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How to understand the concept of Human Rights

Henrietta Olsson

The increase of references to human rights in political discussions today, has made the idea almost hegemonic. Can this type of mechanic use of the terminology of human rights be problematic? Critics argue that it is an "empty word"; it lacks any real or deep meaning. Despite the common use of the word, few of us would be able to give a precise definition of the concept. This may stem from the possibility to imagine several different kinds of societies that all include different understandings of human rights.¹

In this article I argue in favour of a functionalist approach to human rights. We need to ask ourselves: what do we want the concept of human rights to achieve? The idea that human rights are a matter of agreement – the deliberative perspective on human rights – is dominating the ongoing debate about the nature of the concept.² Human rights are not something that belongs to the human being by nature, and is therefore dependent on human recognition. I would argue that an understanding of human rights need to meet a criterion, which I choose to call the basic assumption. This basic assumption is that human rights should protect the individual from arbitrary and unjust power.

¹ See for example: Steven Lukes "Five fables about human rights" in *Liberals and Cannibals: The Implication of Diversity*, London: Verso, 2003, pp. 154-170.

² Marie-Bénédicte Dembour. "What are Human Rights? Four Schools of Thought". *Human Rights Quarterly*, 32, 2010, pp. 1-20.

The purpose of this article is to analyse, on the basis of the basic assumption of human rights, three theories to see which of them that best corresponds to the basic assumption. In the theoretical field of human rights, scholars have been putting a lot of effort into trying to create a concept that is independent of context in order to secure legitimacy. The aim has been to unveil the core of the concept, an essentialist understanding of human rights. I argue that this is the wrong way to go, and that it not only risks diluting the concept as such, but that it also misses the very ontological aspect of human rights. Instead, a more contextual understanding of the concept has better chances of meeting the criteria of the basic assumption.

Three different theories

A brief presentation of the three theories is essential in order to understand the analysis. Martha C. Nussbaum's theory, called the capability approach, has had great impact on the human rights discourse over the last decades. Initiated together with Amartya Sen, the aim of the capability approach was to find a new way of theorising about poverty reduction and global justice.³ Now working separate from Sen, Nussbaum has shifted focus in an attempt to create a more holistic philosophical theory about the needs of humans. The capability approach also creates a new way of understanding human rights, focusing more on the objective of the right than the right in itself. Nussbaum is an Aristotelian moral philosopher, and has by Charles Beitz been referred to as a "naturalist".⁴

Compared to Nussbaum, Charles Beitz operates on a higher level, in the sense of theorising about the international community rather than the individual human being. Beitz joins the tradition of John Rawls in his book *The Law of Peoples*, where he argues that human rights are "a special class of

³ Amartya Sen, *Development as Freedom*, Oxford: Oxford University Press, 2001.

⁴ Charles R. Beitz *The Idea of Human Rights*, Oxford: Oxford University Press, 2009, pp. 60-64.

urgent rights”.⁵ As Michael Ignatieff maintains, there is no historical or pragmatic reasons for believing that human rights result in a more correct moral treatment of people.⁶ Beitz argues that the idea of human rights must be embedded in an existing practice. Because of cultural, religious, and philosophical differences in the world, a common ground for human rights based on abstract theory is not possible.

The third philosopher, Philip Pettit, belongs in a republican tradition and has been one of the key persons in developing neo-republicanism in this time. As opposed to Nussbaum and Beitz, Pettit does not have a theory of human rights of his own. Focusing on freedom and the structure of the state, neo-republicanism could yet offer a new way of understanding human rights. It could seem paradoxical to argue that a perspective focusing on the national level of the state could offer a universal theory of rights.⁷ A republican theory of rights also has to be consistent with the republican concept of freedom as non-domination.

These three theories of human rights represent different perspectives in the discourse. The aim of my analysis is to see how the theories correspond to the basic assumption of human rights, and whether we have good reason or not to favour one of these perspectives.

Moral and political perspectives

As one has already noticed, there is a variation in these philosophers’ perspectives on human rights. A method and structure for the analysis is needed and for that purpose I have articulated four central themes. These themes, it could be argued, extends over both moral and political

⁵ John Rawls *The Law of Peoples: With "The Idea of Public Reason Revisited"*, Cambridge, Mass.: Harvard University Press, 1999, p. 79.

⁶ Michael, I. Ignatieff, “Human Rights as Politics II. Human Rights as Idolatry”, *The Tanner Lectures on Human Values*, Delivered at Princeton University April 4-7, 2000.

⁷ Duncan Ivison “Republican Human Rights?” *European Journal of Political Theory* 9 no. 1, 2010, pp. 31-47.

philosophy. When measuring how well the theories correspond to the basic assumption of human rights, it is also of importance to see whether the perspective that we have good reason to argue in favour of is a moral or political one. Or could it be both?

