

**THE STRUCTURE OF A HUMAN RIGHT IN LAW:
SETTING THE CRITERION FOR A RIGHT LEGALLY SO-CALLED**

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Abstract

Inadequate formulation of human rights provisions is idle endowment that promotes idle entitlement and idle expectations. The law must accord structure to a legislated right. This piece distinguishes human rights as species of law from human rights rhetoric, by examining the internal structure of the former. It emphasises the significance of adequate formulation of human rights provisions while highlighting the elements that accord justiciability or legal force to an otherwise moral appeal. There is a subtle but significant distinction between human rights and human rights law. The rights discourse has to find premise within the legal discourse in order to profit from the long established compelling attributes of the law. The article also makes a case for severance of human rights norms from morality, and reveals how the state of entitlement is obliging in itself.

INTRODUCTION

The prominence of the rights discourse and the visibility of human rights as a field of law have resulted into wide-scale use of the rights language among several aspects of the society. The idea that every person anywhere in the world is entitled to certain rights, which others must respect is deeply attractive.¹ Unguided reference to the subject has led to unstandardized expansion of forms of human rights and consequently diminished the value of rights. Such proliferation has further cheapened their purpose and weakened the resolve of potential enforcers.² Many philosophers and legal theorists for example see the rhetoric of human rights as just loose talk.³ In 1791, Bentham contended that ‘natural rights are simple nonsense, rhetorical nonsense, nonsense upon stilts.’⁴ Hart’s apparently persuasive observation that natural rights are

¹ Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy & Public Affairs* 315, 315.

² See Amy Gutmann and Stephen Macedo (eds), *Human Rights as Politics and Idolatry* (Princeton University Press, 2011) x.

³ Sen, above n 1, 315-16.

⁴ *Ibid* 316.

parents of law that inspire and motivate specific legislation⁵ can be qualified with the view that this parent is often disowned. When people are subjected to political authority as a result of an act of consent of their part, the social contract consequently takes them out of a state of nature.⁶ Their rights become negotiable. If legal consensus is required as either proof of a human right or as the foundation of it,⁷ the human right in question must conform to legal standards.

Authoritativeness of a human right, in law, is sanctioned by legal processes such as codification and judicial proclamation.⁸ These procedures accord human rights legal and institutional force hence creating a category of norms that is distinguishable from moral appeals⁹—also referred to as ethical demands,¹⁰ or the traditional embodiment of natural rights.¹¹ Two discourses of human rights have subsequently emerged: human rights law; and human rights rhetoric or rights as appeal to human conscience. In the words of Jeremy Bentham ‘*Right*, the substantive *right*, is the child of law; from *real* laws come *real* rights; But from *imaginary* laws, from “law of nature” [can come only] *imaginary* rights’.¹² This distinction is consequential.

Upon promulgation, a right is conditioned to a legal order or positive law and it exhibits peculiar attributes. A human right in law must be adequately and effectively formulated. The quality of articulation determines the justiciability of the right. Legality itself depends on certainty, precision and predictability. Without undermining the

⁵ H. L. A. Hart, ‘Are There Any Natural Rights?’ in Jeremy Waldron (ed.) *Theories of Rights* (Oxford University Press, 1984) 79.

⁶ See Charles Taylor, ‘Conditions on an Unforced Consensus on Human Rights’ (Paper presented at the Bangkok Workshop, March 1996) 3 <<http://www.iilj.org/wp-content/uploads/2016/08/Taylor-Conditions-of-an-Unforced-Consensus-on-Human-Rights-1996.pdf>>.

⁷ See natural school’s perspective that legal consensus can only ever be the proof of existence of human rights and not a foundation of human rights—Marie-Bénédicte Dembour, ‘What are human rights? Four schools of thought’ (2010) 32 *Human Rights Quarterly* 1, 6.

⁸ Meyerson defines a legal right as a right that is enforceable through the courts, that is granted by statute, common law and constitutional provisions—Denise Meyerson, *Jurisprudence* (Oxford University Press, 2010) 239. See also Eric Blumenson, ‘Four Challenges Confronting a Moral Conception of Universal Human Rights (2015) 47 *The George Washington Int’l Law Review* 331, 331 stating that one of the elements of a right is recognition by some governments.

⁹ A human being viewed as rational and moral hence a source of rights—see Jack Donnelly, ‘Human Rights as Natural Rights’ (1982) 4 *Human Rights Quarterly* 391.

¹⁰ See Sen, above n 1, 319.

