

# Human Rights & Human Welfare

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Volume 6 | Issue 1

Article 28

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2006

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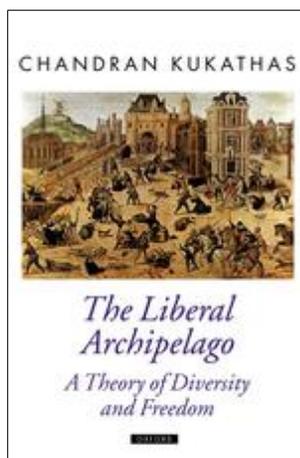
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### Recommended Citation

Fagan, Andrew (2006) "Escaping the Cultural Context of Human Rights," *Human Rights & Human Welfare*: Vol. 6 : Iss. 1 , Article 28.

Available at: <https://digitalcommons.du.edu/hrhw/vol6/iss1/28>

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## Escaping the Cultural Context of Human Rights

By Andrew Fagan

**The Liberal Archipelago: A Theory of Diversity and Freedom**  
by Chandran Kukathas. Oxford, UK: Oxford University Press,  
2003. pp.292

The contemporary age appears beset and driven by moral and political disputes, disagreements, fundamental misunderstandings, and mutual incomprehension. Secularists and religious believers systematically argue past one another. Doctrinal differences across and within religious communities persist despite, in many cases, centuries of dialogue and debate. Many of these disputes are neither trivial nor banal, but go to the heart of some of the most enduring and fundamental political questions and concerns. Foremost among them is the question: how can we co-exist in a peaceful and harmonious manner that does not entail a wholesale renunciation of those constitutive beliefs and practices that make us who we are? How can we be and let be? The search for a sufficiently robust common ground is increasingly urgent and appears increasingly difficult to achieve at regional, national, and international levels. Some readers might balk at this particular characterization of the world “out there,” for some, a solution may appear readily at hand, requiring only sufficient political will and courage to be realized. On this view, the moral and legal doctrine of human rights provides the normative cement capable of overcoming conflict and holding the world together. For many advocates of human rights the doctrine and its core principles are neither partial nor contingent. Human rights, it is argued, address a global community of morally equal individuals. The right to life and the right to be free from torture are absolute and immutable. Simplifying a very complicated series of philosophical arguments, no rational individual, however powerful, is considered rationally capable of rejecting the universal application of such core principles. The doctrine of human rights is a necessary and sufficient means for resolving the phenomenon of moral and political conflict and offers a sustainable answer to the question of how we might live together despite our deep differences.

Within the non-academic human rights community this is a position which is more often assumed than it is argued for: human rights have begun to be characterized, in some quarters, as a new religion, founded less upon reason and more upon faith (Rorty 1993; Ignatieff 2001). The extent to which this may be empirically accurate should cause deep concern for those whose support of the doctrine rests upon more sophisticated, intellectually robust but, hopefully, not unduly idealized foundations. However, I wish to focus upon a slightly different, though no less significant, aspect of contemporary analyses and understandings of human rights: the extent to which culture, in the anthropological sense, affects the development, understanding and implementation of human

rights principles. I pursue this by setting Chandran Kukathas' recent book, The Liberal Archipelago, in a broader theoretical context, which is necessary for understanding and assessing his contribution to the political theory of human rights. My discussion considers the following questions: how do contemporary liberal political theorists conceive of the relationship between culture and the constitutive elements of a core political morality, which is thought to be capable of securing a normative consensus? Within this context, how does culture have an impact upon human rights? Finally, what is Kukathas' political theory and does it present a means for securing political consensus that is supportive of and consistent with the most fundamental human rights principles?

### **Contemporary Liberal Political Theory and Cultural Diversity**

Human rights theory owes its origins, and the greater part of its conceptual development, to liberalism. It would be simplistic and unduly reductivist to describe the two doctrines as synonymous and identical. However, the similarities and commonalities between them significantly outweigh the differences. This common heritage and trajectory is important to the extent that developments within and challenges to liberalism are likely to resonate within and have implications for human rights theory.

