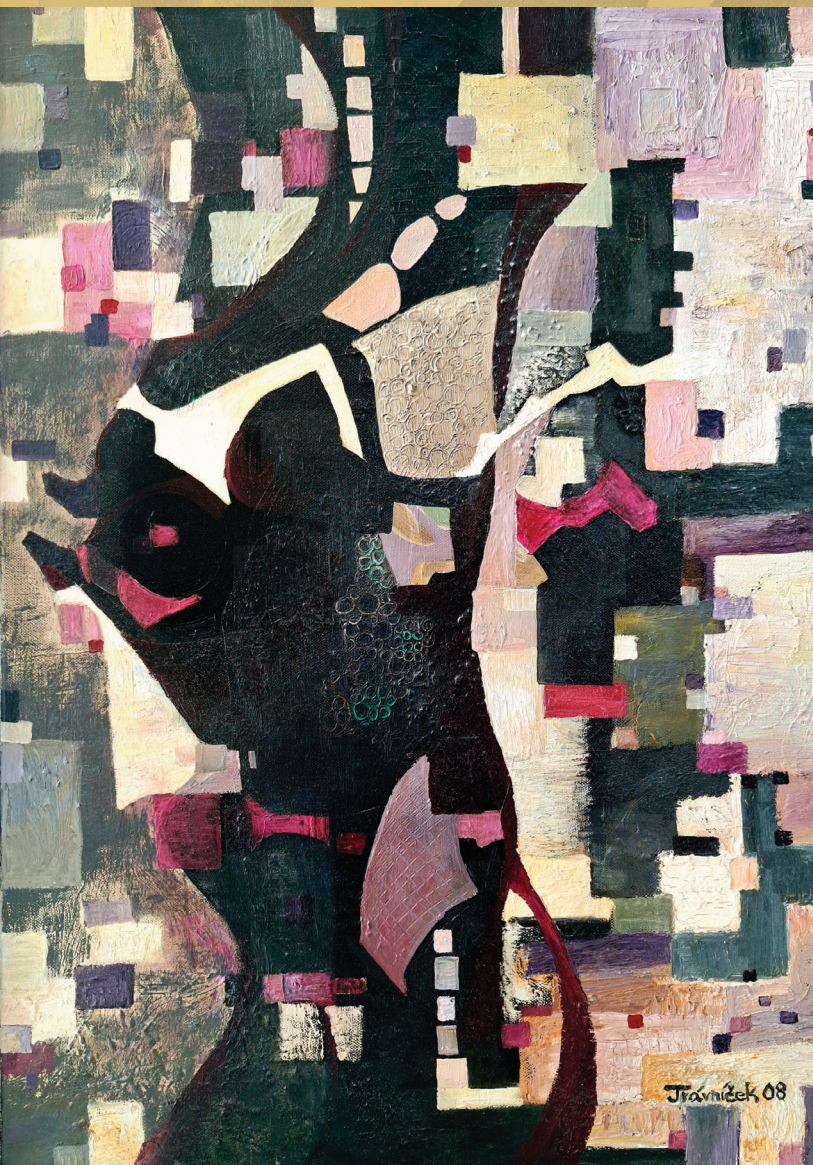


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Martin Hapla

Philosophy of human rights

Concept
and justification
theories

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The philosophy of human rights

Concept and justification
theories

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Foreword

Philosophers are not interested in questions with simple answers but those which are difficult to solve, which is why lengthy and sophisticated debates surround so many of them. This also applies to those questions which are the focus of this book. *Why should we have human rights?* Over time, a large number of possible answers have surfaced. A significant part of the academic community has even been quite open to accepting some of them, though they have always remained the subject of lasting doubts and the targets of criticism by sceptical authors. The main objective of this monograph is to coherently present these discussions and highlight an area which tends to be marginalized. Surprisingly, it may be a school of thought commonly viewed as conflicting with human rights that offers valuable help in answering this challenging question.¹ This is utilitarianism, or one of its variations to be precise.

It is important to note that the book you are holding is not the full original work. It is a translation of my monograph *Utilitarismus a filozofie lidských práv* (Utilitarianism and the Philosophy of Human Rights),² which came out in Czech in 2022. As the title suggests, utilitarian ethics were the focus here. Its ambition was to rehabilitate this school of thought within the Czech Republic. Until its publication, utilitarianism had never been comprehensively presented here, and any preconceptions which the legal community had tended to be strange caricatures.³ The situation abroad is different in this regard, which is also reflected in the structure and title of the translated text. Two chapters have been omitted, which introduced the aforementioned theory and

1 Cf. e.g. LYONS, David. Human Rights and the General Welfare. *Philosophy & Public Affairs*. 1977, vol. 6, n. 2, p. 115. LYONS, David. Utility and Rights. *Nomos*. 1982, vol. 24, p. 109. See also HUSAK, Douglas N. Why There Are No Human Rights. *Social Theory and Practice*. 1984, vol. 10, n. 2, p. 125.