¹¹ Endowment of humans with rights by nature—see Jack Donnelly, ‘Human Rights as Natural Rights’ (1982) 4 *Human Rights Quarterly* 391.

¹² Cited by Sen, above n 1, 325.

transformative power of human rights rhetoric,¹³ this article will focus on the nature of human rights as a species of law.¹⁴ It elucidates the elements of a human right legally so-called, explains the significance of each element, and alludes to the consequences of the distinctive structure of a human right in law. This discussion is not meant as exhaustive or uncontroversial.

ELEMENTS OF A HUMAN RIGHT IN LAW

A human right primarily relates to a cognisable state of being; it is a standard of wellbeing that develops into a claim upon infringement. This view differs from the perspective of a human right as a claim-right possessed in virtue of some aspect of the status of being human.¹⁵ In the former description, a right develops into a claim when not realised or fulfilled. While in agreement with some of the fundamentals of a human right enumerated by Reeves including (i) protected interest; (ii) duty or obligation(s); (iii) duty-bearer;¹⁶ another constituent, that is, (iv) a beneficiary or an interest bearer must be added to the list. The fourth component advanced by Reeves, that is, standard of conduct, correlates with the aforementioned generic description of a right as a whole; a right as a standard of wellbeing sets a standard of conduct.

Protected interest(s)

A right is based on humankind's demand for a life in which the inherent dignity of a human being receives respect and protection.¹⁷ A specific right is a 'living good' comprising of valuable ideals. A justiciable right constitutes warranties that are worthwhile and essential to human dignity. For example, the right of everyone to an adequate standard of living includes adequate food, clothing, housing and to

¹³ See Blumenson, above n 8, 329: citing examples of Martin Luther King Jr., Nelson Mandela, and Mahatma Gandhi that were able to defeat powerful and entrenched forces on the strength of human rights rhetoric. See also Sen, *ibid* 320 on public discussions, appraisal and advocacy as effective means of promoting human rights through creating effective social pressure.

¹⁴ *Ibid*. Blumenson makes a distinction of human rights traditionally as a species of justice rather than law.

¹⁵ Anthony R. Reeves, 'Standard Threats: How to Violate Basic Human Rights' (2015) 41 *Social Theory and Practice* 403, 408. See also Blumenson, *ibid* 330.

¹⁶ *Ibid* 408.

¹⁷ See Ritu Sharma, 'Human Rights Ideology' (2014) 1 (5) *International Journal of Multidisciplinary Approach and Studies* 318.

continuous improvement of living conditions;¹⁸ the right to a fair trial includes guarantees such as information on the charges in a language that a person understands, adequate time and facilities to prepare a defence, trial without undue delay, the presumption of innocence, among others.¹⁹ The intervention of the law is justified by the risk of harm to the aforementioned warranties. It should serve to safeguard a fundamental priority interest.²⁰ This quality reveals the functional character of a human right and distinguishes it from dreamy idleness and mundane aspiration that is of no litigable value. Thus a right that does not reveal a valuable and perceptible aspiration is vague.

Human rights provisions address the details of everyday life such as parental and spousal responsibilities,²¹ the status of the environment, access to health services, availability of food among others. These concerns are actual and realistic thus making the respective rights feasible to enforce.²²

Obligation(s)

The affirmation of a human right involves reasonable consideration of the corresponding duties.²³ The duty imposed by a human right bears significantly upon its justiciability. Infringement of the protected interest, manifesting as a failure of obligation, potentially leads to a claim or legal action. Human rights formulations must therefore be specific and better indicative of which duties each right grounds or what is concretely required.²⁴ Forms of human rights obligations include promotion, respect, protection, and fulfilment²⁵ of the specified interest.

Human rights are commonly perceived as specifying the ways in which state officials must and must not act towards their own citizens.²⁶ They were originally designed to

¹⁸ See CESCR General Comment No.12: The Right to Adequate Food (Art. 11) para 1. Adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights 12 May 1999 E/C.12/1999/5. <<http://www.refworld.org/docid/4538838c11.html>>

¹⁹ Article 14 International Covenant on Civil and Political Rights (ICCPR).

²⁰ Blumenson, above n 13, 331. See Reeves, above n 15, 403 describing human rights as 'risk impositions to protected interests'.

²¹ Blumenson, *ibid* 329.

²² *Ibid* 331 citing J.W Nickel *Making Sense of Human Rights* (Blackwell Publishing, 2007).

²³ Sen, above n 3, 322.

²⁴ Reeves, above n 16, 405.

²⁵ *Ibid*.

