Human Rights

Lesson Five: Nature of Rights

**Learning Objectives**

**Knowledge**

1. Explore the concepts of rights and duties and their relationship
2. Understand the relationship between rights and the rule of law
3. Learn about the importance of duties and protecting one’s rights

**Skills**

1. Critical Thinking Skills

**Values and Attitudes**

1. Fair and Justice
2. Rules of Law
3. Responsibilities

**5.1 Rights and duties**

Human rights never exist alone. The concept of "rights" is necessarily conditional upon that of "duties". Indeed, the two concepts are inseparable. Rights are possible only if there is someone who has to fulfil the rights as a matter of duty. A "right" makes no semantical sense unless it entitles its holder to demand that a specific individual bear and discharge a duty to provide that entitlement. Put conversely, the duty obligates its bearer to respect the rights of a specific individual. If there is no duty-bearer against which to enforce the rights, then it is logically unsound to say that there was a right-holder in the first place. Since rights and duties are correlative, the violation of a right always entails the breach of someone's corresponding duty. The duty-bearer who violates another's rights (and breach his or her own duty), even if no actual damage has been caused, does a moral wrong against the latter: the violator strips the violated of their equal worth and dignity, treating the latter as a mere means to the former's selfish ends.

What and on whose duties do human rights place, then? The concept of “human rights” is traditionally invoked to check the organized and compulsive power of the state to which individuals are subjected. The primary focus is to hold to account state actors for infractions of fundamental human rights. Nevertheless, a paradigm change has emerged over the years, increasingly departing from the traditional notion of “human rights”. It may be argued now that if a non-state actor violates a person’s human rights, it should also be held accountable for the violation. In other words, it may be that human rights obligations can fall not only on states, but also on individuals.

In this lesson, we look at “duties” relating to human rights, which fall into two categories:

1. Duties of the government
2. Duties of the individual

As we shall see, the latter duties are, at least in part, derivative of the former.

Having surveyed the notion of “human duties”, we will turn to the discussion of the relationship between human rights and the rule of law and of clashes of rights.

**5.2 Duties of the government to respect, protect and fulfil human rights**

There are **three** levels of duties on the government in relation to all human rights:

1. First, it has the duty to respect the human rights of individuals. In other words, there is the *negative* duty to refrain from violating human rights.  
     
   e.g. The government must not exploit her own employees.
2. Second, the government have the duty to protect individuals from violations of human rights committed by non-state private actors. This is a *positive* duty which requires the government to actively take protective measures and exercise due diligence to prevent human rights violations, even if it is not the ones causing the violations.  
     
   e.g. The government should protect labour rights against unlawful actions of employers in private sector, ie. passing, enforcing and keep reviewing the Minimum Wage Ordinance.
3. Finally, the government bear the duty to fulfil or facilitate the enjoyment of human rights. This is another *positive* duty demanding positive and proactive measures, such as allocation of sufficient resources, to create conditions favourable to the exercise of human rights.

e.g. Governments should educate the public about labour rights and provide guidelines for forming and operating of labour unions.

**5.3 “Progressive realization” of economic, social and cultural rights and basic needs**

The government’s duties in relation to social, economic and cultural rights are in one respect different from its duties in relation to civil and political rights. Whilst civil and political rights are generally expected to be implemented and realized immediately, the International Covenant on Economic, Social and Cultural Rights expressly provides that the obligation of the state is “to take steps… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the… Covenant”. The concept of “progressive realization” means that economic, social and cultural rights need not be fully and immediately realized irrespective of economic reality.

That said, since human dignity is the basis of all human rights, government have the immediate duty to provide for the most basic needs of life required for human survival and happiness.

It follows that, at the very least, a government is obliged to provide for its people, amongst other things, essential foodstuffs, essential primary health care, basic shelter and housing, and the most basic forms of education. Thus, so far as this inviolable core is concerned, all human rights, whether civil-political or socio-economic, require immediate and active realization by the government.

