

HUMAN RIGHTS AND DYNAMIC HUMANISM

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Human Rights and Dynamic Humanism

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Introduction: An Alternative Perspective on Human Rights

This book is about human rights. Starting with the core foundations of human rights, there is a complete absence of the central animating force that generates human rights problems and generates solutions to human rights problems. The missing ingredient is human emotion. What drives human rights violations at every level is the emotion of negative sentiment which emerges as hate directed at the non-self "other." On the other hand, the driving force for a world culture of human rights is the generation of positive sentiment. Positive sentiment emerges in the form of affection, empathy and solidarity. To embrace the universality of human rights, we must have a quantum of affection which is the foundation for universal global empathy and solidarity. The epidemic of human rights violations is essentially driven by processes devoid of affection, empathy or solidarity. We have many states with nuclear arsenals targeted at each other and these arsenals, if unleashed, would destroy all of humanity. Negative sentiment and hate drive the absolute alienation of human beings from each other. Human rights are not the gift of an omnipotent state or an abstract and unidentifiable idea of global community. On the contrary, its meaning and dynamism in social relations is a function of the activity of human beings who act as asserters, and, in certain roles, deciders, of which values count as human rights values. Therefore, the emphasis on activism and advocacy is on the human being as an articulator and defender of human rights values.

The book is one that focuses on the humanistic element of the human rights process and the indicators which provide human rights a dynamism which challenges social structures to change from human rights denying to human rights affirming social and political processes. The approach is multidisciplinary, goal-guided, and decision focused. The focus on decision is on advocacy designed to influence decision and the challenges to promotion and defense of human rights values. The emphasis on the role of the individual and the subjectivities of the individual implicate the idea that humanism is a central component of the culture of human rights and the challenge this culture poses for progressive social change. This emphasis insists that the human being is the central object of all global social processes, all global power arrangements, all global constitutive processes and is at the center of the system of global public order. These emphases had been pioneered in the configurative jurisprudence associated with the Yale University New Haven School of International Law and Human Rights.

Chapter 1 introduces the concept of dynamic humanism. We draw attention to the fact that the individual in social process is a stakeholder and a claimant for human rights values. Further, these values implicate a necessary intelligence predicate, as well as the functions of promotion, prescription, application, and termination by advocates.

Chapter 2 surveys the illuminating religious traditions which generate values and normative precepts that underlie the formation of modern human rights. We draw attention to the fact that religious experience, which generates value ideals, has often served as a stimulus for action to realize human rights standards. In this sense, religion is not purely a devotional exercise, but also an exercise of social activism generated by members of the community who seek a closer approximation between social practice and religious ideals.

Chapter 3 places human rights in the context of the Western history of ideas. This chapter contains two parts, one general and one specific. The general part examines the development of a higher law in Western tradition. That higher law is influenced by Celtic and Greek philosophy as well as the Roman law affected by Stoic philosophy. The Western tradition, also influenced by Christian scholars such as Thomas Aquinas and John Duns Scotus, provided a deeper frame of reference for the justification of natural law as an expression of human and divine love and reason. The influence of natural law on international law is also considered, since modern human rights is an aspect of international law. This chapter underscores the problems of sovereignty-dominated positivism in the aftermath of the Second World War, and its relevance to the creation of a declaration of human rights. An overview is given of the current natural law tradition and significant proponents and critics of it.

Chapter 4 emphasizes the importance of the often overlooked contributions of indigenous European cultures to the development of human rights. Attention is given to the ancient Celtic culture, ideas of Celtic individualism, the distinctive role of John Duns Scotus, the Scottish Declaration of Independence and Freedom of 1320, i.e. the Arbroath Declaration and the Scottish Enlightenment and their subsequent influence on the late 18th Century revolutions. In these events we see an affirmative declaration of the Rights of Man, which is a precursor to the development of modern human rights. The importance of the Scottish-Celtic contribution to human rights is that it was generated by a struggle that mobilized cultural dynamism. Indigenous Celtic culture staked an early and important claim to the ideal of universal human dignity. This is an important insight because it broadens the ideals that promote human rights, including those ideals of the indigenous cultures of the world, whose voices are often times forgotten. It therefore strengthens the universality of human rights.

