

JOHN STUART MILL: A PRAGMATIC DEFENCE OF RIGHTS¹

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ABSTRACT

The paper suggests that Mill's account of moral rights is an adequate starting point for a consequentialist justification of individual rights as supra-legal rights.

The issue of rights' justification is approached from a double point of view: (i) a reading of Mill's moral philosophy, as interpreted by David Lyons; (ii) a reading of the *contractarian* justification of rights.

Mill's moral philosophy is strongly founded on the notion of moral obligation, and that of reciprocity; those notions comprise a view that combines teleology and the supreme normative force of rights. However, the utilitarian argument for the practical authority of individual rights is deeply controversial. Contemporary contractarian approaches (Gauthier, Scanlon) may contribute a more precise argument for the rational foundation of the normative force of rights within an essentially instrumental account of institutions and a consequentialist account of rationality. Both lines of reasoning add up to what I will term a pragmatic justification of the normativity of rights, essentially in line with Mill's own ideas about moral rights.

Keywords: John Stuart Mill, rights.

RESUMEN

La tesis de este artículo es que la teoría de Mill sobre los derechos morales es un punto de partida adecuado para proceder hacia una fundamentación consecuencialista de los derechos humanos como derechos supra-legales.

El problema de los derechos humanos se analiza desde dos perspectivas: (a) una lectura de la filosofía moral de Mill, tal como es interpretada por D. Lyons; (b) una interpretación de la justificación contractualista de los derechos.

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La filosofía moral de Mill se basa en gran medida en las nociones de obligación y reciprocidad; estas nociones combinan teleología y la fuerza normativa suprema de los derechos. Sin embargo, el argumento utilitarista a favor de la autoridad práctica de los derechos individuales es muy discutido. El contractualismo contemporáneo (Gauthier, Scanlon) puede aportar un argumento más preciso como fundamento racional de la normatividad de los derechos partiendo de las premisas habituales sobre el carácter instrumental de las instituciones y la visión consecuencialista de la racionalidad. Estas dos líneas de argumentación conforman lo que llamaré una justificación pragmática de los derechos, que puede retrotraerse hasta la concepción de los derechos morales propuesta por Mill.

Palabras clave: John Stuart Mill, derechos.

1. MILL ON RIGHTS

It is obvious that chapter V of *Utilitarianism* seats a complex and subtle view of rights and justice. Whatever opinion one may maintain about Mill's conception of non-legal or non-statutory individual rights, it must be conceded that it stands a long way apart from that of Bentham's.

While contemporary literature has emphasized the perplexities and apparent contradictions in Mill's views about rights, liberties, and the supreme moral principle, I propose a reading focused on his idea of moral obligation. A proper understanding of this idea, as is stated in *Utilitarianism*, suggests a vindication of fundamental rights free of some of the obvious difficulties that utilitarian arguments for rights usually encounter. I will propose to take individual rights as a *moral category*—for this, textual evidence can be found in Mill's works—and to construe them in a contractarian way. This approach allows making sense of two apparently contradictory characteristics of rights, when seen from a utilitarian perspective: they are ultimately normative, *and* they must be justified by appealing to an independent criterion of normativity—the supreme value of general happiness—on pain of falling into irrational rule worshipping.

The contractarian interpretation has been naturally neglected, since Mill, following Bentham, was never very sympathetic, to say the less, toward such doctrine. However, his account of moral obligation and moral rights is not entirely alien to certain contractarian ideas about the nature of rights. New interpretations of legal contractarianism suggest that the contractarian reading is worth exploring.

Actually, I do not think contractarianism as such will provide the key to read Mill's view on rights. It will rather serve us as a proxy for a more promising approach, namely, pragmatism, which I will suggest can give us a real grip on the idea of rights within a broadly consequentialist framework.

To reach that point, let us begin with Mill's conception of moral rights. I want to stress the point made by Mill at this passage, from chapter V of *Utilitarianism*:

"Our notion, therefore, of the claim we have on our fellow creatures to join in making safe for us the very groundwork of our existence, gathers feeling round it so much more intense than those concerned in any of the more common cases of utility, that the difference in degree (as is often the case in psychology) becomes a *real difference in kind*."³

I will take the phrase "a real difference in kind" at face value. Even though Mill elaborates the notion of right as the conclusion of a justificatory argument whose principle is, of course, the ultimate value of human happiness, once the idea itself is given a strong foundation, he does not hesitate in considering it an *independent* source of obligation. In particular, rights serve to single out the realm of justice, whose duties are of "more absolute obligation".