**5.4 General duties of the individual to society**

Whilst individuals are primarily beneficiaries of human rights, to be enjoyed in society, these benefits bring, in turn, with them reciprocal duties owed to “the community in which alone the free and full development of [one’s] personality is possible”: Art 29 UDHR.

**Article 42, Basic Law**:  
“Hong Kong residents and other persons in Hong Kong shall have the obligation to abide by the laws in force in the Hong Kong Special Administrative Region.”

If “humanity” is a coin, one side of it is human rights; whilst the other side of it is responsibilities. It is both plain and necessary that the corollary of rights is responsibilities, because rights are not limitless, for otherwise there would not be social balance and harmony. Everyone who exercises his or her rights is bound to ensure that the rights of others are not violated. It follows that boundaries of human rights not only may but also must be drawn if both rights and duties are to be respected and honoured.

Unlike for “human rights”, however, there is no “universal” catalogue as such of “fundamental duties” or “human duties”. This is perhaps unsurprising: notwithstanding the undoubted need to strike a social balance between rights and duties, in almost any society the balance of power tilts overwhelmingly in favour of the state, which has the monopoly of the legal use of force, in the name of protecting all from each other, to impose restrictions on individual rights. Accordingly, it is usually the individual who needs specific protection of her fundamental rights and freedoms; the state has no similarly evident need for such specific protection in order to enforce the duties owed to it by individuals. Refer to the background of UDHR in chapter one for details.

Andrew Clapman, *Human Rights Obligations of Non-State Actors* (Oxford University Press: Oxford 2006)

That said, there are some general and obvious duties owed by the individual to society, including, for instance, a duty to obey the legitimate laws of the land. Further such general duties towards society, such as those enumerated in the African Charter on Human and Peoples' Rights, may include

* a duty to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect one’s parents at all times, to maintain them in case of need.
* a duty to serve one’s national community by placing one’s physical and intellectual abilities at its service;
* a duty not to compromise national security (refer to the 4 types of crimes under Hong Kong National Security Law for details);
* a duty to preserve and strengthen social and national solidarity;
* a duty to preserve and strengthen the independence and territorial integrity of one’s country in accordance with well-established international legal principles;
* a duty to work to pay taxes imposed by law in the interest of society;

These general duties are typically enforced by the government acting on behalf of society. You break the law if you fail to pay taxes in accordance with the relevant laws. As such, they are the inverse of the vertical duties of the government to promote and protect the individual's human rights. In exchange for the government’s protection, the individual reciprocates by discharging one’s own duties to better society.

**5.5 Duties of the individual to respect the human rights of others**

Inverse and general duties of the kind discussed above are by definition vague and open-ended. When abused, they can undermine human rights because the government may rely on them to offset the duties itself owes to the individual under human rights law. Indeed, an over-emphasis on one’s duties to their societies could provide governments with pretexts for limiting or overriding human rights. For example, critics of the leadership during a professed crisis or emergency can be, and usually are, denounced as traitors who compromise social and national solidarity.

Meanwhile, it cannot be denied that at least some private individuals have the power to harm one another greatly and results in serious impairment of human rights. Multinational corporations and terrorist groups are just a few examples that are as capable of mass human rights violations as governments. Similarly, violence against women, perhaps the most persistent human rights violation in the world today, is committed in the home by husbands and fathers far more often than by government agents such as the police. Many human rights, if they are to be enjoyed fully, thus need robust protection from private actors as much as they do from governments.

An alternative, and arguably better, way of thinking about “duties” is therefore by recognising “duties” as corresponding to human rights – that is, private duties to respect the human rights of others. For example, whereas an individual has a right to freedom of speech, others have the duty not to interfere with that right unless that speech threatens to infringe the rights of others. The advantage of this approach lies in the need for the government, every time it purports to enforce “human duties”, to pinpoint the human rights” on which the duties are based, thereby reducing the potential for arbitrariness or abuse.

