

# *Law & Ethics of Human Rights*

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*Volume 3, Issue 1*

2009

*Article 2*

LABOR RIGHTS IN THE ERA OF GLOBALIZATION

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## Comment on Mathias Risse: “A Right to Work? A Right to Leisure? Labor Rights as Human Rights”

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# Comment on Mathias Risse: “A Right to Work? A Right to Leisure? Labor Rights as Human Rights”

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## Abstract

In his ambitious paper, Risse addresses many important topics ranging from very general issues about what human rights are to quite specific questions about rights to work and leisure. I comment on four themes arranged in order of decreasing generality: Risse’s understanding of what human rights are, Risse’s suggestion that a conception of human rights should best be “basis-driven,” Risse’s particular basis-driven conception of human rights, and Risse’s specific position on human rights relating to labor and leisure.

What grounds can Risse give us for accepting his revisionist understanding of human rights as membership rights, which is so dramatically at odds with fundamental fixed points that have been taken for granted in human rights disputes over the last 60 years or so? If Risse has his way, then the treatment of a human being by others raises human rights concerns only if she is a participant in the global order and only if her treatment is a matter of international concern. It is obvious how this understanding of human rights is welcome to those who seek to free their own conduct or their country’s policies from human-rights constraints. Appealing to Risse’s understanding, they will be able to block criticisms based on human rights by denying, for example, that the people of the Gaza Strip are members of the global order or by denying that the torture of Burmese citizens within Burma is a matter of international concern. For those whose human rights are in jeopardy, Risse’s understanding of human rights could be a disaster. We should therefore examine very closely the arguments he may yet produce for his understanding and, unless they are hugely compelling, stick to the orthodox understanding of human rights as rights that all human beings have against all other human agents.

**KEYWORDS:** comment, conception of human rights, basis-driven, Risse, labor rights, leisure rights

## INTRODUCTION

In his ambitious paper, Risse addresses many important topics ranging from very general issues about what human rights are to quite specific questions about rights to work and leisure.<sup>1</sup> I comment on four themes arranged in order of decreasing generality: Risse's understanding of what human rights are; Risse's suggestion that a conception of human rights should best be "basis-driven"; Risse's particular basis-driven conception of human rights; Risse's specific position on human rights relating to labor and leisure.

### I. WHAT ARE HUMAN RIGHTS?

Risse asserts that we should "think of 'human' rights as rights individuals hold qua members of the global and political order that *ipso facto*, but contingently, includes *everybody*."<sup>2</sup> Human rights are then "membership rights" and "associative rights":<sup>3</sup> rights had by all and only those included in the present global order in which their fate is substantially influenced by what happens outside their own society.

What is the status of Risse's assertion? On what basis are we to assess and possibly to accept it? This question seems pressing because the assertion is highly unorthodox. Very few people employing the human rights idiom would think that whether human rights are being violated in North Korea turns on whether North Korea is or is not part of the global order. And although "the UDHR was passed when it barely started to make sense to talk about a global order,"<sup>4</sup> its framers certainly believed that massive human rights violations had been committed by the axis powers in World War II. Risse's understanding of human rights as membership rights would be strongly rejected by the propagators of human rights—both early (Kant) and modern (framers of the Universal Declaration of Human Rights<sup>5</sup>)—as well as by the present users of the human rights language to whom Risse ascribes human rights as a non-universal privilege. It would be rejected as reactionary, as pulling us back to a world before human rights, a world in which even the most fundamental rights of individuals were thought to depend on these persons' specific status—be it ascriptive (nationality, gender, race, ethnicity, caste, social

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<sup>1</sup> Mathias Risse, *A Right to Work? A Right to Leisure? Labor Rights as Human Rights*, 3 L. & ETHICS HUM. RTS. 1 (2009).

<sup>2</sup> *Id.* at 15-16.

<sup>3</sup> *Id.* at 22.

