THE LANGUAGE OF HUMAN RIGHTS AND RIGHTS - TALK IN SOCIETY

NAYEEMA HAQUE

We are all familiar with 'rights', whether we encounter them simply in asking if we have any right to assume so and so in different cases or in the rules and regulations of institutions, games etc. Questions about rights also get involved in consideration over weighty issues of morals, politics, law and widely social contexts because rights are something one can have or be given, earned, enjoyed, or exercised. The idea of human rights is a contentious affair of contemporary world and it is stated in length by international proprieties, both globally and regionally. But this idea is not exposed enough, however much its proponents try to dig into it and explain it as a self-evidenced one.

In the context of moral discourse, duty seems more obvious, and is certainly more ancient, than right. The utilitarian doctrine of the greatest happiness of the greatest number has so long been granted as a more fixed criterion of moral virtue than the idea of moral rights. Again, sociologically, it is evident that individuals gather together as members of communities who are less than global in extent, but they stand together as equal members of the society of all humankind. The starting question is what is *right* and how to understand the language of rights. Do the individuals enjoy their rights in society? What could be their language of rights that they intend to establish? Can talk about rights be established? The questions raised cannot be answered properly if the idea of human rights is not clearly explained and I shall begin with an attempt to make it clear. The question, which I shall try to answer first in this essay, is conceptual. With regards to the question of what rights people actually have or ought to have, I shall try to

Indian Philosophical Quarterly XXIX No 4
Oct. 2002

explain what are distinctively held to be human rights, the grounding of human rights, and finally the language of talk about rights in society.

To begin with the conception of rights the preliminary question that arises is whether 'right' has any denotation or reference. It is a common assumption and indeed a traditional philosophical assumption that all words, for example, 'pen', 'book', 'chalk' etc. do refer to some item in the world. Historically this view is held to be true, at least in legal circles, of the word 'right'. Pollock[1] (1929, pp.89-95) and Maitland[2] (1923, pp.124-49) write that in medieval period a right used to be regarded as a corporeal sort of stuff like property or land. However, they rejected this view but continue to hold on the assumption that the word denotes some object which they regard as an incorporeal thing. Bentham[3] (1970, pp./251-2) advocates the opinion that the word 'right' does not denote any corporeal substance but assumes that it denotes a fictitious object or entity (may be he believes it to be non-denotative). These views thus suggest that the word 'right' does not denote or refer any particular object, whether physical or mental.

The non-denoting function of 'right' has, however, led some philosophers to the conclusion that sentences employing such words do not express truths or state facts. Olivecrona[4] (1971, pp.181-2) categorically states that the notion of 'right' does not correspond to facts. For him, the idea of 'right' as non-denoting and yet the sentences containing it referring to factual circumstances is purely inconsistent. What then is a fact? A fact is usually defined as that which corresponds to a statement or makes it true. It appears to have some existence in the world, independent of thought and language. Facts may be regarded as some sets of objects in the world related in certain ways, for example, 'The sky is blue' is a fact. White[5] (1970, 80nn, 6&7) talks differently in that, facts are not, and do not have the characterstics of any part of the world. Unlike objects, situations, or states of affairs, facts have no date or location. Facts can be stated, whereas events and situations are described. For him, there may be facts about an event, situation, or states of affairs, but not the latter about a fact. True statements like 'The British Airways Flight from Bangladesh to England is at 9 p.m.', state a fact, but do not describe a situation or state of affairs.

The proposal here is that talking about someone having a right to

such and such can be a fact, but 'right' itself does not refer to any items in the world any more than a fact does. Since the conception of 'right' cannot be grasped by pursuing some item which it stands for, we can try to apprehend it to the circumstances in which it is used and to the relations it has to other notions which are commonly associated in thought with it. The related notions need to be included are *duty, liberty, power, claim* and *obligation.*

It is necessary first to defend rights against rationalist philosophy of history in that if the logic of history is the key to everything that happens, the values of judicial humanism are strictly relative to the historical moment of their appearance. The view that reality is subjected to the mastery of reason intends to follow Hegelian formula that "everything in history has unfolded rationally". If we return to the ancient conception of law and right we can get a historical picture of classical idea of rights, particularly Aristotelian thinking about right. The classical idea of law is defined against the authority of tradition, of the notion of nature understood as a 'standard'. Through the discovery of nature, the authority of par excellence, the ancestral was uprooted, philosophy recognizes that nature is the authority and thus originates the idea of *natural right.*

In order to provide the characteristics of this classical conception of right, we need to show what conception of nature makes possible a distinction between the *is* and the *ought* - a distinction that gives meaning to the very idea of right. We first note that, by adopting 'nature' as a criterion (standard) of the just, the ancients, unlike the moderns' consideration of the *subject's* reason, regard a substanitial element, the cosmic order as a model which constitutes a dimension of *objectivity* independently of the subject. As opposed to the 'subjective right' of the moderns, ancient natural right thus proposes the pattern of an 'objective right' which is not derived from the requirements of human reason but can be observed and revealed in nature. Thus to understand the role of nature to decide what is 'just', the Greek idea is that natural right in its classic form is connected with a theological view of the universe. Aristotle's idea of a purposeful world can be recalled in this context.

