The Dilemma of Human Rights: Normalization and Denormalization of Human Rights in Different Legal Context.

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Abstract: This paper takes a closer look at the evolution of human rights in relation to different legal theories. Proponents of natural law, the legal positivist, the relativist and the Universalist are explored in light of current debate on human rights across the different school of thoughts. The problems of conforming to evolving norms become more difficult where some States associate their non-conformance to their influence and authority in global politics. The paper sheds light on the shortcomings of such relative approach to the adherence of the Universal Declaration of Human Rights.

Introduction

Human rights are freedoms established by custom or international agreement that impose standards of conduct on all nations. Sources of modern human rights law developed out of customs and theories that established the rights of the individual in relation to the state. These rights were expressed in legal terms in documents such as the English Bill of Rights of 1688, the U.S. Declaration of Independence of 1776 and the French Declaration of the Rights of Man and the Citizen added to the French Constitution in 1791. Some specific human rights include the Right to Personal Liberty and the Due Process of Law, which includes but not limited to freedom of thought, expression, religion and the formation of movement. Rights such as the freedom from discrimination on the basis of race, religion, age, language and sex have also been expressed in legal terms and are normally guaranteed and defined by international conventions, treaties, and by organizations.

The Universal Declaration of Human Rights enshrines universal rights that apply to all humans equally, whichever geographical location, state, race or culture they belong to¹. However, in academia there are different squabble between scholars that advocate natural law to positivism, and universalism to relativism. Frankenberger for instance argues that human rights is a kind of vocabulary for telling stories that serve the function of ideology, myth, justification,

¹ Full details on UDHR is available at: http://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx
and legal normalization². This essay seeks to explore these views in light of the natural to positivism and universal to relativism narratives. In the first part of the essay, emphasis will be place on narratives of natural law and legal positivism. The second part will analyze the functions and significance of both sources to the human rights discourse. In the third part, I will highlight on the narratives of universalism to relativism and the forth part will base on importance of universalism in light of human rights law. Part five will be the conclusion.

**Narratives of Natural Law and Legal Positivism in the Development Human Rights**

Natural law in philosophy is a system of right or justice held to be common to all humans and derived from nature rather than from the rules of society or positive law. Natural law theorists such as Plato, Aristotle, and St. Thomas Aquinas argued that a law is only just and legitimate if it promotes the common good and stressed that such law takes the position, that the source of divine law is God³. Aquinas was of the same view and further argued that human law is legitimate only if it is in line with divine law and promotes universal happiness. Additionally, he was of the opinion that all law is to fashion to the common welfare of men. He posits that neglecting God’s law or the universal happiness in the formation of a law makes it unjust⁴. Aquinas advances that an unjust law is not a legitimate law at all and does not have to be obeyed. Aristotle and Plato agree that concepts of law and justice are derived from divine laws and practical reason, which govern actions to move toward the higher good. Aquinas further stressed that, the person or persons who make the law must be in care of the community and be acceptable to majority of the people.

Positive law is described as the law that applies at a certain time, at a certain place, consisting of statutory law, and case law as far as it is binding. Proponents of legal positivism such as Jeremy Bentham, H.L.A Hart, Thomas Hobbes and John Austin consider that, law is a human construct and they believe that in many instances the law provides reasonably determinate guidance to its subjects and to judges, at least in trial courts. They were of the view that a law is legitimate if it has been enacted through the proper channels by someone

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with the power to do so regardless of the content of that law for the source of the law to be legitimate, it must come from a source of power. Hobbes finds a middle path on the topic of the source of law and contended that, an individual subordinates himself to the sovereign who can create and enforce laws according to the social contract with the people\(^5\). Thomas Hobbes argued that such law receives its legitimacy from that social contract between the people who are governed and their sovereign. He believes that there should be limits to political obligation and argued that when citizens life are endangered, they have the right to disobey that law or government. A typical justification of Hobbes ideology can be traced to the many uprising happening around the world, most importantly the Arab Spring of 2011 which originated in Tunisia and into other Arab states.

**Functions and Significance of Natural Law and Legal Positivism to Human Rights**

The concept of natural law is very important to the human right discourse even though it might have its limitation. The theme of natural law is regarded as the principal foundation for man's rights in our secular and pluralistic society of today. This law becomes a guarantee of freedom and the basis for ethical judgments related to reality and integrity beyond man-made-laws. More recently, Pope Benedict summon up that every juridical methodology, be it on the local or international level, ultimately must draws its legitimacy from its rooting in the natural law, in the ethical message inscribed in the actual human being\(^6\). This he believes will eliminate all sort of inhumane treatment resulting from the construction of unjust laws in our societies. The U.S. Declaration of Independence of 1776 and the French Declaration of the Rights of Man and the Citizen added to the French Constitution in 1791 under critical evaluation had all derived its source from natural law.

Legal positivism which emanates its source from the power of institutionalized authority or a specific social contract made between eminent leaders and their subordinates binds subjects with fear, force or reason. It is socially constructed and synonymous with positive norms made by a legislator and considered as a common law or case law in many cases. Frankenberg for

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instance argued that, after human rights narratives moved from naturalism to positivism, they have come to share properties of a modern mythology, replacing ancient secularism with updated secular authoritarian perspective. These, he asserted are expected to control the latter-day furies, turn chaos into order and guarantee redemption from world misery. Dworkin as well argues that rules are applicable in an all-in all situations or nothing may function. In his facts, a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.... But this is not the way principles operate.... A principle states a reason that argues in one direction, but does not necessitate a particular decision⁷. That is, once legitimate sources have created legitimate and just laws, there must be a reason as to why people are compelled to follow or obey them. The Positivist are of the view that, man and his environment evolves and this evolution sometimes goes beyond the natural law and as a result, laws need to be enacted to control their activities to prevent them from abusing others freedom. The evolving socio-political norms but dormant laws more especially in Africa continue to contribute immense volatility to human rights and justice delivery without much ado. In an attempt to meet the challenges in the African environment, people now do, and gives different meaning to the existing social, political and economic rights. The positivist view thus is important to the human rights discourse and for safeguarding the rights of all men within their natural setting.

