

Session 6 : Legal theories and human rights

Sriprapha Petcharamesree

Institute of Human Rights and Peace
Studies, Mahidol University

- **Session 6 : Legal theories of human rights**

- Readings

- •Felix Ekardt, Human Rights, the Right to Food, Legal Philosophy, and General Principles of International Law (paper provided)
- •Mark Searl, A Normative Theory of International Law Based on New Natural Law Theory, A thesis submitted to the Department of Law of the London School of Economics for the Degree of Doctor of Philosophy, London, September 2014 (read Chapter 4 – pp.131-173) (paper provided).

- **Session 7: Human Rights and religions**

- Readings

- •John White, Jr., Law, religion, and human rights, Columbia Human Rights Law Review, Vol.28, No.1, Fall 1996 (paper provided)
- •Dipti Patel, The religious foundations of human rights :A perspective from Judeo-Christian tradition and Hindusim (paper provided)
- •Valentine Zuber, Are human rights religious origins?, International Journal on Human Rights, SUR 29 - v.16 n.29 • 17 - 31 | 2019 (paper provided)
- •Uttamkumars Badge, Essential elements of human rights in Buddhism, Journal of Law and Conflict Resolution, (Review), Vol.6(2), pp.32-38, May 2014. (paper provided).

Natural law theories

- there are objective moral norms or 'laws' governing human conduct that are in some way related to the nature of persons.
- as legal theories, natural law theories are characteristically concerned with providing an account of the nature of positive law and its putative relationship to moral standards that are external to it.
- Natural law-law of nature to law of reason- general theory of justice represented by human dignity, impartiality, freedom, protection of conditions of freedom as well as the expansion of freedom in an international and global dimension – universalist law of reason.
- the law is the expression of moral principles that are specific to human nature, which are intelligible thanks to reason and conscience, and to which the historically established rules of substantive law must conform.
- Ideas are independent of a de facto positivist recognition by any authority or majority.

New Natural Law theory

Justice and Human Rights- idea of common good – pursuit of the common good.

Two principles of justice

- Respect for and promotion of human rights should be the primary principle informing the content of positive international law;
- Positive international law should be consistent with the objective of promoting and protecting the international common good, for the sake of furthering objective of respecting and promoting human rights.

Justice

Finnis: the concept of justice encompasses three elements;

- other-directedness-a person's interactions with other persons (thus, it is 'other-directed');
- Duty- it has as its subject the determination of what one person owes to another and what the other person is entitled to;
- and equality or proportionality-what persons are owed, the acknowledgement of the equal worth of persons and their equal entitlement to be regarded as subjects of justice.

Justice

A requirement of practical reasonableness

- the principle that persons should promote the common good of their communities;
- ‘general’ and ‘particular’ justice

General justice – complete virtue, favouring the common good;

Particular justice- what adhering to the requirement of the practical reasonableness entails in specific context.

Justice

Two species of justice

- Distributive justice – the common resources of a community needs to be appropriated to particular individuals for the sake of furthering the common good;
- Commutative justice- reasonable determination of rights and duties between persons in situation not directly involving the distribution of some common subject matter;

Ranges of issues of justice.

Human rights

- Links to the existence of basic human goods- all persons have 'radical dynamic capacities' for flourishing in the basic goods;
- Links between human rights and justice-duties to respect human rights flow from equality of persons and the ontological unity of the human race that is rooted in person's shared radical capacities for freely pursuing fulfillment in the basic goods;
- Relationship between human rights and the common good- human flourishing that are objectives of promoting common good.

Human rights and common good

- Finnis, formal articulations of a list of human rights such as those seen in national constitutions and in international human rights instruments constitute “a way of sketching the outlines of the common good, the various aspects of individual well-being in community.
- each of the dimensions of human flourishing is commonly the right of every person.
- The new classical theory further maintains that respecting human rights is an integral component of promoting the common good.
- Respect for human rights, both by individual members of a community and by those having authority within the community, is itself part of the set of conditions that facilitate human flourishing.

