

Chapter 2

Rights and Duties, Needs, and Merits

Abstract International Declarations and Covenants on human rights pretend to have universal reach, at the same time acknowledging that basic rights can only be cultivated and protected at the national level. This universality has been questioned by non-Western cultures, and by those pointing out that marginalized social groups, by being deprived of citizenship, are subject to violation of their freedom-based negative human rights, and unable to claim positive rights—basic goods. Furthermore, poor- and middle-income countries may lack the political will to protect basic rights, or be unable to muster resources to provide essential goods and services, thus leaving essential needs unattended.

Distributive justice searches for criteria to reduce inequalities and create fair social conditions. Liberal politics defend justice based on merit and access to equal opportunities as the most appropriate criteria for allocating scarce resources. Since poor populations lack the capabilities to behave meritoriously and achieve socially respectable positions, merit cannot lead to more justice. Addressing essential needs is the objective and foremost criterion to allocate resources appropriately, and ought to be applied wherever dire needs are unattended.

Keywords Basic rights • Distributive justice • Equal opportunities • Merit • Need • Risk

Justice Based on Human Rights

Human rights have been with us since the French Revolution, acquiring universal status initiated by the United Nation's Universal Declaration of Human Rights [1948], later buttressed by the International Covenant on Civil and Political Rights, and the simultaneously presented International Covenant on Economic, Social and Cultural Rights [1976] (Gostin and Archer 2007). Human rights have been proclaimed and defended at global, regional, national, and local levels, and presented in the form of declarations, conventions, treaties, recommendations, and guidelines.

Cosmopolitan views have their greatest appeal at the humanitarian level as they navigate theoretical territories, but they lose plausibility and conviction when the appealing but weak plea for rights obscures the more effective and binding claim that correlative obligations ought to effectively secure the demands of right holders (O'Neill 2004). Global justice defenders are notoriously vague on this issue, mostly falling back on the State as the agent responsible for implementing human rights and just procedures at the national level, but eluding the problems and contradictions involved in the brute fact that globalized economics are major factors that make States weak and porous, thus contributing to the persistence of international inequality (Beck 1998).

There seems to be a general, though tacit, agreement that the national level is in the best position to enforce human rights and to sanction violations within its territory. And yet, “many countries have not incorporated human rights provisions or norms into their national laws and politics” (Gable 2007). As a consequence “democracies routinely contain millions of disenfranchised people, namely children and those who are for a variety of other reasons judged to be incompetent” (Weinstock 2006). Some nations emphasize negative rights, but barely mention substantive rights like education or health, while others present comprehensive lists of economic, social, and cultural rights, too often honoring them in the breach. All Latin American countries include a right to health care or health protection (Fuenzalida-Puelma and Connor 1989), but national health services are not up to the task of meeting such commitments, once again illustrating how rights may become empty claims if not correlated with obligations of fulfillment.

The universality of human rights has been questioned by non-Western cultures who resent their marked individualism and indifference to the multiple commitments of human beings in a cosmos of social and natural bonds where a person's life-span is but an episode in transcendent holistic processes. A number of philosophers have pointed out that rights are not universal, seeing that they can only be claimed from the status of recognized citizenship (Rancière 1998). Children, the mentally impaired, the poor and marginalized, and illegal immigrants are all groups that lack the empowerment to voice their claims for recognition as legitimate right holders. The advocacy of rights for the distant or the absent—future generations—remains contested and unheeded. To be consistent, deep ecologists claim, global ethics must go beyond the idea of human rights, incorporating the need to protect nonhuman living beings, nature itself, even macrocosmic Gaia.

