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Original Article

The Concept of "Right" and its Three Generations

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Abstract

In the contemporary world, undoubtedly, "right" is the key element of law, politics, ethics and generally the society which has reached here during a historical process. In the modern sense, right is different from its definition in premodern worlds.There is a certain difference between "having right" and "being right" which (shows the distance between modern and premodern worlds). The first concept of right which is the opposite of void, is always used in thought realm specially, political and ethical thoughts but, right in its second concept which may be used as the opposite of duty, is a new thought and the result of theoretical and practical attempts as a liberal human during the modern era.Jack Donnelly also believes in such separation. He defines "being right" as ethical duty and "having right" as a merit.

Key words: Conception, Freedom, Human right, Right

INTRODUCTION

For instance, when we help a poor person, this is a good, ethical and right behavior (first concept); but when we tell the person who helps poor people that you have the right to help, meaning whether you decide to help or not- just as your decision- is guaranteed and protected; we are using right in its second concept.

According to Donnelly: "when we talk about merit, we scarcely use the verb to be and in contrast we use the verb have and having right. When we talk about the right job and merit, it is bout right in both case; but in two complete difference concepts and what the modern human right benefits from and puts emphasis on it, is the right in the second concept".

The life, freedom, and ownership guarantee is something more than right only in "being right" and here, it is marked as "having right".

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Now, when we discuss right as "having right" (second concept), different meanings may be derivated. The right of a creditor to take his debt, right of each person to admeasure his properties by will, right of a spouse to refuse taking an oath against his or her spouse (some judicial systems), and the right of a worker not to joinlabor unions are some examples of the usages of right in different concepts. The American jurist, Hofeld, divided the legal relationships into four categories:

1. Right-claim
2. Right-freedom
3. Right-power
4. Right-immunity.

Rights such as a right to demand a debt, typically, a demand of a person against the duty of one another, is a right-claim, the absence of a person in the court to refuse taking an oath against his or her spouse, in some judicial systems such as US, is of right-freedom or right-privilege, transferring a property by will or as a gift is right-power and the right to keep a child by his or her parents and the prohibition of the dismissal of a judge are examples of right-immunity.

In modern concept, if the right conflicts other principles, this is the right which will be trusted and that's the reason why 'Dorkheim' analogizes it to the winning card. Right are not only some social and ethical purposes parallel to other purposes, but in normal situations, they also prioritize the calculations of profiteers and social policy considerations.

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In fact, the main purpose of right is to protect the owner and holder of it against claims which are on the basis of those principles.[1]

The Content of Right

Today, three types or in other words, three generations of rights are discussed and any right may be defined in of these generations known as three generations of human rights.

First Generation of Rights

The rights of this generation are mainly political and civil rights and freedoms. Rights such as freedom of speech, free choice of residence and freedom of religion are among the first generation rights. The first generation of rights is generally about the person against political power and typically, maintains the originality of the human. This has been considered in article 2 to 21 of the Universal Declaration of Human Rights. Martin Golding called these rights as "selective" rights which mostly deal with the concepts of freedom and choice. They are the same traditional freedoms and citizenship privileges which have been formed as political and civil rights. The first generation rights mainly match the Liberalism Tradition; because these are the inalienable rights of people which have immunity against aggression of common goods and state authority; the point emphasized by Liberalism.

Second Generation of Rights

The second generation of human is shown in social and economical areas. Rights such as education, dwelling, hygienic protection, employment and an appropriate level of living, are considered as the rights of second generation.

The rights of second generation guarantee an active life along with health. If a healthy nourishment and hygienic protection does not exist, doesn't it harm the health of human and accordingly the health of the society?

Although by approval of Universal Declaration of Human Rights in 1967, the pressure of socialist countries has had a powerful effect on the birth of International Convention of economic, social and cultural rights; but it was also the subject of attention for regulators of Universal Declaration of Human Rights who mainly had liberal viewpoints.[2]

According to the Introduction part of the Declaration: "lack of recognition through human rights and despising it, has led to savage actions which caused the human soul to rebel, and the appearance of a world where human has the freedom of speech and fearless to poverty has been declared as the highest ideal of human being.