**Narratives of Universalism and Relativism towards Human Rights**

The narratives of universalism are of immense important to the human rights discourse. Universalism refers in a wider perspective to any concept or doctrine that generally applies to all humans and all things for all times, circumstances and in all situations. The theory is used to measure the quality ascribed to an entity whose existence is consistent throughout the universe and its contextual value can be conceived as being true in all possible situation without creating disagreement. The original myth of equal sovereignty and universalism in Europe was seen to be at work during the early European colonialism and expansions, through the Roman papacy and Christian Europe that had its legal and political origin through the middle ages.

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By the first century, the Roman Empire had been at least theoretically identified with “the world,” the Roman people with “the human race,” and the Roman law with the “universal law for all mankind.” Anyone outside the empire was by definition “barbarian” and “less than human.” And notions of simultaneous singularity and exclusivity were further reinforced by the Christian insistence upon the uniqueness both of the truth of the Gospels and of the Church as a source of interpretative authority. This patency formed the basis of Europe’s exploitation in non-Christian world exporting religion and using the humanistic theology as a universal tool to protect and promote humanity against odds of the world and the new world order of the Roman-Christian Empire. This myth contributed immensely to legal normalization as certain mythical norms were accepted as universal and binding on its followers and those who did not observe the Roman law for instance were seen as barbaric.

The notion of relativism poses several challenges to human rights, and Slick for Instance is of the view that, relativism is just a philosophical position that all points of view are equally valid, and that all truth is relative to the individual. This means that all moral positions, all religious systems, all art forms, all political movements etc., are truths that are relative to the individual. And this philosophical ideology falls under whole groups of perspectives categorized into cognitive relativism (truth), moral/ethical relativism (All morals), and situational relativism (Ethics of right and wrong) dependent upon a situation. The argument for cultural relativism suggests that human rights are not a universal concept but are, in effect, regional depending on the norms of each society. Proponents of relativism believed that the concept of universal human rights should not be applied to societies that emphasize the greater good of society as a whole and that a form of collective human rights which are above those of the individual should rather be encouraged. The United States reaction to certain human rights for instance calls for strict procedures for the enforcement of all the universal declaration of human rights. If not, many countries might sooner or later oppose the

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8 Anthony Pagden, Lords of All the World: Ideologies of Empire in Spain, Britain and France, c.1500-c.1800 (New Haven: Yale University Press, 1995), 8–10
10 Matt Slick views on Relativism is available at: http://carm.org/what-relativism
declaration of human rights as some versions are technically theoretically and politically pernicious.

**Relativism or Universalism-the Unraveling Dilemma**

The debate on the universality of human rights or the theoretical opposition between culture and rights (relativism) is very important in the human rights discourse. The Roman Catholic Church, especially under John Paul II and Pope Benedict XVI, has identified relativism as one of the most significant problems for faith and morals today. They further argue that relativism constitutes a denial of the capacity of the human mind and reason to arrive at truth.\(^{11}\) Hence there is the need for a universal rights derived from natural laws such as the Universal Declaration of Human Rights charter to guide men in their activities. Professor Chomsky, a linguistic professor at MIT was of the view that, as some Asian and African countries have argued for cultural relativism in human rights and criticized severally, the debate is skewed in the West. He argues that the United States being relativist only allows certain rights to be considered human rights and flatly rejects two thirds of the Universal Declaration. The Universal Declaration with its three parts: civil and political rights; social and economic rights and cultural rights has the United States vigorously rejecting the last two sections.\(^{12}\) This action of the United States continues to create a technical human rights divide between the Western world and the rest of the world with an unforeseen implication yet to be debated upon.

**Conclusion**

The development of human rights is mostly attributed to the U.S. Declaration of Independence of 1776, the French Declaration of the Rights of Man and the Citizen. Additionally, the French Constitution in 1791 earmarking the 1948 Universal Declaration of Human Rights. There have been diverse perspectives in the wings of the proponents of natural law, the legal positivist, the Universalist and the relativist on the content and the application of laws that needs to governed rights even though they all seek the welfare of humans. The naturalist for instance

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11 World Youth Day News August August 21, 2005 available at: www.nationalcatholicreporter.org
now advance towards a renewed understanding of natural law of the rights and duties and a language which is more in-step with contemporary society. The positivist and the naturalist corresponds to the attempt of thought on something common for humanity, some values or norms that are valid at all times, for all people, independent of one's culture, religion, or legal system. The Universalist with its social welfare principle is of the view that welfare services for instance should be available to all by rights and not restricted by individual ability to pay, but funded by general contributions through taxes, rates and national insurance payments. Our efforts today in relation to justice, peace, protection of the environment, and human dignity will be rendered worthless although there is good intentions behind our aspiration, if they are not rooted in a foundation which goes beyond political consensus will be meaningless more especially considering the Asian-African interpretation of human rights in relations to cultural beliefs. The relativist approaches of United States for instance pose a threat to the human rights discourse, and I believe that very soon countries in Asia and Africa would opt out of certain protocols and conventions if the universal human rights become diverse in its interpretation and relative to politics and the powers of nations. The question as to whether we are all equally entitled to our human rights without any form of discrimination which are all interrelated, interdependent and indivisible are yet to be explored further.
Reference

10. Matt Slick views on Relativism is available at: http://carm.org/what-relativism