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ABSTRACT

The purpose of this article is to reopen the debate on some conceptual issues of human rights, for the purpose of relaunching and revitalizing a politically mobilizing agenda for Latin America.

The author defends the priority of civil and political rights over economic and social rights by reformulating, for example, the right to education, which has traditionally been understood to be part of economic and social rights.

He also contends that it is both urgent and necessary to address through political action, and not within the domain of human rights, issues that raise controversies of a moral character in society. The case of abortion, which is still treated as a human rights issue in the United States, is sufficiently illustrative.

ORIGIN, MEANING AND FUTURE OF HUMAN RIGHTS: REFLECTIONS FOR A NEW AGENDA*

Emilio García Méndez

Human rights language exists to remind us that there are some abuses that are genuinely intolerable, and some excuses for these abuses that are genuinely unbearable.

Michael Ignatieff



Human rights: between history and politics

For those who take a critical view of the world of intellectual production on human rights, two specific aspects should stand out: the enormous quantitative dimension and the predominantly pacific character of their conceptual evolution.

While the first characteristic can be explained by the continuous rise in violations of individuals' rights by states, the second appears to refer to the very genesis of the concept of human rights. Born as a political response, real and contingent to a horrific event, unthinkable *a priori*, such as the Holocaust, their theoretic development was marked by an exceptional universal consensus based on the worldwide repudiation of the maniacal plan for the mass annihilation of an entire race. This enormous political consensus promoted a broad theoretic consensus which, objectively, resulted in the intellectual impoverishment of its development.

The ensuing debate on the fundamentals of human rights was initially strongly directed towards a philosophic and metaphysical plane that enabled us to claim their existence and their legitimacy, independently not only of recognition by governments, but also by

* I would like to express my special thanks to Roberto Saba, for his patience and interest in discussing the preliminary draft of this text with me. However, it would be fair to say that the many imperfections and, let's face it, excesses, are entirely of my own responsibility.

The references of the sources quoted in this text will be found on page 19.

1. A representative example of this philosophic-metaphysical, tributary perspective, among others, from the thinking of the Argentine philosopher Carlos Nino, can be found in Pedro Nikken (p. 21): "The recognition of human rights as attributes that are inherent to people, not as a concession from society, nor depending on recognition from any government ...". On the other hand, decisive arguments demonstrating the fragility of the concept of "human nature" in relation to the fundamentals of human rights are presented by Norberto Bobbio (pp. 118 and followings).

2. For a radically critical view of the association between humanist thinking and the idea of progress and, as a consequence, for a view that deals with the serious crisis in humanist thinking, see the recent work of J. Gray (2002, particularly pp. 3-4).

society itself.¹ Within this context, although the concept of human rights as inherent to the human condition has served, on the one hand, to neutralize the negative trends originating from circumstances related to an exaggerated concept of sovereignty; it has, on the other hand, been damaging, in so far as it has considered as heresy any approach that traces the origin and existence of human rights back to history and politics. The strong hegemony of humanism in its various forms supports this perspective of the metaphysical foundation of human rights. Paradoxically, it was the full association of humanist thinking with the idea of progress and the profound crisis which has afflicted this notion² that opened an anti-foundational breach in dominant thinking on human rights.

There is no doubt that the conception of human rights as inherent rights of human beings has contributed decisively to an idolatrous³ and unhistoric view of rights that, evidently, are historic and contingent. Contrary to the metaphysical view held by Carlos Nino, Eduardo Rabossi rejects the idea of any foundation that intends to transcend the normative trend that, on the subject of international protection of human rights, has been under development from World War II to the present day.⁴ These ideas were pursued more aggressively by the American philosopher Richard Rorty (pp. 120-121), in a lecture from which I consider it pertinent to cite a truly significant paragraph:

My basic point is that the world has changed and that the human rights phenomenon renders human rights foundationalism outmoded and irrelevant. Rabossi's claim that human rights foundationalism is outmoded seems to me both true and important; it will, therefore, be the principal topic of this lecture. I shall be enlarging on, and defending, Rabossi's claim that the question whether human beings really have their rights enumerated in the Helsinki Declaration is not worth raising. In particular, I shall be defending the claim that nothing relevant to moral choice separates human beings from animals except historically contingent facts of the world, cultural facts.