Rights necessarily correlate with the obligation to acknowledge, respect, and fulfill them. A right that is not claimed remains virtual and ineffective, whereas claiming a right presupposes an addressee whose unfailing duty is to satisfy the petitioner (O'Neill 1998). Dissident voices maintain, to the contrary, that basic rights do not “necessarily impose second- or third-party positive duties of protection or provision,” which could well be honored by “voluntary institutions” (Cohen 2004). Allowing voluntariness to determine the fate of human rights is tantamount to denying their relevance in *Realpolitik* and their lack of influence on social practices, as they are displaced into the discretionary arena of political and social reality: “If the ideal conception of human rights must be embedded in an institutional conception

in order for human rights to become truly effective and action guiding...[subject] to degrees of scarcity and...particular cultures and states...[then] they do not have universal reach. In other words, institutional human rights are not, strictly speaking, unmodified *human* rights. They will, rather, bear much more resemblance to *political* rights, which are recognized by particular states on the basis of their own particular political culture and value priorities” (Arras and Fenton 2009).

Facing Social Justice

Philosophers may delve in moral quandaries, but applied ethics must come up with at least tentative answers. Justice-based responses are found wanting, all the more so if equality is dismissed for having “no inherent or underived moral value at all” (Frankfurt 1997). When justice is neglected as an inappropriate frame of reference to approach the perplexities inherent in distributing scarce resources, applied ethics must search for a set of criteria that hopefully will allow apportioning in a morally legitimate way. Social justice advocates fair criteria for the distribution of scarce resources to legitimate holders of positive rights, such as education, health care, medical services, and social security. Many criteria have been proposed: merit, need, first come first served, social worth, age, expected utility, or lottery. Equitable distribution has inspired some of these criteria, but health-related goods and services should be less concerned with justice than with ranking access and availability in accordance with the importance of presenting problems. Only merit and need will be discussed, the first because it is the preferred criterion in developed societies, whereas need, it will be argued, is the only ethically valid one in societies or population segments that live in deprivation.

Merit and Luck Egalitarianism

“Justice is a disposition to give to each person, including oneself, what that person deserves and to treat no one in a way incompatible with their desserts” (MacIntyre 1984; MacIntyre 1988). This description presents a number of difficulties, the most obvious one being that desert is seen as equivalent to merit, although they are not analogous. Desert applies in situations “in which someone is responsible for the results he or she brings about,” whereas merit refers “broadly to a person’s admirable qualities” (Miller 1994). Much more troubling is the idea that just distribution is to be assigned according to individual comportment or qualities, a proposal known as justice in inequality. Meritocracy shares with justice in inequality the conviction that desert/merit should operate *after* the basic needs have been met by social institutions treating all citizens as equal. Once opportunities are equally accessible, individuals should fare according to their freely exercised ability and efforts to obtain social privileges and nonessential material goods. Minimum decent coverage is,

unfortunately, disregarded when economically troubled liberal governments or staunch libertarians gain the day.

At least three objections come to mind when evaluating the liberal celebration of meritocracy: First, basic needs are glossed over and often dismissed as lacking objectivity and firm intercultural validity; second, social institutions do not guaranty basic equality nor equal opportunities, quite to the contrary, they are steeped in unavoidable power differentials and asymmetrical relations (Young 2011). Being organized around work and production, societies unavoidably develop hierarchies and income gradients (Rancière 1998). Third, beyond a minimum of equality, individuals need to be supportively empowered to freely employ their capabilities in securing their place in society and the pursuance of their life project (Sen 2000; Nussbaum 2006).

Extreme libertarians may fail to accept that merit can only become a criterion of fairness, once basic needs and empowerment to seize equal opportunities have been secured. The fact that pockets of poverty prevail in rich countries proves that merit schemes are unfair at the basic level where they simply do not operate. But meritocracy does have its virtue, for it caters to the middle classes who are chronically dissatisfied about their duties and the fact that their tax burdens only buys them basic social security. If honoring merit will spur drives toward excellence and prestige, it may be a welcome addition to need-based equity.