Chapter 5 addresses the critical problems underlying the promotion and protection of universal human rights values through international law. This chapter examines the place human rights holds in the contemporary United Nations Charter system. It grapples with the problem of the perceived omnipotence of state sovereignty, and the critical importance of the legal and political standing of the individual. Drawing on the evidence of the changing nature of sovereignty and the individual person's placement in international law, it looks at the changing dynamics of globalization and the challenges that confront an individual's human rights.

Chapter 6 consists of two parts. Part one articulates the contemporary human rights problem as a challenge to redefining authority in terms of international obligation. Given the state of global change in society, we see greater recognition of individuals and greater flexibility regarding sovereign personality. We explore the classical problem of human rights abuse from the state. The chapter provides an overview of the problems of obligation in terms of global constitutional ideals, and the problems of the unruly domain of effective power within the global system. Mapping the global constitutive process of authority and developing a theory of advocacy within the broad outlines of this process are clarified. Part two explores human rights as a struggle for human dignity in terms of non-conventional post-modern theory. This approach underscores creative orientation to observation and intervention, and focuses on advocacy and decision as emphases for inquiry about values and practices. This part underlines the structure of human rights problems in terms of demands for values central to the human rights struggle. The chapter concludes with the importance of the human dignity construct as a preferred form of normative guidance for activism and intervention concerning human rights.

Chapter 7 highlights the importance of sentiment for understanding and addressing human rights norms and human rights violations. Sentiment comes in the form of both negative and positive emotion. Severe human rights problems are frequently driven by a severe addiction to negative sentiment, as reflected in the emotions of hate, racism, or sexism. Conversely, human rights values universally reflect recognition of positive sentiment. Positive sentiment implicates the capacity to identify with all of humanity and with the dignity of the human person. The authors explore the crucial conditions and factors for mobilizing positive sentiment and solidarity to constrain or eliminate the consequences of negative sentiment. These are significantly new features that have been brought to the discourse of human rights.

Chapter 8 addresses the topic of human trafficking, a significant problem for human rights deprivations through coerced sexual submission of its victims. The coercion characteristic of human trafficking has many of the qualities

associated with traditional slavery. Significantly, it involves the complete expropriation of the individual's freedom of choice, and, like the institution of slavery, leads to the extinction of respect. The chapter explores these themes, especially in regard to the property law basis for legal acceptance of slavery, i.e., the development of the idea of a contractual prisoner, the person as a chattel.

Chapter 9 addresses group deprivations relating to the forms of mass conflict based on identification of the "other," and explores the contexts in which racism, apartheid, mass murder, and genocide occur.

Chapter 10 deals with the specific form of deprivation known as torture. This chapter explores the nature and context of torture as well as the description of torture under international and regional legal prohibitions. The chapter relates the process by which one of the authors, formerly the Chair of Amnesty International, USA, advanced the cause of the adoption of the Torture Convention in the United States. Thus, the chapter combines rigorous scholarship with the insights of practical advocacy. It provides a framework to understand the Torture Convention and its efficacy. The chapter further describes the strategies used to secure the ratification of the Torture Convention in the U.S. Senate. It contains information on the position in the United States on the use of torture, by any name, in the aftermath of the events of September 11, 2001. The chapter concludes with a description and appraisal of the proposed Optional Protocol to the Convention. This part is demonstrative of the importance of activism in getting the Optional Protocol adopted. It connects the problems of this Protocol with the problems the Bush and Obama Administrations have had with the treatment of detainees.

Chapter 11 explores the socially-directed formation of positive affective relationships and institutions. We stress the importance of the social process specialized to affection and solidarity. This is a process that is critical to social activism for the eradication of severe human rights deprivations and the promotion of human dignity. We use the phase-mapping analysis of the Yale University New Haven School to develop a realistic and detailed description of the social process specialized to affection in society. We present another important element in the culture of human rights, a systematic description of the global social processes specialized to affection and related values. While this description has broader implications beyond the focus on human rights, it is an important contribution to a better understanding of the role positive sentiment has in the development of social processes generally and, more specifically, as an influence on behavior that generates a response to the human rights problem.

Chapter 12 focuses on the human rights issues created by the institutions of family, gender, and social orientation. This chapter looks at a number of

issues in the context of small group interactions, where those institutions have critical relevance. This chapter underscores the problems generated by misuses of the social process of affection. Extrapolating some unique problems of the affection process within micro-social units, human rights in regard to both gender identity and gender-change are explored.