**5.6 Victim-oriented Approach**

This is where the government’s duty to protect and fulfil human rights becomes relevant. The question here is conceptualized as one of whether the government has exercised due diligence to prevent or repress harm inflicted on a private individual *by* another private individual that, if directly inflicted by itself, would constitute a violation of human rights.

The conceptual basis of this approach is that it is the responsibility of the government to prevent such behaviour as well as to refrain from it itself. Ultimately, it is always the government that has the resources and capacity for effectively creating a human rights friendly culture that is intolerant of ill treatment, discrimination and other violations of human rights. This means that there will be no need really to hold “human duties” on an equal basis with “human rights” in practice – even though the two concepts ought to be equal in theory – but at the same time the government is allowed or indeed required to investigate and punish individuals for violating the human rights of others. Only this, as the late former Chairman of the United Nations Human Rights Committee put it, would be a truly “viable, victim-oriented approach that remains respectful of the essence of human rights”: Sir Nigel Rodley, 'Non-state actors and human rights' in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge handbook of International Human Rights Law* (Routledge 2013).

See further John H Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1.



**Case:**

In 23 Jan 2016, over 300 firefighters, police officers and paramedics were mobilised to respond to distress calls from those trapped on Tai Mo Shan, Hong Kong’s highest peak. They rescued a total of 129 mountain runners and curious citizens who went “frost-chasing”. Some took along their children on a “family outing”.

Rescuers were seen slipping over on the icy slopes and hurt themselves as well, since their standard-issue boots failed to provide any grip. There are only 56 pairs of crampons in the Fire Services Department’s entire inventory. Ambulances and fire engines are neither four-wheel drive nor prepared for icy conditions. A couple of ambulances had to turn away due to the conditions. The Government Flying Service, which managed eight flights that day, also admitted that their helicopters were not designed for such conditions.

One female citizen, obviously without adequate gear to have her adventure into the mountain peak was stopped by policemen on the road. The woman insisted to take the risk and yelled at the policemen, “This is my life!”

Questions:

1. Analyze the woman’s behavior with the theories you have learnt in normative ethics. Is her move ethical?
2. Weigh the woman’s claim of personal freedom against one’s duties and judge if this woman’s action is ethical.
3. Should the police officer in charge let her further access into the frozen road?
4. What other similar ethical circumstances can you think of?



**5.7 Human Rights and the Rule of Law**

All human beings have the right to be treated with dignity and respect. Such dignity and respect are afforded to people through the enjoyment of all human rights and are protected through the rule of law.

The rule of law has played an integral part in anchoring economic, social and cultural rights in national constitutions, laws and regulations. Where such rights are justiciable or their legal protection is otherwise ensured, the rule of law provides the means of redress when those rights are not upheld or public resources are misused.

While universally agreed human rights, norms and standards provide its normative foundation, the rule of law must be anchored in a national context, including its culture, history and politics.

The rule of law and human rights are two sides of the same principle, the freedom to live in dignity. The rule of law and human rights therefore have an indivisible and intrinsic relationship. That intrinsic relationship has been fully recognized by Member States since the adoption of the Universal Declaration of Human Rights, in which it is stated that it is essential, “if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”.

In the Declaration of the High-level Meeting on the Rule of Law, Member States of the United Nations emphasized that human rights and the rule of law were interlinked and mutually reinforcing.

Source: https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/

**5.8 Undermining Human Rights in the name of “Rule of Law”**

Teachers may select one Terms of Service and display the content on a big screen and invite one student to read one paragraph of the document. Time the reading speed and estimate the total hour needed for reading the whole document as advised by related law enforcing authority.