The central idea I wish to defend here refers to the fact

that I am convinced that the development of a vigorous and reliable human rights agenda, which to be effective must recover the capacity for social mobilization, depends largely on recovering original political meaning of human rights, manifest in their historical origin. This perspective seems to me particularly relevant for the tangible reality of what, without ignoring the problematic aspects of this definition, can be understood to be the geopolitical South of our global village. In this South, not only from a factual point of view, but also from what may be described as a cultural standpoint, the absolutely intolerable character of civil and political rights violation is far from constituting a politically closed debate. Discussions surrounding the binomial guarantees/police efficiency in topics concerning the security of citizens are the best examples, although obviously they are not the only ones.

Clearly the paths to the legitimacy of human rights, a vital condition for their effective validity, lead to metaphysics or politics. History and experience are only there to remind us of the mere apparent validity of any metaphysical legitimacy. On the contrary, and paradoxically, there seems to be far more force in the fragility of political legitimacy. Let's take a look at some reasons for this.

If the Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights", this is precisely because men are not equal by nature, since, if it were so, the declaration's content would be, at the very least, superfluous. In this sense, the following quotations seem to me sufficiently illustrative:

The public sphere, always inseparable from the concepts of liberty and distinction, is characterized by equality: men are by nature not equal, they require a political institution to become equal, in a word, laws. Only political action can generate equality [my underlining]. (Fina Birules, p. 22)

*The [Universal] Declaration [of Human Rights] retains an echo of all this because men, **indeed**, are not born free, nor equal ... the liberty and equality of men is not a foregone conclusion, but an ideal to be pursued; not a reality, but a value; not a truth, but a duty ... (Norberto Bobbio, p. 134)*

3. This characterization and this criticism of human rights idolatry are very well explained in the book by Michael Ignatieff (2001, particularly p. 83).

4. A brief but clear reconstruction of this debate between Nino and Rabossi can be found in G. Carrio. Although the topic of the foundation of human rights is present and widely discussed many times in the vast and brilliant works of Carlos Nino, allow me to make a specific reference for this point to his essay *Ética y derechos humanos: un ensayo de fundamentación*. Concerning the perspective of Rabossi, allow me also to make a direct reference to the text "La teoría de los derechos humanos naturalizada".

This perspective paves the way for a positive and non-transcendent foundation of human rights as a political instrument of equality. A perspective that, on the other hand, would enable us to overcome the impasses the aforementioned prolonged debate has imposed on the international human rights agenda. It seems to me that nobody has expressed it better than Michael Ignatieff (p. 83), when he says: “Human rights is the language through which individuals have created a defense of their autonomy against the oppression of religion, state, family, and group”.

The problem of the relationship between civil and political rights and economic and social rights

The situation during the Cold War that followed World War II directly influenced the political and academic debate. Two key focuses of tension emerged at this time: (a) the debate concerning the pre-eminence of civil and political rights or economic and social rights – which pitted industrialized Western nations against countries in the socialist bloc; (b) the debate over the universality of human rights, which, in general, pitted developed nations against much of the Arab world and Asian countries.

Curiously enough, while the second debate continues, largely due to the permanent impulse that the different versions of cultural relativism and of moral imperialism provided it with, the first ended before it was exhausted.

The abrupt and poignant collapse of the socialist bloc in 1989 unmasked the superficial and grossly demagogic character of the “debate” on human rights that accompanied the entire period of the Cold War. What is interesting is that, with the victory of the “West”, in some ways the position of the socialist bloc also triumphed. The overstated, superficial and under-analyzed “indivisible” and “interdependent” character of human rights did in fact serve, as I shall try to demonstrate, as an element relativizing the priority of political rights. As Bobbio reminds us (pp. 150 and followings), one can never insist too strongly on the fact that human rights are not absolute, nor do they constitute a homogeneous category (contrary to what their supposed indivisible character would

indicate). The absolute value of a limited number rights, i.e. their privileged status, arises from the fact that their violation is condemned universally. Nevertheless, for example, the right not to be submitted to slavery implies the elimination of the right to own slaves and the right not to be tortured implies the elimination of the right to torture. Within this context, it can be asked, putting aside rhetoric and irony, what is the content or the significance of the concept of indivisibility.