<sup>4</sup> *Id.* at 31.

<sup>5</sup> The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., 1st. plen. mtg., U.N. Doc. A/810 71 (Dec. 12, 1948). See JOHANNES MORSINK: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT (1999).

rank, age, religion, etc.) or achieved (virtue, merit, desert, spiritual enlightenment, etc.). The language of human rights was deliberately conceived to express the then revolutionary thought that there are some fundamental rights that all human beings have simply in virtue of being human. Risse asks us to reverse this revolution by understanding human rights as membership rights. Why should anyone accept his understanding of human rights?

It is possible that Risse's assertion is not meant as the reactionary move it appears to be. It is possible that the appearance is due to a simple conflation on his part. Risse *appears* to assert that we should ascribe human rights to all and only human beings included in the global order; but what he really means to assert is that a *commitment to* (truly universal) human rights is a condition of full membership in the present global order. On this charitable interpretation, Risse is not a reactionary denier of the universality of human rights, but an astute observer of the non-universality *of the appreciation* of universal human rights. Such appreciation rhetorically is, and more substantively ought to become, central to international society, but is uncommon outside of its spatial and temporal boundaries. So interpreted, Risse's assertion is close to what many have advocated in one form or another—Rawls, for instance, when he suggests that peoples should have to honor human rights as a condition of being recognized as members in good standing in a Rawlsian Society of Peoples. Rawls would never deny that persons outside this Society—oppressed nationals of contemporary or historical autocracies, for example—have human rights. In fact, it is because such autocratic societies fail to honor the human rights of many of their individual inhabitants that Rawls disqualifies them from membership in his Society of Peoples.

In my view, this is too obvious a distinction for Risse to have missed. So I will spare him the “charity” of an anodyne reading and assume that he means what he says. And my question then stands: What is the ground for his assertion? What reason can he give us to follow him in understanding human rights as membership rights? Is this understanding supposed to be implicit in how human rights are conceived in the international documents or by those of us who employ the human rights language? Is there some philosophical reason why there can be no universal rights of the sort many have felt committed to in the last 60 years? Are there some empirical-political worries that a widespread or official commitment to universal human rights would somehow do more harm than good, be counterproductive? All these objections to universal human rights—and others—are familiar from the literature and could be adapted in defense of Risse's proposed understanding of human rights as associative rights. Some such defense is needed if we are to take seriously Risse's challenge to the conventional understanding of human rights as universal. Some such defense would also be helpful for gaining a better understanding of whether Risse's assertion is primarily *normative* (we ought to endorse membership

rights in preference to universal rights) or primarily *hermeneutic* (the most plausible reconstruction of current human-rights talk and practice understands human rights as membership rights), and whether this assertion is directed primarily at the *legal* or at the *moral* human rights discourse.

The assertion that human rights are membership rights tells us something, but not much, about what human rights are. It tells us that the claim “there is a human right to X” is tantamount to the claim that members of the global order have some responsibilities with regard to other members’ having X. But what are these responsibilities? What conduct by what other members is one entitled to by having a membership right to X? In touching upon this question of counterpart responsibilities, Risse casually endorses two common views about them:<sup>6</sup> (A) The primary responsibility for the fulfillment of a person’s human rights rests with this person’s state. (B) Responsibilities for the fulfillment of human rights are unaffected by the causal explanation for the human rights deficit in question, except insofar as the ascription of responsibility presupposes an ability to remedy the deficit in question (“ought implies can”). I have criticized these views at length<sup>7</sup> and would be curious to know why Risse finds them persuasive.

