

Life, Liberty and the Pursuit of Happiness: Human Rights and Immigration

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Abstract

This paper explores the concepts of human rights and immigration. These two concepts are often associated with each other because of the questions that arise about the duties and obligations that a society has toward newcomers who have migrated into the community from foreign lands. To what extent should such newcomers be able to expect that they would share in the rights and privileges of native members of the society? The language of human rights is often used by advocates on behalf of immigrants in an attempt to suggest that certain rights adhere to the human person regardless of current location on the globe. While the concept of human rights is one that has great appeal, the question of the foundation of human rights remains an ongoing philosophical concern: what are human rights, where do they come from and how are we to understand the basis upon which all human beings and societies could be held accountable for honoring human rights?

Amartya Sen is an economist and philosopher who has struggled with these questions in several publications. In his writings Sen has suggested that attempts to ground the concept of human rights in the traditional Western notion of the Social Contract are not adequate since such contract language has tended to be applied to those who are already members of a society. What is lacking is a universal understanding of human rights that is not bound by membership in a particular society but is prior to any such considerations as rights belonging to the human person as member of the human race. This paper explores Sen's alternative conceptual framework for grounding of human rights as well as the duties and obligations associated with them. The implications Sen's theory of human rights has for the rights of immigrants is also explored. Finally, the need for human rights advocates to balance Sen's normative/deontological approach to human rights with a narrative/teleological approach is also suggested.

Introduction

From ancient times, the phenomenon of the migration of human persons from settled homelands to, from the point of view of the migrants, new and strange parts of the world has raised questions about the place, position and treatment of newcomers into an existing, self-defined human community. "The United Nations (UN) defines as an international migrant a person who stays outside their usual country of residence for at least one year. According to that definition, the UN estimated that in 2005 there were about 200 million international migrants

worldwide...”¹ Koser summarizes the importance of migration to public policy and the close connection between migration and human rights:

Migration is inextricably linked with other important global issues, including development, poverty, and human rights. Migrants are often the most entrepreneurial and dynamic members of society; historically migration has underpinned economic growth and nation-building and enriched cultures. Migration also presents significant challenges. Some migrants are exploited and their human rights abused; integration in destination countries can be difficult; and migration can deprive origin countries of important skills. For all these reasons and more, migration matters.²

While it is certainly true that in many historical situations migration may have been welcomed, encouraged, or forced (e.g., slavery) due to the needs and economic circumstances of the societies to which the migrants travelled, it would seem just as often if not more so that the opposite sort of attitude towards migrants has prevailed. Immigrants have been routinely portrayed as having a negative impact on the receiving nation or community by raising fears about employment for native workers, increasing the burden on social and economic resources, and threats people from other places may pose to the health and safety of community members. The backlash that occurs in the wake of such fears often takes the form of either direct violence aimed at immigrant individuals or communities or through exploitation of the relatively powerless position of immigrants by way of low pay, poor housing conditions, and threats of deportation.

In all of these experiences, the question of human rights becomes particularly cogent as immigrants are often seen as being guests, invited or not invited, into a country and, as such are not necessarily deserving of the same protections by the community as those who are considered citizens and/or native. And yet, if human rights exist, they adhere to the individual human person as a member of the human race irrespective of their membership or lack of membership in any other subordinate societies. Human rights ought to “trump,” so to speak, any other laws, regulations, restrictions, or policies that are contingent upon the accidents of time or place as they appear in the history of local communities or nations. Without this priority of place in regards to human rights the term itself seems to be vacuous. The human rights of immigrants then, particularly those who have entered another country without the required documentation, may be seen as something of a test case for this priority of human rights: the extent to which such rights would be honored or respected or recognized for a given resident of a society regardless of the legal standing of that person within the official polity would testify to the actualized priority of those rights that adhere to the person as a member of the human community.

¹ Kahlid Koser, *International Migration, A Very Short Introduction* (Oxford: Oxford University Press, 2007), 4.

² *Ibid.*, 1.

The difficulty with this form of reasoning is that it seems to beg the question of the existence of human rights as such: in a very real way the discussion is getting ahead of itself because the case for human rights has not been established. We tend today, perhaps more so in Western cultures than other places in the world, to assume the given-ness of human rights as part of the conceptual framework related to discussions of law, politics, policies and international relations. It has been over sixty years, after all, since the United Nations General Assembly issued its famous Universal Declaration of Human Rights. However, the advent of human rights language is a relatively recent addition to the lexicon of politics and social ethics. It should be remembered in this context that the concept of Life, Liberty and the Pursuit of Happiness being among those “inalienable rights” with which members of the human community are endowed by their Creator (or that adhere to each person simply due to their being human) is not yet 250 years old or that is represented a revolutionary departure from previous conceptualizations of human social relationships. The ongoing incidences of violence and exploitation of immigrants may be just one indicator of how, perhaps, the concept of human rights continues to be open to question as possibly nothing more than a fiction created by well intentioned advocates intent on bringing relief to situations of manifest oppression. The question then of whether a human being may expect to be treated in a certain way by other human beings, with respect for an inherent form of dignity, a dignity that calls forth at least minimal obligations on the part of others to support the life of the individual and to guarantee freedom from harm and want, these questions are precisely those to which an argument for human rights must be addressed. These issues are often particularly urgent in the lives of persons who have migrated from their original homelands due to the vulnerabilities that migration engenders. While in some situations migration itself has come to be seen as a fundamental human right,³ such instances would still seem very much in the minority among nations in terms of immigration policies that specifically extend human rights to migrants. The successful application of human rights language to the issue of immigration would seem to serve the purpose of strengthening the argument for human rights as such.

