The nature of human rights and its consequences for a multi-layered crisis

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Supreme Administrative Court ordering the treatment of a multiple sclerosis patient with the most innovative and expensive treatment during the peak of the Greek economic crisis. Surely that decision would have caused some eyebrows to raise, specially if the national health insurance budget is under extreme pressure.

Curiously, other judicial decisions that have addressed collective claims have elicited the exact opposite moral intuitions. Indeed, the Koufaki and Adedy v. Greece cases – also know as the 'crisis jurisprudence' – are an instance in which several commentators have denounced that the Greek and European courts are not doing enough in order to protect human rights. Some have even gone as far as to suggest that we are witnessing a dangerous attack against hard-won human rights in which economic considerations are trumping legal and moral reasons. Thus, the nightmare of every human rights' advocate seems to be materializing: Troika accountants deciding which human rights Greeks possess.

Nevertheless, despite these vitriolic reactions, I shall attempt to offer in this short essay an alternative viewpoint that could have the potential to reconcile two apparently divergent positions: a principled commitment to human rights and a qualified defense of the 'crisis jurisprudence' of the ECHR and the Greek Courts, one which finds support from an adequate understanding of the nature of rights and whose venerable pedigree stretches from Aristotle to Joseph Raz.

Indeed, at the heart of the discussion surrounding the nature of

human rights lies the old-aged *threshold question*: What is the threshold for determining the existence and the content of a determinate human right?

Although at first sight the threshold question may only seem apt for the musing of philosophers or ivory tower scholars, it has an immense practical value and purchase. Indeed, the problems surrounding the indeterminacy of the human right to health are one instance in which the tendency to lump a plethora of human interests have prompted serious discussion regarding its correct or true extension. Some progressive definitions have gone as far as to suggest that entitlements to gender equality, access to information, employment, education and others fall within the domains of the human right to health (Gostin and Friedman 2013, Gostin 2014, Tasioulas 2015, Sreenivasan 2012, 2014, O'neill 2009, Ruger 2006, 2009). Consequently, these approaches seem to view the human right to health as a vortex that sucks the content of other rights into its voracious maw.

Not surprisingly, this normative sloppiness has triggered unexpected consequences. Indeed, empirical evidence suggests that the current imperialistic definition of the right to health, namely 'the highest attainable standard of health', is allowing those who can afford litigation in developing countries to grab a substantial part of the healthcare budget for themselves, worsening health inequalities (Ferraz 2009, 2013, 2014, Tasioulas 2014, 2015). From a normative viewpoint, the situation is equally controversial. Even if we reluctantly accept the idea that the human right to health encapsulates a generous mix of human interest such as education and employment entitlements, the question as to why these resources must be distributed under the requirements of the right to health rather than under principles of distributive justice or economic efficiency still looms large (Sreenivasan 2012, Daniels 2008).

Not surprisingly, the threshold question and the controversies surrounding the human right to health may help us to understand the problems that also haunt the human right to property. Indeed, somewhat contentiously, I shall argue that the human right to property, as

litigated in the (Koufaki & ADEDY v Greece) and (Giavi v Greece) cases, raises the same definitional and compositional problems as the human right to health and, consequently, it must face the challenge of the threshold question:

Are entitlements to full salaries and pensions really part of the human right to property? Is the content of the human right to property immutable on the face of economic hardship? Is the right to property really set back by a reduction of 20% of salaries and pensions and other reductions in allowances and benefits during periods of economic crisis?

Although these are controversial questions, it could be argued that these compositional questions have received some attention in the past, either in a direct or indirect way. Thus, in order to avoid reinventing the wheel again, it may prove to be useful to discuss the strands of thought that have attempted to address the concerns surrounding the nature of human rights and threshold question.

Indeed, among these, the legalistic strand has been one of the most influential on the field. Amartya Sen (2008, 2012) argues that throughout the history of human rights, there has been a strong tendency to relate human rights to law. This tendency can be understood as the result of the longstanding tradition of enshrining rights into positive law and the habitus of legal professionals to equate human rights practice with legislation. Nevertheless, Sen argues that legislation is not the only way through which human rights can promote desirable changes (Sen 2012). On the contrary, the idea of human rights as moral rights has a much more diverse and richer role. Activities such as the work of the Red Cross, Amnesty International, Oxfam, can easily be considered as means for effectively advancing human rights practice. Thus, Sen contends that legal discourse does not exhausts human rights practice or promotion.

Whilst Amartya Sen remind us some of the limits of the legalist tradition, John Tasioulas (2012) articulates a more compelling critique of the limits of the legalistic approach. Tasioulas (2012) notes that the legalistic approach lacks a justificatory strategy in order to decide which

rights should be enshrined into positive laws and which should be their content. Thus, the fact the legalist approach makes room for an imperialistic definition of the human right to health as the 'highest attainable standard of health' should not surprise us at all (General Comment 14 of the CESCR). Clearly, this school of thought offers no real solace to anyone interested in finding an evaluative framework in order to meet the challenge of the threshold question.