This superficiality in dealing with the subject has revealed that the pre-eminence of civil and political rights upheld by the West during the Cold War, far from being the product of an ethical or moral imperative, constituted a very unsubtle means of weakening the already fragile legitimacy of the socialist bloc.

However, what is the current state of the problem of the relationship between political rights and economic and social rights? Paradoxically, in a world full of problems, the problem of this relationship appears to be that it poses no problem at all. Similarly to the magical character of indivisibility, the interdependent character of human rights, which places equal importance and homogeneity on both types of rights, has served to suppress any debate on the ultimate priority of one type or the other, generally labeled as being outmoded.⁵

For reasons and with arguments that I shall present later, I am an advocate of prioritizing political rights today in the countries of the South, as part of any strategy to reconstruct a reliable and mobilizing human rights agenda.

In this sense, I have taken this position given the contingent character of the content of political rights and of economic and social rights. There is nothing in the “nature of things” that makes a right inherently belong to one category or another. Moreover, this position in no way denies the importance of the content of economic and social rights. It does, in fact, defend the need for a public debate on the appropriateness of prioritizing one type of right and removing, or not, from politics (entrusting them exclusively to law) some aspects of civil life relating to what, in a broad sense, can be called economic and social development. At the same time, it also does something that could be considered contradictory to this tendency. I am referring to the need to consider as a

5. The supposed indivisible and interdependent character of human rights does not derive from anywhere other than the very declaration. Thus it was consecrated in the Vienna World Conference on Human Rights declaration, in June 1993. On this point, it appears to me important not to confuse the (for some time) un-discussed character of a concept, with the indisputable character of a concept. This last characteristic may only belong to a variable of fundamentalism. The most complete and profound document on the type of relationship between political rights and economic and social rights, which includes an identification of the most determinant causes of their violations, as well as specific recommendations for their observance, is the Final Report of the United Nations Rapporteur on Economic and Social Rights, Danilo Turk.

political right (and, consequently, not subject to tolerance or negotiation by use of the clause “subject to limitations determined by available resources”, which characterizes economic and social rights), certain rights that until now were typically considered to belong to the category of economic and social rights. I am referring here, specifically, to the right to education.

In the current stage of technological development, in which access to knowledge constitutes the decisive and fundamental factor allowing for an existence worthy of human dignity, which is the ultimate purpose of human rights, the right to education cannot be submitted to any form of negotiation, and must be considered to be as much an absolute priority as the abolition of slavery or of torture. Exactly the same can and should be said about basic health care. I will return to this point later.

The approach I am defending here can be mainly explained by a profound dissatisfaction with the existing state of affairs. In fact, it deals with raising new problems and new questions in a world where the war in Iraq has shattered the already weakened and questionable institutionality of human rights as established after World War II. Paraphrasing Ignatieff (p. 81) in a reference to the Holocaust, the war in Iraq revives both the conscience of the fragility of human rights and, simultaneously, their urgent necessity.

This insistence on the necessity for a critical revision of the human rights agenda is not a blind exercise of mere intellectual omnipotence, with the intent of erasing facts with words. It does, on the contrary, attempt to deny the continuance of business as usual in this mutated landscape of profound and dubious transformations.

To make myself clearer, I would like to make explicit my suspicion, from which stems my dissatisfaction and my alternative reasoning, that today’s refusal to accept the priority of political rights, through the assertion that all human rights are of equal priority, has prompted, principally in the countries of the South, an increase in the violation of political rights, while at the same time it has not prompted any significant progress in the field of economic and social rights.

Considering the politically and culturally hegemonic

character that the dimension of human rights has assumed and that later on I shall characterize as “programmatic”, to determine that all rights are equally important and, consequently, of equal priority, constitutes a subtle way of confirming the real priority of those rights whose non-observance does not actually generate strong political tensions with the state. The possibility of establishing a relationship of continuous, non-conflicting cooperation with the state, when the real priority is economic and social rights, explains much of the hegemonic character of this tendency.

Human rights: political, academic and programmatic dimensions

Specially over the past few years, what we might term “the human rights issue” can, for analytical purposes, be divided into three dimensions that I shall be mentioning in just a moment.

What we can characterize as a specifically **political** dimension of human rights has developed, fundamentally, in close connection with struggles on a national level, as a direct response to violations of the rights of individuals by the state. Non-professional active militancy, its essentially divisive character and the absence of significant theoretic thinking (particularly when measured in proportion to the size of the struggles) has profoundly marked the political dimension of human rights.