To see what is at stake here, consider massive human rights deficits occurring under a corrupt and oppressive junta that took power by force in an impoverished but resource-rich country, call it Quark, which participates in the global order. In Scenario 1, the rules of this global order permit outsiders to make loans to the junta, to pay the junta for natural resources it exports, to sell arms to the junta, and to hold the personal fortunes of junta affiliates in secret bank accounts. Foreign corporations, banks, and governments in fact do all these things and thereby enable the junta to maintain itself in power even against the will of most of Quark’s population. In Scenario 2, the rules of the global order contain effective provisions *against* making loans to illegitimate and oppressive regimes, *against* recognizing such regimes as entitled to sell the country’s resources, and *against* accepting corrupt monies for investment. Nonetheless, the junta maintains itself in power through a system of indoctrination backed by brutal intimidation.<sup>8</sup> Contrary to (B), I would think that the difference between these two scenarios makes a difference to the

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<sup>6</sup> *Id.* at 31.

<sup>7</sup> See THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* (2nd ed. 2008).

<sup>8</sup> It will be easier to see the point of these contrasting scenarios when one assumes that local conditions are different so that the junta in Scenario 1 would not have come to power, or could not maintain itself in power, without the support foreigners are legally permitted and disposed to provide to it through loans, resource purchases, and arms sales. (This is not to deny that we also need to think about intermediate scenarios in which such available foreign support makes a *non-necessary* contribution to oppressive rule.) See my *Reply to the Critics: Severe Poverty as a Violation of Negative Duties*, 19 (1) *ETHICS & INT’L AFFAIRS* 55, at 62-65 (2005).

allocation of responsibilities: Contrary to (A), it would be implausible in Scenario 1—but perhaps not in Scenario 2—to allocate primary responsibility for addressing the human rights deficit to the junta and nationals of Quark. To be sure, in both scenarios the junta has a responsibility to mend its ways. But the responsibilities of foreigners are much weightier in Scenario 1 where these foreigners are deeply implicated in the human rights deficits suffered by Quark’s population.

These issues go to the heart of what human rights are, in this way: On my view, agents violate human rights only when they actively conduct themselves in ways that foreseeably and avoidably contribute to the frustration of fundamental human needs or interests. This is what foreigners do in Scenario 1, but not in Scenario 2. Foreigners in Scenario 2 thus have no human-rights-based obligations to intervene. Risse does not make this distinction and takes human rights to oblige even mere bystanders who can alleviate a human rights deficit: Unfulfilled human rights impose secondary responsibilities on foreign states and their nationals no matter how this human rights deficit may be caused.<sup>9</sup> On the face of it, this appears to take human rights more seriously than I propose. But Risse then avoids the burdens such responsibilities might impose on foreigners in other ways: by pointing out that it is often inopportune to intervene and by endorsing Sen’s lame contention that the human rights of others oblige an agent merely to some minimal consideration: “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.” The unfulfilled human rights of others “cannot simply be brushed away as ‘none of one’s business.’”<sup>10</sup> On the Sen-Risse view, foreign governments, banks, and corporations have done their duty when, in Scenario 1, they decide upon reflection to do nothing toward protecting those oppressed by the junta. In my view, such agents, continuing business as usual, are as much violators of the human rights of the abused population as the junta whose oppression they enable and incentivize.

## II. THE IDEA OF A “BASIS-DRIVEN” CONCEPTION OF HUMAN RIGHTS

Risse proposes that we think of a conception of human rights as consisting of four elements:<sup>11</sup> First, a *list* of rights to be included; second, “an account of the *basis* on which individuals have them (an account of what features turn individuals into rights holders)”; third, a *principle* that provides the rationale for the list; and, fourth,

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<sup>9</sup> Provided, of course that these foreigners are fellow-members of the global political order.

<sup>10</sup> Risse, *supra* note 1, at 32, quoting Amartya Sen.

<sup>11</sup> *Id.* at 16.

an account of counterpart *responsibilities*. He then distinguishes conceptions of human rights by the order in which they specify these four elements:<sup>12</sup> There are list-driven conceptions that begin from a list and then try to construct a plausible rationale for this list. There are basis-driven conceptions that begin by explaining in virtue of what those who have human rights have them. And there are principle-driven conceptions that start out from some principle that generates the list. Risse acknowledges that the distinction between the last two types is not precise because basis and principle can be closely related. Basis-driven conceptions work with a principle for identifying human rights, but one that is grounded in an account of what features turn individuals into rights holders.

