30 September 2019

Rights I: Nonsense on Stilts

Rights Talk

* The dominant discourse of morality in our time.
* We use the language of rights all the time, in different contexts, and across contexts, to make judgements about rightness and wrongness, make claims on others to act or refrain from acting, defend ourselves and others, and so on.
* We speak of our rights as citizens of Aotearoa/New Zealand.
* We speak of human rights, which we hold as “citizens of the world” or perhaps simply as human beings, members of a particular species.
* We often speak of animal rights and the rights of nature.

Analysis of Rights

* One way to understand rights is to analyse their conceptual structure.
* We will take a historical approach to understanding rights tomorrow.
* We will take a decolonial approach to understanding rights next week.
* We analyse the structure of rights in terms of agency and the modal structuring of action situations:
  + Permissible (not-necessarily not-φ)
  + Impermissible (necessarily not-φ)
  + Obligatory (necessarily φ)
  + Omissible (not-necessarily φ)
  + Optional (not-necessarily φ and not-necessarily not-φ)
* Hohfeld’s (1919) influential analysis of the four “incidents” of rights:
  + **Claims**—X has a claim that Y φ **iff** Y has a duty to X to φ.
  + **Liberties**—X has the liberty to φ **iff** X has no duty not to φ.
  + **Powers**—X has a power **iff** X has the ability within a set of rules to alter X’s own or Y’s Hohfeldian incidents.
  + **Immunities**—Y has immunity **iff** X lacks the ability within a set of rules to alter Y’s Hohfeldian incidents.
* Rights usually involve a structured compound of Hohfeldian incidents

Making Sense of Rights

* Natural rights and legal/positive rights:
  + Natural rights are not dependent on law, tradition, custom, or membership in a particular community (citizenship, nationality), and so are universal and unalienable
  + Legal/positive rights are created and thus can be modified, repealed, and restrained by human laws
* Human beings have a special status, or dignity, which grounds our rights according to natural rights theorists:
  + We have certain attributes or features that make us “persons” or “moral agents” prior to the law
  + In some versions of natural rights theory, human beings are endowed with pre-legal natural rights “by their Creator”
  + In other versions, human beings are “ends in ourselves” in virtue of our rationality
  + Failure to respect our inherent rights is a failure to recognise our status or dignity as human beings
* The distinction between moral agents and patients is unclear and contestable.
* “We hold these truths to be self-evident, **that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness**. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, **it is the Right of the People to alter or to abolish it, and to institute new Government**, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their **right**, it is their **duty**, to throw off such Government, and to provide new Guards for their future security.”  
  - Preamble to the United States Declaration of Independence
* Natural rights, according to Bentham, are “simple nonsense: natural and imprescriptible rights, rhetorical nonsense, — nonsense upon stilts.”
* Only positive rights, established and enforced by legitimate government, have “any determinate and intelligible meaning”. Rights are “the fruits of the law, and of the law alone. There are no rights without law—no rights contrary to the law—no rights anterior to the law.”
* Yet, French and American revolutionaries attempted to codify natural rights in positive law: **natural rights were made sense of by declaration**.
* Natural rights are not only fictions, they are “anarchical fallacies” that encourage civil unrest, disobedience and resistance to laws, and revolution against governments. Talk of natural rights is “terrorist language”.

Justifying Rights

* Bentham draws a distinction between **what is** and **what ought to be**.
* Two orders of justification:
  + Justification *within* a practice
  + Justification *of* a practice
* Bentham’s claim is that rights can only be made sense of within the context of our practices and institutions, so there is no sense to be made of critiquing our practices and institutions by appealing to an antecedent set of natural rights.
* Yet, there are rational standards of evaluation against which to judge our practices and institutions, and with which to argue for reform.
* Natural rights are grounded in our **status** as persons or moral agents.
* One important feature of natural rights is that insofar as they are supposed to be prior to the law, they can be used to critique the law. They are revolutionary. Whether that is a good or a bad thing…
* But if natural rights do not make sense, then that does not mean we do not have rights, or that the rights that we have in a given social and historical context are fixed.
* On Bentham’s account, it is precisely because of the universality of natural rights across social and historical contexts, that they are fixed, and thus impose the most sublimated form of slavery upon the world.
  + He believes the true motto of the Jacobins is: “All nations – all future ages – shall be, for they are predestined to be, our Slaves.”
* On positivist accounts of rights, how can we argue that the rights we have are justified or unjustified? How are positive rights established, maintained, or abolished through “reason and plain sense”?
* Bentham provides an **instrumentalist** justification for rights.
* Bentham was the pioneer in British political philosophy of **utilitarianism**.
* “That in proportion as it is right or proper, i.e. **advantageous to the society in question**, that this or that right - a right to this or that effect - should be established and maintained, in that same proportion it is wrong that it should be abrogated: but that as there is no right, which ought not to be maintained so long as it is upon the whole advantageous to the society that it should be maintained, so there is no right which, when the abolition of it is advantageous to society, should not be abolished. To know whether it would be more for the advantage of society that this or that right should be maintained or abolished, the time at which the question about maintaining or abolishing is proposed, must be given, and the circumstances under which it is proposed to maintain or abolish it; the right itself must be **specifically described**, not jumbled with an undistinguishable heap of others, under any such vague general terms as property, liberty, and the like.”
* Perfectionist accounts of the justification of rights emerge from neo-Aristotelian virtue ethics and its challenge to deontology or rights-based ethical and political theory, and utilitarianism specifically and consequentialism, the idea that rightness of action or policy depends solely on its consequences, in general.
* Rosalind Hursthouse: “Hume’s attack on that concept of rights enshrined in the constitutions of the American and French revolutions, and his rival account, has, I believe, been unjustly neglected. Those of us who agree with Aristotle that ethical science precedes and is continuous with political science, and who hence are inclined to reject the ‘priority of the Right’ made famous by Rawls, may find hints in Hume of the bridge we need between Aristotle's discussion of justice and post-Enlightenment thought.”
* Like Bentham, Hume (his contemporary), thinks that rights are “naturally unintelligible” prior to and independent of our practices and institutions. He is a proto-legal positivist.
* For Aristotle, the rational standard of evaluation for our practices and institutions – justice, as their first virtue – is to be understood by reference to their **constitutive function** or what it is that they are supposed to do, and whether they do it well.
* The constitutive function of the practices and institutions that govern society is analysed in terms of the **common good** and the **good life** for human beings *as* rational, linguistic, social animals, *in* our environments.
* The concept of the good is **logically prior** to the concept of a right.
* The concept of the good is **explicitly ethical** and cannot be interpreted independently of a community of meaning, value, and practice.
* While Hursthouse’s account shares the same instrumental structure as Bentham’s utilitarian account, it is substantively different.
* Institutions can be evaluated as just or unjust against the standard of enabling or preventing members of a society living well together.
* This account is non-liberal: securing liberty and property is not the standard of evaluation for our governance practices and institutions.