Meanwhile, the dimension that may be called **academic** has in general been confined to the world of universities and other centers of knowledge. The relationship between domestic law and international law and, more specifically, the applicability of international treaties on a national level have occupied the center stage in this debate. In other words, the academic development of human rights has become, to a fairly large extent, a synonym for “International Law of Human Rights”.

But the dimension that presents the greater number of complex fringes and which is, furthermore, perhaps the richest in political and conceptual implications, is the dimension I shall here call **programmatic**. This dimension makes a reference to the incorporation, by international organizations from various geographical areas and from very

diversified fields, of the forms and semantics of political and academic human rights developments. However, it would be a crude misconception to imagine that this process was accomplished by the passive incorporation and mere assimilation of the two aforementioned dimensions. The programmatic dimension of human rights, in the form that it is effectively taking place, presumes a profound reformulation of the theory and the practice, both academic and political, of human rights, whose consequences (some of them) I propose to identify and begin to analyze in the remainder of this article.

The programmatic dimension of human rights is characterized by a perspective that is politically non-conflicting with the state and ambiguous concerning the harsher aspects of the academic debate. An unhistorical, ritualistic, pragmatic, indisputable (mainstream) and totalizing perspective have gradually removed the content of the original political and academic proposal of human rights. Similarly, given that when everything is a priority, in reality nothing is a priority, when everything is human rights (starting with situations that imply no responsibility whatsoever on the part of the state), nothing is human rights.

This bureaucratic colonization of the human rights discourse has had a profound and uneven impact on conceptual practices and developments, particularly in the countries of the South. In these countries, the fragility and at times the sheer inexistence of autonomous centers of knowledge increased the ultimate theoretical and cultural dependence on international organizations, principally on those that have contributed most to the conceptual reformulation of the human rights issue. As a result, nothing that could be perceived to be a critical perspective has emerged over the past few years.

Almost invariably, the “consensuses” in this dimension have been obtained by aggregation. The practical consequence is that any **full and comprehensive** human rights agenda often ends up, in actual fact, just being a euphemism for an agenda that is as politically innocuous as it is static and insignificant.

Paradoxically, while the conflictual character of the politics concerning critical human rights issues grows, i.e. while blatant violations of the most basic human rights

multiply, the list of human rights referring to economic and social development lengthens incessantly. It appears that a sizable part of the current conceptual advances has been able only to reflect the sterility and the superficiality of a unipolar world.

This is the context within which I propose to make a critical analysis both of the practical consequences of some of the (unproven) suppositions on which the current human rights discourse and actions (universality, interdependence and indivisibility) are based, and also on the relationship between politics and the field of human rights.

In the ritualistic concept that today dominates human rights discourse and is clearly expressed in its programmatic dimension, the suppositions that I alluded to earlier appear to constitute home truths that do not require – but, more to the point, do not tolerate – debate or, much less, criticism.

Such a debate, or to be more precise, the absence of such debate, is structured basically around the type of relationship, both the existing and the desirable one, between political rights and economic and social rights.

The programmatic concept that is structured methodologically around the consensus achieved by aggregation constitutes, in actual fact, a cumulative concept of human rights. In this way, economic and social rights are a type of later geological stratum that fits harmoniously and naturally over political rights. It is interesting to observe a certain kinship between this linear and cumulative concept and the development, not divested of a certain economicism, of T.W. Marshall's theory on the historical process of the expansion of rights.⁶

Human rights: between law and politics

After everything that has been said previously, it appears to me important to start questioning the “politically correct” idea that the continuous expansion of the content of human rights, i.e. of those areas of civil life that are removed from political contingency and negotiations, directly strengthen the agenda and the struggle for human rights. To do so, it is important, among other things, to understand the complex nature of the relationship between human rights and civil peace.⁷

6. I am referring specifically to the well known 1950 essay, *Ciudadanía y clase social*. See T.H. Marshall & Tom Botommore.

7. The insistence on the connection between political stability and effective validity of human rights is very firmly present in the work of Ignatieff.

It is true that a greater attention to human rights contributes to civil peace. However, it is no less true that civil peace and democratic stability are the only environment in which human rights may develop in a genuine and sustainable manner.