I am not sure this categorization of conceptions of human rights is clear or helpful. It is hard to see how *any* principle for identifying human rights could be un-based in any facts or values about human beings. And it is then unclear what principles are sufficiently independent to count as “principle-driven” rather than “basis-driven.” Risse characterizes his own conception as “basis-driven, the basis being *membership in the global political and economic order*.”<sup>13</sup> Yet he characterizes the conception Beitz develops out of Rawls as “assessing what ought to be the *function* of human rights in the global order” and therefore principle-driven.<sup>14</sup> I do not doubt that there is a way to make the distinction precise so that Risse and Beitz get categorized as Risse wants. But it would be good to have this distinction drawn more clearly.

Another question is whether Risse’s tripartite distinction is meant to be exhaustive. It is tempting to suggest that there can also be responsibilities-driven conceptions of human rights that begin from an account of what human beings (or, on Risse’s view, fellow members) minimally owe one another. Onora O’Neill has discussed human rights along these lines,<sup>15</sup> and Tim Scanlon’s work may provide another basis for such a conception.<sup>16</sup>

An even more important objection to Risse’s categorization is that we need not assign content priority to *any* of the four elements Risse usefully distinguishes. It makes more sense, in my view, to consider all four elements together: to gather our firmest convictions about each and then to try to unify them into a coherent and unified conception. This is the method Rawls calls “reflective equilibrium”:

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<sup>12</sup> *Id.* at 17.

<sup>13</sup> *Id.* at 21.

<sup>14</sup> *Id.* at 18.

<sup>15</sup> See, e.g., ONORA O’NEILL, *FACES OF HUNGER: AN ESSAY ON POVERTY, JUSTICE, AND DEVELOPMENT* (1986). See also ONORA O’NEILL *CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT’S PRACTICAL PHILOSOPHY* (1989).

<sup>16</sup> THOMAS MICHAEL SCANLON, *WHAT WE OWE TO EACH OTHER* (1998).

We have some firm convictions about what must be on the list but are doubtful about other candidate human rights; we have some definite ideas about what sort of beings have human rights but are unsure about certain borderline cases; we intuitively reject some possible principles for deciding which candidate human rights should be included and find other such principles appealing; and we also have some solid convictions about the plausibility or implausibility of the counterpart responsibilities various specifications of the other three elements would generate. Does it not make more sense, then, to aim for a conception of human rights that is not “driven” by any one of its elements but rather designed to be as plausible as possible across all its four elements?

### III. RISSE’S SPECIFIC BASIS-DRIVEN CONCEPTION OF HUMAN RIGHTS

Risse presents his own conception of human rights as basis-driven, that is, as driven by an account of what features turn individuals into rights holders. On his account, there is one such feature: the individual’s membership in the global order. This is a very thin basis which does not tell us anything further about human beings: about their needs, interest, vulnerabilities, and unique value. It is hard to see how a “basis” that does not include such knowledge about human beings can be of much use for deciding which candidate human rights to include or exclude.

When he sketches how to make such decisions, Risse in fact implicitly draws upon an account of human needs and interests. Thus he writes that the inclusion of some candidate human rights on the list may be grounded in enlightened self-interest.<sup>17</sup> Such a grounding presupposes an account of human interests and their (rough) relative weights. And similarly for his suggestion that, to qualify for inclusion, a candidate human right must express “an appropriate and urgent moral demand against authority.”<sup>18</sup> Risse’s official basis gives us no ground to make such assessments. And Risse must and does then invoke ad hoc judgments, extraneous to his basis, when he qualifies some demands against authority as urgent or appropriate and others not.