This introduction properly declares that human rights, in addition to the fundamental freedoms, also consist of enough facilities for a living. "Golding"calls these rights as "welfare" rights. On the contrary to the rights of first generation which generally emphasize nonintervention of the government and nonexistence of obstacles (negative freedom), rights of second generation not only stress the nonexistence of obstacles, but also demand facilities and necessaries from government (positive freedom).

The basic idea of such division is that, the rights of first generation are ascertained by avoiding any action, and rights of second generation by doing some actions; but the most important commonality between these two generations, is the emphasis of both on humanity of everybody or in other words, the rightfulness of human which does not exist in the third generation of human rights.

The Third Generation of Rights

The establishment of the third generation is the result of new needs of human. The developing human, international, social procedure and moralizing the international rights and human rights and also weaknesses of the first and second generations led to appearance of the third generation of human rights.Therights of third generation or unity rights do not talk about human; but put emphasis on the universal citizen.[3]

In contrast with the first and second generations which are products of theories (liberalists and socialists), the third generation of rights is the result of human experience and human life realities has caused them to form. For instance, before the present age, human didn't have any environmental problem; but today, it has change into a serious problem.

In this generation of rights, the beneficiaries are society and social groups which of course its general benefit is also shared with every individual. The most important features of the third generation of rights are: establishing a powerful feeling among members of the universal society, the inability of not deviating the commitments to such rights for the harms they cause to all, putting emphasis on subjects higher than the geographical areas or special economical and political systems, and specifying the rights which are made as the results of human presence in the human society. Most instances of the third generation of human rights (unity rights) are: development right, peace right, right of human in choosing his destiny, right to have a healthy environment, right to human common wealth, right to philanthropic aids and the right to communication.

The Theories of "Right"

Here we encounter a fundamental question which its answer may help us a lot: what the rights are based on and how they can be rationalized?

Human rights have features that under any circumstances cannot be limited or foreclosed such as universality, being immutable, indivisible, and inherency. Now, how these essential principles of human rights can be justified?

There are multiple mental frameworks for or against human rights which among the negative and rival theories we can mention Marxism, Virtual Morality, Utilitarian School and Conservative Approaches, Cultural Relativism and Postmodernism; but this paper is about the most important positive theories of rights without pointing the negative ones and two right-based schools "natural rights" and "Kantian rights" are discussed for the importance they have.[4]

The School of "Natural Rights"

In the introduction of the book "Natural Rights and Culture", defending the natural rights theory, "Leo Strauss" says: "rejecting natural right is like accepting that any right is an established and set subject. In other words, it is like saying that right is only what the legislators of different countries determine.

While it is known that some laws or decision makings are not fair, then in such cases, there is a standard of right and wrong, fair and unfair, top and independent about the ordinal right in our hands and we judge about ordinal rights according to it".

This approach of Strauss is typically an interpretation of the traditional theory of natural rights which looks for proving a dominant law and adapting legal norms with dominant rules; while the basic thought of modern natural rights theoreticians isexplaining the nature of rights, but the main subject in natural rights theory may be the relationship between morals and rights.

The essence of natural rights theory is summarized as rights have no bases in legislation and are not produced by any government or society and cannot be limited or foreclosed under any circumstances such as cultural relativism claim.

The bases of natural rights theory can be found in the ancient Greece. Although it has not happened in real world and none of the philosophers have not mentioned this; but in ancient Greece literature we see some cases which the most important of them is the drama of "antigone" by "Sophocles".

