

The Role of Human Rights for the Construction of Personal Identity

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Abstract

«The finding of similarity or difference is the key step in the legal process» (Edward H. Levi). This central importance of identity for law applies not only to things and actions, but also to persons. Identity seems to be central to law, probably because legal regulation presupposes coherent actors and their permanence, that is their stability in time and space as well as the constancy of the objects and categories they deal with. Personal identity essentially means the hope or the claim that a human being stays “the same”, in spite of spatial motion and change due to time. Now, from the point of view of the natural sciences, no phenomena stay identical. Therefore, identity is always socially constructed. Human rights contribute in different ways to this construction of the modern self, individual and subject, if not citizen. First, they participate in the general constitution of the single human being by defining, presupposing and isolating her from other members of the species, by giving her legal recognition and a legal status. Rights can indeed be seen as the formalization of mutual recognition (Hegel, Mead & Axel Honneth). This first contribution is hardly distinguished from other legal mechanisms, mainly civil rights and especially the possibility to contract, but also from social and political aspects associated with the existence of the individual self. Second, human rights construct the individual in a specific, if not technical way. They attribute prerogatives to single members of the species, hardly ever to groups. Significantly, the French Déclaration des droits de l’homme et du citoyen of August 26, 1789, mentions the human being in the singular, unlike the English term human rights. Usually only individuals can claim and use them; human rights for the benefit of groups are problematic,

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because they easily collide with individual rights. For instance, the right of free movement within a determined – usually national – territory or the freedom to work and to choose one's employment are by essence individual; groups cannot, as such, pretend to these rights, as this would imply imposing their choices on their members. Third, human rights contribute to the autonomy of the individual, by not mentioning the debtors of human rights' beneficiaries nor any duties. By creating – or allowing to create – a prerogative, other legal provisions explicitly or implicitly also institute a duty and a debtor. Human rights, however, do not contain any indication as to who is obliged by them and what s/he is supposed to do. Thus nourishing the mirage of being beneficial for everyone, they sustain the illusion of human beings independent from each other. That is the idea of individual autonomy in its etymological sense: auto = self, nomos = rule or law, meaning that the single human being creates her own law and governs herself. Human rights can therefore be analyzed as the most prominent expression and guaranty of « possessive individualism » (Crawford B. Macpherson). They are simultaneously cause and effect of ongoing secular individualization and globalization. As these two related processes are indeed continuing, one may look into the future wondering to which extent the combination of human rights and personal identity may expand toward a “world legal subject”.

Keywords: Identity; Civil Rights; Individualization; Globalization.

Bibliography

A) Books & Journals

1. Baldwin et al., Mark W. (1999). *Selfhood. Identity, Esteem, Regulation*, Boulder/Co: Westview.
2. BALIBAR, Etienne (1998). *Of Identity and Diversity*, presenting, Trans. by John LOCKE, Seuil: Paris.
3. BERGER, Peter & LUCKMANN, Thomas (1967). *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, London et al: Penguin.
4. BOURDIEU, P. (1981) *La représentation politique. Eléments pour une théorie du champ politique*, Actes de la recherche en sciences sociales. No. 36-37, pp.3-24.
5. Cohler, Anne M., Miller, Basia Carolyn & Stone, Harold Samuel (1989). *The spirit of the laws*, Cambridge: Cambridge University Press.
6. Cohler, Anne M., Miller, Basia Carolyn & Stone, Harold Samuel (eds.) (1998). *The spirit of the laws*, Cambridge: Cambridge University Press.
7. COLE, Simon A. (2001). *Suspect Identities. A History of Fingerprinting and Criminal Identification*, Cambridge/Mass: Harvard University Press.
8. Cornelius CASTORIADIS, Cornelius (1975). *L'institution imaginaire de la société*, Paris: Seuil.
9. Douglas, Mary (1986). *How Institutions Think*, Syracuse/NY: Syracuse University Press.
10. EDELMAN, Bernard (1978). *La légalisation de la classe ouvrière*, vol. 1: l'entreprise, Paris: C. Bourgeois.
11. EDWARDS, John Group rights v. individual rights. The case of race conscious policies, in: : V. Ruggiero (ed.), *Citizenship, human rights and minorities: Rethinking social control in the new Europe*, proceedings of the XXth Annual conference of the "European Group for the study of deviance and social control", Padova 9/3-6/1992, p. 181-199 (in German in: *Widersprüche* no. 46, April 1993, p. 21-33).
12. ERIKSON, Erik H. (1968). *Identity. Youth and Crisis*, New York: Norton.
13. FEINBERG, Joel (1980). "The Nature and Value of Rights", in: Feinberg, Joel, *Rights, Justice and the Bounds of Liberty. Essays in Social Philosophy*, New Jersey: Princeton University Press.
14. Foucault, Michel (1979). *Discipline and Punish: The Birth of the Prison*, transl. Alan Sheridan, New York: Vintage.
15. FRANCK, THOMAS M. (1999). *The Empowered Self: Law and Society in the Age of Individualism*, Oxford: Oxford University Press.
16. FUDGE, Judy / GLASBEEK, Harry (1992). "The politics of rights: a politics with little class", *Social & legal studies*, Vol.1, pp. 45-70 (61).
17. GABEL, Peter (1984). "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves", *Texas Law Review*, No. 62, pp.1563-1598.