The philosophical history of liberalism in the 20<sup>th</sup> century has been characterized, in part, by a recurring criticism. Liberal political theorists were accused by Marxists, Feminists and, most recently, Communitarians of either ignoring the cultural context of liberalism itself or of being constitutively incapable of assimilating an adequate and accurate understanding of culture as a consequence of the foundational elements and cornerstones of the doctrine. The precise terms of each of these critical perspectives differed as one would expect. However, their respective critiques did cohere around the conception of the individual, which liberals were generally accused of propagating. On this view, liberalism was criticized for being founded upon an empirically false conception of *the* individual. Liberals' normative commitment to formal equality and negative liberty was presented as entailing an empirically false, absurdly abstracted conception of those individuals who were subject to the political authority of the liberal state. Individual citizens are not empty vessels but culturally endowed beings. Our commitments, beliefs and practices are informed, to varying degrees, by the cultural communities within which we developed and with which we associate. To the extent that culture can have such a profound effect upon the perspectives and self-understandings of those who populate liberal societies, culture is an ontological ground that liberals can no longer ignore.

Some may wish to take issue with the significance attached to culture by the various critics of liberalism. Increasing numbers of contemporary liberal theorists have, however, come to accept the claim that for many people who are subject to the jurisdiction of the liberal state, cultural belonging is a primary good: an indispensable element of their particular sense of identity and well-being. Furthermore, forces such as migration and a resurgence of religious belief amongst indigenous and immigrant communities within liberal societies have increased the numbers of those for whom cultural belonging can be considered to be so important. The specter of the atomized and alienated individual unable to commit to anything, as well as finding meaning in nothing, is slowly being replaced by the vision of selves on a search for meaning and a cause to espouse. To some, this new vision appears to be too readily catered to by some religious and cultural communities. Culture and,

within that domain, religion have become central elements of the ongoing development of liberalism and the search for securing a normative consensus sufficient for justifying liberal political authority.

While increasing numbers of liberal political theorists accept that culture and religion cannot be ignored, the precise terms of how liberals should respond differ significantly. At one end of the spectrum resides Brian Barry (2001) who insists that the moral legitimacy of liberalism entails not so much ignoring culture and religion but insisting that individuals be accorded due equal respect, recognition and legal protection irrespective of whether enforcing this principle may have adverse effects upon some religious and cultural communities subject to the jurisdiction of the liberal state. Barry, in effect, draws liberalism's line in the sand at the principle of equal respect, refusing to countenance any compromise or negotiation with communities that do not share this ideal. At the other end of the spectrum, at least ostensibly, resides Will Kymlicka, who has been at the forefront of liberalism's "culturalist turn." While his account has shifted through numerous instantiations, Kymlicka has consistently argued that the formulation and implementation of liberal principles must adapt in order to take due regard of the importance of a sense of cultural belonging to some of those who populate liberal societies. For him the fact of cultural diversity entails that liberals can no longer simply assume the existence of some normative consensus built around a set of substantively liberal ideals and values. Liberals must refrain from an impulse to simply dismiss as false those ideals, values, and practices that do not conform to the liberal credo. He counsels a greater openness and receptiveness to illiberal communities in our midst. He does, ultimately, insist that the liberal state should not be supportive of communities whose practices entail a systematic violation of the autonomy of their adult members. For Kymlicka, culture is important but its value is instrumental to the protection and promotion of the exercise of personal autonomy. Other liberals contribute to this development and occupy varying positions along the culturalist spectrum. The work of Chandran Kukathas is very important in this regard and will be analyzed in detail after a consideration of how this development within liberalism may affect human rights theory.

### **Culture and Human Rights Theory**

Like liberalism, the development of human rights theory has only recently come to adequately engage with the concept and empirical reality of culture as an ontological domain.<sup>1</sup> The emergence of the so-called "third generation" of individuals' rights to cultural goods testifies to this claim. Conceivable reasons for this development both overlap with and differ from those which serve to explain liberalism's neglect of culture. In respect of the differences, it can be argued that the academic discourse and enterprise of human rights has been largely, though not entirely, dominated by the discipline of law. From this perspective, there has been a tendency to conceive of human rights principles in unduly formalized terms that correspond with relevant formal legal instruments. The academic discipline of law has long been criticized by some for its apparent neglect of the social, economic, and political factors that influence the development of specific laws and the institutions through which they are realized. This relative myopia for the context of law provides an explanation for why culture has not achieved the attention it warrants given the importance it holds for many of those subject to the law and human rights. In recent years the influence of academic