Meritocracy blends with the general belief that people are responsible for their life, their place in society, and their relative well-being as compared to others. In the same vein, the worse-off will have no one to blame but their own inferior performance and lack of enterprise to seize opportunities. Even the most responsibility-centered advocates will admit that external circumstances, which in these theories go under the name of luck, strongly influence the range of choices an individual commands. Human beings are not born equal, genetics, moreover, audaciously asserting that molecular determination underlies not only corporeal anatomic and functional constitutional features, but also preferences and conducts. “Brute luck” points at the circumstances beyond personal control, which limit the exercise of autonomy, as distinct from “option luck” which describes the vagaries of results brought about by each person’s choices. Unlucky circumstances for which a person cannot be held responsible ought to be compensated in a fair society.

Luck egalitarianism, also known as equality of fortune, is “a hybrid of capitalism and the welfare state” (Anderson 1999), suggesting that unfortunate circumstances, being undeserved, ought to be removed or mitigated in order to secure a just allocation of essential material and functional resources, as well as empowerment; in addition, people ought to command a basic set of capabilities to compete in the market for their welfare, security, and wealth. The dividing line between undeserved misfortune and self-responsible outcomes is arbitrary and impossible to agree upon, for “structured social positions” and circumstances plays a major part not only at the starting-gate, but also throughout the whole length of peoples’ lives (Young 2011). To equalize the impact of uneven natural endowment, individuals should command a set of capabilities allowing them to function as human beings, as productive members of society, and as participating citizens in a democratic state. Whatever each person actually does with these capabilities is a matter of free choice and therefore

her own responsibility; unfortunate choices are not to be compensated unless they compromise the basic capabilities that are inalienable (Anderson 1999).

By flatly stating that democratic equality matches “the remedy to the injustice: if the injustice is exclusion, the remedy is inclusion,” an important bridge is spanned toward the ethics of respect and recognition, and subsequently to an ethics of protection. Respect trumps over equality, for every “person should be accorded the rights, the respect, the consideration, and the concern to which he is entitled by virtue of what he is and of what he has done.” Respect acknowledges individuality, which equality fails to do because it addresses disparity instead of actual need (Frankfurt 1997). In order to respect someone, three levels of recognition must be obtained and be correlated with corresponding obligations of fulfillment: a person’s “needs and desires,” her status as a moral agent, and the capabilities of social integration and participation. Individual needs and desires are to be met with love and care, moral status is to be respected, while social agency demand “solidarity” or “loyalty” (Honneth 1997). Although the ethics of recognition does consider basic needs, it cannot account for the moral quandaries of the distant, the absent, and the silent, who will not be recognized, for they are voiceless. Without saying so, it allows the liberal idea of earning respect without considering that earning something requires a set of basic capabilities.

In an elegant turnabout, A. Margalit believes that the values of equality and freedom depend on decent societies and institutions that do not humiliate their constituents (Margalit 1997). People are humiliated if they are mistreated, their merits are not recognized and, above all, their needs are ignored. The ethics of recognition has a strong theoretical appeal, but its translation into practice remains unexplored.

Need

Need is an often posed measure for just distribution, but objections are recurrently presented to hinder necessity from becoming a full-fledged and undisputed criterion for an ethics intent on assuaging and relieving deprivation and suffering caused by lack of essential goods. Needs are an unwanted but inevitable consequence of resources being finite and insufficient for universal satisfaction. Therefore, availability of essential resources would become a litmus test of a fair society that acknowledges and attends basic needs. Health care needs are seen in the humanitarian view as a “disturbance in health and wellbeing,” as opposed to the—“realistic view” that recognizes as need only those conditions ably met by medical intervention that “alters the prognosis of the disease in a favorable way at reasonable cost” (Acheson 1978). Both views are flawed from the ethical perspective: disturbance is too vague a term to vindicate a duty or a right, and conditioning need to the ability of satisfying it is inconsistent: did suffering from AIDS only qualify as need once antiviral agents became available? At the most, it could be said that the obligation to satisfy a need cannot obtain unless an effective intervention exists—can implies ought—but the actual suffering of the needy remains undaunted whether relief exists or not. It is further objected that needs lack objectivity and are a matter of

personal preferences and idiosyncrasies. “Which claims count as needs in the first place; which needs give rise to demands of justice; and how to establish priorities among different qualifying claims: these questions raise complex ethical issues that belie the apparent simplicity of “to each according to his needs”” (Miller 1999). These objections miss the moral point that certain needs are basic and universal, and that resources probably would if justly distributed.