2 HAPLA, Martin. *Utilitarismus a filozofie lidských práv*. Prague: Leges, 2022.

3 Until the publication of my book, Tomáš Sobek was the only Czech author who had given this approach adequate attention. See e.g. SOBEK, Tomáš. *Právní rozum a morální cit: hodnotové základy právního myšlení*. Praha: Ústav státu a práva AV ČR, 2016, esp. p. 181. To a lesser degree certain aspects of utilitarianism were studied in Slovakia by Martin Turčan. See, e.g. his text TURČAN, Martin. K otázke pohnútky a úmyslu v utilitaristickej etike. In: KLUKNAVSKÁ, Andrea and Tomáš GÁBRIŠ (eds.). *Ad iustitiam per ius: pocta prof. PhDr. Jarmile Chovancovej, CSc.* Bratislava: Wolters Kluwer, 2018, pp. 70–85. In their writings, other authors tend to mention this theory seldom and very critically if they do so. Cf. e.g. WEINBERGER, Ota. Teorie spravdnosti, demokracie a právní politika. *Právník*. 1995, vol. 134, n. 6, pp. 519–520. HOLLÄNDER, Pavel. *Filipika proti redukcionizmu: (texty z filozofie práva)*. Bratislava: Kalligram, 2009, pp. 21–22. HOLLÄNDER, Pavel. *Filozofie práva*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2012, p. 335.

showed the traditional objections towards it and how these could be resolved. Various changes were then carried out in other sections to ensure coherency following this intervention. The result, therefore, is a publication in which utilitarianism is still afforded much attention, though more as one of several justificatory approaches which the book presents. This might have made it slightly less controversial, but not – I hope – any less interesting.⁴

4 For the sake of thoroughness, I should mention that several of the original Czech chapters in this monograph draw on earlier texts of mine published between 2018 and 2020, primarily in academic journals. In this way, I incorporated certain passages from my articles such as *Utilitarismus a lidská práva* (HAPLA, Martin. *Utilitarismus a lidská práva. Časopis pro právní vědu a praxi*. 2020, year 28, n. 3, pp. 321–336.), *Lidská práva a základní potřeby* (HAPLA, Martin. *Lidská práva a základní potřeby. Právnický*. 2018, vol. 157, n. 1, pp. 31–49.), *Etika lidských práv* (HAPLA, Martin. *Etika lidských práv*. In: SOBEK, Tomáš (ed.). *Právní etika*. Prague: Leges, 2019, pp. 141–157.), *Justifikace lidských práv a is-ought problém* (HAPLA, Martin. *Justifikace lidských práv a is-ought problém. Časopis pro právní vědu a praxi*. 2020, vol. 28, n. 1, pp. 37–54.). The last chapter in part comes from my text *Když se příběhy berou vážně – Richard Rorty, dialog mezi kulturami a lidská práva* (HAPLA, Martin. *Když se příběhy berou vážně – Richard Rorty, dialog mezi kulturami a lidská práva. Iurium Scriptum*. 2018, vol. 2, n. 1, pp. 15–26.). It is possible to consider it as an expanded and fundamentally revised version.

Introduction

Within academic discussions today, the term ‘human rights’ has become more and more frequently used. For example, in the English literature its use has increased two hundred-fold, and at present it is used one hundred times more often than constitutional or natural rights.⁵ Moreover, these rights are not merely being discussed by academics, but also by lawyers, politicians, journalists, as well as many other people. It has thus become a standard part of the academic as well as the everyday lexicon. This success contrasts interestingly with the doubts expressed by a number of authors about the theoretical grounding of human rights. It has often been claimed that their source is far from clear,⁶ that they lack an appropriate theoretical foundation⁷ and that in the words of the famous Scottish philosopher Alasdair MacIntyre – “every attempt to give good reasons for believing that there are such rights has failed.”⁸ Despite all of their strong points, there is still a very pronounced scepticism associated with them, which indicates that we are unable to give a convincing answer to the question why we actually have them.⁹ In the words of Vittorio Bufacchi: “The only consensus about human rights is that there is no consensus on the nature and justification of human rights.”¹⁰