A four-stage model has been created based on these central themes: the first and second (1-2) categories represent a moral perspective and the third and fourth (3-4) categories represent a political perspective. The definition of the moral and the political perspective can only be said to be applicable in this context and has no intention of being a universal definition. This method is a way of identifying a focal point in the theory, not establishing an absolute category.

The four categories are:

1. Human nature

The theory includes a normative idea about human nature. It is a claim that some specific characteristics and abilities constitute the human being as such, which generate a specific moral claim regarding treatment of human beings.

2. Fundamental values

A specific idea about what is morally right or wrong, which creates fundamental values in the theoretical framework. These fundamental values generate a moral imperative regarding the human being and its nature.

3. Agents and status

Instead of a normative idea about human nature, this category covers an idea about the status of the human being in a given society. This idea about status concerns the power relation between individual and the state, individual and groups, as well as individual and individual.

4. Institutionalisation

This category focuses on the institutionalisation of rights, and therefore the institutions in society and the legitimacy of power.

A distinction between the moral and the political perspective has been made. The moral perspective includes an idea about the life of the human being, describes human nature and quality of life. The political perspective is an idea about power relations and the formation of society. With this clarification, we can now move on to the analysis to see how the three different philosophers position themselves.

The four categories will not be analysed separately, but in pairs. This is a consequence of the theoretical relation between the two. The first (1) and third (3) category are related to each other in the sense of theorising about how to understand the individual and its theoretical consequences. The second (2) and fourth (4) will be analysed together since both categories, in different ways, concern what effect rights can or should have.

To clarify before we move on to the analysis, I will analyse these three different theories by using the basic assumption as a benchmark and the four categories of analysis as a method. The aim is to see whether one of these philosophers, in this sense, has a more functional approach to the concept of human rights.

The role of the human being

As a starting point, we need to ask how to understand the role of the human being in each theory and how this view corresponds to the basic assumption of human rights. The fundamental question for the capability approach concerns the position of the individual to be or to do what he or she has the potential of being and doing.⁸ This is based on the Aristotelian idea of an essentialist nature of humans. According to Nussbaum this nature consists of specific capabilities that need to be realised in order for the individual to live a minimally decent life.⁹ Nussbaum's idea about human nature is a

⁸ Martha C. Nussbaum *Creating Capabilities: The Human Development Approach*, Cambridge, Mass.: Belknap Press of Harvard University Press, 2013, pp. 20-23.

⁹ Nussbaum, 2013, pp. 123-132.

normative idea, because it argues that certain conditions need to be fulfilled for the moral standards of a good life to be met. In order to understand the conception of capabilities, we need to make a distinction between internal capabilities and combined capabilities. Internal capabilities are the characteristics of a person, not fixed but dynamic, and together with the social, economic, and political context they form what is called combined capabilities. Combined capabilities should be understood as substantial freedoms; opportunities to choose to act. There is a third type of capabilities: basic capabilities, innate capacities that are a central part of the human nature. The capability approach must be understood as a moral perspective in my definition, since the capabilities constitute the nature of human beings.

Beitz has a more complicated view of the individual in his theory of human rights. As already mentioned, Beitz's idea about human rights is as a normative practice of the international community.¹⁰ The aim of the theory is to create an understanding of human rights that is better suited for the dynamics of the real world. The protection of the individual against unjust and arbitrary exercise of power from the state is the main focus of the theory. Compared to Nussbaum, Beitz has already in his idea of what human rights should be an explicit link to the basic assumption. Here the differences between Nussbaum and Beitz also become obvious; whereas Nussbaum is speaking about the specific human being and its needs, Beitz is speaking about a power relation between the individual and the state and do not bother to say anything about human nature. The central question then becomes: how to understand this power relation? The act of claiming is essential in order to understand what a right really is.¹¹ Human rights are often understood as high-priority claims on some sort of institution. The right-holder is in a position of a legitimate claim, which should protect him or her from unjust power and indecent treatment. Beitz has a different

¹⁰ Beitz, 2009, pp. 13-15.

¹¹ Joel Feinberg. "The Nature and Value of Rights". *Journal of Value Inquiry*, 4, 1970, pp. 243-260.

perspective on the act of claiming, and argues that human rights need not be linked to a claim. Human rights are not rights in a strong sense. Instead, human rights are a special kind of rights that create certain policies regarding the treatment of the people. This puts the individual in a precarious position, where it is not hard to imagine the difficulties in realising and respecting human rights.

