

Petar Bojanić

“Taking the Human out of Human Rights“

Human Rights or Group Rights?

Abstract *What interest me are the reasons why “human” or “human rights” could be important or possibly most important in constituting a group (hence the introduction of the complicated word “group” and “group right(s)” in the subtitle). If I had to justify the existence of the latest debates on nature, justification and universality of human rights, on their distinction from other normative standards, on the philosophy and (legal) foundation of human rights, on “Human Rights without (or with) Foundations” (Raz, Tasioulas, Besson), then I would immediately conclude that this “process of grandiose concretization” of a complete fabrication is far from over. Despite the innumerable pacts and international conventions established after World War II, the slew of obligations to which states have agreed in the last few decades, the establishment of rights to secession or humanitarian intervention it is as if the constitution of classification of basic human rights and their universality is far from over.*

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Key words: *human rights, group, group rights, declaration, international legal human rights*

At the moment it is not at all certain whether a text that features terms such as “human rights,” “human,” “human propriety,” can be completed in a satisfactory manner, nor indeed whether it will be of use in the construction of a theory of the institution or “*contre-institution*,” which is what interests me presently.¹ Upon spending several months of reading

¹ It would appear that the phrase ‘counter-institution’ was first used by Saint-Simon. *“Il en est résulté [du passé historique] que les Anglais se sont en même temps soumis à deux organisations sociales bien distinctes, qu’ils ont, dans toutes les directions, doubles institutions, ou plutôt qu’ils ont établi, dans toutes les directions, les contre-institutions de toutes les institutions qui étaient en vigueur chez eux avant leur révolution et qu’ils ont conservées en très grande partie.”* Cf. Simon 1859: 131. In one of his last texts, “Le modèle philosophique d’une ‘contre-institution,’” Jacques Derrida gives seven basic characteristics of the counter-institution, keeping steadfastly in mind the idea of Collège and Cerisy (*l’expérience contre-institutionnelle de Cerisy*): the counter-institution is non-governmental in origin (*d’origine non gouvernementale*); it does not have war or resistance to any other institution as its mission; philosophy, although omnipresent, does not dominate over other disciplines; it is international; it does not confer honors or titles, academic or professional; it ensures space for expertise and experimentation; finally, we never know what awaits us in counter-institutional space, because it holds within itself pre-institutional space, space prior to norm (that which is ‘incalculable’, this being the word repeated several times in this text). Derrida 2005: 248, 253–255. This paper was written as part of project no. 43007 funded by the Ministry of Education, Science and Technological Development of the Republic of Serbia.

various declarations, protocols, conventions, charters on human rights, various texts on human rights, written in various languages, coming from disparate traditions – all that I can do is to explain this borrowed title (as it is a quote²) and subtitle, in an effort to problematize “conceptual imperialism,” present in different interpretations of human rights. Perhaps this could orient me towards a possible line of argument on the importance of the attribute “human” or “right to the human” within the constitution of a group and collective work (cooperation) within an institution. First, what interests me are the reasons why “human” or “human rights” could be important or possibly most important in constituting a group (hence the introduction of the complicated word “group” and “group right(s)” in the subtitle). Whatever I should at present leave aside, yet which is implicitly always present in any thematization of human rights, refers to the long tradition of concretization of a bit of nonsense and fiction that has been taking place for nearly two and a half centuries.³ If I had to justify the existence of the latest debates on nature, justification and universality of human rights, on their distinction from other normative standards, on the philosophy and (legal) foundation of human rights, on “Human Rights without (or with) Foundations” (Raz, Tasioulas) (John Tasioulas’ *A Philosophy of Human Rights* is expected to come out

2 The title is a remake of Allen Buchanan’s 2006 “Taking the Human out of Human Rights” (a text reissued in Buchanan 2010: 31–49), which was later turned around by Tasioulas 2010: 647–678. My intention is certainly not to oppose Tasioulas’ efforts to ground human rights in morality, nor to renew Buchanan’s criticism of Rawls (on the contrary, Rawls’ attempt to ground human rights on the idea of cooperation seems constructive to me, with a right to association and emigration particularly important). Rather, my intention is to note the problem of the relation or the tension between the terms “Human” and “Right(s).”