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<sup>1</sup> See Cowan, Dembour and Wilson (2001).

disciplines more sensitive to the cultural conditions of human action—such as sociology and anthropology—has increased within the academic study of human rights. This contribution has extended to affect the work of more established academic disciplines in the study of human rights such as political science and law. Through a gradual process of diffusion, culture and cultural belonging have become legitimate elements of the general academic discourse of human rights. To that extent, it marks a diminishment of law's domination in the academic study of human rights and the necessary assimilation of phenomena central to our understanding of the basis for and application of human rights.

The similarities between liberalism's and human rights theory's relative neglect of culture are, arguably, more significant since they go to the very heart of the substance of attempts to normatively justify human rights principles and the claims made on their behalf. One way of accounting for this is by reference to what I shall refer to as the "insider/outsider nexus." Cultural belonging correlates with a range of varying forms of identity, which are internal to a particular cultural community and provide for recognizable and legitimate modes of being and action. Cultural diversity testifies to the existence of multiple forms of identity—multiple modes of being and action across a given society. Cultures may be distinguished from one another by a perception and maintenance of those modes of being and action that characterize a given culture and mark the borders between cultures. Within complex, heterogeneous societies all cultural communities are not self-enclosed, static and homogeneous entities. Very few, if any, can be described in such terms. However, recognition of cultural diversity entails recognition of cultural differences and distinctions. It also entails acceptance of the fact that cultural communities require a distinction between insiders and outsiders—those who belong and those who do not. How this distinction is maintained and enacted will differ from one culture to the next but it is essential to the reproduction of a cultural community. From this perspective and in this regard, all individuals simply cannot be viewed as being the same. The insider/outsider nexus is deeply problematic for the normative justification of human rights principles.

Any attempt to assimilate the value of cultural belonging within the doctrine of human rights must first confront that which lies at the very heart of both the spirit and the letter of human rights. We, fellow human beings, possess human rights, if we possess them at all, not by virtue of our membership of some specifically privileged class or caste but by virtue of biological fraternity and the normative value accorded by the discourse of human rights. The discursive logic of human rights entails that the only legitimate answer to the question of who may be said to have a valid claim for the possession of human rights is each and every individual human being, irrespective of where they are from or which particular set of cultural values they may identify with. Moreover, each human being is deemed to have an equal claim to the possession of human rights regardless of his or her personal capital and achievements. Human rights claims are initiated in a vision of community that recognizes no ethically significant cultural or national distinctions. A commitment to the legitimacy of human rights does not entail turning a completely blind eye to the actual existence of such distinctions. However, it must entail a commitment to the view that these distinctions do not go "all the way down" to affect determining differential moral values of individuals whose cultures or nations differ. The doctrine of human rights thus emanates from a commitment to a form of abstract individualism and one cannot simply extract the latter without fundamentally affecting the philosophical credibility of the former.

Contemporary human rights theory would appear to be confronted by a particularly intractable problem. Culture and cultural belonging are increasingly accepted as sufficiently important for some people living within culturally diverse societies as to warrant some degree of recognition. Liberal states founded upon respect for human rights cannot simply refuse to accept that, for some people, maintenance of one's culture and its constitutive practices and institutions is essential to their sense of well-being. Recent discussions of third generation cultural rights mark an acknowledgement of this and an attempt to respond to the challenge it presents. However, recognizing the importance of culture and cultural belonging raises a fundamental question of how "deep" this recognition may go. An enduring concern centers on whether such recognition can proceed without jeopardizing the basis of the principal justifications for human rights, which intentionally exclude any consideration of those facets that divide the universal moral community into separate and distinct cultural entities. Avoiding this outcome runs the corresponding risk of treating cultural belonging in an unduly trivial or superficial manner, thereby failing to appreciate the sheer importance some attach to maintaining the conditions for such belonging. Culture represents an important challenge to contemporary theory and application of human rights. Responses to this challenge are best described as "works in progress." Indications as to how this might proceed can be gleaned from analyzing examples of how the challenge cannot be legitimately met. The recent work of Chandran Kukathas provides an important example in this regard.