Chapter 13 describes the goals of socio-economic justice and security and its effect on social stability. The authors explore the importance of social justice in a global context of human rights. Implicit in the human rights context of global economic order is a possible right to full employment. Such a right, if it exists, generates important challenges for economic theory and international human rights law.¹

Chapter 14 addresses intellectual property and human rights, specifically regarding the AIDS crisis. This chapter provides a specific grasp of the issue of social justice and human rights in terms of the right to health care and the implications of such a right for the appropriate construction and interpretation of relevant international patent law principles.

Chapter 15 examines human rights as it relates to a society's justification for revolution. The authors explore the connection between morality, human decision making, and choice in the context of societal change. This chapter focuses on real life experience with the fragility of the heroic revolutionary protagonist. It explores the issue of truth and possible reconciliation in the aftermath of revolutionary betrayal.

Chapter 16 explores the theory and morality of the new forms of transitional justice, entailing changes in the manner in which international law and human rights are structured to promote the goals of democratic political transformation. It has a specific focus on the Truth and Reconciliation approach of South Africa and its implications for human rights. Third party influences, which may suggest the exploration of the construction of peace as a human right and a component of democratic transformation, are explored.

Chapter 17 provides a case study of Colombia's experience with transformational justice. The chapter seeks to bridge the gap between theory and practice with revolutionary or transitional justice. This case study indicates that not all forms of transitional justice work in a salutary fashion.

Chapter 18 focuses on the importance of the human rights of the indigenous peoples in the Amazon River Basin. Drawing on first hand experiences with an Amazonian indigenous tribe, the authors present the practical problems and theoretical implications for effectively promoting and defending the

1 Winston P. Nagan, *Human Rights and Employment*, Vol. 1 CADMUS No. 1, 49–52 (October 2010).

fundamental human rights of indigenous peoples. Samples are given of the novel petitions presented to the Inter-American Commission relating to land and resource rights. A situation where rights described in treaties and other legal agreements are meaningless without effective ways of protecting vulnerable communities is discussed.

Chapter 19 describes the human rights violations arising from the testing, use, and threats of nuclear weapons. It describes the complex collaboration that states, groups, and organizations must engage in to restrain or prevent such violations.

Chapter 20 addresses the importance of international law to domestic and regional bodies. Specifically, the authors illustrate the role of human rights in civil litigation in the domestic courts of the United States. We provide a relevant summary of U.S. law relating to claims under the Alien Tort Statute and provide an insider's view into the extensive litigation of *In re: Apartheid*.²

² Lungisile Ntsebeza, et al. v. Daimler AG, et al. (In re South African Apartheid Litigation), 02 MDL No. 1499 (SAS) (2009).

The Perspective of Dynamic Humanism

This chapter introduces the concept of dynamic humanism which focuses on the individual as a stakeholder and a claimant for human rights values. These human rights' values implicate an intelligence predicate and the functions of promotion, prescription, application, and termination by advocates.

The authors of this book are influenced by configurative jurisprudence¹ in developing a theory and method of inquiry about law that is rooted in the individual in the global social process. This book integrates the configurative perspective by emphasizing the role of the individual in the processes of authoritative and controlling decision-making. Our emphasis starts with the assumption that individuals enable the legal process itself through their roles and that law responds to individual human claims. The decision-making focus is broadened to include an emphasis on advocacy, a process which influences decision-making relevant to the defense and promotion of human rights.

This approach combines scholarship, innovation and creativity stressing the dynamic aspects of human rights. Rather than explaining human rights concepts through decisions in courts, this approach is on human rights as a social goal in the process of legal and political development, a process that is furthered through human rights advocacy. The book presents a non-conventional approach to law by promoting established human rights law while generating a progressive theory of human rights as an agent of change. The book explores the multiple dimensions of human rights theory, while focusing on advocacy and change in the prescription, application, and enforcement of human rights as law. The individual is the center of both the human rights problem and advocacy to promote a solution. The individual comes with emotional drives, which are part of identifying human rights, fueling social action and understanding expectations. Recent scholarship has drawn attention to the importance of emotion in driving the problems of public order.² In this book, the importance of affect, or positive sentiment, as a central element in identity capable of expanding to include all of humanity is considered. The role of emotion as a generator of the human rights problem is considered. The emotion of hate, or negative sentiment, is explored to understand important human rights

1 Harold D. Lasswell and Myers S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (1992).

2 Dominique Moisi, *The Geopolitics of Emotion: How Cultures of Fear, Humiliation, and Hope are Reshaping the World* (2009).

deprivations. This approach is novel because the legalization of the culture of human rights tends to rely on the objectification of human rights. A broader, more realistic view of human rights must deal with subjects that seek human rights solutions, driven by positive sentiment, and subjects that seek human rights deprivations driven by negative sentiment. Human rights are not only documents generating living expectations but require active promotion and advocacy by decision makers in society.