This drama may answer the fundamental question in the fifth century BC. That whether there is a dominant standard or not? In this drama, Sophocles transfers this question to us in the form of a puzzle in such a way that it seems as a well known and popular subject at that time.[5]

Civil war had separated the two brothers. One was killed in an invasion to Thebes while the other was defending there. The king prohibited the burial of his killed brother till his corpse gets torn by animals. According to religious beliefs of the Greeks, this would cause his soul not to rest in peace; since resting in peace was possible only by a handful of soil. "Antigone", sister of the killed body, bridled the king's order following moral religious instructions and poured soil on the dead body and got arrested as the result. The king asked her whether she knew about his order and if the answer was yes; why she had disobeyed him? She answered: these rules are not from Zeus and as a God, he is the symbol of Justice and has not established such human rules. I don't think that you as a mortal human can rescind and violate the unchangeable and unwritten divine rules by an order. They were not born yesterday, they don't die and nobody knows when they have appeared.The text apparently shows that the main thought of traditional theories is natural rights which emphasize the existence of prior law and dominant rules. The theory of natural rights was used by the lawyer and politician of ancient Rome called "Cicero". He defines natural rights as: "different laws do not exist for Rome, Athena and for now and future; but only one valid and unchangeable law for all societies and for all times. There is no ruler and king for us but God; because he is the writer, legislator, and judge of this law". In another speech and by believing in the unity of justice in all societies, he continues that if the justice principles were on the basis of human orders, commands of princes or judgments of judges, justice could be the reason of theft, adultery and forgery of will according to the judgments or orders of society. Up to here we see that virtue and indecency of entities is on the basis of divine orders rather than their natures. In Plato's opinion, desirability or in other words the virtue and indecency of entities is what the Gods have wanted. This natural virtue and indecency of entities on their natural basis (not divine orders) started at "Aquinas's time and later, led to irreligiousness and common interpretation of natural rights; a way in which the role of "Grotius" was tangible; since it was him who tried to separate natural rights from theology. The phrase "even if there was no God, natural rights exist" proves this idea. But it is said that until 17th century, most of emphasis has been on responsibilities and duties and following the dominant law. From this date on, by the effect of Nominalism instructions and protestant reforms which both put stress on the special importance of human being- the emphasis point started to change from natural law to natural rights. The Approaches of two theoreticians of natural rights are discussed as follows.

John Locke

Locke without any doubt was one of the thinkers who had lots of effects on the modern human rights. In one of the articles of US Declaration of Independence has been

stated that: "we know these certain facts by themselves and believe that all human are born equal and God has given them some rights that cannot be taken; such as right to life, freedom, and looking for happiness." These words all show the impact of "John Locke" on legislators of the US Constitution Law and codifiers of the country's Declaration of Independence. Even some writers attribute all the US cultural features and its Constitution law to the Locke's Liberalism. As "Hobbes", "Locke" also talks about natural condition; but in contrast with his compatriot, his natural condition is not the condition of challenges and opposition war. "Locke" believes that naturally, human is in the condition of complete freedom and equality and all people have natural rights through freedom and equality. He says: "a natural law also rules over a natural condition that forces everyone and reason which is that law, teaches human-who surely refer to that. Human who are all equal and independent must not harm life, health, freedom or properties of others. This commitment to not harming others- according to Locke- needs the rights of all human not to be harmed." Locke's perspective through natural rights is a traditional one. Although "Jack Donnelly" doesn't want to come to such conclusion; but "Michael Freeman" in his essay "Human Rights, Religion, and Secularism" confirms that. "Locke" naturally knows all human as equal and emphasizes on the independency of human against others; but he mentions that: "unless their Lord and Creator explicitly declares the rule of one over others and by a clear choice, bestows an undoubted right of rule and sovereign to him."[6]

By this way, Locke states that natural freedom of human is limited by natural law; the law which its source, according to Locke's philosophy, is God. About the teachings of Locke for ownership, he can be distinguished not only from "Hobbes" but from traditional theories. Teachings of Loche about ownership and as a result, all of his philosophy has a revolutionary perspective through both Torah's tradition and also all philosophical tradition. In this type of philosophy, no duty and obligation is emphasized; but his natural rights take the prior importance.