It is within this framework of the questioning of human rights that the philosopher and economist Amartya Sen (currently the Thomas W. Lamont University Professor at Harvard University) has devoted much of his attention as he has studied the nature of social justice. First in an article entitled *Elements of a Theory of Human Rights* published in the journal *Philosophy and Public Affairs* in 2004 and later in his comprehensive book devoted to social justice entitled *The Idea of Justice* (2009), Sen has sought to provide a conceptual foundation for human rights language given what he recognizes as an intellectual atmosphere in which “Many philosophers and legal theorists see the rhetoric of human rights as just loose talk—perhaps kindly and well meaning forms of locution—but loose talk nevertheless.”⁴ As an example of the longstanding nature of this form of opposition to human rights language, Sen holds up the Utilitarian

³ See Barbara Hines, “The Right to Migrate as a Human Right: The Current Argentine Immigration Law,” *Cornell International Law Journal* 43, (2010): 471-485.

⁴ Amartya Sen, “Elements of a Theory of Human Rights”, *Philosophy and Public Affairs*, 32, no. 4 (2004): 315-316.

philosopher Jeremy Bentham's early (1791) denunciation of the concept of the Rights of Man that emerged from the French Revolution as nonsensical. The only rights that exist, according to Bentham, are those rights that proceed from legislation. All other concepts of Natural Rights remain a fiction. In this sense, as Sen points out, Rights become the Child of Legislation, i.e., rights only exist as law exist which create those rights following from the law.⁵ Over and against this point of view Sen cites another position which equally misses the mark in terms of the relationship between human rights and law. In the work of Herbert Hart, Sen sees a kind of opposite tendency in which Rights are characterized as the Parent of Law, indicating that the only utility of Rights language is in the extent to which it tends to inspire or generate legislation to codify and ground Rights in the real world of implied sanctions.⁶

Against both of these extremes, Sen finds himself walking a golden mean in which Human Rights are viewed in a way that acknowledges the potential benefit of legislation as one way of securing human rights but sees human rights in a larger and more comprehensive category that frees it from the force of law either as child or parent. In this perspective, to exclusively tie rights language to legislation is to make a category mistake since human rights is best understood in the realm of ethical obligations rather than legal statutes. As such human rights may lay claims on individuals that exist prior to and possibly in the absence of legislation. Not all ethical principles need necessarily become the stuff of legal sanction (e.g., fidelity in marriage), nor would legislation necessarily be the best route to take in promoting such principles within a community.⁷

So while Sen would support, for instance, an activist approach which proclaims and works for greater awareness and monitoring of human rights, he argues that activism is by itself is not enough: "the conceptual doubts must also be satisfactorily addressed, if the idea of human rights is to command reasoned loyalty and to establish a secure intellectual standing. It is critically important to see the relationship between the force and appeal of human rights, on the one hand, and their reasoned justification and scrutinized use, on the other."⁸ Thus the need for a theory of human rights which Sen pursues in these writings. The remainder of this paper will be devoted to an examination of Sen's conceptual framework for the grounding of human rights in a way that honors and promotes the necessarily universal nature of the concept as it is usually understood, i.e., as rights that adhere to the person simply on account of their membership in the human race and which can not be superseded or denied by local laws or customs. After exploring Sen's framework for understanding human rights in general, the focus of this paper will then shift to considerations of how the model sketched out by Sen may be applied to the test case of immigration as described above by asking the question: how does Sen's model provide a

⁵ On Bentham and the concept of rights following upon legislation see Sen, "Elements of a Theory of Human Rights," 324-326 and Amartya Sen, *The Idea of Justice* (Cambridge, MA: The Belknap Press, 2009), 361-362.

⁶ On Hart see Sen, "Elements of a Theory of Human Rights," 326-327 and Sen, *The Idea of Justice*, 363-364. **Note: from this point forward these two primary sources will be referenced with the abbreviations: "ETHR" for "Elements of a Theory of Human Rights," and TIJ or The Idea of Justice.**

⁷ Sen makes this argument in both primary sources: "ETHR", 327 & 342-345; *TIJ*, 368.

⁸ Sen, "ETHR", p. 317

foundation for understanding the nature and priority of human rights of immigrants (particularly those who may be viewed as having entered the community without having been asked)?

A Conceptual Foundation for Human Rights

To begin exploring Sen's argument suggesting a conceptual foundation for human rights language, it is first important to locate his approach within the broader context of the philosophy of social justice in general and human rights in particular. While there may be various approaches to establishing this context, Sen provides a very cogent summary of his own view of how his approach fits into the history of these discussions in an introduction he wrote to an edition of *The Theory of Moral Sentiments*, by Adam Smith. Sen distinguishes here between two traditions in the philosophy of social justice, one he calls the "Contractarian" approach and the other, the one in which Sen locates his own views, that of "Comparative Realizations."⁹

The Contractarian approach Sen traces back to Hobbes, Locke, Rousseau and Kant in the seventeenth century all of whom contributed to the concept of the "social contract" as the foundational principal that underlies the notion of social justice within a society. Sen explains more specifically that "this approach concentrates on identifying 'just' institutional arrangements for a society, which would yield a corresponding—hypothetical—contract. The demands of justice are, then, seen in terms of those institutional requirements, with the expectation that people would behave appropriately to make those institutions entirely effective."¹⁰ In modern social ethics, this point of view is best represented by the work of John Rawls in his classic work *A Theory of Justice*. Sen identifies this approach as a transcendental approach in that the goal here is to focus on the ideal of justice, what perfect justice, a perfectly just society and perfectly just institutions within the society, would look like. This "transcendental institutionalism" as Sen names it seeks to create a priori institutions that would embody the perfect notion of justice and depends upon "the assumption that people's behavior would be exactly what would be needed for the proper functioning of the chosen institutions."¹¹ The difficulty for this kind of idealism, of course, is that people have typically not always acted within institutional arrangements in the kind of selfless manner upon which the theory seems to hang (witness the complex of seemingly self-centered behaviors leading up to the economic collapse in 2008 following upon an environment of deregulation in, for instance, the housing and mortgage markets). Sen also goes on later to point out that this approach presents particular difficulties for human rights language in that the concept of a social contract seems particularly difficult to

⁹ Amartya Sen, "Introduction" in Adam Smith, *The Theory of Moral Sentiments* (New York: Penguin, 2009), xv-xvi.