The starting point of Pettit's theory is the already existing society, institutional framework, and political context.¹² The individual is a citizen in a state, and each citizen is holding an equal status in the political community. This idea of equal citizenship is linked to Pettit's definition of freedom as non-domination, meaning that one can be free if and only if no one is in a position to arbitrarily interfere in one's choices.¹³ The very existence of domination makes a person unfree. The essential idea in relation to a theory of human rights is the conception of arbitrary domination. Arbitrary should be understood as interference without taking the persons preferences into account. This makes a basic level of equality a necessary condition for freedom. The concept of equality is a matter not only on an interpersonal level, social justice, but also between the state and the citizens, political legitimacy. Just like Beitz, Pettit does relate to the basic assumption more explicitly. We will see how this affects the concept of human rights further on in this article. I would like to emphasize that Nussbaum has not yet been rejected. We cannot evaluate the theories based only on how explicit they are in their references. The theoretical consequences are just as important.

The individual in Pettit's theory is, similar to in Beitz's, primarily an actor in society. Neither Pettit nor Beitz has to reject an idea about human nature, though it is not the focus of their theories. The opposite is the case for Nussbaum. She argues that a decent political society must secure a list of

¹² Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, Cambridge: Cambridge University Press, 2012, pp. 75-77.

¹³ Philip Pettit, *Republicanism. A Theory of Freedom and Government*, Oxford: Oxford University Press, 1999, pp. 52-54.

central capabilities as a threshold level, but this is secondary in the theory compared to the nature of the human being. This, as already mentioned, makes Nussbaum's position an essentialist one. One could argue that the result of Nussbaum's and Pettit's theories does not have to be that different, but what I'd like to point out here is the arguments and how linguistic activity creates a theory's influence on social reality. Pettit argues that only a certain position of the individual in society can guarantee a decent treatment, though it requires a non-dominating power relation. This makes Pettit's individual a "political" being, contrary to Nussbaum's "moral" being.

The impact of rights

Nussbaum's capability approach is not only a theory about the essence of humans, but also a theory about basic social justice. A threshold level of social justice is necessary in order to achieve the key goal: to promote freedom of choice.¹⁴ The state needs to treat people equally in providing for their basic capacity to function in the local society. The concept of equality is therefore not substantially egalitarian, meaning that it allows some people to do better than others. Some will reach the threshold level (based on the conditions in each society), while others will do way better. Based on the idea of the necessity of capabilities to function in one's local context, the threshold level relates to a quite expansive ethical principle.¹⁵ The identification of the importance of functioning in the local society implies a contextual understanding of what a human being needs. Still, there is only a minimum level, which means that the theory allows variations in outcomes as long as everyone's basic capabilities are secured.

So what does this have to do with human rights? By combining the capability approach with rights, each person is given a moral claim to be

¹⁴ Martha C. Nussbaum "Capabilities and Human Rights". *Fordham Law Review*, 66, No. 2, 1997, pp. 273-300.

¹⁵ Nussbaum, 2013, pp. 24-30.

treated not as a means, but as an end. The reference is to Kant's principle, and Nussbaum uses it as a consequence of her idea about the nature of the human being. Rights are understood as combined capabilities, meaning that there is both an internal and an external component needed in order to realise a right:

to secure a right to a citizen in these areas is to put them in a position of capability to go ahead with choosing that function if they should so desire.¹⁶

The value of rights is given by the capabilities that they protect. Nussbaum argues that her theory is a form of political liberalism. But in my distinction between a moral and a political perspective, Nussbaum must be understood as having a moral perspective on human rights. Nussbaum only refers to the perspective of political liberalism in the discussion on how to institutionalise rights. She fails in the attempt to integrate her ethical principle in what should be understood as its political manifestation. As a consequence, she tends to avoid the question of how to secure rights.

While Nussbaum is more concerned about moral values, Beitz only focuses on existing institutions. He argues that institutionalisation of human rights is a matter only for the international community, not the rights-holders.¹⁷ Beitz tries to create a mixed system of international and national institutions that each has a special function in the human rights discourse. Human rights are cosmopolitan and are therefore not only a concern for the nation state, but for the whole international community. How to institutionalise rights becomes a question of how to express this international interest. The goal is to find a balance between national sovereignty and international control. His idea about institutionalisation is not based on a principle but on the factual state of the world order. Beitz is more concerned about the power relation between states than between the

¹⁶ Nussbaum, 1997, pp. 293.

¹⁷ Beitz, 2009, pp. 33-41.

individual and the state. His focus on institutionalisation, rather than on values, puts him in the category of a political perspective on rights. The focus on power relations is noticeable, which at this point seems to correspond well with the basic assumption.