²⁶ Leif Wenar, 'The Nature of Human Rights' in A. Føllesdal, and T. Pogge (eds) *Real World Justice* (Kluwer 2005) 1.

apply vertically, while creating rights for people and duties for the government.²⁷ The aforementioned perspective is restrictive and does not envisage the horizontal application of human rights which promotes their quality as a relational tool to oneself, and among individuals. A human right should be rightly described as a guiding standard of interaction among individuals; a norm that governs human behaviour.²⁸ Donnelly's reference point for understanding human rights as obligation grounded in human commitments is relevant.²⁹ A person can speak meaningfully of their rights where they can hypothesise, demand, claim, or perceive that another person has an obligation, the obligation which may arise from commitment to a legal system, a moral system, a fundamental moral principle, an ideological cause, or to respect for humanity or the fundamental humanity of each person.³⁰ Humanity is also owed to oneself. The state as a guarantor and a 'guard' realistically has an oversight role in the realisation of rights but the reality that citizens threaten their own rights and those of others cannot be underestimated. The language of rights gained dominance following the Universal Declaration of Human Rights of 1948 after the Second World War which was sparked by majorly state sanctioned abuses of human dignity. State accountability was central in the subsequent decades but a contemporary holistic protection model must integrate the obligations of non-state actors such as organisations, corporations, groups and individuals. Government's efforts alone are not enough to guarantee the wellbeing of all persons in any state. Other stakeholders must be willing and able to cooperate.

Sunstein notes that the inability of international charters and declarations to connect each presumed right holder to some specific obligation bearer leaves the content of the proclaimed rights obscure.³¹ This observation should not only relate to the identity but also the capability of the duty bearer. A weak state³² may not fulfil the rights of its people. Institutions are central to the realisation of human rights.³³ Such provisions raise the expectations of the populace without the likelihood of being met in the near

²⁷ Maria Green, 'What We Talk About When We Talk About Indicators' (2001) 23 *Human Rights Quarterly* 1062, 1067.

²⁸ See Charles Taylor, 'Conditions on an Unforced Consensus on Human Rights' (Paper presented at the Bangkok Workshop, March 1996) 1.

²⁹ See Donnelly, above n 9, 82.

³⁰ Ibid 9.

³¹ See Sen, above n 3, 346.

³² A state with no public coercive forces to uphold law and order, and no authorities to extract or deliver services—Samuel Larsson, *Weak States: A pursuit for a weak state definition and feasible reconstruction theories* University of Lund, 2005, 9 <<https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1332751&fileOId=1332752>>.

³³ Ibid 347.

future. The concerning quality of governance among many African countries is met with bills of rights that are continually expanding.

Hart's subtle distinction between a person 'under an obligation' and a person 'having an obligation' informs this debate. Whereas a person is under an obligation to do something where doing that thing is a necessary condition for avoiding some threatened evil,³⁴ a person having an obligation is one that accepts that commitment even without a threat. The human rights discourse should promote voluntary assumption of responsibilities by all stakeholders. The state in under an obligation but every other person or entity has an obligation to respect and uphold their rights and of others.

Duty bearer(s)

The duty imposed by a human right should accrue to an ascertainable and "functional" entity. Blumenson describes the duty bearer as a particular addressee that is duty-bound by the right.³⁵ The state-centric nature of the international human rights system³⁶ is undisputable. This perspective of human rights suffices for those protections and violations that constitute the exercise of state power.

Human rights guarantees and infringements transcend the boundaries of state power. In fact, a human right is equally a 'self-governance' concept. In the language of the African Charter on Human and Peoples' Rights, the enjoyment of rights and freedom also implies the performance of duties on the part of everyone.³⁷ The duties are owed to one's family and society, the state, and other legally recognised communities and the international community.³⁸ While expressly introducing corresponding obligations that a rights holder owes to other significant entities, the Charter does not mention the obligation that such a person owes to him-herself. This omission is an underestimation of the potential of a human being to violate their rights or refuse to exercise their

³⁴ Neil MacCormick *H.L.A Hart* (Stanford University Press 1981) 56.

³⁵ Blumenson, above n 13, 331.

³⁶ Vinodh Jaichand, 'After Human Rights Standard Setting, What's Next?' 2014 (11) 20 *International Journal on Human Rights* 35, 35.

³⁷ Preamble, the African Charter on Human and Peoples Rights (ACHPR), adopted on 27 June 1981, entered into force on 21 October 1986.