Two questions merit attention: first, how should one characterize the *difference in kind* that differentiates rights from other obligations or sources of obligation? Second, Does Mill actually succeed in accounting for the differential normativity of rights?

The first question is suggested by the very text quoted above; the second one derives from Lyons' argument that Mill does not succeed.

About the first question I think it is safe to say that Mill accepted that direct considerations of utility just do not apply to rights. To have a moral right is to have a claim to a special protection from a social institution (positive legislation, social conventions, the judicial system, public officials, etc.). That special protection is obviously grounded on the importance of the protected good for the happiness of the individual and/or the whole of society; but the protection of the rightful claim cannot be subjected to utility calculations, for this would blur any difference between rights and any other claims. The only way to understand a difference in kind is to suppose that when a claim is so important as to define it as a "right", this implies cancelling consequential calculations about utility—except in cases of conflicting rights.

"Difference in kind" means, therefore, different *moral reasoning*—and not mere "special protection by society", as it is normally understood. Moral rights obligate the moral reasoner and the moral agent to do or to refrain from doing certain actions, *just because they are required or prohibited by a right*. The only acceptable reason to fail to respect a right

3 Mill, *Utilitarianism*, p. 251, my emphasis.

is the presence of another right. The only permitted calculative operation is the ranking of rights in order of precedence or priority.

This disciplining force of rights over the reason of the moral agent turns them into a *moral category* of its own. Rights give a certain form, or dimension, to the moral landscape: actions, characters, policies, can be judged according to whether they respect rights, as well as they can be judged according to their tendency to promote welfare. They are two kinds of moral judgement to be made, or two dimensions in the moral judgement. Again, the standard reading of this idea is to conceive of rights as secondary principles, or even as expedient guides to attain the goal of maximizing happiness. But this reading divests rights of their key normative feature: their non-compromising demand on the agent for him to stop calculating consequences. Therefore, both categories must be thought of as in the same plane.

Mill is still a consequentialist because he defends that the ultimate ground of both categories is the same. But a common ground does not blend two categories into the same. I think it is safe to say that Mill considered both the rightfulness and the utility of an action or institution, etc., as proper categories of moral valuation; while the supreme principle of morality has the role of *justifying* both standards of value.

About the second question, I disagree with Lyons (1994, p. 172) in that Mill's theory does not successfully account for the moral force of rights⁴. Lyons insists that any teleological theory of norms faces a dilemma when it comes to justify the adherence to institutional norms.

I will not get into the distinctions Lyons assumes here —teleological *vs.* deontological theory of norms, institutional *vs.* moral norms, etc. His point is clear enough: if the general normative framework is teleological, then there is always a potential source of conflict between the (teleological) justification of institutions *and* the presumably non-teleological justification of the norms *within* the institution. Whenever violation of an institutional norm promotes the end that justifies the institution itself, the agent has an apparent reason for violating the norm. But this turns norms into mere provisional advice, that is, valid *unless proved otherwise*. If this is Mill's account of moral rights, definitely he cannot explain why they are morally binding.

However, it should not be a problem to accept that moral judgement can have two dimensions. Humans ordinarily apply several categories in judgement, and this causes no dilemma (it may cause, it is true, difficulties and complexity in judgement)⁵.

4 At that point, Lyons refers to *legal* rights within institutions. However, his reasoning can be extended to, and it is framed in a general criticism of, the broad consequentialist account of rights.

5 Let me use an illustration. We may have one-dimensional practical problems. For example: how to go to the highest point on earth, or how to go to the northernmost point of earth. These one-dimen-

Reducing all judgement —and equally all practical considerations— to a single category would be a fallacy (or a mistake). The complex account of justice, obligation, rights and liberties the Mill presents was surely affected by this reflection.