Pettit is more interested in the national level and argues, contrary to Beitz, that only a democratic state can respect and protect human rights. Beitz makes a distinction between liberal democracies and decent societies, just as John Rawls does.¹⁸ Although decent societies are not real democracies, they do respect basic human rights and share a conception of the common good. That is also the reason why the international community has to respect them, even though a liberal democracy is preferable, according to Beitz. Pettit has a narrower view of the definition of democracies.¹⁹ There are two necessary conditions: 1) there must be a protection against individuals being dominated, meaning that each individual needs to be free, and 2) there must be political legitimacy, which means that the people, as a collective, also needs to be free. Institutions in this state must guarantee the equal freedom of all its citizens. This creates the free citizen, the "liber", in the democratic state. This type of state can only become a reality with proper institutions.

The key concept for understanding Pettit's idea about institutionalisation is contestation.²⁰ The basic idea is that if one group (most likely the politicians) would have control of all citizens, this would be an ideal context for domination to occur. The citizens must be able to contest a decision, if they believe that it is contrary to the ideal of non-domination. Pettit explains why there is a need of separation of power:

The assumption is that if power is localised in the sense of accumulating in this or that person, then power is potentially dominating.²¹

¹⁸ Beitz, 2009, pp. 152-158.

¹⁹ Pettit, 1999, pp. 186-188.

²⁰ Pettit, 1999, pp. 171-175.

²¹ Pettit, 1999, pp. 179.

The idea about freedom as non-domination and the function of the political institutions seems to correspond to the basic assumption of human rights. The next step would be to see if protection from domination creates a framework for human rights.

A limited moral perspective

By analysing the three different theories, we have seen that Nussbaum has a moral perspective on human rights while both Beitz and Pettit have a political perspective. This is the analytical foundation for the next step. The question is whether we, by using the basic assumption as a benchmark, have good reasons to favour one perspective over the other. When creating a theory about a social phenomenon, such as human rights, the philosopher not only aims to develop an abstract theory, but also to have an impact on social reality. This, of course, has consequences for us when choosing which theory about human rights that we prefer.

One thing to note about Nussbaum's theory is that *how* capabilities are realised is not of such importance, just *that* they are.²² Nussbaum does not create a system, which we here call institutionalisation, to secure rights. Instead, she prefers to talk about the moral responsibility of the states. These responsibilities are a result of certain moral values, and not of a political system. Remember that a philosopher who has a political perspective on human rights does not need to withhold normative values in his or her theory. I would argue that a political perspective could have an ethical principle as a base, but it has to shift focus to the institutions that can secure rights. The absence of institutionalisation from Nussbaum's theory makes the individuals vulnerable to unjust or arbitrary exercise of power.

We want a theory of human rights that can explain the function of rights in the social context of society. Therefore, we must answer the question: should a theory of human rights primarily cover an essentialist view of the human being, or the nature of power relations and its consequences? In both

²² Nussbaum, 1997, pp. 273-300.

Beitz's and Pettit's theories, the question of how rights are realised is of importance. An institutionalisation of human rights can be a guarantee against arbitrary exercise of power. With that said, they differ in their opinions on how to institutionalise rights. A theory of human rights must cover the power relation between the individual and the state, in order to protect the individual. This function of a right is lost in Nussbaum's theory, and that is the reason why the capability approach does not meet the requirements set by the basic assumption.

Beitz or Pettit?

Nussbaum's moral perspective does not meet the criteria set by the basic assumption, but what about the political perspective? As already seen, Beitz and Pettit differ in their view of the status of the individual and institutionalisation of rights. I argued that a functionalist understanding of rights would be preferable, and therefore use the basic assumption as a tool of assessment. Based on the argumentation above, I find Pettit's theory to stand stronger.

While Pettit is interested in creating a theory that secures individuals from arbitrary power, Beitz is more concerned about international policy making.²³ Whether human rights have their place in the international or in the national context will have consequences for the rights-holders. An inactive rights-holder is more likely to not be part of a system where there is equal distribution of power. Beitz is creating a system, in which the international system seems to have almost all the power. The power will be located to a global elite in global institutions and organisations. We are looking for a system that protects individuals from exactly this.

Pettit manages to create a theoretical ground for institutional protection of human rights. His theory seems to be more consistent with the idea that human rights should protect people from unjust and arbitrary power: both from the state and from fellow human beings. Pettit's theory is the one

²³ Beitz, 2009, pp. 33-41.

closest to the basic assumption of human rights. His theory covers the power relation in a way which appears to theorise about the need of the existence itself of human rights. This is not a final conclusion about the function of human rights, more like a starting point. Pettit has no developed theory of human rights, but the idea about freedom as non-domination seems to have potential for being developed into a theory of human rights.

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