³⁸ Article 27 (1) ACHPR.

rights, in cases where positive steps are required, and as a result constrain every possibility of ensuring human dignity.

The guarantor should include the beneficiary. A rights bearer has the responsibility of safeguarding their dignity to the extent of the means available to them. A human being is born in an intrinsic state of dignity. Dignity is obliging; its maintenance requires activity from the holder. It is against this background that the first level of obligation is 'respect'- a restraint from violation. The leading standard of 'respect' presupposes that a person naturally inhabits a state of adequate wellbeing that should not be distorted. It is notable that the rights discourse has been a more effective instrument in protecting individuals against the evils of abuse, cruelty, oppression and degradation,³⁹ which require restraint than as a guarantee to a better life that requires a provision role. An example is the prohibition against torture, which is a non-derogable right that also constitutes customary international law.

With regard to positive human rights obligations, the expectations of a population from their government ought to correspond to the level of facilitation offered by those people to the state. A government of a state with a wide tax base is better placed to fulfil the socio-economic rights of its people and *vice versa*. Even a capable governing entity agrees to a supposed right before it takes effect in its jurisdiction. Globalisation and increased circulation of information creates pressure among struggling nations as human rights are perceived as guarantors of social justice and substitutes for comprehensive conceptions of a good life.⁴⁰ A population must be mindful of its contribution to the capacity of the state to facilitate human rights. The bottom-up dynamic is as significant as the up-bottom perspective.

Interest bearer(s)

A human right is an entitlement of an ascertainable natural person. An expression that 'everyone has a right to education' implies that the right to education is the property of somebody.⁴¹ The popular proclamation that 'it is my right' follows suit. The bearer must engage in an active process of taking ownership of the right, sustaining it or even developing it. The right derives significance from meaningful control by the bearer;

³⁹ See Gutmann and Macedo (eds), above n 2, x.

⁴⁰ See Gutmann and Macedo (eds), above n 2, x.

⁴¹ See Taylor, above n 28, 3.

they have a role in enforcing it and they can waive it.⁴² This perspective lacks adequate expression and promotion in the human rights discourse. Much should be done about sensitising people of their role in realising their rights as there is in empowering them to demand the fulfilment of their entitlements.

The aforementioned component is also important in delineating boundaries of rights. Whereas some rights are for 'every person', others are restricted to specified categories of persons such as citizens, children, women, refugees, accused persons, among others.

THE CONSEQUENCES OF THE INTERNAL STRUCTURE OF A HUMAN RIGHT IN LAW

The rights discourse has successfully obliged the state entity as a primary guarantor of human rights of persons subject to its jurisdiction. The focus on the state has politicised the language of rights and obscured the role of other stakeholders. While advancing a right as a claim, the rights discourse has been devoid of emphasis on the significance of the contribution of the individual towards safeguarding their inherent state of dignity. The challenging result is a disproportion between the expectation of persons and the capacity of the state to meet them. This accounts for some of the enforcement gaps. The role of the rights bearer in exercising their rights cannot be underestimated. Rights are standards of equity and equity aids the vigilant. Efforts to guarantee human rights should mainstream empowerment of individuals that would in turn reinforce the capacity of the state.

A position of entitlement is one of responsibility as opposed to a state of idle endowment. The obligations corresponding to the human rights in the African Charter on Human and Peoples' Rights are right on point. In fact, the level of enjoyment of human rights corresponds with the level at which a particular population assumes responsibilities. The internal structure of a human right advances a sacred human quality. Human dignity goes beyond the regulatory framework.⁴³ Dignity is oversimplified when presented as only a political demand from policy makers or used as an excuse for dreamy idleness and idle clamour for better conditions. This position justifies the standard of progressive realisation of resource driven rights. A population

⁴² Ibid.

⁴³ Emilio Á. Icaza, 'Human Rights as an Effective Way to Produce Social Change', (June/December 2014) 11 (20) *International Journal on Human Rights* 77, 77.

with a lower consuming power and limited capacity to contribute to their nation's tax base would naturally endure lower levels of progress in the realisation of socio-economic and other rights.

A right is a state of being. It develops into a claim in specified circumstances including (a) where its inherent nature involves exercise of state power or collective enjoyment such as the right to self-determination, the right to development, the right to a clean and healthy environment, and (b) where the enjoyment of the right is at risk or another party, other than the interest bearer, violates it.