### **Kukathas and The Liberal Archipelago**

Kukathas would most likely not describe himself as a human rights theorist. However, his work is important to our understanding of human rights in a culturally diverse society or political system. He has long had an interest in the politics of cultural diversity and its implications for rights claims as the basis of political authority. The Liberal Archipelago represents a systematic formulation and expression of the political theory he has developed over the past two decades. Kukathas recognizes and accepts, along with the likes of Will Kymlicka, the empirical fact of cultural diversity. He accepts that political theorists must no longer assume the existence of culturally homogenous societies, nor assume that those who populate such societies continue to share a common outlook and a commitment to a set of fundamental and substantive ideals. He distinguishes himself from the work of Kymlicka, however, by claiming to draw the appropriate conclusions from this recognition. Kymlicka has consistently advocated the continuing prioritization of the substantive ideal of personal autonomy as providing the necessary normative foundation for political authority under conditions of cultural diversity. Kukathas argues that autonomy is no longer capable of enjoying the degree of normative consensus in many contemporary societies as a consequence of the existence of cultural communities that do not recognize the value of the ideal. These communities fall under the jurisdiction of the same political authority as those which espouse the ideal. He argues that securing a basic, though minimal, normative consensus under these conditions cannot be achieved by pursuing a policy of assimilation or enforced conformity to previously totemic liberal ideals, such as personal autonomy. Taking cultural diversity genuinely seriously entails an account of political authority that is not enthralled by the norms and values of any particular community which falls under its jurisdiction. Kukathas argues that his account raises and addresses a distinctly different question to that typically found within contemporary political theory. Where his more conventional counterparts are concerned with identifying *what* political authority ought to *do*, he is concerned with

identifying *who* ought to have authority (4). This distinction is important to the extent that the focus will necessarily shift away from which ideals, interests, and values ought to be promoted, to a concern for who has authority.

A concern for who possesses political authority has a long heritage in political theory, stretching back at least as far as Machiavelli and Thomas Hobbes. Unlike his illustrious predecessors, Kukathas is not concerned to identify a single, personal source of political power which reigns over the populace. His position conforms to the contemporary spirit of human rights in so far as he aims to identify both the limits to the exercise of political power and to establish the individual agent as possessing an ultimate and ineliminable moral status within this context. Rights, then, occupy a central place within Kukathas' theory. The basis and delineation of these rights, however, are subject to the startling premise that contemporary, culturally diverse societies are incapable of yielding a common, substantively normative foundation for political authority. Kukathas eschews, therefore, others' appeal to the implementation of cultural or group rights as incapable of enjoying sufficient consensus. The fact of cultural diversity, he argues, speaks against, rather than in favor of group rights claims (259). In contrast, Kukathas draws upon the long-standing heritage of rights discourse in his identification of the individual as the only legitimate bearer of rights. Recognizing the fact of cultural diversity entails, for Kukathas, a return to the individual. However, the extent of cultural diversity excludes the legitimacy of valorizing substantive accounts of the individual and the promotion of extensive categories of rights to which the individual is entitled in order to realize her essence or presumed *telos*. In promoting the individual as the bearer of rights one must not return to those accounts of political authority which seek to protect and promote certain substantive ideals, values or conceptions of the person. Kukathas' account of the individual, one might say, is far more pluralistic or eclectic than political theorists typically espouse. This is expressed, most importantly, in his formulation of the actual rights to which individuals may lay claim within a society whose political authority refrains from prioritizing certain ideals.

Ultimately, Kukathas founds his political theory upon the individual's right to freedom of association and its correlate, the freedom of dissociation (or, right of exit). He argues, "[A] good society is thus one in which individuals are free to associate with, and dissociate from whomever they wish, since dissent from the views of the majority or the powerful is tolerated, and conformity is not compelled" (76). Cultural diversity is thereby not reduced to the lowest common denominator of a collection of homogenous, integral cultural communities that may be said to contain their individual members. Personal identity, he accepts, can have a cultural context but is not ultimately reducible to a set of specific cultural constituents. Unlike, for example, Michael Sandel (1982), Kukathas' recognition of the role of culture in identity formation rejects a view of culture as wholly constitutive of individual identity. After all, within culturally diverse societies most of us are going to be exposed to a variety of different cultural influences to such an extent that the claims of our "own" culture are bound to be diluted or constrained to a certain extent. It is also vitally important for Kukathas that recognition of cultural diversity not include a claim that these communities need to be normatively liberal in their outlook. He insists that a political theory adequate to the task of legitimately regulating culturally diverse societies must be based upon the ideal of toleration which, he argues, is secured by maintaining individuals' right of freedom of association. Cultural communities are to be tolerated, therefore, not because they share "our" outlook but so long as they do not seek to impede individual members' right of exit from any particular cultural community (97). This would be intolerable to the extent that it violated this fundamental right.