However, is such scepticism really justified? To a large degree, this depends on what we understand by human rights and what claims we associate with their theoretical foundation. If someone were to imagine them as a certain kind of thing, existing in a strange transcendent realm, and chosen individuals (for example, members of a constituent assembly or constitutional judges) recognized them through a mysterious sixth sense, then such a notion would of course be indefensible.¹¹ If someone were to understand human rights in this way, then their relationship to them would be most

5 POSNER, Eric A. *The Twilight of Human Rights Law*. New York: Oxford University Press, 2014, p.6.

6 NEUMANN, Michael. Needs Not Rights. *Canadian Journal of Philosophy*. 1992, vol. 22, no. 3, p.353.

FREEMAN, Michael. The Problem of Secularism in Human Rights Theory. *Human Rights Quarterly*. 2004, vol. 26, n. 2, p. 392.

7 FREEMAN, Michael. The Philosophical Foundations of Human Rights. *Human Rights Quarterly*. 1994, vol. 16, n. 3, p. 500.

8 MACINTYRE, Alasdair. *After Virtue. A Study in Moral Theory*. Indiana: University of Notre Dame Press, 2007, p. 69.

9 This issue was already addressed in my first book. See HAPLA, Martin. *Lidská práva bez metafyziky: legitimita v (post)moderní době*. Brno: Masaryk University, 2016, pp. 9–11.

10 BUFACCHI, Vittorio. Theoretical Foundations for Human Rights. *Political Studies*. 2017, vol. 66, iss. 3, p. 601.

11 See also some of the conclusions drawn in my first book: HAPLA, 2016, op. cit., pp. 136–137.

suitably described as belief,¹² with the added remark that in this case, there would really be no difference from belief in unicorns or witches, as was vividly suggested by the aforementioned MacIntyre.¹³ In my book *Lidská práva bez metafyziky* (Human Rights without Metaphysics), which was published in Czech in 2016, I attempted to demonstrate how such an idea of human rights was fundamentally flawed. I still subscribe to this conclusion today. However, this in no way means that we cannot conceive of these rights in another way, or that questions concerning their theoretical foundation cannot make perfect sense under certain circumstances and even have an acceptable answer. One of the things I set out to do in my new work was to show what such a meaningful and workable concept might be – in other words, how we should understand human rights in order for them to be a plausible and transparent concept from a theoretical perspective, rather than some mysterious entity shrouded in mist, which no reasonable person could take seriously.

I claim that one of the keys to a defensible concept of human rights is to attribute them with an intersubjective rather than objective character.¹⁴ What exactly do I mean by this? If we state that these rights exist, this doesn't mean that they have some kind of mental or physical attributes.¹⁵ Their existence is nothing more than their validity, and this comes from the relevance of the moral reasons which support these rights.¹⁶ Put simply, human rights are not a matter of faith, they are a matter of reasoning. We take them seriously because the arguments for them are stronger than for any of the alternatives. If it is unsettling to imagine an SS officer sending Jews to the gas chambers of Auschwitz because without eternal objective truths everything is just relative and therefore permissible, then the concept outlined offers an elegant solution to this problem. What arguments can be put forward to justify such behaviour? And contrastingly, how can we support the alternatives? If we require our positions to be justified, then these matters have already ceased to be arbitrary. If there are compelling reasons for human rights, then we can't simply dismiss them by saying we hold a different opinion. The process of reasoning also has its limits, but it is still the best instrument we have at our disposal. On the other hand, the mere reference

12 The issue of what it means to believe in human rights has been raised by, for example, Michael Ignatieff. See, IGNATIEFF, Michael. *Human Rights as Politics and Idolatry*. Princeton: Princeton University Press, 2003, p. 53.

13 MACINTYRE, 2004, op. cit., p. 89.

14 See also some of the considerations in my article HAPLA, Martin. Justifikace lidských práv a is-ought problém. *Časopis pro právní vědu a praxi*. 2020, vol. 28, n. 1, pp. 40–41.

15 GEWIRTH, Alan. The Epistemology of Human Rights. *Social Philosophy & Policy*. 1984, vol. 1, n. 2, p. 3.

16 Compare this with Michael Freeman's claim that human rights exist to the extent that the reasons supporting them are strong. FREEMAN, Michael. *Human Rights. An Interdisciplinary Approach*. Cambridge: Polity Press, 2011, p. 88. See also a similar approach by Robert Alexy. ALEXY, Robert Law, Morality, and the Existence of Human Rights. *Ratio Juris*. 2012, vol. 25, n. 1, p. 10. Cf. also a similar line of thought in BILETZKI, Anat. *Philosophy of Human Rights. A Systematic Introduction*. New York and London: Routledge, 2020, p. 37.