For Aristotle, the fact that objects move is not explained by impacts

that can be the efficient cause of movement for the moderns. The cause of the movement is a *final* cause, objects move so as to regain their natural place, to occupy the place in the cosmos which corresponds to their nature and in which their essential features are finally established. Thus nature itself is the principle of movement, which occurs only insofar as an object has been driven from its natural place by some other object inclined toward its own place. And finally the movement of the object ends after regaining its position.

Aristotle's explanation of cosmology gives an account of nature as the criterion of the just. Right can be determined by considering the order in which everything that exists has, by virture of its nature, something like a right to occupy its proper place and where it attains the perfection of its essence. Thus the just, for a given thing, is what corresponds to its natural (*its telos)*- injustice, at the level of human actions, a movement by which some reality drives another one out of its natural place and prevents from being what it is.

What follows from this ancient idea of right is that the natural law of the just, the objective basis of right, is determined as the rightful place for something in the purposeful cosmos. The science of right, on the other hand, is defined not as the area of laying down rules of conduct, but as the science of distribution or division like the formula of Roman law : *suum cuique tribuere* (to give to each what is his due). Thus justice can primarily be formulated as distributive justice. Because justice is inscribed in the very nature of things, the method of the law will decide what is legitimate or rightful for each person according to the hierarchy of the cosmos.

Given this view, the term 'natural' in natural law is readily intelligible in Lockean[6] thought (1960). Natural law describes a body of rules, authorizing human conduct, which are visualized as part of a natural ordr of things. These are laws laid down by God for human beings: they are natural because they are not 'artificial' laws as formulated by men. They are part of a given natural order of things as what can be considered presently as scientific 'laws of nature'. The laws of nature laid down by God should govern the laws advocated by human rulers.

For Locke, the basic moral rule that man require to conduct his life

are provided by the law of nature and that law is fully available to everybody in the state of nature. The state of nature is characterized by a structure of moral rights and duties supplied by God's natural law. Conflicts and problems emerge only when men fail to correspond to the natural law that God has provided. The failure of understanding natural law instigates men to establish political authority. But the establishment of political authority does not mean the disappearance of natural rights. Rather, Locke argues that men carry their natural rights forward with them into political society.

In the full language of 'human right', therefore, only a *person* or a *human being* can logically have a right because only human beings can be the holder of these types of affirmations. Non-humans cannot be the subjects of rights, however properly it may be treated to them in some particular ways. For example, children, the dead etc. may be empirically unable for various reasons to perform the complete role of a right-holder. But so long they are humans - and we crucially think and speak of them as young, feeble-minded, crippled, dead *persons*- they are logically possible subjects of rights to whom the full language of rights can importantly, however falsely, be used. These humans cannot unfortunately exert or claim their rights or fulfil their duty. In Roman law slaves were things, not human beings, and therefore, had no rights. The modern law has always linked together the concept of a human and of the bearers of rights, duties, privileges, etc., which shows that a change in application of one notion has accompanied a pearallel change in application of the other. Thus emerges the significance of using a set of concepts, for example, rights, duties, privileges, etc., together and not secluding one of them, for example, right, which is, as Wittgenstein[7] (1968,#38.) might put it, the lone concept is only idling. What follows is that the job done in such contexts by the notion of 'a right' as opposed to that of 'right' can be questioned when it is segregated from other normal associative notions like duty, obligation, power, etc.

Before discussing the logical form of the idea of rights we must make a preliminary distinction between legal or positive rights on the one side and moral or human rights on the other. Legal or positive rights are those which persons have by virtue of some legal or customary practice within society. For example, a person has the right to vote in his/her country's general elections, but not in the elections of some other countries. The

legal codes of each country may vary in terms of offering or denying the right as the case may be. Moral or human rights by contrast are less discernible, being endowed or denied in terms of a moral code. For instance, it is the moral right of persons not to be physically assaulted by others. The basic distinction between legal and moral rights depends on the courses or processes that are involved in order to establish the existence of rights. As Weale expresses,

> Just as sentences in general take their meaning from the conditions that have to be satisfied in order for them to be true, so claims to the existence of rights take their character from the procedures that must be followed in order to establish their existence.[8] (1983,p.123)

In case of legal or positive rights the central idea, therefore, lies in the fact that appropriate legal or constitutional procedures have been followed in establishing the right. As opposed to this, a moral or ethical argument is supposed to lead to a conclusion to establish the right with regard to moral or human rights.