Lon Fuller (1902-1978)

The American philosopher "Lon Fuller" is one of the followers on modern human rights; but opposing to the theoreticians of natural rights, he has different thoughts. As it was mentioned before, natural rights theoreticians focused on the relationship between morals and rights from the viewpoint of normal contents of rights; but Fuller tried to explain the concept of rights on the basis of its formation process and procedural conditions of morally acceptable law. So, he necessitates the link between law and morality at the general level of a judicial system and mostly focuses on the formation conditions and publishing laws and rules. He believes that a law is not qualified as a law without having these eight conditions.[7]

1. Publicity 2. formal publish 3. no ex post facto 4. clearance and transparency 5. No contradiction 6. Not going beyond one's ability 7. Relative continuity (not having frequent and inconstant changes, in a way that citizens cannot regulate themselves with it) 8. conformity between the announced law and implementation of it by enforcement agents and correspondents.[8]

The list presented by Fuller which are his inner moral factors, was a reaction to the growth of Positivism and Nazis" function and defense based on legality of their actions. Fuller believes that the Totalitarian regimes have treated against humanity by the leverage of law and have made it seem legalized. So, these corrupted governments must be disarmed from such weapon. As a result, it may be said that here, "Fuller" agrees the traditional theoreticians of natural rights; with a difference that he focuses on the formation rather than content. "Fuller" believes that from his viewpoint, the list typically results in the natural rights. He begins his argument with a question: are these principles representing a kind of natural rights? The answer is a definite yes; but a bounded one. Whatever I have tried to do, has been identifying and describing a certain type of natural rights related to a special kind of human responsibilities. I have called this responsibility as human behavior's subordination rule. The aforementioned natural rights have no relation to the permanent thoughtful presence in heavens. Also, they have the least relation with propositions such as using the contraceptives violates the God's laws. They are totally earthy in form and function. They are as the natural rights of carpentry or at least like the rules that if a carpenter wants to build a house and fulfills the needs of its residents, must obey them. As an easy way (although not completely satisfactory), and by the mentioned denotative description, we can talk about a procedural natural rights versus substantive natural rights. In this sense, what I have termed as inner natural rights (its standards to be fair) is a procedural readership of natural rights. With no consideration to the criticisms to "Fuller" in concluding the natural rights, it can be said that this category of rights have been changed into common natural rights (secular) through their evolution process and according to "Pufendorf", it has been devoid of any divine revelation and completely product of reason. Anyway, natural rights, despite of all criticisms to it, is alive and active as one of the most important proving theories of right and many courts have issued their verdicts on the basis of natural rights.[9]

Kant's Moral School

What is morality from Kant's viewpoint? In Kantian moral conversation, on the basis of free will and along with intent,

everything done with a basis in an individual independence and without any carnal desires and personal selfishness, will be treated as moral. According to "Kant", every teaching which cannot be extended to others is not moral and on this basis, he tries to make the universality among right and morality reasonable within the morality knowledge. He has excessively explained his philosophy of right in moral metaphysics and the links between right and morality. He believes that the link and mutual effect between morality and right results in the fact that the freedom of every individual is not allowed to be shown as external behavior and action in such a way that damages others' freedoms. This result requires two essential and important principles of "Kant":

1. Only act on the basis of the principle that you can make it a universal law at the same time
2. Always act in a manner that considers the humanity inside you and others as a purpose and not as a device.

From Kant's point of view, it can be resulted that he feels a great and unconditional respect for the sanctity and dignity of human and if there was a certain, obvious, and unconditional reality for Kant, that would be related to human integral dignity of delegation. Deep thoughts of "Kant" about human and his dignity and esteem are considered as one of the strong pillars of human rights thoughts in West. These words of "Kant" mean that respecting the human being is the factor of morality of an action. In other words, the Kantian morality principle guarantees rights of all individuals in taking the advantage of their reputations being respected as creatures who own natural worth by themselves and not because of other factors.

The meaning of Kantian morality principle in the area of justifying human rights is obvious; since all individuals are equal in natural human reputation, then, only for their humanities, they equally take advantage of all required rights in order to be respected as natural purposes.[10,11]

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