¹⁰ *Ibid.*, xv.

¹¹ *Ibid.*, xvi.

extend to the universal level, i.e., a contract to which all human beings are a party, without some form of institutional actualization in the form of world government.¹²

Over and against the Contractarian approach, Sen provides what is perhaps the lesser known Comparative Realizations approach traced back to Adam Smith and other Enlightenment philosophers. This approach is decidedly not idealistic in that it does not set up a theoretical notion of what perfect justice would be and then seek to have everything measured against this ideal. Rather, Comparative Realizations would focus on what may be done in concrete social circumstances to make the lived social reality more just than it is now, i.e., comparatively more just. As Sen explains, this approach is “concerned primarily with removing identifiable injustices in the world—such as slavery, or bureaucracy-induced poverty, or cruel and counterproductive penal codes, or rampant exploitation of labor, or the subjugation of women. The focus is on what actually happens to the lives of people, and the judgments are comparative—for example, how the world would improve if slavery were abolished.”¹³ By starting with what might be considered empirical instances of injustice and working toward comparative improvements in those situations (improvements which are also empirical as they are relative to the original circumstances), the Comparative Realizations perspective would seem to have the advantage of being grounded in the particular and local experiences of people wherever and whenever such injustices are identified.

The difference between the two approaches in terms of human rights seems to center for Sen around the place or importance of open dialogue in the attainment of a more just society. The Rawlsian approach is heavily dependent upon an a priori notion of the nature of justice which is to be applied to all societies at all times and places. This would seem to have the consequence of shutting down all conversation about differences in perception or culture since no one may argue with perfection (ignoring the possibility that the very ideal itself is likely to be culturally bound in various ways). Smith on the other hand warned of the parochial nature of much social justice theorizing and urged the need for open dialogue with points of view that are not necessarily our own. This feature of Smith’s approach, the need to seek other points of view, will become key elements of Sen’s theory of human rights, particularly in his call for any particular claim for a human right to be able to stand up and survive a process of open and critical scrutiny. This kind of open dialogue is important according to Sen for two reasons that highlight the need to go beyond social contract language: “(1) the relevance of other people’s *interests*—far away from as well as close to a given society—for the sake of preventing unfairness to those who are not party to the social contract for that society; and (2) the pertinence of other people’s *perspectives* to broaden our own investigation of relevant principles, for the

¹² Sen provides a more in depth discussion of the limits of the social contract on a global scale in *TJJ*, 25-26 & 70-72; here he cites the inability of proponents of transcendental institutionalism, namely Nagel and Rawles, to develop consistent global institutional frameworks (i.e., some form of world government) that would, from their point of view, be a prerequisite for perfect justice on a global scale.

¹³ Sen, “Introduction,” in Adam Smith, *The Theory of Moral Sentiments*, xvi.

sake of avoiding underscrutinized parochialism of values and presumptions in the local community.”¹⁴

Sen’s Elements of a Theory of Human Rights

With the foregoing discussion of method in place, it is now possible to consider Sen’s argument for how a theory of human rights may be founded. He accomplishes this in *Elements of a Theory of Human Rights* in six steps which will be outlined in what follows. These six steps are posed by Sen in this article as six questions to be answered if a coherent theory is to be developed.

The Nature of Human Rights Language

The first point to be considered in Sen’s argument is the nature of the language involved in human rights talk: “What kind of a statement does a declaration of human rights make?” What he seems to have in mind here is the need to clarify the level of discussion involved when we speak of human rights and, specifically, to differentiate it from legal language. In fact, Sen argues, thinking about human rights must be located primarily on the level of ethics and the demands implicit in human rights declarations are necessarily in the nature of ethical claims. As an ethical claim, a human right carries a level of importance due to the fundamental subject matter that is involved in the right. Consideration of human rights from this perspective would be similar to the consideration of utility in a utilitarian ethical system in that utility (in such a system) is a concept that ought to be recognized and maximized in ethical deliberation. The theory of human rights Sen is proposing is not utilitarian, however. Rather, the content of a human rights ethical approach is taken up with notions of freedoms to which the rights refer. These freedoms will be the focus of the second point in Sen’s argument for human rights. At this point, it is only important to make the connection that, as utility is a key concept in utilitarian ethics, freedom is the key concept in the theory of human rights being elaborated here: “A pronouncement of human rights includes an assertion of the importance of the corresponding freedoms—the freedoms that are identified and privileged in the formulation of the rights in question—and is indeed motivated by that importance.”¹⁵ In other words, these freedoms form the content of the ethical claim and require people to consider their importance in ethical decision making. The nature of the requirements involved in these claims will be discussed later in Sen’s third element of the theory of human rights.

As indicated earlier, ethical claims in the form of human rights language are to be distinguished from legal language in at least two ways. On the one hand, since human rights recognizes the importance of certain freedoms as fundamental characteristics of human life, they are not dependent upon the force of legislation. Laws do not create rights. Rights already exist whether recognized in law or not. Rights make a claim upon human ethical deliberation because

¹⁴ Sen, “Introduction,” in *The Theory of Moral Sentiments*, xviii.