Bodily needs are no doubt essential. Food and water are indispensable elements for survival, and if the autopoietic [self-generating] vital processes fail to perform—as in disease—the living system succumbs unless external assistance—therapeutic care—is instituted. The basic needs of living beings are universal and therefore public, that is, generally accepted. These needs are not negotiable, neither amenable to lexical ordering nor postponement, for they cannot be displaced from their principal position by other needs. Being universal, bodily needs are context independent and distance neutral, equally valid if directly recognized or reported from remote regions.

A reasonable and straightforward understanding of needs defines them as requirements of an organism in order to live a healthy life, but such a definition will not do since it relies on “healthy life” as a criterion that is itself undefined and controversial. Other descriptions are more ambitious, like Maslow’s hierarchy of psychological needs or preferences. Broadly relating needs to undefined and unspecified social integration make it all the more difficult to identify those necessities that are primary, inherent, or fundamental. Nor is much gained by resorting to Marx’s vivid aphorism “to each according to his needs” or his definition of humans as “creatures of need.” Comprehensive definitions bring forth subjective elements that invite polemics and foreclose agreements as to what ought to qualify as basic need.

Occasional approaches have set priorities in a realistic bottom-up perspective. Thus, the Framework Convention on Global Health (FRGH) hosted by the O’Neill Institute for National and Global Health Law proposes to “set priorities so that international assistance is appropriately directed at meeting basic survival needs” and directing resources “so that all elements of the health sector can perform their core functions and meet the population’s basic needs in a sustainable manner” (Gostin and Mok 2010). Down-to-earth recognition of unmet essential needs is a more promising approach than proclaiming officially favored unrealistic goals like global justice or universal well-being, hopefully meeting approval and inspiring action.

Essential human necessities go beyond the stark fulfillment of corporeal requirements since humans must relate socially and integrate to the milieu they live in, developing the empowerment to autonomously exercise certain capabilities in pursuance of existential projects. Lack of basic social capabilities is also a situation of dire need, for the disempowered will not survive in a structured and complex society.

Intent on the provision of bodily survival needs—food, shelter, medical care, basic education—and securing social agency that safeguards the luckless from irretrievably precipitating into primeval impotence, societies must institute a safety net in form of unemployment subsidy, emergency loans, disease treatment, rehabilitation, old-age support. Even such a coarse mapping of needs as bodily essential and existentially basic should help design a social agenda that recognizes obligations to the needy—those in dire bodily need—and those requiring empowerment

to maintain autonomous functioning in pursuance of a life-project. Though captive in the language of justice, a similar proposal is echoed in the statement that “the foundation of deontology is *the desire to live well with and for others in just institutions*” (Ricoeur 1992, italics in the original).

Need must be related to the needy, an apparent tautology that stresses the objective quality of basic needs, and should discourage those who condemn need-talk to triteness by claiming that arbitrary idiosyncrasies posing as necessities are not to be socially respected. Certainly, even basic needs may to some degree be contextual: in poor communities survival is the primordial need, whereas in more developed societies it is essential to be capable of mastering certain basic skills in order to gain support and social integration. Philosopher Agnes Heller has theorized on necessity, attending to J.P. Sartre’s distinction between *manqué*—deficiency that reflects need—and *project*—life plans referred to satisfaction. She has also made the point that political and cultural systems tend to foist needs on people in a way that contradicts the most elementary necessity of being one’s own master (Heller 1993).

