

Early Courtesy Draft
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“Does God Believe in Human Rights”

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Title: “Does anyone believe in Human Rights?”

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There are some strong similarities between certain types of religious obligation and human rights. Religions comprise sets of beliefs (parts of which may be reduced to writing in the form of regulation) based on cultural, national, spiritual, moral and emotional sources.

Human Rights comprise sets of ideals (often reduced to writing in the form of regulation) based on moral, rational, cultural, national, spiritual (humanist) and emotional sources.

Both religious duties and human rights are (at least when brought to book and the subject of decisions) constantly developing, interpreted by representative bodies and reactive to contexts.

The similarity of the compositions and sources of religious beliefs and human rights often make them competitors in beliefs and corresponding regulatory systems. If so, are there any developing themes or rules to help us know which, of religion or human rights, trumps the other and when?

In beginning to ask and answer this question in this paper, I intend to reflect as example material on some issues which are considered to be important within the Jewish Religion and also to reflect briefly on whether there appears to be a Jewish Religious approach to Human Rights.

The provenance of human rights- e.g. Jewish religious obligation

Deutscher’s concept of “The Non-Jewish Jew” included a comment about the wheels of revolutions often being oiled by Jewish blood. He noted the over representation of people from culturally or nationally Jewish backgrounds in the lists of those who had brought about changes associated with developments in human rights. (**Isaac Deutscher, The Non-Jewish Jew and other essays, ed. Tamara Deutscher, OUP, London 1968.**) If this is true, then is there any provenance for this approach to be found within the religious beliefs and duties set out within the Jewish religion which might have brought about this over representation?

A preliminary point. The Jewish religion itself promotes concepts of duty rather than “right” in its modern positive form. Duties (as between people, actions against the

deity are not frequent!) may be actionable in Rabbinical Courts and therefore equivalent to rights. Some rabbinical writing makes much of the distinction between rights-based societies which may engender a “taker” attitude rather than duty-based societies which encourage a society of “givers”. But, if a duty is actionable in law it does not make any difference whether it is couched in the language of rights or not, since in effect it becomes a right. One might argue about the degree of exhortatory influence a “right” could have over a “duty” but this would be a largely academic, semantic discussion (one which already exists in the literature).

What duties, of the nature of human rights, are referred to within Judaism? A familiar and constant theme relates to the proper treatment of those who are different, alien or strange – treatment of the stranger “Ki atem yedatem et nefesh hager” for you know what it is like to be a stranger since you were strangers in the land of Egypt.

The first set of people duties beyond those of the ten commandments (which include respect for parents, murder, adultery, theft, bearing false witness, jealousy) enumerated in the text of The Torah, the Five Books of Moses, relate to issues of servants - “the eved” (Exodus Chap 21 v.2). Rabbi Shimshon Refael Hirsch, German enlightened Rabbi of 19th Century modernity asks why do Jewish Social Laws begin with concepts of servants or slavery. The answer given is that one can determine a society’s level of humanity by the way it treats its most vulnerable members (Paul Taylor). Unlike traditional forms of slavery the Eved Ivri (actually a penal system for dealing with criminals who have stolen but cannot repay) is not the chattel of the master and there are limits in terms of excruciating, debasing and unnecessary labour he may be asked to perform. The master must treat him properly e.g. if the master only has one pillow it should be given to the servant /eved. On his release the master must give him a generous severance payment.

The eved kanaani is also to be protected from inhumane treatment and to be treated with dignity - unusually for the time and place of the original injunction.

Only after these are dealt with does scripture go on to talk in detail about murder, patricide, matricide, kidnapping, cursing of parents, grievous bodily harm, goring oxen and the “lex talionis” which has been the subject of much misunderstanding throughout the ages.

Relationships between men and women are also heavily legislated for. Though many areas do not come up to modern levels of safeguard, many go beyond.

On the basis of this example it would appear to be true to say that what we know today as Human Rights may well derive from such “natural rights” or “natural law” and they may therefore have some affinity to religion or a religious basis. A religious source, background or basis may well have given rise to ideals similar or equivalent to human rights at different times in history when religion was more popular.

Human Rights – the cultural context

It is important therefore also to note that Human Rights do not necessarily come from a strictly rational tradition. It is clear from a review of the different standards

throughout the world in relation to regulation, let alone performance of human rights, that rationalism is not the only factor in their existence and in their detail.

This would therefore suggest that Human Rights are not universal but cultural. What is appropriate to England in 2005 may not be appropriate to The Republic of Ireland in 2105, let alone Iraq or China or Hong Kong. What is sexually appropriate for Denmark or Germany may not be appropriate for England even if they are both covered by the European Convention on Human Rights. In fact it could be asked, if Human Rights, just like any legal regulation, are not culturally contextual will they ever be respected?

The other side of the coin.

However it could also be asked, and this is the interesting dichotomy, if human rights are not universal do they have any value at all? If human rights are such a movable feast that they can be changed, or are adjustable, according to context, culture or political need - then how important can they really be?

It is this dichotomy which lies at the root of the great difficulty addressed in this paper. Since no right is absolute and therefore all rights are relative what happens when religious duties clash with human rights or, put in another way, the right to practice one's religion clashes with some other human right?

