

# INTERNATIONAL LEGAL THEORY



## Human Rights

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## CONTENTS

### LETTER FROM THE CHAIR:

*By Fernand Tesón* . . . . . 1

### ARTICLE:

Rethinking Human Rights

*by Edward L. Rubin* . . . . . 5

### COMMENTS:

On the Two Sides of Human Rights

*by Jin-XueFan* . . . . . 79

How (and Whether) to Rethink Human Rights

*by Alon Harel* . . . . . 87

Human Rights and Political Liberty  
*by Florian F. Hoffmann. . . . .* .105

Translating Human Rights Into Moral Demands on  
Government  
*by Heather Lardy. . . . .* .123

A Plea for Theory in Rethinking Human Rights  
*by Siegfried Van Duffel. . . . .* 135

RESPONSE:

*by Edward L. Rubin. . . . .* 167

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FALL 2003



# Letter from the Chair

*Fernando Tesón*  
*Florida State University*

The last fifteen years or so have witnessed a true explosion of international legal theory; that is, a blending of traditional legal doctrine with various theoretical disciplines such as philosophy, economics, international relations theory, history, and even literature. This is a welcome development, and not just because readers of this letter are already sympathetic to theory. Current events highlight the continuing need to break from traditional doctrinal structures and incorporate the insights of the theoretical disciplines. No serious reflection on pressing international issues – such as the situation in Iraq, terrorism, globalization, and so forth – can omit reference to moral, political, or economic theory in order to understand central aspects of those events that legal doctrine alone cannot address.

Central among international topics of importance is that of human rights. Few other topics have been abused, politicized, degraded, and even distorted beyond recognition, as the topic of human rights. Some human rights activists seem to believe that only victims of right-wing governments deserve protection; others exactly the opposite. Some make excuses for vile re-

*Fernando Tesón*

gimes on account of supposed economic or other accomplishments. Only recently a life long member of Amnesty International privately complained to me about the alarming number of members of that venerable organization who defend the Cuban regime. Others in and out of government, demonize bothersome Middle Eastern regimes while saying nothing about Saudi Arabia. Yet many others manipulate human rights simply to help elect a political candidate (this is particularly egregious in the United States in this electoral year.) Last but not least, human rights have been used to defend protectionism and similar forms of predatory rent-seeking that harm large numbers of people, and the poor in particular. It is instructive to compare the rhetoric of sovereignty with the rhetoric of human rights. The language of sovereignty was turned from its noble original Enlightenment roots (national states as the realization of individual and political freedom) into “the last refuge of scoundrels.” Let us hope that the language of human rights does not meet similar fate.

Against such discouraging backdrop, Professor Rubin has written an erudite and sensible piece that tries to rescue human rights from the conceptual and political morass in which it is submerged and attempts to provide some intellectual order. His investigation into the historical and the philosophical roots of human rights, and his distinction between natural rights and protections against government will not be accepted by everyone, but it deserves

serious consideration. It is also relevant to contempo-



*Letter from the Chair*

rary debates about human rights. In this issue we are also fortunate to publish comments from scholars from several parts of the world. The critical comments by Professors Fan, Van Duffel, and Harel and contributions by Professors Lardy and Hoffman challenge Rubin's approach in different ways. We include a reply from Professor Rubin. I will leave of course to the reader to pick the winners and losers in this rich debate. This issue of *International Legal Theory* is an example of the importance of the vitality of robust debate on international legal issues that ASIL President Anne-Marie Slaughter commends in her editorial in the recent ASIL Newsletter. We hope to continue what is already a fine tradition in future issues of *International Legal Theory*.

# *COMMENTS*

## **On the Two Sides of Human Rights**

*Jin-Xue Fan*  
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Too often discussions of human rights concentrate exclusively on the rights themselves, without considering their corresponding moral obligations. Yet the ultimate source of human rights is respect for human dignity, which also imposes obligations towards others. Some positive rights and obligations can only be fulfilled through state action. These positive rights deserve equal consideration in developing a theory of universal human rights.

### **I. Human Rights as Moral Rights**

If scholars agree about anything concerning human rights, it is on their basis in human dignity. Human beings require certain conditions in order to thrive and without these necessities an individual cannot be fully human. Thus human rights belong to all humanity, and rest on the

*Jin-Xue Fan*

concept of human equality, rooted in universal human nature.

Human beings are social animals and human dignity cannot exist in a vacuum. Humans will need the freedom to think for themselves and to communicate their views to other members of society. The freedoms of opinion and of speech lead to truth through deliberation, to the benefit of society as a whole.

Freedom of speech and opinion, however, are not enough in themselves. People will also need the resources to survive and guarantees of personal security against lawless violence and arbitrary government activity. All humans have a right to life, but also to the basic necessities of life, such as food clothing and adequate housing. These necessities depend in turn upon the right to work for a living and to social support by the state when work becomes impossible. Without the necessities of life, one cannot be fully human.

Property is the laborers' right to the fruits of his labor and is the most basic material condition for survival. In a society in which property can be arbitrarily invaded by the state, the right of survival cannot be guaranteed and life becomes very precarious.

The right to housing reflects the right to property and to privacy. The residence should not be invaded except after due process of law. There should be no searches except by judicial order. These restrictions make private life and relaxation possible, by keeping the state at a distance. Improper violations of private space threaten hu-

### *Two Sides of Human Rights*

man dignity by exposing personal affairs to public ridicule. The house should be sacrosanct.

The rights to food, housing and clothing would be meaningless if there were not also a general right to personal liberty – to act and speak freely in pursuit of ones own private desires.