Needs are to be understood from a bottom-up perspective that recognizes their stark reality and frees the issue from as much contextual ballast as possible to gain them universal acceptance as basic to survival. Grass-root bottom-up health care planning as practiced in Oregon is a case in point, as is the report about deliberating low-income individuals that have been known to voice their hope of directing “planning and budgeting services to most effectively address the immediate needs of the community” (Pesce et al. 2011). It might be argued that context-free conceptual definitions of need are contradictory in relation to tangible basic goods and services, but a robust ethical concept of need ought to resist the bloodless vagaries of financial narrowness and political moods.

One of the most discussed forms for allocating scarce medical resources is the strategy of triage, inherited from the Napoleonic wars. Essentially, triage suggests reserving scarce resources to those who will actually be rescued if attended to. In war time, this meant that the severely injured were left behind because they could not be salvaged, while the lightly wounded were also neglected, since they would probably heal without intervention. If looked at through the optics of need, triage represents a need-based criterion of allocations, since resources are concentrated on those who require them most, for their future is the one that directly depends on receiving care.

Poverty

Looking closer at poverty reveals some unsettling realities. A country may be at the top of the list in terms of *per capita* income and overall human development—a concept used by the United Nations Development Program—yet perform badly in poverty rating or population health ranking, thus illustrating that equality is foremost a matter of distribution rather than aggregate wealth. Equally baffling is the fact that minimum wages may be insufficient to keep families out of absolute poverty, in which case they are, in fact, subminimal (Williamson and Reutter 1999).

Basic needs are related to biological deprivation, whereas comparative poverty, although including needs, is associated with social indicators that measure social inclusion/exclusion (Marlier and Atkinson 2010). “Poverty is not an absolute state”; individuals and families whose resources over time fall seriously below the average of members of the community in which they live “are in poverty” (Townsend 2010).

Economists distinguish between absolute poverty related to material want, and relative poverty referred to social deprivation (Williamson and Reutter 1999). The absolute poor are deprived of the essential goods necessary to cover their biological needs, while the relatively poor are insufficiently empowered and devoid of opportunities on average available to other members of their society. Health care programs should address need and deficient empowerment inasmuch as both kinds of poverty are detrimental to health. Resources being scarce, public health must first attend those in dire need—the undernourished, those weakened by disease, those befallen by catastrophic illness, the unprotected—before attending the health problems of social deprivation—emotional distress, mental illness—which may have to be postponed for lack of funds, but cannot be ignored.

Primary Goods

Arguments from insufficient resources are specious as long as short supply of basic goods is caused by grossly unequal distribution and not by absolute scarcity. The world’s wealth increases, and so does the population of the needy. Discrimination, exclusion, illegal immigration, and economic crisis are some factors that perpetuate pockets of destitute populations even in the most affluent nations. Superfluity and consumerism flourish side-by-side with people in dire needs as shown by the fact that humanity produces enough food to provide over 3,000 calories per day to every human being on earth. This massive food production is consumed, abused, or wasted in such a way that one third of the human population is undernourished, half of which receives less than the minimum food uptake necessary for body maintenance (Nadakavukaren 1984).

The enormously complex issue of relating needs, primary goods, empowerment, and citizenship, has tasked the efforts of influential philosophers. Rawls elaborates the specification of citizens’ needs as “a construct worked out from within a political conception and not from within a comprehensive doctrine.” His list of primary goods is a “political understanding of what is publicly recognized as citizens’ needs,” and yet, one of its headings is “income and wealth,” hardly a basic need (Rawls 1996). Rawls is dealing with members of society who enjoy the status of citizens, and rely on a functioning democracy that facilitates agreements on an equal standing—the original position: each participant enjoys equal rational expediency to engage in reflective equilibrium and reach overlapping consensus. This is, of course, a very selective view of humanity. A. Sen is less interested in listing and indexing primary goods, than in describing their functional value to reach empowerment and develop capabilities, but some primary goods are so essential that they are transcendental, that is, necessary conditions that must initially obtain before an

individual can decide what goods he wishes to engage in pursuing his choice of achievements. The capabilities freely employed are rooted in the basic empowerment every person requires to pursue whatever life-plan is freely chosen.

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