Another significant contribution to this debate emerges from the foundationalist account of human rights. At the heart of this account lies the proposal that human rights should be grounded on the 'personhood account' (Griffin 2009). Its most vocal proponent, James Griffin, has argued that human rights should play a paramount role on the protection of human agency, namely, our ability to pursue and form conceptions of the good. Despite the centrality that Griffin attaches to human agency, he also highlights the role that 'minimum or essential provisions' play on allowing us to exercise our human agency. Indeed, human beings must have at least a minimum or essential provision of resources and capabilities in order act autonomously (Griffin 2009).

Although at first sight one could argue that the foundationalist account seems to provide a normative justification for the nature of human rights, Joseph Raz (2010) has deftly argued that it faces insurmountable contradictions. Indeed, Griffin's argument seems to derive human rights from basic features that are both essential and valuable. Nonetheless, the difference between something being valuable and having a right to it is conspicuously blurred on Griffin's account. In other words, the foundationalist account attaches ultimate value to our individual personhood but fails to distinguish the relationship between value and right, which is of paramount importance since Griffin fails to defend the idea that that valuing something establishes a right over it (Raz 2010). Indeed, if one follows Griffin's argument one could say that 'if the love of my children is the most important thing to me then I have a right to it' (Raz 2010: 325). Clearly, that would be untenable conclusion since no one has a right to be loved by somebody else because valuing something is not sufficient to establish a right over it.

Examples like this abound, and of course, they lend support to the idea that Griffin's thesis suffers from a radical instability. Hence, these logical contradictions give support to Raz's conclusion that the relationship of value and right is not properly articulated by the foundationalist account.

Likewise, Griffin's account does not fare much better in relation to the threshold question. Raz notes that this account does not help us to elucidate which human rights are derived from the protection of human agency, let alone which rights are derived from the protection of the so called minimum conditions (Raz 2010). Indeed, the personhood account fails the test of que threshold question since grounding human rights in the protection of minimum conditions does not help us to elucidate the content of different human rights. Questions such as what level of minimum conditions are the appropriate ones are left without any satisfactory answer. Consequently, Griffin's assertion of minimal standards offers no guidance in order to devise a reasonable threshold that could help us to determine the existence and the content of any given human right.

Now, another main philosophical account of the nature of human rights that has attempted to offer guidance regarding their existence and content has been the 'functionalist account'. Notably, John Rawls' contribution to this strand of thought has been extremely succinct but highly influential. In his work 'The Law of the Peoples' (1999) Rawls contends that human rights 'are a class of rights that play a special role in a reasonable law of peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy' (Rawls 1999: 79). According to Freeman (2007) human rights play a double role on Rawls' account: First, governments cannot claim sovereignty against internal violations of human rights hence they set limits to the internal autonomy of any government and second, human rights restrict arguments for war and its conduct.

Along similar lines, Raz (2010) argues that human rights violations trigger international interventions and responses against the perpetrators, thus they set limits to states' sovereignty. Not surprisingly, his

functional reading emerges from current human rights practice: 'while human rights are invoked in various contexts, and for a variety of purposes, the dominant trend is to take the fact that a right is a human right as a defeasible sufficient ground for taking action against violators in the international arena' (Raz 2010: 328). Thus, Raz's argument supports the idea that the violation of human rights disarms the moral justification of state sovereignty.

Despite the similarity of Rawls and Raz's accounts, Raz contends that human rights can be held against other international actors, domestic institutions or individuals. But, at the centre of this account lies the fact that only rights whose violation warrant external intervention are considered human rights. Of course, this characterization carries important consequences: Since human rights are moral justifications against the sovereignty of some states, there is no argument for sustaining that human rights have a universal feature (Raz 2010). This is the case because human rights can only be asserted when the conditions are 'appropriate for governments to have the duties to protect the interest which the rights protect' (Raz 2010: 335). When the necessary conditions are not appropriate it will not be possible to articulate a moral justification for holding a state accountable. Moreover, it will not be plausible to claim that a duty has been violated. Thus, a right to higher education cannot be asserted within a state that lacks the material and structural capabilities to provide for it.

Whilst the functionalist account attempts to characterize the nature of human rights according to actual practice, John Tasioulas notes that this account fails to grasp the historical evidence that compliance to human rights does not presuppose or relies on international intervention. On the contrary, 'domestic mechanisms such as elite-initiated agendas, litigation and popular mobilization' have played a crucial role on human rights compliance (Tasioulas 2012: 23). Likewise, the functionalist account is vulnerable on other fronts. James Hathaway has argued that the prevailing human rights practice has embraced one very specific facet of human dignity anchored in western political thought, whereas 'the developmental needs of the third world were

largely excluded from the scope of human rights protection' (Hathaway 1990: 141). Thus, according to Hathaway, it would be difficult to conceive international interventions over human right aspirations promoted by third world countries.