Kukathas, then, presents a political theory that seeks to retain a foundation in rights or, better expressed, a single right. The fact of cultural diversity does not, therefore, contradict or challenge the legitimacy of basing political authority upon a rights foundation. However, its effects are significant in the paring down of the fundamental rights Kukathas presents. Ultimately, he appears to accept the legitimacy of the one, single right to freedom of association. Upholding this right, he appears to assume, will be sufficient to protect against cultural incursions upon those diverse categories or collections of “goods” and values individuals hold to be important to them. The final arbiter on this issue is, therefore, the individual who chooses to either stay or go. So long as this choice is not impeded, political authority may be considered satisfactorily legitimate under conditions of cultural diversity. Kukathas insists that political authority must remain “indifferent” to substantive questions of the assumed necessary constituents of a “good life.” Political authority must not concern itself with issues and disputes over notions of identity, human flourishing or well-being. Rather, “[I]ts only concern ought to be with upholding the framework of law within which individuals and groups can function peacefully” (249). For Kukathas no single group or community can legitimately wholly possess political authority. Political authority is diffused across the various communities which together form not a single, homogeneous political entity, but an archipelago of co-existing authorities united by a commitment to maintaining the right of freedom of association.

### **The Cultural Politics of Human Rights**

A commitment to human rights entails a commitment to the claim that there exists a single, global moral community of human beings. Beyond cultural, religious, ethnic, and national differences a normative realm is envisaged in which all enjoy a basic and equal moral recognition in the eyes of one another and in the eyes of those who hold and wield power. At this level what I referred to earlier as the insider/outsider nexus can have no real significance. The growing appeal of human rights to countless people across the globe reveals that this vision is not the preserve of ivory-tower dwelling philosophers and political theorists. However, the doctrine of human rights is confronted by the fact of cultural diversity, which, in some respects, constitutes a challenge to this vision of a single global family. Kukathas’ work is important in this respect.

Cultural diversity must be accepted as an empirical reality which imposes certain constraints or limitations upon the scope and content of our fundamental normative values and ideals. However, the model espoused by Kukathas suffers from a significant degree of political naïveté. It may or may not be desirable to seek to establish a political ethics capable of securing the consent of all the relevant constituent cultural communities but, before one can embark on any such project, one must adequately gauge the extent to which different cultures and cultural differences are deeply affected by politics and the possession and exercise of political capital. Not all cultures enjoy equal standing and thus the individual members of any particular culture (whom Kukathas is primarily concerned about) may lead disadvantaged lives as a consequence of their cultural membership. Recognizing the cultural or national basis of identity and those rights that ensue entails an acceptance of the correlative necessity of exclusion of some based not upon the discovery of purportedly natural attributes but upon the imposition of politically motivated criteria.

Underlying all of this is, however, a deeper and more troubling question: are human rights sufficiently morally compelling in an environment in which culture has become deeply political, and