It is important to understand human subjectivity in the evolution of conventional legal theory, because conventional legal theory tends to diminish human subjectivity. This issue is introduced by outlining the importance of contending theories about law and jurisprudence. Jurisprudence has generated powerful scholarly discourses with tight boundaries that limit inclusion. A contrarian illustration was the work of Harold Lasswell and Myers McDougal. Despite the importance of this book in expanding responsible legal theory, the work has not generated discourse to refute, accept or promote ongoing discourse about its strengths or shortcomings. It is difficult to speculate on why but one of the possible reasons is because of how it approaches the issue of subjectivity in law and jurisprudence.

I Threshold Legal Theory

Conventional jurisprudence highlights two contending schools, natural law and positivism. Natural law stresses normativity. Positivism supports a scientific perspective. From a natural lawyer's perspective, the source of law is trans-empirical and law is not a matter of logical deduction or empirical verification. The approach is not scientific. The implications of knowledge informed by science require rejection of natural law with the assumption that its trans-empirical foundations mask subjectivity in the prescription, application and enforcement of law. In the late 18th century, Jeremy Bentham described natural law as essentially nonsense on stilts.³ Bentham's protégé, John Austin, understood the need for a scientific theory of law and such a theory would objectively determine what law is and is not.⁴ Austin's theory was a powerful theory and remains the model of the conventional view of law. Austin's theory provides us with a central ingredient that a scientific approach brings to law.

3 Philip Schofield, *Jeremy Bentham's 'Nonsense upon Stilts,'* *Utilitas*, 15, 1–26 (2003).

4 John Austin, *The Province of Jurisprudence Determined* (1832).

That ingredient is that we can say what the law actually is. Austin defined law as the command of a sovereign enforced with a sanction and directed at the community which was in the habit of obedience.⁵

This model was simple. It had the intuitive appeal of common sense and the backing of the scientific thinking of the time. It provided an objective view of what law is and excluded subjectivity from the theory and legal discourse. The Austinian view has traction with the implication that the law is objective and exists as a structure of commands, precepts and practices functioning mechanically, but objectively in the determination of the rights and duties of the subjects of law.

A *Legal Theory and the Revolt against Formalism*

In the late 19th century, there emerged in the United States an important discourse which engaged both theory and practice about the nature of law. One view, promoted at Harvard University by the legal legend Christopher Columbus Langdell, law existed in legal rules and precepts to be discovered by the legal scientist.⁶ This view was the legal version of formalism. There were critics of this view who led the revolt against formalism. American theorists at this time were influenced by the science of Austin but were skeptical of viewing law as “the formal science of positive law.”⁷ There was law influenced by logical science and logical empiricism and law influenced by the empiricism of social relations and interaction. Oliver Wendell Holmes insisted that the life of the law had not been logic, it had been experience.⁸ Holmes indicated skepticism of mechanical jurisprudence by suggesting that as a judge, he could give any conclusion a logical form.⁹ Holmes’ meditations, sometimes contradictory, had a tremendous influence on the future of legal thinking. Holmes was one of the leaders in the revolt against formalism.¹⁰

5 Donald C. Hubin, *Chart of Austin Positivism* in Overview of John Austin’ Theory of Law (2004).

6 Kimball, Bruce A., *Young Christopher Langdell, 1826–1854: The Formation of an Educational Reformer*, J. Legal Educ. 52: 189–237 (March–June 2002); See also Speziale, Marcia, *Langdell’s Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, Vermont L. Rev. 5 (1980).

7 John Mason Lightwood, *The Nature of Positive Law* (1883).

8 Mark P. Painter, *Justice Oliver Wendell Holmes, Jr. (1841–1935), From Revolution to Reconstruction* (2010).

9 Oliver Wendell Holmes, *The Path of the Law*, 10 Harvard L. Rev. 457 (1897).

10 *Id.*

B *From Holmes to Legal Realism*

Holmes insisted that to understand law we should look at it from the point of view of the “bad man.”¹¹ This viewpoint was a revolutionary idea because Holmes was saying that the most realistic exploration of law and legal theory should be rooted in the individual, i.e., the self-interested claimant.¹² This approach radically changed the focus of inquiry in law which had been fixed on what sovereigns and officials do to the consumer of law, the stakeholder. Holmes said that the stakeholder’s view is critical to a responsible professional discourse. The pragmatic implication of this view for legal theory is that law is a response to the problems involving stakeholders that emerged from social life. Holmes’ “bad man” is really the individual citizen consumer of law. For jurisprudence to be realistic and relevant, it must bring a focus on the consumer. Limiting the consumer to the “bad man” is Holmes’ ignorance of developments in the psychological sciences about the inner workings of personality and the subjectivity of the individual. Legal theory, at least in the United States, proceeded with an approach described as American Legal Realism. The focus of realism was on what officials do and what officials do was law. This focus provided insights into conditions that influenced officials in law or influenced decisions. Realism ensured that the study of judicial or administrative behavior used a wider set of indicators than purely legal precepts, rules and precedents. Other indicators included culture, class, crisis and personality factors. These are conditions that may influence how law is made, applied and enforced.

C *The Revolt against Formalism and the Social Sciences*

While these developments were unfolding, the revolution in the social sciences was beginning to generate traction. The study of politics and law had focused on institutions. Institutions are nothing apart from the human beings who operate them and whose benefits and deficits impact those on the outside. In the social sciences there was the idea that however the theory and method of the

¹¹ *Id.*

¹² Holmes’ “bad man” is an abstraction that he created for the purpose of separating law from morality. Holmes viewed morality as subjective and law as objective. The bad man is one dimensional, whatever morality he has. A more informed view of human personality is that self-interest is one of the motivational factors for human action. Action is also moved by the salience of identification as well as the importance of the cultural norms of expectation. The personality of modern man is more complex than Holmes’ one dimensional view of the purely self-interested bad man. The bad man did not broaden legal analysis. However, once Holmes opened the door to the individual consumer of law, it was not possible to close it without resistance.

social sciences was reconstructed, science would require objective verification of data and scientific results. In this environment, Harold Lasswell, a relatively new PhD from the University of Chicago, broke onto the intellectual scene with a book that sought to break barriers from the subjectivities of the individual social participant.¹³ Even today this book is extraordinary, which may mean that many of the vastly important insights and challenges that Lasswell anticipated in this work are still not adequately understood. This book is a work that was reprinted several times because of its continued vitality. Yet, many of the lessons in the book have been more influential on the fringes of the discourse in politics, sociology or law. The challenges in this work have been summarized by Fred Greenstein in the following quotations from the book:

Political science without biography is a form of taxidermy. Political man [displaces] private motives... on to public objects [subjecting the former to] rationalization in terms of public interest. Political movements

13 Harold D. Lasswell, *Psychopathology and Politics* (1986). Lasswell posed the question of in what sense psychopathology is an application of psychoanalysis to politics. He noted that he was not a professional practitioner of psychoanalysis, but a professional student of political behavior. Lasswell explained this issue as follows:

We can say that the book is an "application" in at least these senses. The author was exposed to a training analysis from psychoanalysts (and from physicians or psychologists heavily indebted to Freud); he brought together the case fragments available in the literature and examined the articles and books—few in number—dealing directly with psychoanalysis and politics; he discussed theories of the interrelationship with specialists and read the existing corpus of psychoanalytic literature and the appraisals of psychoanalysis made by former associates of Freud and by exponents of other "schools"—Kraepelinian psychiatrists, Watsonian behaviorists, Pavlovian reflexologists, McDougalian instinctualists, Wertheimerian perceptualists, Sternian personalists, Angellian functionalists [to mention a few].

Lasswell also referred to the importance of developing case material of life history interviews of politically active subjects. These methods also included the technique of wide free association and references to multiple forms of subjective experience. These methods extended to the idea of the "prolonged interview." It was from this raw subjective data that Lasswell was able to deploy psychoanalytical methods to distill the meaning of symbolic communication from the life of the individual. He was able to make an important breakthrough in distinguishing conventional analysis and categories that emerged from personalities in the pursuit of values. This permitted him to go beyond conventional roles to study the dynamism of the human personality as agitator, administrator or theorist in impacting the distribution of values in the public sphere. These insights permitted Lasswell to become one of the most important contributors to the understanding of power in society.