

The Theoretical and Social Conditions of Human Rights*

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Abstract

Human rights are the most famous political and legal concepts of our age. They seem a cornerstone of human being's development and a criterion for the degree of civilization. Everybody -even crypto dissenters of them- champions human rights. From the radical right to the left almost all political understandings try to show their compatibility with them. But this dust cloud can not hide the crucial questions and the worries about human rights: what is the theoretical or ethical core (the sufficient explanation about which human being uniqueness and causes of having these rights) of human rights? And, in the postmodern era, what are or can be their social bases, namely the conditions which lead to comprise and support human rights norms? Which kind of social structure and relations give a rise to human rights norms? In this text I would like to give modest answers to the questions above. The Answers would be modest because I do not argue that they are the only answers can be given to such questions or they are completely true. But I strongly believe that the answers given below about the theoretical and social bases of human rights, define the conditions which envisage personally and socially a good condition for human being.

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Introduction

Human rights are not just a matter of law, their supposed scope and function goes far beyond law. But in general human rights are taken as a matter of law, especially international law or sometimes used an instrument of international politics. However high their popularity has been in the last decades, a critical glance reveals there has been only a little improvement in this area. Scholars who focus on the matter can easily see the current conditions of human rights and convey some facts about them.

1. Human Rights are lovely child of twenty century. They became very popular in the post Second World War period (especially, after 1950) with the rebirth of Natural Law theories. Winners and losers of the War did not enough care about human rights. Nobody can forget the winners' atomic bombs or the losers' concentration camps. All parties in the war made heartless, detailed calculations and carried out them, resulting in killing more people with less cost. The bitter experiences of the War invoke, Natural Law, as a reaction or a remedy, and its important, perennial idea of inalienable, innate and universal rights of human beings.

2. Human rights can be seen at two levels: at the first level, international declarations include and manifest them. Declarations, from the American or the French documents to the Universal Declaration, played crucial a role in the recognition and development of human rights. But declarations do not have any coercive power behind them, namely they lack tangible enforcement or sanctions. At the second level international covenants define, limit and coerce human rights abusing parties. Some international machinery, detailed procedures try to embody or realize them trough law.

3. Development of Human Rights continually has been and is subject to politics. Current political events and circumstances have a deep impact on human rights theory and practice. The impact of politics on human rights is a reality, but at the same time it is the source of both human rights' development and degeneration. Political intervention, from the birth period of human rights doctrine to the present has been

a key motive of human rights thinkers (from Locke's *Essay on Toleration* or Spinoza's *Treatises* to Rawls' *A Theory of Justice* or Dworkin's *Taking Rights Seriously*). If we see that human rights always are fundamentally used for limiting governmental powers of *sovereignty*, it can easily be understood how they relate to internal politics. But, in general, it seems that political intervention in human rights distorts legal procedures which are supposed to be the best way to realize them. So the possibility of intervention, even if it doesn't occur, casts doubt on and can potentially undermine human rights.

4. On the surface of the current political and legal discussions everybody accepts and seems to grasp perfectly the importance of human rights, however, generally nobody believes that human beings have rights or another values which can be morally or theoretically defended. They treat human rights as a practical instrument for social life, like machinery or marriage. The view brings about a misuse of human rights and lots of misleading discussion about the topic. People lose faith in human rights in law and in general, which results in two degenerative effects on society itself. First people, do not rely on law, and try to find different ways to get their rights or what they think they deserve. Second, they do not feel obliged to obey any rules so they try to continue living their lives without the guidance of legal rules.

The situation pictured above could sum up the position of human rights at present. But in order to answer two crucial questions about human rights we should turn to the theoretical conditions.

The Theoretical Conditions of Human Rights

In this text when I talk about theory of Human Rights I mean their moral framework. So, a review of fundamental moral explanations and thinking on moral grounds of human rights, leads us to get a sound understanding of them. Why should it be moral? After we ask this, there are two questions about the issue: why are there human rights? And why ought human beings to have rights? An answer to the former question can be found in the field of social sciences, especially sociology and will be

explored below. The latter is a normative question and it belongs to ethics. Law, especially international law which made great effort to develop human rights, has been overridden in the human rights area. Despite that fact, “excessive attention to human-rights law distorts our understanding of human rights”¹ because of their interdisciplinary character.

Human rights are fundamentally concerned with treatments. They prescribe some formulas about to treat people. So they do not give us a factual definition of reality. Quite to the contrary, human rights envisage an ideal portrait of the human condition. They do not include the word “is” but use “ought” in Benthamite terms. The future makes them normative and it is explored with normative disciplines, namely law and moral philosophy or ethics.

In conclusion, only a part of human right theory is in the legal field. The other theoretical and normative part of it, which is the crucial part, is concerned about ethics or moral philosophy. Morals, which are social rules about right and wrong, are one of the most related kind of social rules to law. Theory of law can be divided into two different parts according to their view about relations of morals to law: One is natural law which accepts the importance of moral content of law and gives priority to the value of justice, and the other is legal positivism which accepts a separation thesis, in order to keep law’s uniformity or consistency. This latter thesis it-says that law and morals are different subjects and we do not need any moral references in theory or practice of law, because it is a self-contained and closed system.

First of all, human rights can be neither limited nor defined by legal positivism aspects. They can not be completely covered by human-rights law:

“The legal-Positivist approach not only misinterprets their character, it also dangerous implications. The *point* of human rights has historically been to criticize legal authorities and laws that violate human rights. Legal positivists sometimes say that the only rights are those that are legally *enforceable* ... The concept of human rights implies that they are often not.

¹ Michael Freeman, **Human Rights**, Cambridge: Polity Press, 2004, p.12.

If human rights were legally enforceable, one could, and normally would, appeal to one's *legal* rights, and would not need to appeal to one's human rights. One appeals to human rights precisely when legal institutions fail to recognize and enforce them. If legal positivism were true, an important basis for criticizing unjust legal systems would be eliminated"²

A theory of human rights reaches beyond legal. Ethical bases of human rights are a very debatable matter but, I think, it can be supported by *two secular grounds*. I prefer secular grounds because religious frameworks are always subject to the objection that they can not be adhered to by people who believe in another religion (despite Semitic religion's inner connection) or atheists. The two secular grounds I will introduce are Utilitarianism and Kantianism.

The main sources of Utilitarianism are the writings of Bentham and Mill, and they express a famous principle, Principle of Utility: "of all the possible actions open to you, perform that action with greatest tendency to bring about the greatest balance of happiness over misery for mankind as a whole."³ The Principle can shortly be stated as "the greatest good for the greatest number". Additionally, Utilitarianism has a view of human psychology that is a simplistic or reductionist one:

"Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think..."⁴.

Pain and pleasure govern us in every aspect of life. So a logical conclusion of Utilitarian psychology is that human beings (and almost all animals) have a fundamental property: called sentience, which means

² Freeman, p.10.

³ Jeffrie G. Murphy, Jules, L. Coleman, **Philosophy of Law: An Introduction to Jurisprudence**, Colorado: Westview Press, 1990, p.72.

⁴ Jeremy Bentham, **An Introduction to The Principles of Morals and Legislation**, Gloucester: Dodo Press, 2008, p.1.

they can feel pain and pleasure, and furthermore that this property is the base of their moral character. Their capability of feeling pain and pleasure makes human beings morally relevant so they have or ought to have rights. These rights are not merely legal but have a basis in this unique property of humanity supported by Utilitarianism and the natural rights which flow from it:

“(M)oral relevance- i.e., other things being equal... it is wrong to pain a human being (or, indeed to any sentient creature). The point is not that it is always wrong under all circumstances to hurt a sentient creature (or always right to give pleasure to a sentient creature) but rather this: the causing of pain is always a relevant moral point against what we do (and thus must be justified) and the causing of pleasure is always a relevant point in favor of what we do”⁵.

Despite this psychological basement which is a strong argumentation because it is supported with empathy and sympathy, Mill defined rights in a social manner he conceive, that “to have a right is have something that society ought to defend me in the possession of.”

The other basis for consideration is Kantianism and, at first glance, it has a very different view about the moral grounding of human beings. However this differences on the surface is illusory, because they are closely related due to shared deeply roots in the Enlightenment. Kantianism prefers autonomy, which is the capacity to make rational choices out of causality, to support moral relevancy. Human beings are unique in their morally relevancy because they can make a rational choice which is not determined by an outside cause but entirely determined by their own free will.