One example has been provided for teachers’ reference:

https://www.facebook.com/terms.php

Below is an extracted paragraph from one of the hyperlinks in the above document:

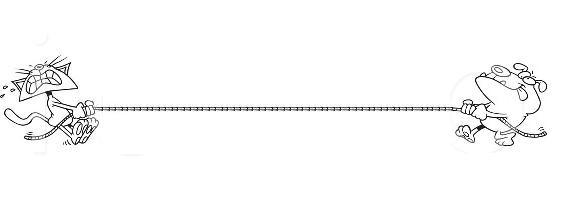
We may access, preserve and share your information in response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so. This may include responding to legal requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law in that jurisdiction, affects users in that jurisdiction, and is consistent with internationally recognized standards. We may also access, preserve and share information when we have a good faith belief it is necessary to: detect, prevent and address fraud and other illegal activity; to protect ourselves, you and others, including as part of investigations; or to prevent death or imminent bodily harm.

Questions:

1. In what circumstances that the above terms protect human rights
2. Will the terms undermine human rights in some other circumstances? Discuss in groups and suggest 2 situations that your human rights can be taken away LEGALLY.
3. What new understanding of “rule of law” can you generalize after exploring into the above case?

**5.9 Clashes of Rights**

For supporters of Human Rights ethicists, the most pain-skating problem is that, it is impossible to satisfy the rights of all parties in the community to their fullest extent. The issue is as much practical as it is conceptual. As the saying goes, a person’s human rights end where another’s human rights begin. It makes no sense to say, for example, freedom of movement enables a stranger to enter your bathroom while you are taking a bath. Thus, the real question is often how we can strike a fair balance between competing claims of human rights.



The following are some scenes where the rights of different parties may clash. Please explain when, how and in what circumstances might one human right prevails over another (**not always an easy question!**):

|  |  |
| --- | --- |
| The news reporters takes a photo of what happens inside a flat.  ***Right to Information***  **(What if all the reporters want to know is how the owner of the flat looks like when he is in the toilet?)** | The owner of the flat refuses to let reporters take photos of and publish the details his private life.  ***Right to Privacy***  **(What if there is credible intelligence that people in the flat are making a bomb?)** |
| A teenager tries to warn people that all the tap water has been poisoned.  ***Freedom of speech***  **(What if this is only the teenager’s irrational beliefs, unsupported by any evidence?)** | The citizens complain that such a claim makes them very anxious.  ***Right to information, Freedom from threat***  **(What if the claim is in fact supported by evidence?)** |
| The demonstrators obstructed the road peacefully, but block the only exit of the district.  ***Freedom of peaceful assembly***  **(What if the demonstrators are doing it just for fun?)** | The residents of the town cannot leave their homes because of the demonstration.  ***Freedom of movement***  **(What if the demonstrators are causing the obstruction only to stop a totalitarian government from committing genocide?)** |
| The Government wants to introduce universal education up to the level of PhD.  ***Right to education***  **(What if research shows that this would only lower the quality of education overall?)** | However, that means heavier taxation must be imposed.  ***Property Rights***  **(What if the increased amount would only be $1 per citizen?)** |
| The doctor wants to skip the procedure of organ donation for one particular patient.  ***Right to life***  **(What if the illness in question is not fatally urgent?)** | The authorities do not allow this because it would be unfair to others in the queue.  ***Right to life, Right to equality***  **(What if the patient would die if a surgery is not immediately performed?)** |

***Learning Activity 1***

Teachers may choose the following cases to design their own class learning activity. The purpose of this activity is to let student realize when rights conflict with each other, the society needs to go through a discussion process to determine the balancing point.

*(Cases extracted from “Making Human Rights Real: Teaching Citizenship through Human Rights” by Amnesty International in association with the Northern Ireland Human Rights Commission.)*

1. **Everyone should be free to say whatever they want (linked to Article 19)**

Ask students to stand on the line between “strongly agree” and “strongly disagree” regarding the following;

**Prompt questions**

• Should you be able to insult other people?

• What about racist/sectarian/sexist/homophobic comments?

• What about criticizing the policies of Hong Kong Special Administrative Region Government by writing to the newspaper?