### IV. RISSE ON LABOR RIGHTS

Such improvisation is also apparent in Risse’s discussion of candidate labor rights. Early on he announces: “Asking the apparently straightforward question whether labor rights should be considered human rights takes us to the core of conceptual

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<sup>17</sup> Risse, *supra* note 1, at 27.

<sup>18</sup> *Id.* at 28.

questions about human rights.”<sup>19</sup> However, Risse’s treatment of those conceptual questions does not in the end inform or facilitate his discussion of labor rights. He favors a human right to work, understood as a right to offer one’s services, rather than a right to have a work opportunity actually provided to one, if need be by the state.<sup>20</sup> The argument Risse offers for qualifying this right as a human right is that “for most adults, paid work is the source of their livelihood, and they spend much of their time earning the money on which they must live and raise families. Employment is also a crucial source of self-esteem.”<sup>21</sup> This argument is entirely extraneous to Risse’s conception of human rights. And it supports including not the narrow right Risse favors: to offer one’s services, but the broader right Risse rejects: to have real access to some job. That’s what people must have if employment really is, as Risse says, the source of livelihood and crucial to maintaining self-esteem. If, on the other hand, livelihood and self-esteem can also be maintained without employment—perhaps through a state-funded basic income that permits the unemployed to enjoy various other pursuits—then even Risse’s limited human right to employment should be rejected in favor of an even weaker, disjunctive human right to employment *or* a basic income.

Pursuant to his understanding of human rights as rights of membership in the global order, Risse requires that candidate human rights must also pass a second test: They must be matters of “urgent global concern.”<sup>22</sup> He claims that the limited right not to be legally excluded from employment passes this test in virtue of “enlightened self-interest and interconnectedness.”<sup>23</sup> The idea seems to be that in a global order characterized by extensive international trade, people are affected by, and have an interest in, how labor is regulated in foreign lands. Again, I don’t find this argument convincing. Suppose some country violated the candidate human right Risse proposes by legally excluding a part of its own population from employment. This country would thereby render its own economy less productive and would thus put itself at a competitive disadvantage against other countries relative to what its position would be without the restriction. Is this a ground for other countries to have a legitimate interest in including the labor right Risse favors among the rights of membership in the global order? Offhand, I cannot see why it should be.

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<sup>19</sup> *Id.* at 2.

<sup>20</sup> Risse invokes the analogy to a right to marry, which is a right to offer marriage to others rather than a right to be provided with a suitable spouse, *id.* at 34.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 34.

<sup>23</sup> *Id.* at 30.

This difficulty about labor rights suggests a more general problem with Risse's postulated second necessary qualifying condition for human-right status. There are many paradigm human rights that—even more obviously than Risse's favored labor right—fail to meet the second condition. The right not to be tortured is an example. The fact that people are tortured in Burma does not affect the interests of people elsewhere. And Risse's understanding of human rights would then disqualify a human right against (domestic) torture. This problem highlights once more the puzzlement I expressed in the middle paragraph of section 1 of this commentary: What grounds can Risse give us for accepting his revisionist understanding of human rights which is so dramatically at odds with fundamental fixed points that have been taken for granted in all the busy arguments and disputes about human rights over the last 60 years or so? Why should we hijack an expression that, despite much dispute and contestation at the margins, has some firm and widely agreed-upon meaning and use it for something very different? I don't see so much as a hint toward an answer in Risse's paper. But I see very clearly the great attraction his understanding of human rights might have for those who seek to free their own conduct or their country's policies from human-rights constraints. If Risse has his way, we'll soon be obliged to spend time arguing that the people of the Gaza Strip *are* members of the global order and that torture *is* a matter of international concern even if it happens to Iraqis in Iraq or to Burmese in Burma.

Not looking forward to such debates, I suggest that we examine very closely the arguments Risse may produce for his understanding of human rights. Unless they are hugely compelling, we should stick to the orthodox understanding of human rights as rights all human beings have against all other human agents.