Despite the differences between legal and moral or human rights, there remain still to be explained the logical structure of the idea of 'rights'. A classification of the form of rights was propounded by Hohfeld[9] (1919) which has come to be regarded as the calssic analysis of types of legal rights. He divides rights into four types, which he names: claim, liberty, power, and immunities. We can explain them in turn.

Claim rights are those which constitute claim upon others and therefore, always exist in conjunction with others. For example, if a person A has lent money to another person B then A has a right to get that sum of money from B, and B has a reciprocal duty to pay back that amount of money to A. Hohfeld terms it as a right 'in its strict sense' although it is more commonly described as a 'claim-right' since it involves claims upon others and imposes a correlative duty to help secure the act protected by the right.

Liberty-rights, by contrast, are those whose exercise does not oblige other people under any duty to procure the ends for which the permitted action is undertaken. For example, if two persons are trying to buy a landed property, then each person is at liberty to buy it, but neither is under any

obligation to allow the other to do so.

A power is usally defined as the legal ability to change a legal relation. Such powers are more commonly stated as rights than as powers. For example, the right to make a will, the right to sue, the right to vote-each constitutes a power. In every case, the person involved has the legal power to effect some transaction. A person has the right to make a will in that the law provides a legal facility which enables him/her to decide the disposal of his/her property after his/her death.

Finally, to hold an immunity is not to be subjected to another's power, i.e., to possess an immunity is to be free of another's power. Immunities constiture the counterpart to powers, the correlative of an immunity is a disability. For example, in a society where there is no legal provision for divorce, a person is 'immune' from his/her spouse's power of divorcing. In other words, a person has the right not to be divorced by his/her spouse, in that spouses have no power to divorce. The point is that powers and 'immunities both concern the ability of person or institutions to determine the rights and duties of others.

But it would be wrong to believe that every right categorized by Hohfeld should belong to one and only one of the four types. For example, the assertion of a right to vote may be simultaneously the assertion of a power, a claim-right and a property-right. In a similar way, if one has a property-right in a car that would typically include his liberty-right as owner to use the car; the claim-right that other should refrain from damaging his car or using it without his permission; the power to sell the car or permitting others to use it, and also immunity from any other power of others to dispose the car without his consent. The idea is that a single right might turn out to be a bunch of different types of right.

However, a society's conception of rights changes with social changes taking place. Hohfeldian four-fold classification helps us to follow the way of rights during the twentieth century. It is argued that the gains in civil rights of the eighteenth century (especially rights on arrest and trial) and in political rights in the nineteenth century (especially the political freedom of the working class) have been supplemented by gains in social rights in the twentieth century (especially the rights of social and economic security). Thus the number of rights, on this account, can be regarded to

have expanded which enable the citizens to enjoy in the twentieth century and indicates the sign of recognizing more rights to enjoy in the present century too.

Apart from Hohfeldian classification of rights, a right is usually thought of as consisting of five main elements: (i) the subject of a right claiming some thing (ii) the object of a right, by enjoying or demanding it through (iii) exercising a right, against some individual or a group who is (iv) the bearer of the correlative duty, specifying in support of his/her claim some particular ground (v) the justification of right. We can elaborate these in turn.

(i) The subject of a right, the right holder, might be specifically an individual. But it can also be a family, a group, a nation, a state, a culture, and even the entire world itself (in the journalists' word 'the world has a right to know)'.

(ii) The object of a right is what it is a right to. This is something that the right holder can claim which should be marked importantly by attaching the label 'right'. Thus the demand for a secured society or a secured life must be regarded as a top priority to run a state as claimed by its citizens.

(iii) Exercising a right, the activity which connects a subject to an object, can be formulated in various forms. It can be shown that right exists in the sense of a claim as a call for accepting something which is admitted. Or it can be done more confidently by asserting or demanding a right. It can also be done in a relaxed way by enjoying a right. Energetic versions also get involved in it in the sense of seeking protection against violation of law or demanding compensation for the damage done.

(iv) Rights, with some exceptions, are held against someone and it characteristically correlates with duty. The right of a lender to the repayment of a debt is held against the borrower which involves a specific duty of a particular person. Thus the link of duty with right helps to establish the idea that a *right* actually exists.