According to Lyons, Mill's view is ordered in three levels: acts, principles, and the ultimate value. These three levels allow us to make perfect sense of the role of rights. Moral principles (the principle of utility, for example, but also moral rights and obligations of another kind) are justified if they serve the ultimate value of human happiness. Acts are judged right or wrong depending on whether they respect, or are compatible with, moral principles and obligations (including those derived from moral rights).

To judge acts according to their apparent tendency to promote human happiness is a conceptual error⁶: it means applying to acts categories that are meant to be applied to principles.

Lyons' worry may be due to the fact that he accepts that normative theories can be of only two sorts: teleological and deontological (although he does not use these names). His analysis rests on the plausible conviction that if a theory fixes an end as the criterion of all norms, it is counter-intuitive to approve of an act that knowingly obstructs the attainment of that end. On the other hand, even non-teleological theories may have trouble in accounting for the normativity of rights whenever fulfilling duties derived from rights contradicts the duties derived from the basic criterion of correction (moral duty, moral perfection, etc.).

This problem seems to have no solution. But then, are rights simply impossible to be accounted for? Are they mere conventions or expedient guides to be dropped whenever the agent judges it fit?

I do not think so. I think that Lyons is mistaken, and Mill is right in giving importance to moral rights, and this can be made clear if we consider an alternative conception of rights.

2. THE CONTRACTARIAN APPROACH TO RIGHTS

I will follow David Gauthier in exploring a contractarian approach to rights⁷. Gauthier rescued legal contractarianism from an ill-formed fame

sional problems need a one-dimensional scale to be solved. In the first case, we have to search *only* for attitude; in the second, for latitude. But we regularly face many-dimensional practical problems: for example, go to the warmest point, or accept the more rewarding job, etc. In these cases, our judgement is many-dimensional. We have to take into account, say, latitude, altitude, distance to sea, etc. (in the case of a job, salary, location, position, compatibility with spouse's, etc.). All these categories are of *different kind*; they are not reducible to one another, and transactions are not easy to make. However *this* is the most usual form of our practical problems; this is the context in which we regularly apply normative categories.

6 Another illustration: the act by a court-martialled soldier must not be judged according to its tendency to win or lose the war; but according to whether it was as commanded, etc.

7 I draw also upon the "contractual" view of Scanlon, as well as on ideas from Dworkin and Sen.

of crude positivism. He did that particularly in two texts: in his 1990 article “Thomas Hobbes and the Contractarian Theory of Law”, and chapter VII of *Morals by Agreement*: “Rights and the *Proviso*”.

Gauthier’s view is that contractarianism represents a sort of *tertius genus* between natural law theories and legal positivism. From a contractarian point of view, rights are conceived around three basic ideas:

First, rights express the minimum conditions of social living from the point of view of individuals willing to join in a society with the prospect of being free to pursue whatever ends they may have. Rights are the basic goods or permissions (liberties) no rational agent would willingly renounce in exchange for the benefit of securing the support of society.

This is expressed in the function of the *Proviso* in Gauthier’s argument. But also, in the contractual view of Scanlon (1982), which does not require the classic contractarian argument —a hypothetical agreement among pre-social beings. The idea of the minimum that agents would accept does not need to resort to the artificial idea of a social contract.

Second, others’ rights —and therefore our obligation to respect them— express a generic debt we owe to society for securing for us the means to our own happiness. This idea is found in Mill’s *On Liberty*. It deserves a long quotation (from p. 75):

“...though no good purpose is answered by inventing a contract in order to deduce social obligations from it, every one who receives the protection of society *owes a return for the benefit*, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct toward the rest. This conduct consists, first, in not injuring the interest of one another; or, rather, certain interests, which, either by express legal provisions or by *tacit understanding* ought to be considered as rights...”

Third, and perhaps more properly contractarian, is the idea that rights express the *core of public reason*. The idea behind this suggestion is that individuals abandon their capacity and liberty to judge everything according to their particular interests and *constitute* a sovereign that takes over the role of their own reason when the issue is not purely private. The dictates of the sovereign, being authorized by all members of society, are normative for each, and therefore take the form of rules about which further questioning is not appropriate⁸; they are laws.