3 There are different readings of “Déclaration des droits de l’homme et du citoyen” by Joseph de Maistre, Edmund Burke, Jeremy Bentham (Bentham calls the declaration a “manifesto”), Marx, all the way up to Alasdair McIntyre or Bernard Williams. (In his 1987 “The Standard of Living: Interests and Capabilities,” in *The Standard of Living*, ed. G. Hawthorn, Cambridge, Cambridge University Press, 1987, Williams writes: “The notion of a basic human right seems to me obscure enough, and I would rather come at it from the perspectives of basic human capabilities”) Williams 1987: 100. All these readings above all question the existence of personal rights (*subjektive Rechts*), “man” as such, as a legal subject and the legitimacy of what today, from the perspective of biopolitics, we might call “the naked life” or “the simple or naked man.” Hegel’s formulation is at the root of these phrases: he mentions the right to life or a right to live (*Das Recht des Lebens*) in paragraph 118 of his lectures on the *Philosophy of Right*, held in Heidelberg’s winter semester of 1817–1818, Hegel 1983: 221–222. The right to live (the commandment “Thou shalt not kill” implies an existence of some such right) or the right to live freely is protected by law such that “the rights of liberty rest simply upon the supremacy of the law – they are law, not personal rights.” Jellinek 1901: 53. Jellinek explains that before the declaration, in 1765, “in spite of his fundamental conception of a natural right, the individual with rights was for Blackstone not man simply, but the English subject.” *Ibid.*, 56.

shortly, as is Samantha Besson's *A Legal Theory of Human Rights*) – then I would immediately conclude that this “process of grandiose concretization” of a complete fabrication is far from over. Despite the innumerable pacts and international conventions established after World War II (the Universal Declaration of Human Rights was adopted in 1948, whereas the Convention on the Right of the Child was adopted in 1989), the slew of obligations to which states have agreed in the last few decades, the establishment of rights to secession or humanitarian intervention (it is possible today to intervene forcefully in order to protect the human rights of certain ethnic groups – paradoxically, it is possible to kill people in the name of free life of other people, entirely in harmony with various protocols and pacts followed by “signatories”) – it is as if the constitution of classification of basic human rights and their universality is far from over.

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Why is this so? For two reasons. One of the correct answers to the questions why do people have human rights and what are they could be that people actually have their rights or human rights because a multitude of states has agreed on the Universal Declaration. However, not all states have agreed to and signed the international conventions (immediately taking away from the universality of the Declaration, as well as from human rights, which thus become instantly subjective normative evaluations not establishing any universal obligation). Not only that, but the Declaration has created space for a differentiation between democratic and non-democratic states (Rawls, Christiano), or between more or less democratic states. And perhaps most importantly, the Declaration as such (as a document) establishes neither procedures nor bodies or institutions for the protection of human rights. This is directly under the auspices of politicians and lawyers (not philosophers) and concerns an insufficient emphasis on what Buchanan calls “international legal human rights.”⁴ The

4 In Buchanan 2013 insists on the construction of a very specific system of international legal human rights (an act which would certainly suppose the establishment of institutions and an even greater curbing of state sovereignty), and investigates in detail all existing theories of human rights. One of these is a book by James Nickel *Making Sense of Human Rights* (2007 saw the publication of a revised version). Buchanan writes in the introduction of his book: “James Nickel states that the human rights of today are “the rights of the lawyers, not the philosophers,” and he too recognizes that international legal human rights need not mirror pre-existing moral human rights. However, in my judgment he does not focus sufficiently on the question of what it would take to justify having an international legal human rights system, where this includes an account of why there is a need for individual rights at the international in addition to the domestic constitutional level and an examination of the legitimacy of international legal human rights institutions.” Nickel 2007: 4.