These are the fundamental rights, which should be enjoyed equally by every human being. Denying anyone the rights to free speech, free opinion, life, food, housing, property, privacy, or world liberty would diminish their humanity.

Immanuel Kant recognized human dignity as the basis of all other human rights. Poverty or illness may deprive a person of life, but the state and his fellow citizens owe him a basic equality of concern and respect as a human being. This was the fundamental principle of the American Declaration of Independence in 1776, the French Declaration of the Rights of Man and the Citizen in 1789, and the Universal Declaration of Human Rights in 1948.

The rights of free thought, speech, life, property, liberty and equality are necessary preconditions of a life of dignity, and therefore moral rights, whether or not they are recognized by law.

Human rights are rights that belong to every human being in virtue of her or his common humanity. They are also moral entitlements, which individuals may claim or assert against others. Unlike legal rights, human rights

*Jin-Xue Fan*

exist whether or not the government recognizes them. They are binding against government and the state.

It is confusing to speak of collective rights as human rights, because they do not arise as directly from human nature. Corporations and other groups do not enjoy rights in the same way that individuals do. Rights in communities arise from the attributes that community members have in common. These exclude some humans by including others. Such rights are not human rights, but membership rights.

Rights not based on human nature are not human rights. Human rights cannot be derived from any aspect of human beings other than their mere humanity, because universal human nature generalizes human rights, while groups develop to divide human beings. Social, economic, and cultural rights exist to advance human dignity. In modern society, if a person loses social, economic, and cultural rights, he will not be able to live a decent life, or fully realize his human nature. Rights exist primarily to protect individuals against the state rather than against other individuals. Individuals typically have rights against groups, but groups do not have rights against individuals. Collective "rights" are usually little better than excuses for violating individual rights. Broadening rights vocabulary to include groups will undermine the conception of rights that developed with such difficulty out of the fight against feudalism.

Group rights also threaten the distinction between human rights and legal rights. Human rights are moral rights that exist independent of the state, while legal rights

### *Two Sides of Human Rights*

are creatures of the state. Group rights are created by association, and lack the independent authority of universal human rights.

Human rights and legal rights differ in their power to obligate their subjects. Legal rights have no more validity than the legal system which created them, while human rights are universally true. Human rights follow from the nature of humanity while legal rights are transient and contingent.

Scholars in China divide human rights into three categories: due human rights, legal human rights, and actual human rights. This is a mistake. All human rights are “due” to all human beings, so the adjective is unnecessary. “Legal” human rights are simply those rights which have been recognized by law. What makes human rights human is their underlying moral validity, not recognition by the law. Human rights justify legal rights and not vice versa. “Actual” human rights should be those rights that citizens enjoy in practice, whether or not the law has played a part in securing them. The law only legitimately exists to secure the rights of the people.

Human rights are moral rights that exist whether governments recognize them or not, but from a practical perspective, it is very important to get the governments to recognize these demands.

## **II. Human Rights as Moral Obligation**

Human rights as moral rights belong to every human being. Human rights as moral obligations have a narrower

*Jin-Xue Fan*

subject, which is to say, the state. Only the state can violate human rights. Karl Marx called the United States Declaration of Independence “the first declaration of human rights in the world,” and that document was addressed to government, which had the duty of securing its subjects’ life, liberty, and happiness. Governments that fail in this duty deserve to be removed. The French Declaration of the Rights of Man and the Citizen of 1789 attributed all public misery to government ignorance of universal human rights. The Universal Declaration of Human rights of 1948 was also a response to governmental violations; in this case the Nazi crimes against humanity. The Universal Declaration makes it clear that these rights are a common standard of achievement for all peoples and nations, which is to say the governments of all the existing states in the world. Governments have obligations, but their citizens have rights. When governments fail to fulfill their obligations they lose the legitimate power to rule.

Since human rights create moral obligations for governments, the government’s attitude toward rights helps to determine its legitimacy. This applies not only to the government’s negative obligation not to violate rights, but also its positive obligation to realize human rights for all citizens. The government has a duty to act to secure the rights of its citizens.

Most of the well-known civil and political rights are negative rights, in the sense that they will be secure so long as government takes no action to violate them. The United States Bill of Rights of 1791 concentrates, for example, on negative protections of religion, speech and so

### *Two Sides of Human Rights*

forth. This does not mean, however, that the state may not also take active steps to make such rights secure.

Most “economic, social and cultural rights,” on the other hand, will require government intervention before they can be fulfilled. Such so-called “positive” rights as those protected by the International Covenant on Economic, Social and Cultural Rights will not be realized unless states “take steps” to achieve progressively their full implementation. Positive rights are claims against government and government has a moral obligation to secure these rights for its subjects. Some positive rights can be secured through the courts, but this approach limits the government’s flexibility. The government’s moral obligation to secure positive human rights should guide its whole program of action and legislation.

The proliferation of the human rights to embrace so-called “third generation” rights to solidarity may undermine some of the negative and positive rights recognized by the Universal Declaration of Human Rights. The old concept of rights assumed a separation between society and the state and the priority of the individual. Rights claimed on the basis of group solidarity are no longer human rights because they shut some humans out. Collective rights threaten individual rights. Defining human rights as Professor Rubin suggests, to emphasize the government’s moral obligations, makes it easier to accommodate collective needs to such third-generation goods as environmental rights, rights to peace, and to development.

Understanding human rights in terms of the government’s obligation to its subjects, as Professor Rubin sug-



*Jin-Xue Fan*

gests, will solve several problems created by the old terminology. Since many positive rights can only be fulfilled by state action, it makes sense to think of rights as obligations and constraints on government, rather than a form of property that individual human beings possess.