It is often argued that, in the field of rights, the incorporation of aspects that were previously considered exclusive to social policy possesses the exceptional advantage of its “justiciability”. Although this statement is, strictly speaking, correct, it is no less correct to say that the individual action of justice to provide the benefits of social policy may become not only a source of amplified reproduction of social inequalities, through unequal access to justice,⁸ but also an undesirable concession of legitimacy to governments that use this means to serve only very few.

However, the more important and alarming problem of this extended concept of human rights is not found, in my opinion, in the aforementioned example. The most serious problem arises, more specifically, from transforming into a human rights issue political matters that are also highly conflictuous from a moral point of view.

In the words of the British philosopher John Gray (1997, p. 22):

To make a political issue that is deeply morally contested a matter of basic rights is to make it non-negotiable, since rights – at least as they are understood in the dominant contemporary schools of Anglo-American jurisprudence – are unconditional entitlements, not susceptible to moderation. Because they are preemptory in this way, rights to not allow divisive issues to be settled by a legislative compromise: [in the field of law] they permit only unconditional victory or surrender. The abortion issue in North America, where it is treated as an issue of constitutional rights rather than of [political] legislation, is the clearest example of a divisive issue rendered yet more dangerous to civil peace by being elevated to an issue of constitutional law and the theory of rights.

In fact, the comparatively different treatment afforded to the abortion issue in Europe and the United States illustrates well what has become the central way of thinking that I am attempting to express here.

8. This specific warning may be found in the excellent work of Vitor Abramovich & Christian Courtis (p. 42), who defend, contrary to what I argue for here, an expanded concept of human rights.

Arising almost simultaneously in Europe and the United States, in the early 1970s, the abortion issue literally shattered the European social fabric, the case in Italy probably being the clearest example of this. During years of intense and heated debate, the Catholic Church on the one hand and the feminist movement on the other, directed and mobilized a society that was deeply divided by this moral issue. The first glimmer of consensus did not emerge from within the debate itself, but instead from a procedure to settle the conflict. Given that society had become exhausted from years of debate, an agreement was finally reached to understand the political dimension of a problem with deep moral roots. Plebiscites and laws resolved the issue politically, in a peaceful and lasting manner.

Concomitantly, the path taken in the United States was very different. Shortly after the debate began, which promised to become even more embittered than in Europe, the Supreme Court of the United States cut short the political debate by, in the well-known *Roe vs. Wade* case, declaring abortion to be a constitutional right.⁹ Exactly 30 years later, American society is even more divided and the civil peace is more threatened, precisely because the country attempted to solve within the field of human rights, and not within the field of politics, a problem that morally split (and that still splits), profoundly, this society.

Final words

Lastly, with no intent to draw any final conclusions, but primarily with a view to stimulating the debate, I would like to address the issue of the relationship between politics and human rights. The problem is complex in appearance, but is far more so in its very essence.

Under the perspective of a democracy taken seriously, a broad consensus exists over imposing and accepting the need to bar from politics some areas of civil and institutional life, as a necessary condition for the functioning of the Rule of Law. However, this should not be confused with judging human rights to be beyond or above politics. In general, the consensus to bar certain topics from politics is the result of nothing other than political agreements, whose solidity and durability are directly related to the degree of moral

9. An excellent description and analysis of this case was published in a special report in the British magazine *The Economist*: "The War that Never Ends" (Special Report Abortion in America), 18-24 January 2003, pp. 24-26.

consensus supporting them. As Ignatieff says (p. 22): “Human rights language exists to remind us that there are some abuses that are genuinely intolerable, and some excuses for these abuses that are genuinely unbearable”.

If we agree with this quote, we should, then, be prepared to accept the possibility that the lack of explicit human rights priorities contributes to exhaust the content and relativize the existence of a resistant nucleus of human rights.

The insistence in continuously expanding the areas of economic and civil life that should be considered human rights considerably weakens any reliable and, above all, any mobilizing political human rights agenda. It does not appear to me that the actual list of human rights is expanding, like a type of flight to the future making up for lost credibility.

For the partisans of the interdependence and indivisibility of human rights, primarily those with the responsibility of developing the programmatic dimension of human rights, it is appropriate to recall that a cultural hegemony cannot be conserved indefinitely by always evading the debate and demonizing the critical postures of this article, which they may consider disruptive or outmoded.

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