**Balancing rights**

Sometimes the right to freedom of expression conflicts with other rights. For instance, imagine someone chants racist slogans, encouraging violence against a particular racial group. What other human rights might be affected? Encourage students to refer to specific rights from the UDHR in their answers, such as:

• Article 2, the right to be treated equally and to be free from discrimination

• Article 3, the right to life and to live in freedom and safety

• Article 5, the right to be free from cruel and degrading treatment.

In this situation, how would you balance these conflicting rights?

Do you think the right to freedom of expression needs to be limited?

Encourage students to explain their answers and change their position on the continuum if anything they have heard has changed their opinion.

2. **Everyone should be able to join a peaceful protest (linked to Article 20)**

Ask students to stand on the line between “strongly agree” and “strongly disagree” regarding the following;

**Prompt questions**

• What types of protest are unacceptable?

• What if a group holds a peaceful protest, but the message they communicate incites violence?

• What if a noisy protest is held in a residential area where lots of young families live?

**Balancing rights**

Sometimes the right to peaceful protest conflicts with other rights. For instance, imagine a peaceful protest blocks access to a local school. What other human rights might this conflict with?

Encourage students to refer to specific rights from the UDHR in their answers, such as:

• Article 13, freedom of movement

• Article 26, the right to an education

In this situation, how would you balance these conflicting rights?

Do you think the right to peaceful protest needs to be limited?

Encourage students to explain their answers and change their position on the continuum if anything they have heard has changed their opinion.

3. **Everyone should be allowed to follow their own religious beliefs (linked to Article 18)**

Ask students to stand on the line between “strongly agree” and “strongly disagree” regarding the following;

**Prompt questions**

• What if these beliefs encourage prejudice, or inequality between men and women?

• What if these beliefs incite hatred or violence?

• What if these beliefs encourage corporal punishment as part of a child?

**Balancing rights**

Sometimes the right to freedom of religious belief and practice conflicts with other rights. For instance, imagine that a religious leader preaches that homosexuality is a sin and that homosexuals should be persecuted. What other human rights might be affected?

Encourage students to refer to specific rights from the UDHR in their answers, for instance:

• Article 2, the right to be treated equally and to be free from discrimination

• Article 3, the right to life and to live in safety

• Article 5, the right to be free from torture and other cruel, degrading or inhumane treatment

In this situation, how would you balance these conflicting rights?

Do you think the right to religious belief and practice needs to be limited?

Encourage students to explain their answers and change their position on the continuum if anything they have heard has changed their opinion.

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**5.10 Human rights in ethical issues**

The following aspects of human rights can be linked to the other six personal and social ethical topics in Ethics and Religious Studies. Please explain the following links:

|  |  |
| --- | --- |
| **Human Rights** | **Ethical Issue** |
| Article 3: The Right to life | Bioethics: Do we have the rights to end the life of an embryo?  Medical Ethics: Do the families have the right to give up resuscitating a patient or even arrange euthanasia for him? Etc. |
| Article 5: The Freedom from pain and torture | Medical Ethics: Are the doctors obliged to relieve the pain of the patients even that may kill the patients? Etc. |
| Article 7: Equality under the law | Ethical Values: How the rule of law is supported by this article? If a normal person and a mentally retarded person make the same offence, should there be any differences in the verdicts according to this right? Etc. |
| Article 13: The Freedom of Movement | Environmental Ethics: How the pollutions restrain others freedom to stay or leave for a place? How infrastructures violate others’ right to abide? Etc. |
| Article 17: The Property Right | Business Ethics: How does this article stop some kind of intervention from the Government? |
| Article 18 and 19: The Freedom of Thoughts and Expression, and the Right to Know | Media Ethics: How does this ensure that the reporters and editors can report truths without coercion? Etc.  Business Ethics: How this article entitles customers the right to know information about the products? |
| Article 20: The Freedom of peaceful assembly | Many kinds of ethics: How does this article justify demonstration for the right reasons? Etc. |
| Article 23: The Labour’s Rights | Business ethics: Can the employer push the labour to have paid work unlimitedly? How is under-wage forbidden by this article? Etc. |