second reason refers to (again using Buchanan's words) "conceptual imperialism" of philosophers who definitely insist, and in particular so when it comes to human rights, without any argument, that there is "only one concept of human rights (namely, theirs)."⁵ No doubt, philosophers are incredibly exclusive when it comes to an understanding of human rights.⁶

Philosophers routinely use the phrase "human rights" without making it clear whether they are talking about moral human rights or international legal human rights. This is unhelpful, especially if one of the goals of a philosophical theorizing is to explain the relationship between moral and international legal human rights.⁷

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To this distinction between philosophic speech on moral human rights and international legal human rights, I would like to add another reason for caution that could possibly help facilitate the understanding of the significance of the term "human" for the harmony itself between an individual and a group, and in general, for the construction of a group as such. Namely, I would here assume that the rights of the individual could have a significantly greater potential and efficiency exclusively if they were publicly declared and manifested in a group (vocally, clearly, publicly or collectively), and not despite the group or in opposition toward a group. In that sense, moral rights of the individual do not necessarily have to be independent of the law (or international legal human rights), presenting some kind of basis for criticism of the very same law, and therefore be in disharmony with the rules of the group or be opposed to institutions. Law need not at all be the means an individual uses against the repression on the part of other entities (Nozick, Dworkin), but just the opposite, a means for achieving harmony with others (Raz). It seems to me that introducing an instance that refers to other individuals and equal rights of others, and thus collective or group rights, could improve the normative potential of law held by each individual in seeking to affirm and preserve its own humanity (and vice versa, the human potential each individual possesses in seeking to affirm and preserve its right to be part of a group).

5 Buchanan 2013: 10.

6 Of course, this exclusiveness on the part of philosophers has nothing to do with the cynical comment by Edmund Burke about the lack of existence of any use of debating a professor of metaphysics about abstract rights to food or medicine. Burke says that in those situations it is better to seek cooperation of the peasant or doctor. Onora O'Neill analyses this fragment at the very beginning of "The Dark Side of Human Rights", O'Neill 2005: 427–428.

7 Buchanan 2013: 12. In a famous lecture from 2002, "Why Invent Human Rights" and probably the most complex text on human rights ever written, published in 2004 as "Elements of a Theory of Human Rights" Amartya Sen 2004: 315–356), Amartya Sen speaks in the conclusion about the necessity of public debate and critical inquiry of human rights that surpass the borders of states.

Let me now assume that speech about human rights or declarations (publicly and always collective, of a group: “We the people...”) regarding the right of each individual of a group implies a few models that hold the group together, connected, and also give right to a group. Instead of a model, I could mention a few unconditional conditions for the existence of a group as such. Further, I would attempt to claim that the Declaration as such (or various declarative acts or declarations as documentary acts) is the very establishment of the protection of the individual and that it guarantees its freedom.

The first model or condition for the existence of a group concerns the guarantees for the protection of life or right to life and freedom of all its members or parts. A group is a group only if it protects, always for a limited time, the basic rights of the individuals who comprise it. However, this protection is produced by the very members of a group. The protection of human rights as a basic or minimal condition of collaboration and joint living would be conducted by encouraging the rights of individuals to collaborate and protect the ties that hold the group together. Human rights exist if and only if they serve to protect the ties we establish with other individuals (responsibilities and commitment).⁸

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The following model – and the reason human rights should never lose this eminent legal register or legal protocol⁹ – refers to the nature of law to connect and bind all those who are or are not present, who participate and cooperate in a group.¹⁰ My right also represents a responsibility towards another or for others, and vice versa. “Rights involve counterpart duties: I only have a right to X if someone else is under a duty to me with respect to X” (Tasioulas, Raz). The duty to be human therefore always refers to the right of another.

Finally, the last and for us most important model, also the most important part of this brief presentation, refers to the Declaration as a

8 Human rights speech is *de facto* speech about a minimum, a minimum of rights and a minimum of humanity. A theory of human rights is a “minimalistic theory” (Cohen), sometimes described as “the minimalism of human rights” (Buchanan), and at other times as having a “minimalistic character” (Griffin). Nickel writes: “Human rights are not ideals of the good life for humans; they are rather concerned with ensuring the conditions, negative and positive, of a minimally good life.” Nickel 2007: 138.