Like Utilitarianism, Kantianism has famous formulas expressed by Kant which include: The Formula of The Law of Nature, The Formula of End in Itself and The Formula of Autonomy. They are as follows⁶:

⁵ Murphy, Coleman, pp.75-76.

⁶ Immanuel Kant, **Groundwork of Metaphysic of Morals**, Trans. H.J. Paton, New York: Harper Torchbooks, 1964, pp.88-100.

Act as if the maxim of your action were to become through your will a universal law of nature.

Act in such a way that you always treat humanity, weather in your own person or in person of any other, never simply as a means, but always at the same time as an end.

So act that your will can regard itself at the same time as making universal law through its maxim.

These formulas try to give a strong basis to build on human dignity. Human beings are autonomous and “an end in itself” so they ought to have a “moral space” to act. These human properties require a special kind of treatment to flourish and this is an acceptance of their dignity. Human beings’ dignity is required by these formulas, especially the second one: “All rational persons have a right not to be used without their consent even for the benefit of others”.

Despite the fact that they are very contestable and have a lot of versions, Utilitarianism and Kantianism both are enough, I think, to give a relevant theoretical basic for human rights at an abstract level (we remember R. Dworkin’s “equal respect and concern”). If we did not accept in anyway human’s sentient character and dignity, we never would recognize human rights in theory or in practice, especially not in philosophy or law. So, the sentient nature of human beings and their dignity are the theoretical conditions of human rights. This is true not only for human rights norms but also all norms should accept these conditions as a primary obligation to be fulfilled.

The Social Conditions of Human Rights

When I say ‘social conditions of human rights’, I mean social norms’ (including law) compatibility with human right. This can occur at two levels: at the first level, the social structure of a society and it is compatible wholly with human rights, so all norms derived from this structure (laws for example) are to impose to whole society meet human rights

requirements. At a second level, which is more pervasive and important, all social norms (laws, customs, mores, etiquettes for instance) which guide peoples' behaviors will be in accordance with human rights and this kind of society that will result can be properly called a democratic one. Human rights and democracy are inseparable concepts, they always refer to each other.

Morality has a social basis, most importantly there is a social basis of good and evil in that the conceptions of them continuously change over time and in one society to other. Sources of all social norms are social relations and social institutions. Relations and institutions affect and determine each other interactively. The character of a relation, at the last turn, will determine the tone of a social norm that it can be derived from it. Because society is alive and always changing, when people change goods they change symbols at the same time. Collective values and symbols which comprise the culture of a society are the most influential factors on norms.

Some kind of social relations are especially important for norms. Because, some social practice has a potential to become widespread, it can become a norm under certain conditions. Georges Gurvitch called it as a 'normative fact': "having designated as 'normative fact' each manifestation of social reality capable of endangering law..."⁷ Normative facts have two conditions:

"The first condition is the capacity of these social facts to embody positive values by their very existence; this capacity... is certified by the collective acts of intuitive recognition, acts in which the participants yield to a social fact realizing one of the multiple aspects of the idea of justice. The second condition is that in these facts prevails the active element, a task to be accomplished".⁸

The importance of normative facts which is the main source of law, is its close relation with values, namely justice: "A normative fact can be recognized only in as far as it represents a reconciliation of values... this

⁷ Georges Gurvitch, **Sociology of Law**, London: Kegan Paul Co. Ltd., 1974, p.158.

⁸ Gurvitch, p.158.

reconciliation is achieved by justice...”⁹. So if the main source of law and other social rules were normative facts and normative facts related with values, it would be true that awareness of human rights would have an affect upon the main source of law and vice versa. In the Postmodern era everything is fragmented and universality seems to be problematic. Postmodernism supports and develops cultural relativism which is the most opposite concept to universality.¹⁰

The logical conclusion of this fact is that susceptibility of societal intuitions and structures must be increased to empower human rights. So the social conditions of human rights norms are the increasing awareness and susceptibility about human rights. I think, theoretical ideas and social conditions are both interlinked and they support each other.

Rorty has a good definition of progress: “an increase in our ability to see more and more differences among people as morally irrelevant”. We must accept that all people are, at least, as human as ourselves.

⁹ Gurvitch, p.42.

¹⁰ Cf. Jack Donnelly, “The Relative Universality of Human Rights”, *Human Rights Quarterly*, 29 (May) 2007, pp.281-306.

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