Note the implications of these three ideas. From the first one, it is clear that rights rest ultimately on individual rationality. They exist in the first place because they guarantee a benefit for all; they are in

8 Of course, if they stay within the limits of the authorization.

everyone's interest, so to say. From the second one it is implied that the obligation to fulfil and respect rights derives from a willing agreement or common understanding (although there is no necessity to imagine a fictitious pact as such). Finally, the idea of the institution of a public reason as independent of individual reason, means two things: first, that the content of rights may not be equal to the content of our desires, particular interests, or even particular conceptions of the general happiness, so there is some objectivity that makes them independent from our own private will; second, they transform the cognitive landscape by establishing a public reason which is not proper to judge from an individual point of view according to categories of benefit or utility, since it is established *precisely* to determine or adjudicate what is collectively beneficial, when such determination is beyond the capacities of individual persons.

Gauthier argued that legal contractarianism is in one sense describable as voluntarism, just like legal positivism; but on the other hand, it is a scheme in which the source of obligation is the (natural) reason of each party, and this connects the scheme with some forms of Natural Law theory. In consequence, he thinks a contractarian theory of law cannot be considered either one.

Mill's account of rights can be seen under this light. For Mill, rights are basically in the same position. He would deny that moral rights are merely conventional rules (as Lyons seems to suggest), but he takes pains not to be mistaken for a defender of Natural Law theory⁹. Perhaps the idea of a *tertius genus* would resolve the dilemma for Mill. Of the three ideas that ground the contractarian reading of basic rights according to Gauthier, only the third one —the idea that rights express the core of public reason— is not shared by Mill's account. Mill lacks an account of public reason because, as a utilitarian, he does not share the constructive view on authority which is characteristic of contractarians. But, it was suggested above; this does not prevent him from taking rights as a standard of moral judgement absolutely independent of subjective ends or purposes. Even without a notion of public reason, Mill would almost entirely share the implications of such notion for the conception, character and function of moral rights.

3. A PRAGMATIC UNDERSTANDING OF RIGHTS

However, it would be most misleading to suggest that Mill can be considered a legal contractarian. All I suggest is that his view on moral rights is in roughly the same position as legal contractarianism, in the sense

9 Let us remember his clarification on p. 11 of *On Liberty*: "I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being."

of being equally distant from the belief in Natural Rights and from the reduction of all rights to statutory law.

But if Mill's view on rights and liberties can not be fully identified with any of these known positions, it is definitely the most promising utilitarian approach that we have. In exposing its similarities with the contractarian view, I have tried to show that it is possible and plausible for a theorist committed both to the consequentialist nature of rationality and to the instrumental value of human institutions to support a rational justification of individual rights as absolute limits to action, in the form of an independent category of moral judgment, grounded on the principle of morality.

As a tentative conclusion, I want to sketch how individual rights could be made sense of within a broadly consequential framework. I use a pragmatic idiom; however, I think the sketch is not far from what Mill might have had in mind.

Let us assume that an end can be in two kinds of relations with actions: instrumental and pragmatic. An action is instrumental to an end if it is effective, or necessary, to bring about the end, or to bring about a necessary intermediate end—or another requisite for the bringing about of the end. An action is, on the other hand, a pragmatic condition for an end if its presence makes possible in general the state of affairs in which the end can be *defined, or imagined* (and hence sought, if wanted).

An agent is instrumentally rational if she is able to choose the adequate instrumental actions for her ends. However, instrumental rationality is only a part of rationality—Mill would call it “expediency.” An agent can be said to be pragmatically rational if she is able to perform the individual actions—or his part of joint actions—that are pragmatically necessary for her to be able to figure and afterwards pursue ends that she considers valuable. Note that both instrumental and pragmatic rationality are consequential in structure: they set standards according to which actions are rational or irrational *depending* on their (expected) consequences.

Pragmatic rationality would enable agents to commit themselves with systems of norms such that the particular compliance with each singular norm may not be rendered instrumentally rational from the point of view of the agent's structure of ends¹⁰. Those norms appear to the agent as constraints in the pursuit of her ends. However, if the agent possesses the kind of rationality that I have termed “pragmatic”, she will be able to see the rationality of her compliance, since these norms establish the grounds of the possibility of her having certain ends—even meaningful ends at all.

¹⁰ This was argued by Gauthier in “Assure and Threaten” (1994).