Interconnectedness of justice, rights and common good

- The requirements of justice are the implications of the principle of practical reasonableness indicating that persons should promote the common good of their communities.
- Human rights embody and identify the particular aspects of human flourishing that are the objective of promoting the common good;
- human rights and their correlative duties together provide the content for articulating the requirements of justice in the context of community life;
- Respect for human rights is a general requirement of justice; simultaneously, it is an important component of the set of conditions comprising the common good.(Searl, pp.139-140)

- links between contemporary articulations of human rights norms and the various requirements of practical reasonableness.
- the principle that persons must maintain respect for all the basic goods in their conduct, and not choose to act in a manner that directly impairs any of these goods in order to affirm the existence of absolute human rights as a distinct category of natural rights.
- Finnis -absolute human rights are corollaries of the exceptionless duties that follow from the requirement that persons refrain from acts that directly violate the basic goods;
- examples of such rights that Finnis cites include the right to life, the right to procreation, and the right not to be deliberately condemned on false charges.

Public morality and public order

grounds for limiting the exercise of human rights.

- these concepts usefully affirm the idea that the secure enjoyment of human rights depends on the existence and preservation of an environment that is itself favourable to the exercise of rights.
- public order is illustrative: this concept, he claims, concerns “the maintenance... of the physical environment and structure of expectations and reliances essential to the well-being of all members of a community, especially the weak.
- concepts of public morality and public order may thus be seen as identifying components of the common good that are not equivalent to human rights, but that nonetheless play an important enabling role in relation to the exercise of human rights.

Principles of Justice for International Law Based on New Natural Law Theory

- International treaty norms and rules of international custom do not only regulate the conduct of state entities in their international relations, but also have impacts on the welfare of individuals and communities residing within states.
- new natural law conception of justice for describing the duties of states towards persons in relation to the formulation and evaluation of international law. the human rights of persons comprising the universal community of persons, as well as the instrumental significance of the international common good for the exercise of human rights. 'State' duties; the duties to be observed by those persons who possess authority within a state and are primarily responsible for determining the course of the state's conduct in international affairs:

Two principles of justice for international law: the new natural law framework

Respect for and promotion of human rights should be the primary principle informing the content of positive international law.

- theory's intersecting conceptions of the common good and human rights, entail a claim under new natural law theory that the content of ideal positive law should demonstrate respect for human rights.
- states' obligations- Charter of the United Nations.⁴⁵ It may be noted that by the terms of Article 55(c) and 56 of the Charter, states parties are obliged to promote "universal respect for, and observance of, human rights and fundamental freedoms for all" and to take "joint and separate action" in cooperation with the United Nations to achieve this goal.
- international human rights norms may be described as bearing a close relationship to the principles of practical reason and requirements of practical reasonableness identified in new natural law theory.

- A further feature of international human rights law that suggests a relationship between this body of norms and natural law principles is its recognition of absolute human rights. While most human rights enshrined in international human rights instruments are susceptible to varying forms of limitation or qualification, a small number of human rights are affirmed as being inviolable under all circumstances;
- international human rights norms should also be seen as articulating principles of justice for international law;
- states, in determining and evaluating the content of international laws, should seek to ensure that these laws are consistent with respect for the basic human goods and the requirements of practical reasonableness as expressed in international human rights norms

Positive international law should be consistent with the objective of promoting and protecting the international common good.

- principles of justice for ideal international law, to consider the relationship between these principles and the international common good;
- The international common good has been earlier described as a set of supranational conditions that facilitates the flourishing of persons within the universal human community, and that accordingly justifies the collaboration of states within the international community of states;
- promotion and preservation of the international common good is itself a principle of justice for international law;
- principle for maintaining an environment that affirms the equality of all persons in the universal human community notwithstanding the de facto inequality of states.