Human rights and morality

Although rights may be grounded in morals, can lead to a morality, or embody moral norms, morality is not, and cannot be a qualifying standard for a legal human right.⁴⁴ Morality has no propensity to do so because it is neither standardised nor universal.⁴⁵ The legality of a human right severs it from morality as a pre-requisite. Upon promulgation in legislation, a legal right acquires the positivist character; it is what it is and not what it ought to be.⁴⁶ The apparent mingling of moral considerations with human rights complicates the discourse of rights. A case in point is gay rights that are continually challenged on grounds of morality. A right is sometimes a personal guarantee that revolves around individual interest; to subject it to a fluid notion such as morality is to expose it to infinite possibilities from other parties. The Kantian theory that rights depend upon the idea that '...every person is an end in themselves and never the means for ends of others' is credible; every person is an autonomous rational being, knowing their own interest as they do.⁴⁷ In fact, natural scholars opine that a right is an individual's interest and human rights are typically realised through individual enjoyment.⁴⁸ If one wishes to ascertain the rights of another, the targeted person should be asked. What is right for another cannot be assumed or imputed by analogy. The fact that voices of beneficiaries of human rights are less heard during negotiation of human

⁴⁴ Blumenson, above n 13, 331: 'there are no moral claims when the sole referent is a legal right rather than a moral one'.

⁴⁵ Blumenson refers to it as a fundamental challenge to moral universality. Blumenson, *ibid*, 336.

⁴⁶ See H.L.A Hart, 'Positivism and the Separation of Law and Morals', (February 1958) 71 (4) *Harvard Law Review* 593, on the merits of the distinction between law as it is and what it ought to be.

⁴⁷ Blumenson, above n 1, 329.

⁴⁸ See Marie-Bénédicte Dembour, 'What are human rights? Four schools of thought' (2010) 32 *Human Rights Quarterly* 1, 7.

rights treaties⁴⁹ has to be corrected. Clashes between rights and social goals are reasonably probable; rights themselves may constrain meritorious or rational social goods.⁵⁰ It is a balancing act.

Distinctively, the African Charter on Human and Peoples' Rights subjects the exercise of the rights and freedoms enshrined in the Charter to morality, among other standards.⁵¹ Morality may rightly act as a control to enjoyment of rights so as to harmonise them with other guarantees. This viewpoint differs from where the recognition of the right is subject to morality.

Moral rights exist.⁵² Such rights are justifiable regardless of whether they are legally or socially recognised.⁵³ These rights can facilitate a persuasive debate despite their inability to found legal action.

CONCLUSION

The rights discourse has developed into a distinctive and significant area of the law. Initially manifesting as moral appeals, human rights have remarkably acquired legal force following legislative proclamations. Human rights as species of law or creatures of positive law are distinguishable from natural rights, which derive from the state of nature.⁵⁴ The formulation of human rights standards in law must reflect their legal character and embody elements that actualise their purpose. A human right must be functional, valuable, attainable, realistic and essential. A legal human right without a structure is indeed rhetorical nonsense although human rights can have influence without depending on coercive legislation.⁵⁵

The law must render structure to a right and direct it to its purpose. An adequately formulated legal human right in law should contain the protected interest(s); the obligation(s); the duty bearer(s), and the interest bearer(s). The rights may constitute exercise of state power or diligent fulfilment of responsibilities of human life or both. A statement of a human right must stipulate what is at stake, to whom it belongs, and

⁴⁹ See Jaichand, above n 36, 36

⁵⁰ See Meyerson, above n 8, 248.

⁵¹ Article 27 (2), African Charter on Human and Peoples' Rights

⁵² Meyerson, above n 8, 239.

⁵³ Ibid 239-240.

⁵⁴ See Sharma, above n 17, 319

⁵⁵ See Sen, above n 1, 345.

who is obliged. The rights discourse has successfully obliged state entities as crucial defenders of human rights. Entitlement is responsibility. A human right is a tool for change⁵⁶ and an end in itself. The human rights discourse should mainstream empowerment of individuals to take ownership, safeguard and facilitate their ‘state of proper being’ as much as they are enabled to make claims. A right facilitates self-governance as well as state governance. The standard of progressive realisation is premised on this reality.

The nature of a human right needs to be put in proper perspective. A right is primarily a state of well-being or proper being. It turns into a claim when there is an intervening factor that distorts the aforementioned state. Certain rights naturally require state action or the involvement of others; they are inherently demand oriented.

The determination of suitability of the state of being is principally subjective. The subject of the entitlement has more knowledge of the ideal. That ideal is not subject to unstandardized opinions of others such as morality. Satisfactory ideals vary among persons.

⁵⁶ See Icaza, above n 43, p.79.