(v) Finally emerges the question of the justification of rights. A right as a *justified* claim suggests the importance of the social acceptance of the right. Social permission or command can help to empower the bearer of a right to enjoy it. Entitlement of enjoying a right then rests on social

sanction of the justice of a claim. The type of justification nevertheless varies and it might appeal to custom, contract, or statute. But the form of the defense of rights remains the same: e.g. one is entitled to the right *x* (property, freedom) because of *y* (contract, reason).

But how does the notion of 'human' fits or what does the addition of 'human' to 'rights' in each of these five elements signify?

Firstly, with regard to the idea of right holder, it suggests that every human being does have rights in some way. The subjects of human rights are not members of any particular society, but of the community of humankind.

Secondly, the objects of human rights are no less important than plain rights. In fact, human rights may be said to outweigh plain rights. The human right to life may be judged to override, in certain situation, a right under a particular civil law, say, to the use of land. For example a person to a 'secured life' which he can claim typically to his government in the form of protection of his life from any threats.

Thirdly, the exercise of human rights might have a more restricted range than that of civil rights. Rights indeed get involved with claiming, demanding, asserting, enjoying, protecting and enforcing. But in the case of *human* rights the assertive end of this entire compass is the most important. Because, prayer for human rights are often placed when the claims they pursue are not locally acknowledged in judicial law. Here the argument forwarded is that they should be so acknowledged, and enforcement would be the next step.

Fourthly, there is the question of the location of the duties that correlate with human rights. It can be said here that there are universal human rights in a strong and a weak sense. Rights in the weak sense are held against a partucular section of humanity. By contrast, the strong sense is considered to be globally held about rights of human beings where say, everyone has a right to life against everyone else and there is a general duty to respect it. Thus all (basic) human rights are said to be concerned with three correlative duties: duties to *avoid* depriving, duties to *protect* from deprivation and duties to *aid* the deprived. The duty-bearers, in different situations, may be different (individuals, responsible nations) and

the particular duty also varies (assistance in a natural disaster). But basic rights stimulate all these kinds of duty.

Finally, with regard to the justification of rights, rights can be conceived as possessed by all human beings simply as human beings. They can be described as 'general' since they are universal to all humanity. Merely being human is sufficient to make one a possessor of rights. It treats all human beings as its portrayal theme and attributes the ingredient of an equal basic moral significance to all human beings as such, but not in terms of different ideologies and cultures which give different moral statuses to people belonging to different races or religions.

If human being is defined as social and political animal then it does not need Aristotle's endorsement of regarding human as essentially rational to pass everywhere because it does not expect rationality to be present in every human when assembled. Aristotle, in fact, believes that although human beings actual tendencies are primarily non-logical, they are capable in principle- if trained technically to use the formal patterns of Aristotelian logic- of drawing valid conclusions from conceptually formulated premises. And one day they may prove their efficiency in working according to those validly deduced conclusions. But this Aristotelian thought hardly fits with the conception of human as social or political animal because even if anyone can be social or political, rational leadership can scarcely be developed in very few human beings.

However, social or political animal can be guided only indirectly, for the most part, by reason since their approach, even when they appear to follow the formal patterns of Aristotelian logic, will be largely non-logical. Most people live by impelling force rather than by strict reason. Whatever the degree of the power of logical thinking, all men are actively social and political. They associate themselves with various interests like economic, religious, cultural or simply social. But all their interests cannot be worked out properly without the concept of human right. Modern thought, therefore, has regarded rights as 'absolute' in the sense that -

An absolute right is one that is never justifiably infringed, it is a right that must be respected in all possible circumstances.[10] (Jones, 1994, p. 191)

The doctrine of human rights thus ascribes a number of rights to human beings indifferently in an extended way in that it portrays all humanity as its members and attributes an equal basic moral significance to all human beings as such. In that way it stands at odds with cultures and ideologies which give fundamentally different moral statuses to people belonging to different races, religions, sexes or castes. Human rights are thus said to have attained a legal or semi-legal status, since they are now manifested in a number of international conventions and declarations like the 'Universal declaration of Human Rights' adopted by the General Assembly of the United Nations in 1948. International lawyers also talk about human rights in the strictly legal sense according to the declarations established by the members of the international community or international agreement. Nevertheless, the idea of human rights remains fundamentally a non-legal one in the sense that these rights are something which human beings are speculated to possess independently of their being recognised in positive codes of law. The doctrine, therefore, advocates that declarations and conventions of human rights do not 'create' and 'give' rights to human beings, they simply recognise and announce the rights that human beings have.