¹⁵ Sen, “ETHR,” 321.

of the importance attached to the freedoms involved. Sen makes this claim in argument against Jeremy Bentham and others who view natural rights as fiction. Bentham argued against the existence of rights endowed by nature or God. The only rights anyone ever has would be those granted by specific laws. In a likewise manner, the ethical claims of human rights are not to be seen as existing only as inspiration for legislation. This is the second way in which rights are to be distinguished from law. While ethical concepts enshrined in human rights may serve to inspire legislation and legislation may be one avenue of activity that would help ensure that human rights are honored, it is not the only route and, in some cases, it might be a counter-productive way of promoting human rights. The fact that other means of promoting human rights (to be discussed in Sen's fourth element) are viable underscores the fact that rights are not dependent upon law, nor do they exist only to inspire law, but are in a different arena of concepts, namely ethical discourse.¹⁶

The Importance of Human Rights

The second element in Sen's foundation for human rights is a further exploration of the nature of the freedoms indicated in human rights language. While the question for this element is "What makes human rights important[?],"¹⁷ the focus of this element is on freedoms as these are the "what" that makes human rights important. The importance of a human right is derived from the importance of the freedom to which it points. It is that freedom which is seen as an essential aspect of human life and because of the importance of that freedom to any human life, the language of the right is crafted to express the inviolable character of that freedom. The freedom to live or the freedom not to be tortured are so critical to human existence that the human right to not have one's life taken from one or to not be tortured take on the same level of importance for ethical deliberation. Sen points out that this focus on freedoms rather than some other aspect of the human condition allows for "a motivating reason not only for celebrating our own rights and liberties, but also for our taking an interest in the significant freedoms of others, not just their pleasures and desire-fulfillment (as under utilitarianism)."¹⁸ Instead of focusing on maximizing everyone's pleasure or desires, a seemingly very elusive and hard to measure outcome, the focus on freedom enables the comparative realizations approach to come to the fore in that freedom or the lack of freedom reflect actual social conditions that might be altered through various means in order to achieve a comparative improvement. Sen also discusses how this approach avoids other problems involved in utilitarian approaches such as "valuational distortions resulting from the neglect of substantive deprivation of those who are chronically disadvantaged but who learn, by force of circumstances, to take pleasure in small mercies and get reconciled to cutting down their desires to 'realistic proportions'..."¹⁹ This last remark seems to be particularly important to

¹⁶ For Sen's differentiation of human rights language from these two extremes of relationship to law, see "ETHR," 324-328.

¹⁷ Sen, "ETHR," 318.

¹⁸ *Ibid.*, 328.

¹⁹ *Ibid.*, 329.

a discussion of human rights and immigration as it is people forced under different circumstances to migrate from their homes that could be identified as “chronically disadvantaged” both in their homeland and in the new lands to which they move. Concentrating on freedoms rather than utilities as the fundamental component of the human condition would aid in avoiding this utilitarian trap of being happy with less. Less freedom in this context does not make sense because freedom is an all or nothing concept: I either am free with respect to certain aspects of my life or I am not.

Sen goes on to explore the nature of freedom in more detail. Freedom in the form expressed in human rights is made up of two components: freedom of opportunity and freedom of process. Both aspects have a part to play in helping to define the nature of human rights. Freedom of opportunity indicates the kind of freedom associated with the capacities to “achieve valuable combinations of human functionings: what a person is able to do or be...”²⁰ In this sense, the question becomes whether certain opportunities exist for a given person to achieve that which she or he values. Someone who is not able to achieve valued goals due to arbitrary limitations having to do with factors such as race or gender or due to characteristics of the individual that by their nature limit the options available (as in the case of physical or mental disabilities), is someone who is less free than she would be if those limitations were not in place. Process freedom, on the other hand, refers to the processes by which opportunities are actualized. In process freedom, it is the way in which, on the one hand, an individual may make a choice among options that are real and available. On the other hand, the way in which decisions are made in either awarding opportunities (admission to college) or denying of freedom (imprisonment) are subject to fair and open processes of deliberation. In either the positive or negative versions the outcomes of the processes are not at issue but rather the free nature of the process itself.

In both process freedom and opportunity freedom real but different issues of liberty are at stake. Both forms of freedom are important to a theory of human rights that stresses freedom as the basis of rights. It would seem that, while both opportunities and process considerations may play a role in the first generation rights (free speech, freedom of the press and of association, trial by jury, freedom from torture or capital punishment, etc.), freedom of opportunity seems to be much more at stake in the second generation level of human rights (freedom from lack of medical treatment, freedom from illiteracy, freedom from unemployment, from hunger, from exposure, etc.). This question will be addressed later in Sen’s fifth element regarding the viability of social and economic rights (i.e., second generation rights).

Before leaving Sen’s consideration of the importance of freedom to a theory of human rights, it is important to note that he has set up a mechanism by which any proposed freedom being offered as a potential subject of a human right must be assessed. The mechanism consists of what Sen calls two “threshold conditions” that must be met for a human right to be seriously thought of as calling for recognition and support. The first of these threshold conditions has to

²⁰ Sen, “ETHR,” 332.

do with the “*importance*” of the matter involved. By importance here Sen is indicating that there must be a kind of limit established as to what rises up to the level of concern necessary to qualify an opportunity as being important enough to warrant the kinds of activities invoked to promote human rights. The second criteria is what Sen calls that of “*social influenceability*.”²¹ In this case he is arguing for the fact that society has to be able to do something to promote the freedom. Sen’s own example serves best here to get the point of both across:

...it is not hard to argue that some importance should be attached to all four of the following freedoms:

- (1) a person’s freedom not to be assaulted;
- (2) her freedom to receive medical care for a serious health problem;
- (3) her freedom not to be called up regularly by her neighbors whom she detests;
- (4) her freedom to achieve tranquility.

However, even though all four may be important in one way or another, it is not altogether implausible to argue that the first (freedom not to be assaulted) is a good subject matter for a human right, and so is the second (freedom to receive necessary medical care), but the third (freedom not to be called up by detested neighbors) is not, in general, important enough to cross the threshold of social significance to qualify as a human right. Also, the fourth, while quite possibly extremely important for the person, is too inward-looking—and too hard to be influenced by others—to be a good subject matter for human rights.²²

As threshold conditions, these criteria do not preclude discussion of any proposed freedom as a subject of human rights. As will be seen in the sixth element of Sen’s theory of human rights, open, free, and informed discussion, including critical scrutiny of all such proposals, is a necessary aspect for the way in which a comparative realizations approach is to be implemented. Sen is simply saying here that within the context of this kind of open and informed deliberation, certain issues will not be found to be either important enough or influenceable enough to continue to inspire concerns over human rights.