According to this distinction, basic rights are the normative expression of certain pragmatic conditions for social life and for the full execution of individuals' freedom; which is part, let us recall, of "utility in the largest sense, grounded on the permanent interests of man as a progressive being."

Obviously this is not the language employed by Mill, but his commitment to liberty as an absolute right, and his understanding of the relationships human beings stand to each other in society allow us this interpretation.

Observe that according to the pragmatic view, rights again are neither positive nor natural. They are not an arbitrary or conventional commandment of the sovereign; but neither are they universal rules deducted from human nature or from the nature of human society. They are normative without regard to the consequences of the particular actions or omissions they command. But their normativity holds insofar as they pass the pragmatic justificatory test: they must serve our ends through the constraints and priorities they establish.

BIBLIOGRAPHY

- BINMORE, K. (1994), *Game Theory and the Social Contract. Vol. 1: Playing Fair*, Cambridge (Mass.): The MIT Press.
- BRANDOM, R. (1994), *Making it explicit. Reasoning, representing and discursive commitment*, Cambridge (Mass.): Harvard University Press.
- BRINK, D.O. (2001), "Millian principles, freedom of expression and hate speech", *Legal Theory*, vol. 7, n. 2, junio 2001, pp. 119-157.
- DWORKIN, R. (1977), *Taking Rights seriously*, Cambridge (Mass.): Harvard University Press.
- DWORKIN, R. (1996), *Freedom's Law. The Moral Reading of the American Constitution*, Cambridge (Mass.): Harvard University Press.
- GAUTHIER, D. (1986), *Morals by Agreement*, Oxford: Clarendon.
- GAUTHIER, D. (1990), "Thomas Hobbes and the Contractarian Theory of Law", *Canadian Journal of Philosophy*, vol. 16: 5-34.
- GAUTHIER, D. (1995), "Public Reason", *Social Philosophy and Policy*, 12/1: 19-42.
- GAUTHIER, D. (1994), "Assure and Threaten", *Ethics*, 104 (July 1994) p. 690-721.
- GAUTHIER, D. (1998), *Egoísmo, moralidad y sociedad liberal*, Barcelona: Paidós-ICE.
- GIBBARD, A. (1985), "What's Morally Special About Free Exchange", en Paul, Paul y Miller Jr. (1985): 20-28.
- GUISÁN, E. (1992), "El utilitarismo", en V. Camps (comp.), *Historia de la ética* Vol. II, Barcelona: Crítica: 457-499.

- HARSANYI, J.C. (1982), "Morality and the Theory of Rational Behavior", en Sen y Williams (1982): 39-62.
- HARSANYI, J.C. (1985), "Rule Utilitarianism, Equality and Justice", en Paul, Paul y Miller Jr. (1985): 115-127.
- LYONS, D. (1994), *Rights, welfare and Mill's Moral Theory*, Oxford: Oxford University Press.
- McCLENNEN, E. (1990), *Rationality and Dynamic Choice*, Cambridge, Cambridge University Press.
- MILL, J.S. (1989), *On Liberty and other writings* (ed. Stefan Collini), Cambridge: Cambridge University Press.
- MILL, J. S. (1969), *Utilitarianism in Mill's collected Works Vol. X* (ed. J. M. Robson), Toronto: University of Toronto Press / Routledge & Kegan Paul.
- PAUL, E.F., PAUL, J. y MILLER, F.D. Jr., eds. (1985), *Ethics and Economics*, Oxford: Blackwell.
- RAWLS, J. (1993), *Political Liberalism*, Nueva York: University of Columbia Press.
- RAWLS, J. et al. (1988), *Libertad, igualdad y Derecho*, Barcelona: Ariel.
- RORTY, R. (1993), "Human Rights, Rationality and Sentimentality", en S. Hurley y S. Shute (eds.), *Of Human Rights. Oxford Amnesty Lectures, 1993*, Nueva York: Basic Books.
- RORTY, R. (2000), *El pragmatismo, una versión. Antiautoritarismo en epistemología y ética*, Barcelona: Ariel.
- SCANLON, T. (1982), "Contractualism and utilitarianism", in Sen and Williams (eds.), 1982: 103-128.
- SEARLE, J. R. (1995), *The Construction of Social Reality*, Nueva York, The Free Press.
- SEN, A. K. (1984), *Resources, Values and Development*, