

Human rights as Ideal and Moral rights

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When we talk about “Human Rights,” we have two different types of “Human Rights” in mind.

This is my first fundamental proposition.

In my account, human rights could be distinguished as Ideal and Moral rights. Human rights as Ideal is the sovereign normative power which directs the people, mainly the state officials, to review legislation, administration and judiciary constantly and repeatedly from the viewpoint of human wellbeing of every individual under its jurisdiction. Human rights as Ideal is also the normative supreme power which reminds the citizens of their dignity as equal human.

Moral rights, on the other hand, are individual and concrete rights which are said to exist even before the statutes and the constitutions codify them.

It is common that human rights have two dimensions, the underlying foundation/justification and legal/moral norms as highlighted in the drafting process of the Universal Declaration of Human Rights. In this connection, the following passage by Jacques Maritain is illuminating¹.

I am quite certain that my way of justifying belief in the rights of man and the ideal of liberty, equality and fraternity is the only way with a firm foundation in truth. This does not prevent me from being in agreement on these practical convictions with people who are certain that their way of justifying them, entirely different from mine or opposed to mine, in its theoretical dynamism, is equally the only way founded upon truth.

¹ Jacques Maritain, Introduction, in *Human Rights-A Symposium edited by UNESCO*, Columbia University Press, 1949, 9-17, pp.10-11.

Charles Taylor also proposed a tripartite distinction of human rights².

What we are looking for, in the end, is a world consensus on certain norms of conduct enforceable on governments. To be accepted in any given society, these would in each case have to repose on some widely acknowledged philosophical justifications, and to be enforced, they would have to find expression in legal mechanisms.

I basically agree to Taylor and Martin that human rights have the philosophical dimension as underlying justification as moral rights. However, it seems to me that most of human rights activists are committed not to the underlying justifications but to the belief in human rights as the universal ideal and its accompanied moral sentiment beyond concrete moral rights. In other words, the moral source of activists is their belief in human rights as the universal ideal.

My argument aims at making their dual or tripartite distinction more practical and adapting them to the ordinary use of human rights in the contemporary international human rights regime. For instance, in Taylor's terminology, "certain norms of conduct enforceable on governments" are a bit ambiguous concept and we are not certain whether it only designates Universal Declaration of Human Rights or also denotes international human rights instruments such as International Covenant on Civil and Political Rights or may embrace regional human rights treaties and declaration and human rights articles in national constitutions. If the last interpretation is accepted, it would become obscure how it is different from "expression in legal mechanisms." Likewise, it is not clear whether "expression in legal mechanisms" includes uncoded moral rights and customary laws.

There is another ambiguity around the concept of human rights, which, in my account, also derives from the lack of distinction between human rights as Ideal and human rights as moral rights.

It is common that human rights are considered universal, inalienable, indivisible, interdependent and interrelated as elaborated in the UNFPA commentary³;

² Charles Taylor, Conditions of an unforced consensus on human rights in Joanne R. Bauer and Daniel A. Bell eds., *The East Asian Challenge for Human Rights*, Cambridge University Press, 1999, 124-144, p.129

³ UNFPA, Human Rights Principles, 2005.< <http://www.unfpa.org/resources/human-rights-principles>> finally confirmed on Sept. 29th 2016.

They (human rights) are universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background. Inalienable because people's rights can never be taken away. Indivisible and interdependent because all rights – political, civil, social, cultural and economic – are equal in importance and none can be fully enjoyed without the others. They apply to all equally, and all have the right to participate in decisions that affect their lives. They are upheld by the rule of law and strengthened through legitimate claims for duty-bearers to be accountable to international standards.

On the other hand, distinction between non-derogable rights and the other derogable rights has steadily developed in scholarship and in practice and it is often argued and agreed that children, elders and the ones with disability needs some special rights more than human rights, which is, strictly speaking, in contradiction with equality and indivisibility of human rights.

This paradox could be settled by distinguishing human rights as Ideal and concrete moral rights which could be in conflict with each other and should be subject to restraint based on the other ideals such as the public welfare or public moral order whereas human rights as Ideal is universal and supreme in normativity.

My second fundamental proposition is that human rights must find out appropriate philosophical foundation/justification in order to be incorporated into non-western society and such foundation/justification must be attractive and inspiring for the ordinary citizens in the society and reposed on their own intellectual resources including local language.

For instance, even basic human needs such as desire for food, water and communication take different expressions in different languages.

So, although basic human needs constitute the foundation for human rights, we still need different reasoning/justification, specific to each language and society.

It is also my basic assumption that each society/community has its own social moral order with certain conception of humans and society, historically developed in its society. In other words, any philosophical justification of human rights must contain own conception of social moral order embracing its unique philosophical view of humans and society.

1. Human rights as Ideal

What is human rights as Ideal?

Ideal as noun has two meanings, a person or thing regarded as perfect and a standard or principle to be aimed at. Human rights as Ideal means a perfect moral norm which makes human rights universal, indivisible and inter-dependent and -related despite of separate and hierarchical nature of concrete moral rights. However, the idea of human rights as ideal is not Platonic idealism although it is against legal positivism.

Ronald Dworkin presented distinction between rule and principle. In his account, principle is a standard to be observed “not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality” whereas rule is set of standards applicable in an all-or-nothing fashion such as “The maximum legal speed on the turnpike is sixty miles an hour.”⁴

In my account, rule and principle is not rigid distinctive category and like the article 3.1 in the Convention on the Rights of the Child “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration,” it can be applied as rule and principle, depending on the context.

Human rights as Ideal is not principle in Dworkin’s sense, rather it is what authorizes or justifies principle.

Hence, we should not consider human rights as Ideal some rigid set of standards completely different from set of concrete moral rights. Rather, human rights as Ideal should be understood as the supreme normative power universally embedded in the norm named “human rights.”

So, what does it mean to be the supreme normative power?

Héctor-Neri Castañeda, a Guatemalan philosopher(1924-1991), presented three approaches about the distinctive meaning of the moral language, ought-statement such as command, request, advice and prohibition;

- 1) Imperative approach, which views the peculiar character of ought-statement as its purpose of telling someone to do something on a certain occasion,
- 2) Resolutive approach which identified the distinctive meaning of ought-statement as its expression of decision to do something,
- 3) Good-reason approach which equates ought-statement to the corresponding

⁴ Ronald Dworkin, *Taking rights seriously*, Universal Law Publishing Co. Pvt. Ltd., pp.22-24.

assertion “There is good reason for X to do A.”

Tatsuo Inoue, a Japanese legal philosopher, drawing on Castañeda’s formation, submitted his own approach that the unique role of ought-statement is to define semantic structure of reflection on justifiability of the corresponding “directives,” a action-guiding statement such as “You shall not do A.”⁵

In my account, for instance, the article 4 of the Universal Declaration of Human Rights “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms” is not only “directives”, but also embraces the normative power to direct the people, mainly the state officials, to review legislation, administration and judiciary constantly and repeatedly from the viewpoint of human wellbeing of every individual under its jurisdiction. It also contains the normative supreme power which reminds the citizens of their dignity as equal human.

2. Human rights as moral rights

Some philosophers such as Jeremy Bentham and Alasdair MacIntyre do not accept the existence of moral rights prior to codified rights enacted by legitimate legislation.

Other philosophers such as Alan Gewirth, Ronald Dworkin and Robert Alexy believe that there exist moral rights.

Alexy illustrates one consequence of the argument about existence and non-existence of human rights.

If human rights do not exist, constitutional rights would be nothing more than what has been written down in the constitution. They would have an exclusively positive character. If, however, it should be proven that they exist, the picture would change fundamentally. Constitutional rights would be understood as attempts to positivize human rights⁶.

⁵ Tatsuo Inoue, Norm and legal proposition(規範と法命題), 1~4, *Kokka Gakkai zasshi* (*The journal of the Association of Political and Social Science*)(国家学会雑誌), vol.98-100, 1985-1987.

⁶ Robert Alexy, The Existence of Human Rights, in *Law, Science, Technology: Plenary Lectures Presented at the 25th World Congress of the International Association for Philosophy of Law and Social Philosophy, Frankfurt Am Main*, (Archiv Fur Rechts- Und Sozialphilosophie - Beihefte (Arsp-B)), Franz Steiner Verlag Wiesbaden GmbH, 2013, pp.87-89.

As a proponent of existence of human rights as moral rights, I present argument to prove the existence of moral rights, drawing on their arguments.

I start with the view of human as agent, one with intention and free will at least subjectively.

Gewirth presented very rigorous argument based on two features as agent, voluntariness or freedom and purposiveness or intentionality. Briefly, Gewirth demonstrated that agent need certain conditions and abilities to achieve own goals, named as well-being consisting of three different categories;

- 1) Basic well-being, essential preconditions of action including life, physical integrity, mental equilibrium,
- 2) Nonsubtractive well-being, general abilities and conditions required to keep one's general level of purpose-fulfillment undiminished and one's capabilities for particular action, including not being lied to or stolen from,
- 3) Addictive well-being, general abilities and conditions required to increase one's level of purpose-fulfillment and one's capabilities for particular action, including education, self-esteem and opportunities for acquiring wealth and income.

Gewirth highlighted community as one of the important components of additive well-being and of well-being generally for the following two reasons. Firstly, being a member of a supportive community helps one to be more effective in achieving one's purposes and secondly, one can develop one's full humanity only by and in association with other humans in a stably regulated order.

Then, Gewirth demonstrated the existence of moral rights based on a dialectically necessary method, a way of logical inference as agent as follows;

- (1) The statement "I do X for end or purpose E" is the one which every agent must accept,
- (2) "E is good" in the sense that E has sufficiently valuable for agent to try to achieve it,
- (3) "My freedom and well-being are necessary goods as freedom and well-being are necessary conditions to try to achieve E", which establishes that,
- (4) "I(agent) must have freedom and well-being."

Then, Gewirth introduced the concept of right as follows; (5) "I have rights to freedom and well-being" because if one rejects (5), he also rejects (6) "all other persons ought at least to refrain from removing or interfering with my freedom and well-being and as a consequence, he accepts (7) "Other persons may remove or interfere with my freedom and well-being" and by accepting (7), he also must accept (8) "I may not have freedom and well-being," which contradicts (4) , which establishes that every agent must reject

denying (5).

Gewirth, based on the logical principle of universalizability which is that if some predicate P belongs to some subject S because S has a certain quality Q, then P logically must belong to all other subjects S_1 to S_n that have Q, demonstrated (9) “I have rights to freedom and well-being as I am a prospective purposive agent” that any agent who accept (5) as he is a prospective purposive agent must accept (9).

Finally, Gewirth presented the Principle of Generic Consistency (PGC), (11) “Act in accord with the generic rights of your recipients as well as yourself” based on the argument that any agent who accepts (9) must logically accept (10) “All prospective purposive agents have rights to freedom and well-being” and (11) because he is now committed to taking action for all other prospective purposive agents to have rights to freedom and well-being and the rights in question become moral rights⁷.

The recent findings in the cognitive science confirmed that what makes human cognition different from other animals is “shared intentionality”, the ability of humans to learn through other persons and their artifacts and to collaborate with others in collective activities⁸.

In my account, Gewirth’s entire argument could be justified based on “shared intentionality” without his individualistic view of agent, one with voluntariness or freedom and purposiveness or intentionality in that “shared intentionality” is “collaborative interactions in which participants share psychological states with one another” with “joint attention” which is two people not only experiencing the same thing at the same time, but also knowing that they are doing this.

Arguably, if free will and intentionality has communal nature for human, then community and individual agent could be viewed as necessarily complementary for humans and their commitment to all other prospective purposive agents could be justified more strongly.

There is another line of argument supporting the existence of human rights presented by H.L.A. Hart. He holds that the minimum content of natural law could be established through generalization based on observation and, if possible, on experiment like sociology and psychology. In his account, the question of morality, how we should live together, must be based on the assumption of survival as our general aim, and given the human nature such as (i) Human vulnerability, (ii) Approximate equality, (iii)

⁷ Alan Gewirth, *The Community of Rights*, The University of Chicago Press, 1996, pp.13-20.

⁸ Michael Tomasello and Malinda Carpenter, Shared intentionality, *Developmental Science* 10:1 (2007), pp.121-125.

Limited Altruism, (iv) Limited Resources, (v) Limited understanding and strength of will, “a natural necessity” contingent on human beings and the world in which humans retain the salient characteristics of their life could be a content which both law and moral should embrace⁹.

The most striking criticism against the proponents of human rights as moral rights might be that this idea makes boundary between what law is and what law ought to be blur and leads to the state of anarchy. As standard procedural liberalism assumes, state must be neutral between private conceptions of the good and law should not promote certain conception of the good under the name of transcendental virtues. I would respond to this fundamental question with the statement by Charles Taylor.

One has to distinguish the fundamental liberties, those that should never be infringed and therefore ought to be unassailably entrenched, on one hand, from privileges and immunities that are important, but that can be revoked or restricted for reasons of public policy-although one would need a strong reason to do this-on the other¹⁰.

Then, human rights as Ideal is normative power which directs the people, mainly the state officials, to review legislation, administration and judiciary constantly and repeatedly from the viewpoint of human wellbeing of every individual under its jurisdiction.

⁹ H.L.A.Hart, *The Concept of Law* 3rd edition, Oxford University Press, 2012, pp.193-200.

¹⁰ Charles Taylor, *Multiculturalism and “The Politics of Recognition”*, Princeton University Press, 1992, p.59.