Duties and Obligations

Any discussion of human rights is always closely associated with further discussion of the kinds of duties and obligations that such rights imposes on members of the community. In social contract language, the members of the community...those bound by and to the social contract,

²¹ On both criteria, see Sen, “ETHR,” 329-330.

²² Ibid.

have duties to establish and support the kind of just institutions needed to fulfill the ideal of a just society. A utilitarian approach requires the duty or obligation for each social actor to seek maximization of their own utility (desire-fulfillment) while keeping as minimal as possible any interference in the same effort on the part of other members of society. In his third element of a theory of human rights, Sen also addresses the question: “What duties and obligations do human rights generate?”²³ This becomes an important question particularly when dealing with the social and economic human rights often referred to as second generation human rights. Although it may be somewhat obvious that a human rights claim over freedom to live (or to not have my life taken away from me) generates duties or obligations on others not to take another person’s life, it is not as obvious to discover the way in which, for instance, someone’s right to be fed or given medical care or to have housing actually imposes a specific obligation on another member of the community. How is it that these ethical claims that form the basis of human rights language are able to impose requirements on other members of society? Why is it that those other members of society are not simply able to say “fine, you have your freedom to be employed, how does that involve me?”

It is hard to see, in the face of such questions, how social contract language can be avoided here. From that transcendental perspective, obligations are part of the social contract and parties to the contract who expect to benefit from the contract are expected to hold up their end of the bargain in honoring the rights of others. Sen, on the other hand, was very clear (as described earlier in this paper) in distinguishing his and Smith’s comparative realizations approach from this kind of transcendental approach and, specifically related to the notion of a social contract, indicated how that approach is not practicable as a foundation for human rights since the social contract binds the members of a particular society and is not easily extended to a global level in such a way that would guarantee rights to all human beings.

As a way of coming to grips with the way in which social obligations can be generated from the ethical claims involved in human rights, Sen first recalls the assumption that, for a matter to have risen to the question of human rights, that matter involved must have already met the threshold conditions of importance and influencability and is therefore a matter to be taken seriously. It is due a certain amount of careful consideration on the part of an actor as to the ways in which they may have a duty to assist in bringing about the realization of the right in question. This consideration, however, does not immediately leap to the level of an overwhelming command in which no account of specific circumstances and abilities are allowed:

The recognition of human rights is not an insistence that everyone everywhere rises to help prevent every violation of every human right no matter where it occurs. It is, rather, an acknowledgment that if one is in a plausible position to do something effective in preventing the violation of such a right, then one does have an obligation to consider doing just that. It is still possible that other obligations or non-obligational concerns may overwhelm the reason for the particular action

²³ Ibid., 318.

in question, but that reason cannot be simply brushed away as being “none of one’s business.”²⁴

It is in this context that Sen introduces a distinction made in terms of obligations by Immanuel Kant as a useful way to conceptualize how different duties or obligations may be generated from the same concern for a human right depending upon the factors involved. The distinction suggested by Kant in his *Critique of Practical Reason* is between *perfect obligations* and *imperfect obligations*. The former kind of obligation consists in what might be thought of as absolute or binding duties not to act directly to violate a human right. The duty not to kill or steal from someone imposes a perfect ethical obligation of the would-be murderer or thief. Such obligations are perfect in the sense that they take priority over other considerations and deliberation about various obligations one might have does not come into play.

Informal obligations, on the other hand, are less specific and binding because they do not refer in this way to the person who may be contemplating (or in the act of) violating another’s rights directly. Informal obligations refer instead to others who may be in some sort of a position to help protect or secure another person’s freedom or to stop someone from directly violating another’s rights. Obligation in this sense derives from the importance of the freedom implied in the right: in effect, the freedom is so important to human existence that everyone is drawn into a duty “to consider what they can reasonably do to secure the freedom.”²⁵ The force of these obligations are less binding not due to the fact that the freedom is not important, but due to the nature of the deliberative process that the other person must undergo as they assess (i.e., reasonably consider) what they are able to do given their own personal circumstances and after due consideration of the other obligations they have that are also important. A by-stander on a city street who happens to see another person being attacked in an alley may have to consider calling the police on their cell phone, but the imperfect obligation to secure another person’s right not to be attacked may not extend to her running into the alley and trying to break up the attack if it meant, for instance, that by doing so she would have to leave her baby in a stroller. Sen goes on to suggest the possible content of such deliberation:

The person has to judge, for example, how important the freedoms and rights are in the case in question compared with other claims on the person’s possible actions (involving other rights and freedoms, but also altogether different concerns that a person may, inter alia, sensibly have). Furthermore, the person has to judge the extent to which he or she can make a difference in this case, either acting alone or in conjunction with others...Also, since detailed reflection on what one should do is itself time consuming (and cannot even be actually undertaken for all the ills of the world), the duty of reasonable consideration will not, in a great many cases, translate into an obligation to take on an elaborate

²⁴ Sen, “ETHR,” 340-341.

²⁵ Sen, “ETHR,” 321.

scrutiny—only a willingness to do just that, when it seems relevant and appropriate.²⁶

The question, then, is how this distinction of obligations pertains to the task of providing a conceptual foundation for human rights? Obligations become a necessary part of any declaration of human rights because rights language not only implies that someone has the freedom named by the right, but that the right itself calls for a corresponding form of support (obligation) from all people since all people would presumably want that freedom themselves (keeping in mind the two threshold criteria of importance and influenceability). The universal nature of the freedom calls forth the universal obligation to uphold the right associated with the freedom. The obligation will differ depending on the nature of the involvement and circumstances of the actor who incurs the obligation: some will be obligated to duties that are specific and unvarying (perfect) and others to obligations that vary with their circumstances (imperfect), but all are obligated one way or another. The introduction of imperfect obligations extends the reach of human rights to this universal level by involving “the demand that serious consideration be given by anyone in a position to provide reasonable help to the person whose human right is threatened.”²⁷

It is precisely this universal reach that is necessary for a theory of human rights since these kind of ethical claims are intended by the very definition of the term to be universal: they are to apply to all humans by virtue of their humanity. Recalling Sen’s critique of the Contractarian school of social ethics, it is noteworthy that this form of universalism cannot be supported by the concept of the social contract because in that line of reasoning, the rights extend only to those who are party to the contract, i.e., those who belong to a particular society of “us” over against all other “thems.” And yet, the importance of universalism for the question of the human rights of immigrants is foundational and inescapable: people who are leaving their homes to go to other lands where they become the “foreigners” are uniquely invested in the firm existence of rights that belong to the human person at any time and in any place by virtue of his or her humanity. Without such universalism of freedoms and obligations, immigrants more than any other group are vulnerable to the whims of parochial notions of social justice. It would seem appropriate, then, that a conceptual framework for human rights would necessarily also call for development beyond the notion of a social contract in theories of social justice.