in which the politics of cultural difference potentially threatens deep division and conflict? In the face of potential division and deep misunderstanding, is it not reasonable to seek to both identify and withdraw to some common ground, no matter how formalistic this may be? And, if one accepts this position, is it not at least credible to identify, in effect, an individual's right to exit as that which political authority must uphold? Not to uphold this right would, after all, serve to confine individuals within cultural communities to which they were born and only add to cultural retrenchment and the potential for conflict. Such a vision is liable to appear more appealing the greater the prospect of cultural division and conflict. However, it cannot perform the task required of it. Politics occurs not simply between cultures but within them also. Kukathas suggests that the capacity to exit from a cultural community, which an individual may experience as oppressive, is always retained so long as it is legally upheld and protected. This is, of course, nonsense. Any given individual's ability to exit from a cultural community within which their identity may have been formed is a measure of the individual's possession of the requisite resources for beginning a genuinely new life and a measure of the willingness of others to accept this former outsider. Some women, in particular, may find this very difficult, if not impossible to achieve. Simply upholding a formal right to exit will not be sufficient to secure the effective exercise of the right. One's possession of rights may not be determined by one's cultural or national affiliations. However, the actual capacity to exercise such rights, particularly the right to exit, is deeply affected by one's identity and cultural status. Confronted by the internal and external planes of cultural politics, how should an advocate of human rights proceed?

### **No Escape from Culture**

The ideological cleavages of the Cold War have been replaced by a new form of political conflict, revolving around a set of religious and cultural divisions and mutual incomprehension. Defenders of human rights must not turn a blind eye to this empirical reality. Nor should it be dismissed as a mere epiphenomenon or temporary deviation from humanity's striving towards those truly cosmopolitan ideals which, if realized, would genuinely secure a new world order founded upon peace and mutual respect. The world is not well served by such naïveté. However, human rights do exist and are accepted by countless millions of people across the globe. Beyond the narrowly legal sphere of their application, part of the enduring value of human rights consists in their embodiment of a spirit (for want of a better, less Hegelian term) of openness and acceptance of oneself and of others.

Imagine, if you will, a vision of human society as consisting solely of self-enclosed, homogenous cultural or religious communities which, though aware of the different normative values and ideals of other communities, seek only to shut themselves off from these by means of ever more rigorous forms of "border control." In this context, security is perceived as requiring the exclusion or close scrutiny of all those who do not share "our" commitments and outlook. The identification of "insiders" and "outsiders" would, one may confidently assume, become a central concern for each and any such community. For some this vision bears an ever increasing similarity to the post 9/11 United States, the hegemonic Western power. Perhaps to a lesser degree, it is also a vision which underlies the concept of a "fortress Europe" in which non-Europeans are, at times and in places, seen as illegitimate intruders. A reversion to "culture" and "religion," while most certainly not an

exclusively “Oriental” phenomenon, appears only to undermine a substantive basis for human solidarity and mutual concern. To this extent, Kukathas’ vision of political society might appear to draw the correct conclusions. The principal value of human rights in the contemporary world consists in its providing and representing a counter-point to this trend.

The contemporary importance of other peoples’ cultural and religious commitments must, then, be accepted and responded to by the human rights community generally—theorists and practitioners alike. However, this response will be deeply undermined if developed from a position of a persistent ignorance or denial of the extent to which the human rights discourse has been fundamentally informed by a shifting and highly complicated collection of cultural and religious factors. The appeal of human rights is both undeniably global and cosmopolitan. Realizing this appeal requires not the persistence of a form of cultural myopia but a recognition and acceptance of the extent to which these principles themselves emerge out of a complicated amalgam of cultural and historical forms, not all of which are exclusively Western in character. Human rights provide a highly fluid and “unstable” world with a framework for inter- and intra-cultural dialogue. Inevitably, taking cultural differences seriously will entail a critical scrutiny of what counts as a “genuine” human right. One would expect, and hope, however, that the doctrine which emerged from such a scrutiny contained significantly more substance than that envisaged by Kukathas’ vision of political society.

The process itself should also be informed by recognition of the fact that there is no escape from the conditioning forces of culture and society. All too often secular “enlightenment” advocates of human rights have been blind to the presence of such forces in their own forms of reasoning and moral commitments, dismissing opponents as laboring under the yoke of culture and religion from which, it is assumed, they are themselves immune. However, this process must not fetishize culture and society. Appeals to the nation and the people as a means for excluding “outsiders” almost always obscure the fact that any such entity is a human construction and not a natural phenomenon. They emerge from choices and decisions made, typically, by power-holders. Human rights provide a lever for a far more extensive participation in these processes. They provide a means for challenging those who claim to speak in “our” name. They provide a means for a far more comprehensive account of who “we” are. There is no escape from culture but the conclusions that have all too often been drawn from this claim must and can be countered. An appeal to human rights is an excellent place to begin.

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