9 Human rights are not principles, nor are they “*das Prinzip einer andren Politik*” (Ch. Menke), nor a practice or “*die Bewegung einer Praxis entbildet*.” Menke, Raimondi 2011: 9, 18.

10 Here I am giving a version or a rewording of a famous maxim by the Physiocrats: “*Qui dit un droit, dit une prérogative établie sur un devoir; point de droits sans devoir et point de devoir sans droit.*” [To claim a right is to claim a prerogative based on a duty; there can be no rights without duties and no duties without right.]

document,¹¹ that is, a written document. Human rights are above all constituted as a declaration, as a text that binds all who sign and publish it. This recognition by all produces the deontological power of this document and, at the same time, the power of the group as such. The Declaration is possible exclusively in the form of “we,” such that the declaration constitutes the rights of all at the same time as the constitution of the group or the community of all. When all declare (assert) themselves regarding the rights of all individually, on human rights – this is when they become constituted as a “we,” a group. However, since human rights are published in the form of a declaration, these rights are also at once permanently declared and interpreted. Therefore human rights exist in the form of an explanation of their own essence and are the sum of various declaratory acts. A permanent explaining of the word “human” is in fact part of the great and eternal project of human rights.¹²

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11 In a text dedicated to human rights from 1996, Cornelia Vismann explains the genesis of the term declaration and its use during the course of the 18th century. This term encompasses interpretation, permanent interpretation of certain legal acts on the part of the minister of justice. Vismann 2012: 231.

12 This sentence is a modification of a Vismann excerpt that goes like this: “So wie die Menschenrechte keine Rechte sind, sondern eine rhetorische Praxis in Gang setzen, ist auch der Mensch kein Rechtssubjekt. Der Mensch, die Lücke im Gesetz, erklärt sich, indem er spricht. Die Erklärung des Begriffs ‘Mensch’ – wohlweislich kein, nicht einmal ein unbestimmter Rechtsbegriff – ist darum Teil des diskursgenerierenden Projekts der Menschenrechte.” Ibid., 238.

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Petar Bojanić

„Oduzeti ljudsko iz ljudskih prava“

Rezime

Interesuju me razlozi zašto bi „ljudsko“ ili „ljudska prava“ mogli da budu važni ili eventualno presudni u konstituisanju jedne grupe (to je razlog zašto sam u podnaslovu ovog teksta uveo komplikovanu reč „grupa“ i „prava grupe“). Sve ono što bih u ovom trenutku trebalo da ostavim u rezervi, a što je implicitno uvek prisutno u svakoj tematizaciji ljudskih prava, odnosi se na dugu tradiciju konkretizacija jedne besmislice i fikcije koja se obavlja već skoro dva i po stoleća. Ako bih trebao da opravdam postojanje najsavremenijih rasprava o prirodi, opravdanjima i univerzalnosti ljudskih prava, o njihovom razlikovanju od drugih normativnih standarda, o filozofiji i (pravnim) utemeljenjima ljudskih prava, o „ljudskim pravima bez (ili sa) utemeljenjem“ (Raz, Tasioulas, Besson), onda bih odmah zaključio da ovaj „proces grandiozne konkretizacije“ jedne izmišljotine uopšte nije završen. Bez obzira na bezbroj paktova i međunarodnih konvencija koje su ustanovljene posle Drugoga svetskog rata, na mnoštvo obaveza država potpisnica koje su pokrenute poslednjih decenija, na ustanovljenje prava na secesiju ili humanitarnu intervenciju, kao da kompletna klasifikacija osnovnih ljudskih prava i njihova univerzalnost još uvek nije ni dokazana ni konstituisana.

Cljučne reči: ljudska prava, grupa, prava grupe, deklaracija, međunarodna legalna ljudska prava