The Promotion of Human Rights

While the third element of a theory of human rights established the conceptual grounding for obligations tied to the existence of rights, Sen moves on in the fourth element to consider what forms of action may be used to promote human rights. In taking up this issue, Sen is returning to

²⁶ Ibid., 340.

²⁷ Sen, “ETHR,” 341.

the concern he expressed previously about the need to not locate human rights entirely in the legal realm. Specifically, he argues that work toward the advancement of human rights may take at least two other forms that are distinct and which may not be reduced to simply being stages on the way to the endpoint of legislation.

The first form of activity to promote human rights involves the many avenues by which consciousness of human rights may be raised (and acceptance of them developed) through formal processes of recognition of those rights. These processes need not be legal in character nor carry any form of punitive action. They simply exist as proclamations that certain freedoms belong to human persons as universal rights. The prime example of this form of action is The Universal Declaration of Human Rights established by the United Nations in 1948. In this case legislation was not instituted by the United Nations as a body. Sen explains that “[T]his approach is motivated by the idea that the ethical force of human rights is made more powerful in practice through giving it social recognition and an acknowledged status, even when no enforcement is instituted.”²⁸

The second form of action is what Sen calls “active agitation.”²⁹ In this form, the intention is to go beyond the raising of consciousness with regard to human rights. The idea is to advocate for the upholding of human rights through various means depending on the situation. These means may and do include human rights watch organizations that publicize violations of human rights with the aim of bringing public pressure to bear on leaders who sponsor or tolerate such abuses. Later, in arguing for the importance of public reasoning in the establishment of human rights, Sen again suggests the strength of this model of action: “The fact that authoritarian orders are typically quite afraid of uncensored news media and of uncurbed public discussion, which make them resort often enough to suppression (including censorship, intimidation, incarceration, and even execution), provides some indirect evidence that the influence of public reasoning can indeed be quite large.”³⁰ While he is arguing here for the methodological necessity of open public discussion (to be considered as his sixth element), the point is just as cogent for the practice of the form of agitation he has suggested as a form of action to promote human rights.

The Viability of Economic and Social Rights

In moving on to the fifth element in Sen’s framework for human rights, we come to the point that seems most crucial to that aspect of the debate on immigrant rights which seems most contested, i.e., the foundation for the so-called second generation rights. No one who has sincerely entered into the dialogue about the ethics of human rights (recognizing, of course, that there exist many situations in which ethics and human rights are simply ignored) would today try to make an argument about the existence of the first generation rights for immigrants or any one else. The

²⁸ Sen, “ETHR,” 343.

²⁹ See Sen, “ETHR,” 343-344.

³⁰ Sen, “ETHR,” 356.

right to life, to freedom from torture or slavery, and the importance of basic civil rights such as due process of law are, for the most part, not debated despite the fact that they may be routinely violated (for immigrants more than others, perhaps). It may be important to recall that this was not always the case and that such recognition is a relatively recent phenomenon. For Sen, the concept of human rights only begins to receive a widespread hearing with the publication of the American Declaration of Independence and, soon after, the French Rights of Man in the late 18th century.³¹ As indicated previously, social contract language does not provide support for the concept of rights that adhere to the human qua human. Prior to the development of the social contract concept, the place of the individual was subsumed under the priority of the community and the divine right of rulers in any way they deemed necessary for the welfare of the community (including summarily denying an individual continued life, liberty or any other consideration of personal happiness). To the extent today that such cultural contexts exist in which the individual is considered of no importance next to the priority of the community, the question of first-generation rights as discussed here may still be in question.

However, it is in the realm of second generation human rights, rights such as the right to medical care, the right to food, to education, to housing, to work, that concerns about whether such “entitlements” can or ought to be considered under the rubric of rights language are still often expressed even by those who would acknowledge and grant the existence and importance of the first generation rights. And yet, it is particularly in the area of second-generation rights that immigrants may be most vulnerable. If medical care, education (for children, at least), food, shelter and work are not seen as the subject of human rights, then migrants are made vulnerable in a way that almost makes support for the first-generation human rights vacuous: there is little good in saying that someone has the right not to be killed or tortured if their right not to starve or slowly die due to medical neglect are not also guaranteed. To what extent then can these so-called economic or social rights be thought of as inalienable human rights? To answer this question, Sen chooses not so much to make a positive argument for the existence of these social or economic rights as to consider the arguments that have been made against the inclusion of these kinds of rights within the human rights framework. These objections may be categorized, in Sen’s view, into two major forms that are related yet distinct.

The first of these forms of objection is what he calls the “institutionalization critique.”³² In this case, the argument is made that the proclamation of a particular human right necessarily involves the incurring of a particular and specific obligation on the part of some party to meet the demand or entitlement specified in the right. The concept of “institutionalization” enters here because it is thought by those who make this objection that such rights only exist when institutional structures have been created that specify who has the duty to guarantee the fulfillment of those rights or, in other words, who incurs the obligation. This is reminiscent of the same form of argument that Sen cited earlier regarding the relationship of rights to law in

³¹ See for instance, Sen, “ETHR,” 316.