18. GODELIER, Maurice (1984). *L'idéal et le matériel. Pensées, économie, sociétés*, Paris: Fayard.
19. GÜNTHER, Klaus (1994). "Kampf gegen das Böse ? Zehn Thesen wider die ethische Aufrüstung der Kriminalpolitik", *Kritische Justiz*, Vol. 27, No. 2, pp.135-157.
20. GÜNTHER, Klaus (1994). "Kampf gegen das Böse ? Zehn Thesen wider die ethische Aufrüstung der Kriminalpolitik", *Kritische Justiz*, Vol.27, No.2, pp.135-157.
21. HAARCHER, Guy (1990). *Les droits collectifs contre les droits de l'homme*, Revue trimestrielle des droits de l'homme.
22. HACKING, Ian (1986). "Making up People", in: Thomas C. Heller et al. (eds.), *Reconstructing Individualism. Autonomy, Individuality and the Self in Western Thought*, California: Stanford University Press, p. 222-236.
23. Hacking, Ian (1999). *The Social Construction of What?*, Cambridge/Mass: Harvard University Press.
24. HEGEL, G. W. F. (1979). "Grundlinien der Philosophie des Rechts", Vol. 7, § 4, Frankfurt/M.: *Œuvres*, Suhrkamp.
25. HERBERT MEAD, George (1934). *Mind, Self and Society from the Standpoint of a Social Behaviorist*, Chicago: University of Chicago Press.
26. HONNETH, Axel (1996). *Kampf um Anerkennung. Zur moralischen Grammatik sozialer Konflikte*, Frankfurt/Main: Suhrkamp.
27. KENNEDY, Duncan (1993). *Sexy Dressing etc. Essays on the Power and Politics of Cultural Identity*, Cambridge: Harvard University Press.
28. KOJÈVE, Alexandre (1981). *Esquisse d'une phénoménologie du droit*, in particular § 35-38: "La source du Droit: le désir anthropogène de reconnaissance en tant que source de l'idée de justice", p. 237-266, Gallimard: Paris 1981.
29. LEVI, Edward H. (1949). *An Introduction to Legal Reasoning*, Chicago: University of Chicago Press.
30. LOHOFF, Ernst (1993). "Zur Kernphysik des bürgerlichen Individuums", *Krisis* (Horlemann Verlag, Bad Honnef/Germany), no. 13
31. MACKINNON, Catherine A. (1987). *Feminism Unmodified. Discourses on Life and Law*, Cambridge/Mass: Harvard University Press.
32. MACPHERSON, Crawford Borough (1962). *The political theory of possessive individualism. Hobbes to Locke*, Oxford: Oxford University Press.
33. MAINE, Henry (1884). *Ancient Law*, New York: Henry Holt.
34. MARSHALL, Thomas H. (1963). "Citizenship and Social Class", in: MARSHALL, Thomas H., *Sociology at the Crossroads*, London: London University Press.
35. MIAILLE, MICHEL (1980). *Une introduction critique au droit*, Paris: F. Maspero.
36. MINOW, Martha (1990). *Making all the Difference. Inclusion, Exclusion and American Law*, Ithaca & London: Cornell University Press.