Can culture/religion accommodate human rights? Examples within the Jewish religion include the behaviour towards the leper— metsorah – leprosy and removal from the congregation, or the treatment of the sotah- the adulteress who is given bitter waters to drink – a little perhaps like the ducking chair for witches in England's middle ages; the carrying out of stoning as the death penalty; and the physical punishment of makot or whipping for certain crimes. None of these by the way are in use, but each is theoretically a possibility as a concept. Can these in any way accommodate the human rights of those involved? The answer is already given – none of these apply nowadays and rabbinical courts may not mete out punishments in these ways.

But more interesting is the question put the other way round. Can Human Rights accommodate culture/religion? Examples within the Jewish Religion include Brit Mila – male circumcision at eight days after birth; shechita – kosher treatment including slaughter of animals; get – divorce in which the man has to give the woman a divorce, she can demand it but he has to be forced if necessary to give it and the resultant problems of the Agunah – “the chained woman” when husbands refuse the injunction of the Rabbinical Court to give their wives a divorce. All of these are areas which currently do operate and areas about which there have been questions or political attempts to organise a ban on these practices.

Is there any way of knowing which right should prevail? And – which principle should accommodate the other.

Within the Jewish religion two overriding principles ease this issue: 1. Dina demalchuta dina- the law of the state is the law to be obeyed; and 2. "Vachay Bahem" – "and you should live by them" in other words the rules have to be capable of being obeyed or they do not need to be obeyed.

But beyond the realms of a religion which includes within it conforming to the local rule or custom who is right, morally or legally in the problem cases? If a young Nigerian woman has a right not to be forced into having a clitoridectomy performed on her, does a little Jewish baby boy have a right not to have a circumcision performed on him? Should animal rights prevent shechita or halal slaughter?

If another right prevails over the right to practice one's religion then human rights may be more universal than previously suggested, but they will also be subject to a cultural imperialism. Human rights are usually there to defend the underdog, but in these situations who would become the "victims" of whom?

Dworkin compares two models for deciding about what to do when it is unclear whether a proposed policy would violate an individual's fundamental rights. (Dworkin's *Taking Rights Seriously*)

The first model involves balancing individual rights against other social goals. The second model holds that one should err on the side of individual rights instead of balancing. The argument against the one is the argument in favour of the other. Dworkin also identifies what he regards as the grounds of fundamental rights.

In an interesting recent lecture organised by the Institute of Commonwealth Studies and given at Senate House by Professor Patrick Thornberry on "Working against Racism – The View from Geneva" he talked about – homogenising universalism versus differentiating universalism; equality in diversity versus equality in standardisation; the possibility of preservation of culture; and the mistake of heterophobic application of human rights. Like Dworkin's approach this begins to give us some leeway in answering the question of competing rights. But we still do not know rationally whether Brit mila is right and clitoridectomy is not.

So what are "good" or "acceptable" cultural/religious traditions and which are not, and why? What is wrong with the hijab, the kippa, modesty of dress, the cross of a dominant culture or the Star of David / Red Crescent of a dominant culture? What is right e.g. about arranged marriages that is wrong about forced marriages and what is better e.g. about serial monogamy than parallel partners? How should society decide what is acceptable *here* and *now* or *there* and *then*? And how should we decide what

is **not** acceptable? In other words what level of cultural imperialism do human rights imply?

The Quebecois Succa story - A case in point.

There have, as yet, been few cases which actually address these issues in any direct way. A particular case which has is the case of the Quebecois Succot. A succa is a booth erected for 8 days in September / October of each year as a part of the Jewish Festival of Succot. The religious duty (to God rather than man in this case) is that you leave your house/ apartment and live in a temporary dwelling with the roof open to the stars for a week to remember the 40 years of wandering in the wilderness, and also to get away from the material things of life inside the home.

In general this is not a problem since erecting a temporary booth tends not to interfere very much with the rights of others. When planning laws or nuisance laws are invoked against them, the case usually takes too long to get to court to actually deal with the 8 day event.

In this case the co-ownership declaration of a set of apartment dwellers in a condominium in Quebec seemed to prevent them erecting things on their balconies. The management corporation sued, saying they would allow a communal succa in the shared gardens but not a set of individual succot on each balcony for each family. The case went to the highest constitutional court in Canada before the individual succot were allowed. The language of the decision is interesting:

“Freedom of Religion is triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion. Once religious freedom is triggered, a court must then ascertain whether there has been non trivial or non-insubstantial interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec or Canadian Charter. However, even if the claimant successfully demonstrates non trivial interference, religious conduct which would potentially cause harm to or interfere with the rights of others would not automatically be protected. The ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.”

So a balancing of rights occurs. There is probably insufficient clarity from this case to help many others but it does begin to assist. Religious rights are not supreme, but they can trump others in certain circumstances.

Conclusion

We do not yet seem to have sufficient jurisprudence on these issues to understand what will be the dominant themes which will assist in making these decisions. In truth they are already made, but politically and not judicially. It will be interesting to see whether the judicial decisions are any better made than the social or political.