal and political usage of human rights must be counteracted by state officials and by international law: states are expected to enforce human rights law and protect minorities from discrimination. While I agree with this view, I believe that we will be unable to effectively counteract racism if Muslims themselves (and those who show solidarity with them) lack democratic agency. The more such groups are treated as a threat to human rights and democracy, the more the legitimacy of their political agency is questioned. In Sweden, for example, Muslim organizations, including human rights organizations, are subjected to far stricter administrative control than other organizations of civil society. Instead of promoting the bottom-up democratic consolidation of Muslims, the Swedish state has

introduced policies of assimilation that present human rights as a particular set of personal values which Muslims should endorse in order to become included in society.[27]

From a Habermasian perspective, the constitutional principle of equal respect for human dignity requires institutions that make Muslims into the agents of democratic will-formation, not merely the objects of official state concern. Dissatisfaction with the current situation among Muslim minorities represents a democratic resource, not a threat to democracy. Their experiences reveal contemporary forms of injustice and they are motivated to democratically work for a change. Such a change might include a questioning of established policies of human rights.

To sum up, human rights, if interpreted in light of the principle of equal respect for human dignity, should not be reduced to positive legal and political norms for state officials to enforce but should also function as a critical morality.[28] To achieve this, unprivileged persons and groups must be recognized as agents of human rights. This thesis differs from the idea that human rights are subjective rights. Subjective rights are claimable rights, that is, rights with corresponding state obligations. Democratic human rights are claimable rights that we are the *authors of*. And it is here that the capacity to see unjust social institutions becomes fundamental. From the perspective of unprivileged persons and groups, injustice *appears* as an injustice that prompts the (re)adoption of the democratic struggle for reforms of social and legal institutions.

Human rights bind states by virtue of their legal forms, that is, authoritatively. As a moral and political project human rights are fundamentally open, they are and should be constituted and re-constituted through democratic processes in which disagreements related to different social positions play a central role.

Universalism without closure

Let us return to my initial question about the contribution that critical ethics can make to progressive political agency with regard to human rights. Most importantly, we must firmly reject the idea of a uniform natural morality that is waiting to be implemented in politics and law. Instead of proposing new versions of naturalistic theories of "cosmopolitan rights," we should look for models of critique. How should we develop an ethics of human rights that is to be an instrument for the critique of different moral and legal conventions on human rights?

Classical utilitarianism offers a critical model of "natural rights" by counting every person's actual interests and/or preferences. Islamic liberation theology claims that any subjugation of humans by other humans is an offence against God and must be rejected on moral grounds. The normative principle of equal respect for human dignity promotes a democratic human rights culture by claiming that discrimination is incompatible with genuine practices of human rights. While human rights are constructed contextually, humans in any context are all entitled to the same level of protection by human rights.

In my view, human rights interpreted in the light of the principle of equal respect for human dignity do not presuppose a belief in any particular substance of humanity; we

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[27] Muslims are not the only group subjected to discriminatory practices. Roma organizations in Sweden testify about similar experiences. In fact, several minority organizations work together to reach out to the UN with parallel human rights reports.
[28] For a more elaborated account of my view of human rights as politics, law, and morality see Namli, *Human Rights as Ethics, Politics, and Law*.

can construct legitimate human rights regimes even while disagreeing about what exactly it means to treat humanity with respect.

What the principle of equal respect for human dignity does presuppose is the purely normative demand that the exercise of power must be justified in such a way that a morally valid judgment can be regarded as valid in every identical situation. We can disagree on what particular human right should be regarded as the strongest. But if we reason in favor of one particular meaning or the priority of one particular human right, we cannot legitimately argue that some groups (for example, because of their presumed or actual culture) can be restricted in claiming such a right. If we agree that humans are entitled to freely choose their way of life and personal values, we are committing ourselves to securing this right for everyone. Human rights can be limited, of course, but such limitations must be justified and applied in a non-discriminatory manner.

Somewhat unexpectedly, perhaps, I also believe that we can utilize Richard Hare's universalizability principle as a way to combine normative universalism with a constructivist approach to human rights, that is, an understanding of human rights as socially constructed in particular contexts. As Hare writes:

> Universalizability can be explained in various equivalent ways; it comes to this, that if we make different moral judgements about situations which we admit to be identical in their universal descriptive properties, we contradict ourselves.[29]

This version of universalization, as a criterion of valid moral judgements, is sensitive to the particularity of human conditions. Universalizable moral judgments are always judgements in particular contexts, which means that universalizable judgement is not the same as general judgment.

Although Hare has himself endorsed utilitarianism as the best normative theory, his metaethical principle of universalizability is coherent with a critical morality of human rights. Human rights are constructed by different agents in concrete social settings, but these constructions are not legitimately different if they allow for different normative judgements in identical situations.

The universalizability of moral judgements as a justificatory demand does not explain *how* we recognize situations as either identical or non-identical in their descriptive properties. Hare himself is mostly concerned about the coherency of professional philosophical moral judgments. My own view is that finding out whether situations are identical in their descriptive properties demands democratic practical reasoning, i.e. actual involvement in deliberation with others. Situations that seem identical can be significantly different when viewed from other social perspectives.

Let us consider a situation where two women apply for a position as a nurse at a hospital somewhere in Europe. One woman belongs to the majority population and, having previously been part of a particular religious culture of the region, is now secular. Another woman is a Muslim who has been born and educated in Europe. Many of us believe that the situation of these women seeking the position is identical. Such might indeed be the case, but in order to make such a judgment we need to include the perspectives of European Muslim women, their actual experiences of being evaluated in comparison with "European" women.

Open universalism is the term I have given to the kind of universalism of human rights that I am proposing. This kind of universalism is best achieved if human rights are

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[29] R.M Hare, *Moral Thinking. Its Levels, Method and Point* (Oxford: Clarendon Press, 1981), p. 21.

interpreted in light of the principle of equal respect for human dignity. Open universalism of human rights is purely normative insofar as it does not offer a description of what constitutes humanity in any specific time and space. Instead, it states that all humans should be treated as equally human, thereby opening up a space for specific people in specific places to demonstrate how they are treated inhumanly and argue for what should be done in order to reform institutions, including human rights.

As noted already, the open universalism of human rights enables a critical morality that is political. Already classical utilitarian philosophers have questioned the possibility of moral and legal conventions being meaningfully scrutinized by super-philosophers who elevate themselves above particular human conditions. Ethicists ought, rather, to involve themselves in the critical analysis of human rights. And this means that we need to act in solidarity with those for whom injustice is the consequence of their material social conditions.

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