37. MINOW, Martha (1997). *Not Only for Myself. Identity, Politics and the Law*, New York: New Press. MONTESQUIEU (1748). "De l'esprit des lois" book XI, chapter 3, in: *Œuvres complètes*, Paris: Bibliothèque de la Pléiade – Gallimard.
38. MONTESQUIEU (1949). "De la liberté politique", in: "Mes pensées", *Œuvres complètes*, Paris: Bibliothèque de la Pléiade – Gallimard.
39. MONTESQUIEU, (1748). "De l'esprit des lois", book XI, chapter 3, in: *Œuvres complètes*, Bibliothèque de la Pléiade – Gallimard: Paris 1951, p. 227 ff. (395)
40. Mutua, Makau (2002). *Human Rights. A Political and Cultural Critique*, Philadelphia: University of Pennsylvania Press.
41. NARR, W.-D. & ROTH, Roland (1998). *Menschenrechte und globaler Kapitalismus. Anmerkungen zu einer notwendigen Neubestimmung der Menschenrechte*, *Widerspruch*, No. 35: "Menschenrechte", pp. 113-128.
42. OMI, Michael & WINANT, Howard (1986). *Racial Formation in the United States. From the 1960s to the 1980s*, New York/London: Routledge & Kegan Paul.
43. OST, François & DROOGHENBROECK, Sébastien van (2004). "La responsabilité, face cachée des droits de l'homme", in: E. Bribosia & L. Hennebel (eds.), *Classer les droits de l'homme*, Brussels: Bruylant.
44. PARFIT, Derek (1995). "The Unimportance of Identity", in: Henry Harris (ed.), *Identity*, Oxford: Clarendon, pp. 13-45.
45. PASHUKANIS, Evgenij B. (1966). *Allgemeine Rechtslehre und Marxismus*, Frankfurt/Main: Neue Kritik. MARX, Karl (1962). *Das Kapital*, vol. 1, Berlin-East: Dietz.
46. POLLMANN, C. (1999). "The recourse to human rights in order to overcome them", *Georgian Law Review (Tbilisi)*, No. 04, p. 56-63
47. POLLMANN, C. (2001). "Individualisme, double mesure et pathos moral. Une critique des droits de l'homme illustrée par des propos d'écrivains et de philosophes", *Revue de la coopération transfrontalière*, No. 29, pp. 22-29.
48. POLLMANN, C. (2001). *Jurisconsultus – Bulletin de l'Université Kanto-Gakuin (Tokyo)*, No. 11, pp. 117-145.
49. POLLMANN, C. (2003). "Human Rights between Critique and Moralization", *Human Rights Review*, Vol. 5, No. 1, Oct. 2003, p. 99-111;
50. POLLMANN, C. (2005). "Neocolonial and Idealist Human Rights Pitfalls", *Journal of Human Rights* Vol. 4, No. 1.
51. RUGGIERO, Vincenzo (2000) "Daniel Defoe and business crime", chapter 11 in: idem, *Crime and markets. Essays in anti-criminology*, Oxford: Oxford University Press.
52. RUGGIERO, Vincenzo (2000). "Daniel Defoe and business crime", chapter 11 in: idem, *Crime and markets. Essays in anti-criminology*, Oxford: Oxford University Press.

53. STEINER, Henry J. & ALSTON, Philip (2000). *International Human Rights in Context. Law, Politics, Morals*, Oxford: Oxford University Press.
54. THOITS, Peggy A. & VIRSHUP, Lauren K. (1997). "Me's and we's. Forms and Functions of Social Identities", in: R. D. Ashmore & L. Jussim (eds.), *Self and Identity. Fundamental Issues*, Oxford: Oxford University Press, p. 106-133
55. THOMAS, Kendall (1995). "Beyond the Privacy Principle", in: Dan Danielsen & Karen Engle (eds.), *After Identity. A Reader in Law and Culture*, New York/London: Routledge.
56. TUSSMAN, Joseph (1960). *Obligation and the Body Politic*, New York: Oxford University Press.
57. VILLEY, Michel (1983). *Le droit et les droits de l'homme*, Paris: Presses universitaires de France.
58. WILLIAMS, Patricia (1991). *The Alchemy of Race and Rights. Diary of a Law Professor*, Cambridge: Harvard University Press.

B)WebSite

59. « Maternal deprivation syndrome », cf. MEDLINE HEALTH INFORMATION, MedicalEncyclopedia:
<http://www.nlm.nih.gov/medlineplus/ency/article/001598.htm>.