- the importance of preserving the earth's climate system, as a component of the international common good that is essential to continued human flourishing, should be a primary consideration in evaluating the adequacy of climate change regulation provisions that are currently operative in international law.
- The claim that states should regard respect for human rights and protection of the international common good as the ultimate criteria of significance in creating and evaluating positive international law entails an assertion that the principles of justice for international law – and by implication, the international legal provisions that give them concrete expression – should be regarded as supreme norms of the international legal order.

New Natural Law Theory and Existing Conceptions of Justice and Human Rights in International Legal Theory

Allen Buchanan :

- justice should be a primary moral goal of international law, and that realising this objective entails respecting human rights. Justice is a morally obligatory goal for international law, based primarily on the 'Natural Duty of Justice', the principle that everyone has a limited moral obligation to contribute to ensuring that all persons have access to institutions that protect their basic human rights;
- requires the presence of appropriate institutions for protecting human rights;
- a set of basic human rights that includes many of the human rights recognised in international human rights law such as rights to life and liberty, freedoms of expression and association, and the right to resources for subsistence.

Buchanan

- Justice as a Morally Obligatory Goal for International Law;
- Characterisation of Human Rights-basic human rights identify fundamental interests that are shared by all persons and that are constitutive of a decent human life-minimalist theory of human rights;
- Claims Regarding Distributive Justice which means social and economic rights that go beyond the right to the means of subsistence. However, the lack of appropriate institutional structures in the international sphere for formulating, applying, and enforcing comprehensive principles of distributive justice.

- principle of ‘common but differentiated responsibilities; a determination of what is practically required in order to realise the objective of preserving the climate system, taking into account a range of contextual factors such as the historical contribution of developed states to current greenhouse gas emissions levels.
- protecting the earth’s climate is a means of facilitating and safeguarding the exercise of a host of human rights, including rights to life, food, and shelter.

Summary

- primary principles of justice for positive international law based on the new natural law conceptions of justice and human rights.
- respect for and promotion of human rights, and furtherance and protection of the conditions comprising the international common good, should be the primary considerations informing the content of positive international law.
- the authority of international law, it may be said that the moral authority of positive international law is contingent upon its conformity with these principles of justice.
- The principles of justice for international law, considered in conjunction with the new classical theory's interpretation of the relationship between natural law principles and the authority of positive international law, provide the principal bases for understanding the new natural law account of the significance of legal obligation in the international sphere.

Session 7 : Human rights and religions

Q : Are human rights of religious origin?

- Between secularised and universalist natural law of human rights and religions
- The Russian Orthodox Church proposed its own understanding of human rights in a document in 2008. This document links respect for human dignity to the moral duties and responsibilities of all humans. These responsibilities are summarised as a set of ethical norms that are consistent with the exercise of this original freedom. The document lists the five fundamental rights of man, which are the right to life, freedom of belief, freedom of speech, freedom of creation and the right to education.

The Religious Foundations of Human Rights: A Perspective from the Judeo-Christian Tradition and Hinduism

Dipti Patel:

- there is a relationship between the Judeo-Christian as well as Hindu traditions and international principles of human rights;
- the term 'human rights' as such is not found in these religions but that the religions provide for a theory of human rights;
- Human dignity and worth, as stressed in the UDHR, is a common feature of both traditions and in this context the two concepts of rights and duties should be seen as complementing each other;
- All human beings are not seen as (inherently) equal. Since each caste was created to serve a specific purpose or duty, it was an effective system to organise society, a division of labour.

Judeo-Christian Tradition

- Being created in God's image is to be understood 'in the sense of God bestowing dignity and honour upon man'.
- The Jewish understanding of human rights is entirely a function of the absolute value of humanity granted to every person.
- The absolute value of a person pre-exists any social differences, all are seen as equal, and as a result the value is universal.
- Although the idea of rights has been much of the focus, it is the concept of duties which is expressly stated and encouraged in the religious text.
- However, not all aspects of human rights can be explained by a Biblical theory.
- Each person is equal simply by virtue of God's gracious love.

Hinduism

- In Hinduism, there is no word for 'rights'.
- There is more emphasis on the concept of human duties as opposed to human rights.
- The conception of dharma as embracing the whole life of man. It is a mode of life or a code of conduct, which regulates a man's work and activities as a member of society and as an individual. Since dharma regulates the mutual obligations of the individual and society, it is to be protected in the interest of both the individual and society.
- Individuals have duties which, if fulfilled, carry rights. Therefore, human rights are not inherent but rather to be worked towards by the fulfillment of duties.
- According to Vedanta philosophy, the souls in every human being is the same, therefore, all human beings should be treated as such

Buddhism

- In Pali, there is no word that actually conveys the idea of rights, as subjective entitlement.
- The centre of Dharma is man and relation of man to man in his life on earth.
- Dharma- if every person followed the path of purity, the path of righteousness, the path of virtue, it would bring end of all sufferings.
- Duties have been expressed more prominently in Buddhism, while corresponding rights are implied therein rather than expressed.

Islam

Are Islam and human rights compatible?

- Some proponents of human rights are deeply sceptical of Islam (and religion in general for that matter). They argue that the two are inherently incompatible. There are plenty of examples of Islam being used to legitimise violations of human rights today: Think of Saudi Arabia's use of whipping and other inhuman punishments, Pakistan's blasphemy legislation, or the many gender discriminatory laws in other Muslim-majority countries.
- "Islam has laid down some universal fundamental rights for humanity as a whole. The right to life, security, freedom and justice are basic Islamic rights. The OIC's 1990 Cairo Declaration on Human Rights in Islam is a concrete attempt at formulating such Islamic rights. The declaration states that "fundamental rights and universal freedoms (...) are an integral part of the Islamic religion" and that "all the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah."

Islam

- “There is nothing in Islamic law that prevents human rights – and if there is, it is due to misunderstandings and wrong interpretations of the law.”
- Need to push the boundaries for how Islamic law can be interpreted, facilitating space for human rights, but without seriously challenging the religious authority of Islamic law. Islamic law is, in other words, still the supreme authority under which human rights need to be subsumed.(Marie Juul Petersen ,LSE, June 2018, <https://blogs.lse.ac.uk/religionglobalsociety/2018/06/islam-and-human-rights-clash-or-compatibility/>)

Law, religion, and human rights

John White arguments based on Christian traditions.

- Any solution to the world crisis must ultimately be grounded in a global regime of law and human rights.
- Religion must be seen as a vital dimension of any legal regime of human rights.
- Law and religion are two interrelated dimensions of human living, two interlocking sources and systems of value and vision that exist in all human communities, regardless of time, place, and culture.

Religion and law

- Religion cannot be reduced simply to private belief or ecclesiastical action. Viewed in its broadest terms, religion embraces all beliefs and actions that concern the ultimate origin, meaning, and purpose of life, of existence. Religion involves the responses of the human heart, soul, and mind to revelation, to transcendent value.
- Law consists of all norms that govern human conduct and all actions taken to formulate and respond to those norms. Law consists of more than simply the rules of the state. On the one hand, law is the social activity by which certain norms are formulated by legitimate authorities and actualized by persons subject to those authorities.
- Law and religion are conceptually related: both disciplines draw upon the same underlying concepts about the nature of being and order, of the person and community, of knowledge and truth. Both law and religion embrace closely analogous concepts of sin and crime, covenant and contract, redemption and rehabilitation, righteousness and justice that invariably combine in the mind of the legislator, judge, or juror.

Religion and law

- Law and religion are *methodologically* related. Both have developed logical methods, modes of deducing precepts from principles, of reasoning from analogy and precedent. Both have developed ethical methods, modes of molding their deepest values and beliefs into prescribed or preferred habits of conduct.