³² see Sen, “ETHR,” 346-348 for a summary of and Sen’s counterarguments regarding objections to the inclusion of social or economic rights into the canon of human rights.

which rights are not seen to exist unless a law granting (and enforcing) the right exists first (therefore, as in Jeremy Bentham discussed earlier: rights are children of the law).

As a means of answering this critique, Sen returns to the concept he has already developed about the different kinds of obligations a right establishes upon human agents, in particular, both perfect and imperfect obligations. In both cases, it is the importance and influenceability of the freedoms inherent in the right that call forth obligations on the part of the actors who are in some position to do something to uphold the freedom. The freedom may be so important, in fact, that it will call forth obligations upon certain members of society to seek ways of establishing institutional supports for the freedom:

...the ethical significance of these rights provides good grounds for seeking realization through institutional expansion and reform. This can be helped through a variety of approaches, including demanding and agitating for appropriate legislation, and the supplementation of the legal demands by political recognition and social monitoring. To deny the ethical status of these claims would be to ignore the reasoning that motivates these constructive activities.³³

Sen is essentially claiming here that the institutionalization critique is putting the cart before the horse: rather than the institutions creating the right, the importance of the right calls forth modifications to institutional arrangements as well as other activities to ensure the protection of the freedom involved. In this context, it is important to remember that Sen has argued for a *comparative realizations* approach to social ethics. This approach is perfectly comfortable with recognizing that perfectly just institutions may not yet exist while at the same time arguing that it is possible to imagine improvements in our institutional structures based on the motivating desire to ensure greater freedom.

The second form of objection to seeing social or economic entitlements as human rights is what Sen calls the “*feasibility critique*.” This criticism essentially maintains that the concept of such entitlements can not be put into the language of human rights simply because it would be impossible for some societies to come near to approaching the ability to provide for these rights due to lack of resources. In other words, such rights would simply not be *feasible* in many places and at many times. Such relatively poor societies would immediately be judged as violating the human rights of their citizens if they could not provide for the variety of social security measures guaranteed by the right. Whereas every society may be able to adhere to the freedoms related to first generation rights in that they cost very little to uphold, the kinds of entitlements claimed under the heading of the second generation human rights can not reasonably be demanded in many situations due to feasibility. It is, therefore, something of a category mistake to treat them as if they were inalienable entitlements granted by human nature.

³³ Sen, “ETHR,” 347.

In this case, Sen again sees a case of misplaced priorities: the importance of the freedoms involved (e.g., freedom from illness, freedom from unemployment, freedom from illiteracy) is not defeated by the fact that conditions do not yet exist to allow for the full realization of these rights in all places. “The understanding that some rights are not fully realized, and may not even be fully *realizable* under present circumstances, does not, in itself, entail anything like the conclusion that these are, therefore, not rights at all. Rather, that understanding suggests the need to work towards changing the prevailing circumstances to make the unrealized rights realizable, and ultimately, realized.”³⁴ Once again, from a comparative realizations point of view, the challenge is to think about how the world could be comparatively better with changes that can be made to work toward actualizing their achievement rather than waiting around for the conditions to be just right in all times and places before a right may be claimed.

Sen does not go on to provide any further justification for the inclusion of these concerns within the concept of human rights. However, by suggesting that the typical arguments against these rights do not, in fact, take away from the importance of the freedoms involved, Sen does indeed provide a methodological framework for human rights activists. On the one hand, he has shown that these objections are misplaced in that they have only succeeded in demonstrating how much more work is necessary to improve institutions or circumstances to the point where such freedoms may be actualized for more and more people. On the other hand, he has also shown that the most important focus of any efforts to advocate for human rights must be on how important these freedoms are to any truly human way of life. The more agreement we have around the fundamental importance of these freedoms, the fewer objections there will be to including them in the list of human rights and the more motivation we will have for changing those conditions that militate against the freedoms. In itself, this would represent a significant contribution to the advancement of thought around the nature and place of the second generation rights.

The Importance of Public Reasoning

In the final element of his theory of human rights, Sen concludes with a concept that has characterized much of his way of looking at social justice in general: the need for open and informed public reasoning about what constitutes social justice or, in this case, human rights. In answering the question he poses about how these kinds of ethical pronouncements (i.e., human rights) are to be evaluated and disputes over them settled, Sen states: “I would argue that like the assessment of other ethical claims, there must be some test of open and informed scrutiny...The status of these ethical claims must be dependent ultimately on their survivability in unobstructed discussion.”³⁵ The form of what Sen has in mind here is illustrated by the kind of scrutiny to which the concept of second generation rights was subjected in the previous section. To the extent that the argument for inclusion of social or economic rights may be said to have survived

³⁴ Sen, “ETHR,” 348.

³⁵ Sen, “ETHR,” 348-349.

the challenges of the *institutionalization critique* and the *feasibility critique* by way of Sen's response to those challenges, then to that extent such rights may be said to live another day and await other challenges. As in the process of empirical verification in science, the more that experimental evidence fails to contradict or falsify the hypotheses deduced from a theory, the more confidence the theory is said to merit. Public reasoning is an open process, as is empirical investigation, in that new evidence and new argument must always be considered and theory must be able to survive the challenges posed by novel counter-arguments.

In the present case, the unrestricted access to information is critical to a genuine ethical methodology that would seek the kind of universal acknowledgment required by the notion of human rights. Arguments for or against a claim being a right must be open to the point of view of all comers if it is to escape the parochial limitations of much ethical debate that is carried out within a homogeneous social context. Sen returns to the universalism of Adam Smith here in holding up Smith's notion of the need to view our claims from the eyes of others. Here he quotes Smith at length:

We can never survey our own sentiments and motives, we can never form any judgment concerning them; unless we remove ourselves, as it were, from our own natural station, and endeavour to view them as at a certain distance from us. But we can do this in no other way than by endeavouring to view them with the eyes of other people, or as other people are likely to view them.³⁶

Such an approach would seem to require that any discussion of the human rights of immigrants, for instance, is in need of enlightenment from the point of view of the person who has migrated about the conditions in their homeland, their need to leave their country for the sake of survival of self or family, the way in which jobs disappeared in the wake of foreign trade agreements, etc., before decisions are made about whether local concerns about border sovereignty should trump the rights of a person to do what must be done to survive. While the same concern may be said to apply to any situation in which certain voices are suppressed in favor of a dominant discourse (as in the feminist critique of patriarchal institutions), in seeking to secure the human rights of immigrants, the need to encourage open and informed scrutiny seems particularly important given the way in which immigrant voices are so notably absent in public discussion in the climate of fear that often surrounds them.