Another prominent account that also aims to explore the nature of human rights is one in which a plurality of values plays a major role. Indeed, Tasioulas contends that within a sensible orthodox account human rights are doubly pluralistic: Regarding the moral values that ground them, and second, regarding the practical implications they create. Thus, human rights are seen as 'moral rights possessed by all human beings simply in virtue of their humanity' (Tasioulas 2012: 26).

Now, the real upshot of Tasioulas (2014) account is that he defended the idea that grounding human rights in the interest they serve is not the same as identifying the right with the interest that is at stake. Consequently, the paramount question for any theory that aims to clarifies the nature of human rights is to clarify when a person's interest can generates duties.

Employing a Razian framework, Tasioulas argues that the interaction between interest and duties has the potential to illuminate the existence and content of different human rights. Thus, banking on the promising features of the razian conception of rights, Tasioulas addresses the threshold problem with the following schema: i) Considering an historical context, having X serves one's basic interest. For example our interest in autonomy, health, property and so on; ii) Simply in virtue of our humanity the interest in having X is 'pro tanto of sufficient importance to justify the imposition of duties on others' such as the protection of our interest; iii) Duties are feasible claims on others only insofar as they take into account the constraints of human nature and social life in any given specific historical context (Tasioulas 2014). In simple terms, this schema proposes two main stages. The first one entails an analysis of the 'pro tanto' case of a duty. The second one seeks to affirm or reject the existence of that duty according to its feasibility. This latter stage is of utmost importance since it will leads us to ask the question of what is possible according to present circum-

stances. For instance, it is all too possible that 'some people may have a right to a more than adequate standard of living' in some wealthy nations (Tasioulas 2014: 14). Thus, this schema allow us to clearly grasp the temporal evolution of human rights taking into account any given specific socio-historical conditions.

In a similar direction, Cass Sunstein, borrowing the Razian conception of rights, contends that 'rights are interests of persons that are sufficiently weighty to generate duties on the part of others'. Thus, for Sunstein and Holmes, almost every right implies a correlative duty ' (Holmes and Sunstein 2013: 43).

Now, having articulated the structure of the orthodox account, we can start to envisage how this account may yield some sensible arguments that could help us to put forward a qualified defense of the 'crisis jurisprudence' of the ECHR and the Greek Supreme Administrative Court without jettisoning a principled defence of human rights.

Indeed, we believe that the gist of the answer lies on the fact that feasibility is of paramount importance, especially if we take into account that it is undoubtedly tied to scarcity (Posner and Vermeule 2007). Clearly, there is a strong moral case for not imposing duties onto others if the feature of scarcity make it too burdensome within our current circumstances. Thus, prioritising scarce economic resources for satisfying a human right to property whose compositional structure was adequate before the Greek economic crisis may negatively impact other more important human needs under current circumstances and hence would impose an unbearable burden onto other Greek citizens.

Moreover, Adrian Vermeule also argues that the cause of many conflicts between pro tanto duties is scarcity, and that the root of several disparate arguments in the world of human rights is that the the feature of scarcity places a frontier at which we can claim a protection of any given interest (Vermeule 2011). 'Respect the distinction between persons as much as you like, and the nature of the world will still be such that scarcity places constraints on feasible combinations of liberty and security' (Vermule 2011: 7). Clearly, this point is not only applicable to issues related to security and liberty in particular. Even if we

were speaking about providing basic healthcare attention over securing worker's pension contributions in full, the arguments will carry the same weight.

Indeed, on the grounds of scarcity, it may be sensible to rule out a human right to property that includes full entitlements to salaries, pensions and other benefits such as the ones suggested by the plaintiffs. Specially if we understand this situation as a positive duty to provide all the potential right-bearers with all the benefits of full salaries, pensions and allowances. Arguably, the scarcity of resources and the consequent economic limitations arising from the Greek financial crisis made it impossible to cover such benefits for all potential right-bearers without placing unbearable burdens onto other Greek citizens.

Nevertheless, this argument does not presuppose the contents of the right to property cannot be properly affirmed considering what is feasible during the economic crisis. Arguably, other more essential economic benefits would fall within the limits of the right to property during the Greek economic crisis. It may be the case that the ECHR and the Greek Supreme Administrative Court would have rejected a 50% reduction of salaries, pensions and allowances given our previous arguments.

Consequently, it may be sensible to contend that reducing salaries, pensions and allowances below certain level would be aninstance of human rights violation and, on the other hand, not providing a an entitlement to salaries and pension equal to the ones established before the economic crisis would not entail a human rights violation. Indeed, our analysis suggest that the crisis-jurisprudence of the European Court of Human Rights and the Supreme Administrative Court may not represent a blatant curtailment of hard-won human rights. In other words, this jurisprudence is not a 'wolf that comes as a wolf'. Rather, it could be argued that it sensibly embraces the inescapable fact of scarcity in order to address deep moral and legal questions.

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