There is, however, a fundamental difference between the claim that *human beings* have rights and that human beings have *rights*. The first claim gives emphasis on the idea that merely being human is itself of moral significance and believes that being human makes one a member of the moral community. It maintains the view that there are certain ways in which it is right or wrong morally to treat *any* human being. The difficulty that crops up here is to assess the range of 'human' since its area in 'human rights' is not very simple. Some rights can be extended to the whole of humanity without qualification. For example, the right not to be tortured generally is and can be ascribed to all human beings independently of their qualification. But not all human rights can be claimed for everybody who are biologically *human,* e.g. the right of self-determination. These are confirmed as human rights with the implicit idea that they are not being attributed to the very young or to mentally handicapped adults. They are intelligibly attributed to human beings only when they possess perfect human capacities. But this is a disputed issue since it is well illustrated by arguments about abortions and the right to life.

By contrast there are rights which can be extended beyond the human race and may be ascribed to non-human beings. For example, the right not to be subjected to cruelty can be ascribed to all living beings. This suggests that not all human rights necessarily need to be only human rights. However, human beings are concerned with respecting human *rights* and the responsibility or duty lies upon them not to deny the moral relevance of humanity. They can and do share the general idea of human rights even though they differ over the specific rights they have, the possible rights that they can have and over the implications of these rights. This diverse thought about human rights makes the idea more logical and defensible. But when the question of implementation comes in, the diverse thought associated with human rights obviously creates problems.

Questions about rights, therefore, need to be further queried with regard to its absoluteness. Should all rights be regarded as absolute? If they are given the status of absoluteness with an added status of moral concern, can they maintain the conception of right as absolute? If the purpose of human rights is to provide guaranteed protection of individual persons,what sort of guarantee would it render to people when the right of not being tortured is not absolute? Can these rights be infringed in the 'national interest' and specially not claimed by those government dishonoring human rights for some justification for such violation? Despite the right not to be tortured listed in the UN Declaration, it is not very unusual to think of circumstances where it is put to test. For example, a bomb implanted by a terrorist will result in the killing of hundreds of innocent people. The terrorist's aim may be to implement some special purpose like asking for his country's independence from foreign captivity. If the man in this case is arrested but the result to find out the location of the bomb turns out to be negative, then the usual process to reveal the secret of the bomb in order to save hundred innocent lives is torturing. But should he be tortured or left free to give him the right of 'not being tortured' an absolute status in spite of the involvement of human costs?

This leads to the path of an unfortunate choice of alternatives where one option will be to treat rights as absolute which undoubtedly will give them a decisive status. Again, it might lead to unsatisfactory result morally and also purely incoherent outcomes (when one right will conflict with one

another). The other option will be to hold straightway that rights cannot have absolute status which will then immediately raise the question of what rights morally signify or indicate. The question is complex and there is no easy way out of these options.

The very idea of human rights looks special therefore, and cannot be answered simply in terms of conceptual setup since moral outcomes creep into it. Similar problem arises in case of ascribing fundamental moral importance to any principle like keeping promises, telling the truth, etc.-- where there could be circumstances in which any one particular principle will be justifiably kept aside or overriden. One solution will be that the question of rights is given special status because it has been considered with the provision of security and protection. There may be a day when people will be well considerate towards each other and that insistence upon their rights will become unnecessary. At that stage securing and protecting individuals rights should be validated fully which, unfortunately, are not furnished now. The existing global situation of disastrous political experiments has indicated widely that the present non-establishment of rights cannot accelerate this trip to the pledged home.

NOTES

1. Pollock, F. H., *First Book of Jurisprudence*, 6th ed., London, 1929.
2. Maitland, F. W., *The History of English Law*, 2nd ed., Cambridge University Press, 1923.
3. Bentham, J. *Laws in General* ed., H.L.A. Hart, London, 1970.
4. Olivecrona, K. *Law as Fact*, London, 1971.
5. White, A. T. *Truth*, London, 1970.
6. Locke, J. *Two Treatises of Government*, ed. Peter Laslett, Cambridge University Press, 1960.
7. Wittgenstein, L. *Philosophical Investigations* tr. G.E.M. Anscombe, Blackwell, 1968.
8. Weale, A. *Political Theory and Social Policy*, The MacMillam Press Ltd., London, 1983.

9. Hohfeld, W. N. *Fundamentals Legal Conceptions as Applied in Judicial Reasoning*, New Haven, Yale University Press, 1919.

10. Jones, P. *Rights*, Macmillan Press Ltd., London, 1994.