Conclusions

In the introduction to this paper it was suggested that any theory for human rights faces perhaps its greatest test in the case of the rights of immigrants due to the difficulty of arguing for the rights of those who are quite literally strangers in a foreign land. In no other case is a coherent

³⁶ As quoted in Sen, "ETHR," 350.

argument for rights that adhere to the person due to their humanity more necessary since often it is only their humanity that those who migrate bring with them into their new land. In what way can an argument be made that such rights exist and may not be violated no matter where a person finds themselves? Even if such rights are said to exist, can they be said to go beyond the kind of political rights that cost little to ensure into the realm of social rights that involve extensive costs and the incursion of obligations on particular actors as well as on society as a whole?

In this paper, I have tried to follow Amartya Sen's conceptual framework for a theory of human rights as that was first expressed in his article *Elements of a Theory of Human Rights* and later in substantially the same form as part of his book *The Idea of Justice*. I have tried along the way at various points to bring the discussion back to the particular application of Sen's ideas to the human rights of immigrants. While it may be too early to see yet how Sen's approach will survive his own call for open and informed public scrutiny and, thus, the extent to which it will stand the test of time, it seems that several key elements in his approach represent a real advance in efforts to conceptually ground the fervent rhetoric of human rights advocates.

First, by linking the importance of human rights to freedom, Sen has found a way of universalizing the concerns expressed in human rights language without getting stuck in the parochial limitations of social contract language or in the somewhat self-contradictory notions involved in maximizing utility. In surfacing freedom and/or freedoms as the primary focus of human rights, he challenges those who would deny the concept of natural rights to think of how important a given freedom is to the flourishing of their own life and to ask how the same could not be said of any other human person. This universalizing factor of freedom provides a solid touchstone against which all competing claims must at least be weighed in ethical deliberation.

Secondly, Sen has provided a realistic framework for understanding how different kinds of obligations may be incurred by the recognition of the importance of freedoms in the form of human rights. This framework of obligations is critical to the theory in that it anticipates the kinds of objections that would see rights language as vacuous without real obligations being imposed upon some real agents. By surfacing Kant's distinction between perfect and imperfect obligations in the context of what are thought to be important and influenceable freedoms, Sen has provided the moral argument against those who would say "it's not my problem." If the freedoms are as important as we say they are (even indirectly in the extent to which we would not want to be deprived of them ourselves), then they do call for careful consideration of the way in which their realization may occur in the lives of more and more people. In this vein, Sen's whole approach of *comparative realizations* seems to provide a very down to earth approach that seeks what can be done in concrete situations and that avoids the traps of idealized notions of perfect justice (particularly the trap of not doing anything to improve conditions out of fear that advancements may not be ideal).

Finally, by calling for free, open and informed dialogue and scrutiny of all arguments for or against human rights, Sen has provided a methodological framework that has the potential to escape parochial visions of what is good or just in social arrangements by the honest testing of

ideas in the global court of public opinion. In his discussion of the arguments against the inclusion of social and economic entitlements as human rights, Sen has given a very valid example of the nature of the kind of ongoing open dialogue necessary for the advancement of any sort of ideas. And parallel to this line of reasoning, Sen has also opened up a broader frame of reference for thinking about the kinds of activities that may be undertaken in support of human rights and, by so doing, has enabled legitimate avenues for social action beyond strictly legal remedies.

Ultimately, Sen is working in a deontological framework in the sense of advocating for normative and universal approaches to human rights. Whether he is able to entirely escape his own critique of the social contract approach may be a point to be considered in that it seems that his argument for recognizing the importance of freedoms calls upon moral agents to enter into some form of global contractarian thinking (if I want these freedoms to apply to me I must ensure that the freedoms apply to everyone in whatever way I can do that). This fact, on the other hand, may represent a kind of advancement in the universal scope of contractarian language that Sen found lacking in Rawls and others.

It might be suggested also that advocates for human rights, while benefiting from the universal nature of this sort of deontological framework, might find that the recognition of more teleological approaches in the form of narrative frameworks with which certain people identify, may also augment the work to provide wider recognition of human rights. While such narrative approaches (as in the virtue tradition of ethical reasoning represented by Alisdar McIntyre and others) have the potential of sinking into the small minded parochial viewpoints that Sen is rightly anxious to avoid, this need not necessarily be the case. The advantage of adding in the recognition of such narrative approaches to human rights as found in many of the great religious traditions is that the power of meaning inherent in the narratives has great potential to sway people to treat each other with compassion and respect in situations where an intellectual argument about the importance of freedoms may not do so. This is not to suggest that the power of the argument Sen has made about the importance of freedom is insufficient, but why should human rights advocates miss the opportunity to appeal to the heart as well as to the mind of so many people in the world who place themselves within the meaning systems presented in these narrative frameworks? It may be a faster route to protecting the human rights of immigrants if more time were to be spent on not only having people focus on the importance of the freedoms that they hold dear, but also to focus on the implications of the meaning systems to which they have devoted their lives that ultimately call for the immigrant to be recognized as a brother or a sister to whom one has an obligation that goes beyond any notion of a contract, global or otherwise.

None of this is to suggest, however, that an appeal to the mind with the kind of solid conceptual framework Sen has provided is not essential to the work of advocacy and is, perhaps, long overdue among activists who would proclaim human rights without providing the necessary

intellectual groundwork that would call forth assent on the part of many others. To that extent, Sen has provided a lasting contribution to the open and informed scrutiny of human rights.

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