



Is there a single moral foundation of Human Rights?¹

Há apenas um fundamento moral para o conceito de Direitos Humanos?

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ABSTRACT: There are a number of theories trying to find a definition for “human rights”. Authors such as Ronald Dworkin, John Rawls and Joseph Raz have written their different perspectives and nonetheless do not reach a definition to cover all human rights practice since the end of World War II. This article, compiled with the ideas of George Letsas, suggests four main groups of such rights which undeniably exist: a) Constitutional human rights; b) International legally binding human rights (eg. international treaties and custom); c) Human rights which are written and binding in the United Nations non-judicial system of human rights (eg. UN Universal Declaration of Human Rights and administrative bodies entitled to supervise and sanction the practice); d) Human rights which are not written nor legally binding (eg. moral right not to be tortured). Dworkin sets a theory with a high threshold as a moral foundation and role of human rights: the one of internal legitimacy of State depending on its correct practice of human rights. John Rawls theory, in summary, explains that states must meet some minimal standards to guarantee not being invaded by other states and complying with Human Rights represents a threshold for guaranteeing their sovereignty. Rawls also enumerates those rights. Joseph Raz’ theory reaches a complex combination of elements, in which human rights are a subset of moral rights, those whose violation can justify a wide range of international responses against the perpetrating state. Although Letsas concludes that it is a satisfactory answer to recognize that there are different normative roles of human rights and not only one moral foundation, there could be an alternative answer. This article postulates that there exists a second option: a combined view of the natural law principles with Dworkin’s interpretivist theory. A dialectic between the rules of human rights recognized until now, limited and oriented by a value (eg. dignity).

¹ Artigo submetido em 06-11-2017 e aprovado em 08-02-2018.

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KEYWORDS: theory of human rights; international human rights; constitutional human rights; dignity; natural law.

RESUMO: Existem várias teorias que tentam encontrar uma definição de "direitos humanos". Autores como Ronald Dworkin, John Rawls e Joseph Raz escreveram suas diferentes perspectivas e, no entanto, não alcançam uma definição suficiente para cobrir toda a prática de direitos humanos desde o final da Segunda Guerra Mundial. Este artigo, compilado com as idéias de George Letsas, sugere quatro grupos principais de tais direitos, que inegavelmente existem: a) Direitos humanos constitucionais; b) Direitos humanos internacionais juridicamente vinculativos (por exemplo, tratados internacionais e costume); c) Direitos humanos escritos e vinculativos no sistema não judiciário das Nações Unidas de direitos humanos (por exemplo, Declaração Universal dos Direitos Humanos das Nações Unidas e órgãos administrativos com poderes para supervisionar e sancionar a prática); d) Direitos humanos que não são escritos nem juridicamente vinculativos (por exemplo, direito moral de não ser torturado). Dworkin estabelece uma teoria com um alto limiar como base moral e papel dos direitos humanos: a legitimidade interna do Estado depende da prática correta dos direitos humanos. A teoria de John Rawls explica que os estados devem cumprir padrões mínimos para garantir que não sejam invadidos por outros estados e o cumprimento dos direitos humanos representa um limiar para garantir sua soberania. Rawls também enumera esses direitos. A teoria de Joseph Raz alcança uma combinação complexa de elementos, nos quais os direitos humanos são um subconjunto de direitos morais, cuja violação pode justificar coação internacional contra o estado perpetrador. Embora Letsas conclua que reconhecer que existem diferentes papéis normativos dos direitos humanos e não apenas um fundamento moral é uma resposta satisfatória pode haver uma resposta alternativa. Este artigo postula que existe uma segunda opção: uma visão combinada dos princípios da lei natural com a teoria interpretativa de Ronald Dworkin. Uma dialética entre as regras dos direitos humanos reconhecidas até agora, limitada e orientada por um valor (por exemplo, dignidade).

PALAVRAS-CHAVE: teoria dos direitos humanos, direitos humanos internacionais; direitos humanos constitucionais; dignidade; direito natural.



In order to properly address this question, it is necessary to first present another inquiry, which is why this discussion is relevant. Since the period of the end of the Second World War and the establishment of the United Nations and its apparatus under the name “human rights”,³ a number of theories have been developed trying to define, explain and understand their meaning and purpose,⁴ what has been accelerated with the growing practice.⁵

They represent a recent practice in the history of law and despite the effort, no consent has been reached.⁶ Questions like what the moral source of human rights is, and which is the main role of these norms, rested unanswered. The main question, addressed in the title (is there a single moral foundation of human rights?), is in this same context. George Letsas went through these inquiries and reached the conclusion that human rights do not have a “one-size-fits-all” theory.⁷ This essay questions whether a punctual answer cannot be reached, and whether there is no other alternative solution.

³ Example of the Universal Declaration of Human Rights 1948 – General Assembly, which was followed years later by the legally binding covenants, which entered into force in 1976: International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights; and the bodies: the UN Human Rights Council and the UN High Commission for Human Rights.

⁴ Letsas, G. Dworkin on Human Rights (March 22, 2013). Jurisprudence (Hart Publishing) (Forthcoming). Available at SSRN: <http://ssrn.com/abstract=2237860> or <http://dx.doi.org/10.2139/ssrn.2237860>

⁵ Letsas, G. ‘The International Bill of Rights’ in Hugh LaFollette (ed), *The International Encyclopedia of Ethics*, Wiley/Blackwell (2012).

⁶ Letsas, G. A theory of interpretation of the ECHR, p. 18.

⁷ Letsas, G. A theory of interpretation of the ECHR, p. 25



Letsas first step in direction to his conclusion is stressing the definition of some concepts, which could be misused if not made clear. More precisely, he makes the differentiation between (i) national and international human rights; (ii) between different goals of their norms; and (iii) the difference between political and legal human rights.⁸

The first differentiation, between national and international human rights, is an interesting start for recognizing that there is not only one source of human rights. They could be either normative texts assimilated by a state's constitution or norms of international custom or treaty. Although the norms may have exactly the same prescription form and content, they differ in the aspect of what the State represents in each of the contexts.⁹ Different moral duties arise from each different position. In international law, the state is a sovereign actor of international law; in constitutional law, the state is the institution which represents the democratic apparatus of a country.

Made this first point, one could conclude that the answer is as simple as categorizing human rights either as international or constitutional law. However, the first of many objections is that this classification does not include human rights norms that are not written in any official legislative document.

Illustrating this idea in a more concrete scenario, how would “the right not to be tortured” be classified? Is enough to describe it as a product of international law? What if the UN treaties and declarations had not mentioned this right specifically on their body of rules? Would it then not be considered a human right? The answer relates to the concept of *jus cogens*, which is grounded on natural law philosophy. At least part of the human rights practice has its roots

⁸ Letsas. G. A theory of interpretation of the ECHR, pp. 21-23.

⁹ Letsas. G. A theory of interpretation of the ECHR, p. 21.



on morality. Human rights treaties, for instance, may have as their general purpose to specify and institutionalize moral duties that states already have.¹⁰

Human rights are a direct reflection of moral and political values¹¹ existent in a society and this is why the right not to be tortured is a human right independently of being stated in international treaties or constitutional documents of states.

Hence, it is possible to identify four different categories of rules of human rights:

- a) Constitutional human rights;
- b) International legally binding human rights (eg. international treaties and custom);
- c) Human rights which are written and binding in the United Nations non-judicial system of human rights (eg. UN Universal Declaration of Human Rights and administrative bodies entitled to supervise and sanction the practice);
- d) Human rights which are not written nor legally binding (eg. moral right not to be tortured).

Now it is pertinent to move to George Letsas second differentiation of concepts, which is between different normative goals of human rights.¹² It derives from the idea that different norms may have different roles. For example.

¹⁰ Letsas, G. 'The International Bill of Rights'.

¹¹ Dworkin, R. Justice for Hedgehogs, p.332 and following.

¹² Letsas, G. A theory of interpretation of the ECHR, p. 22.



John Rawls theory, in summary, explains that states must meet some minimal standards to guarantee not being invaded by other states. The comply with human rights obligations becomes a threshold for guaranteeing their sovereignty.¹³ Although this is explained by Rawls as a fundament of the theory of human rights, it does not show fidelity to the international practice.

More specifically, Rawls enumerates as human rights the following: “the right to life – to the means of subsistence and security -; to liberty – to freedom from slavery, serfdom and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought-; to property –personal property-; and to formal equality expressed by rules of natural justice – that is, that similar cases are treated similarly-“¹⁴ These rights have a sufficient moral weight to trigger international sanction in case of disobedience.

Human rights abuses may not be sufficient to allow alien intervention, although they characterise a necessary condition for it. In face of that, Letsas points that Rawls’ explanation shall be understood as fit for a certain context of human rights. If limited to a category, of those which if not complied with by the state endorses international intervention, may be considered a sound theory.¹⁵

Letsas proposes to understand Rawls’ theory in the context of the search for an answer not limited to liberal states. This means, the trump-over-sovereignty theory represents the moral

¹³The exact terms used by the author are: “Human Rights are a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime’s internal autonomy”. Rawls. J. The Law of Peoples ed 1999 p. 79.

¹⁴ Rawls, Law of the People p. 65 in Letsas. A theory of interpretation of the ECHR, p.22, footnotes.

¹⁵ Letsas, G. A theory of interpretation of the ECHR, p. 29.



foundation and justification of rights which magnitude is not limited to fit the ideology and principles of liberal states only.¹⁶

Instead of promptly rejecting the theory, as Ronald Dworkin did,¹⁷ Letsas recognizes the trump-over-sovereignty threshold as a characteristic of a selected group of human rights, as a “theory of legitimate tolerance of peoples”.¹⁸ Again, although Rawls’ theory may not fit to be considered the basic fundament of the theory of human rights, it may fit for a selected group of norms.

Understood the shift that Letsas has done with the role of trump-over-sovereignty theory - from nuclear, to complementary- it becomes clearer what he meant when stating that there is no “one-size-fits-all” theory of human rights. Just as Rawls’ cover the justification of some human rights obligations, there may exist other explanations - and not necessarily they have to be wrong if they do not fit as a unique moral foundation. It is possible that different normative roles exist for different human rights rules.

Dworkin, for example, sets another theory with a high threshold as a moral foundation, and role, of human rights: the one of internal legitimacy of State depending on its correct practice of human rights. In Letsas words: “Dworkin draws the distinction in the following way: a government is legitimate when it makes a good-faith *attempt* to treat its citizens with equal respect and concern and to protect their dignity; it is just when it *succeeds* in doing so”.¹⁹

¹⁶ Letsas, G. Dworkin on Human Rights.

¹⁷ Dworkin, R. Justice for Hedgehogs, p 332 and following.

¹⁸ Letsas, G. A theory of interpretation of the ECHR, p. 23.

¹⁹ Letsas, G. Dworkin on Human Rights.



Joseph Raz explanation, for meeting the criteria of establishing essential features of the contemporary practice of human rights and identifying their qualifying moral standards, may be the broadest within the ones which were presented.²⁰ For him, “human rights are a subset of moral rights, those whose violation can justify a wide range of international responses against the perpetrating state, from coercive action to calls for information and diplomatic condemnation”.²¹

Summarizing, a theory (eg. Dworkin’s, Rawl’s, Raz’s, treaty interpretation) does not have to be accepted or rejected if each of them is understood to cover different objects of analysis (states’ internal legitimacy, their liability for external interference and their treaty-based obligations).²² Although they explain different features of human rights, they are all contributions for the same theory. Again, borrowing Letsas expression, different normative roles. The conclusion for now is that there may be recognized many roles and moral foundations, depending on the norms analysed.

The third differentiation which George Letsas makes of human rights is between legal rights and political goals. The former relates to positive law. The latter, to the value in which these rights are entrenched. They may reflect the same moral value, but the former is straightened in order to have a “trump” force,²³ where “the state has a duty not to use coercion in a way that would violate this right”.²⁴ Political goals are not of less importance, but are not aiming

²⁰ Raz, J. Human Rights without foundations. In BESSON, S. and TASSIOULAS, J. The Philosophy of International Law, Oxford University Press (2010), pp. 327-328.

²¹ Letsas, G. ‘The International Bill of Rights’.

²² Letsas, G. ‘The International Bill of Rights’.

²³ Letsas, G. Dworkin on Human Rights.

²⁴ Letsas, G. A theory of interpretation of the ECHR, p. 23.



at a specific objective, from a normative perspective. They may be recognized as aims to be achieved in long term, or principles not to be neglected by the state.

These *political goals* seem, in certain way, to approximate to the category of human rights set above as “human rights which are not written nor legally binding”.²⁵ Both, although not necessarily written in a legal or UN binding document, reflect a category of human rights which is directly related to moral values not mediated by the command of legal rules. What would be the justification for these norms as human rights?

Laura Valentini’s conclusion about the role of natural law theory may lead to an answer.²⁶ There is a value, not necessarily transparent in positive law, but which has to be recognized in order to be able to explain this part of the practice²⁷ of human rights. It does not have its source in any legal document, hence its origin is solely associated with morality.

In the case of the political goals cited above, one could argument that its origin relies on the legal right to which it is related to. However, even if this is accepted as true, the boundaries of this value are not delimited, what also entails the need of knowing moral parameters. Natural law theories focus on the value from which human rights derive from. They argue

²⁵ Look previous p. 3.

²⁶ Valentini, L. *In what sense are human rights political? A preliminary explanatory*. A Preliminary Exploration. *Political Studies*, 60: 180–194. doi: 10.1111/j.1467-9248.2011.00905.x, 2012. Available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9248.2011.00905.x/abstract>.

²⁷ The term is used in the sense of the categories of human rights recognized in this essay: constitutional human rights; International legally binding human rights (eg. international treaties and custom); human rights which are written and binding in the United Nations non-judicial system of human rights (eg. UN Universal Declaration of Human Rights and administrative bodies entitled to supervise and sanction the practice); human rights which are not written nor legally binding (eg. moral right not to be tortured).



that the value of humanity is entrenched on people, from which human rights derive. Why would not this value serve as well as a parameter for the other categories of human rights?

Raz recognizes that natural law theorists do not have a proper explanation to how political goals turned out to be recognized as “rights”. However, if their contribution is accepted as another *normative role* of the theory of human rights and not their foundation, it may be considered an optional explanation. Although natural law theories (or also called traditional or orthodox theories) ²⁸ may not be perfect as a theory which both fits and describes the whole practice, they may fit to explain and justify one part of it, the “human rights which are not legally binding nor written”.

On top of characterizing one part of the practice of human rights, there may be a second characteristic of this value which is interesting to be discussed. It may also be a tool used by theorists to decide whether the actual practice of international and national human rights law is consistent with what it should be. The theory depends on a moral value as a guide to evaluate and develop the present practice, and there could be the answer.

There may be a value from which human rights can be illuminated from. It is just not certain what it is. Maybe it has its source on the dignity of the human person, which is written on the UN Covenants²⁹ and the Universal Declaration of Human Rights. Or could be any other chosen moral value, like god, or the good. The point is that there must be a value in light of which human rights may be evaluated. The value which makes “the right not to be tortured” a human right even if not present in any binding document.

²⁸ Letsas, G, Dworkin on Human Rights.

²⁹ International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights.



Nonetheless, if this logic is taken as sound, not only it may represent part of the practice, it may reflect the connecting factor of all the recognized practices. Although there were recognized other normative roles for the other categories of human rights, the existence of a value of X (eg. humanity/dignity) is not excluded as moral foundation and justification of them. This value may be what explains the last source of moral foundation of the practices of human rights. It may be considered an element of justification and probation of the actual practice. It may be the leading starting point and the limit for human rights interpretation.

If this is right, some interesting questions might find an answer. For example, the argument that positive norms of human rights should not be accepted as authoritative without further questioning.³⁰ If the prescribed norms in constitutions and international law are not to be accepted as human rights, there must be an orientation point from which the disagreement may flow. This may be the value recognized by natural law. Again, not only this value describes a part of the practice and provides a starting point to criticize the current practice of human rights, it is also the parameter for the development of the theory and for creation of new rules.

Although Letsas concludes that it is a satisfactory answer to recognize that there are different normative roles of human rights and not only one moral foundation, there could be an alternative answer. A combined view of the natural law principles with Dworkin's interpretivist theory³¹ could be also a solution. A moral foundation of human rights may have a process as its answer, the process of interpretation of the current practice in light of a value. If the interpretivist theory is accepted as the orientation for construction of human rights

³⁰ Griffin, J. 'Human Rights and the Autonomy of International Law', in Besson et als (eds), *The Philosophy of International Law* (OUP), chapter 16, p. 340.

³¹ Dworkin, R. *Law's empire*, chapter 2.



norms and the values recognized by natural law as its parameter point,³² this idea may be the theory which meets Dworkin criteria of fitting and describing the human rights practice.

Accepting the “interpretivist construction process towards the value X” as the moral foundation and the main role of human rights does not contradict Letsas vision that different norms may have different normative roles. It just represents the same ideas through a more holistic view. A dialectic between the rules of human rights recognized until now, limited and oriented by a value (eg. dignity) reflects Dworkin’s interpretivist view. Henceforth, the moral foundation of human rights could be the same as the one which justifies law as integrity: a constant adaptation of the current practice to the principles of a community of value.

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³² The criteria for artist interpretation, with which Dworkin makes an analogy with legal interpretation, is “the best”. Dworkin, R. *Law’s empire*, chapter 2.



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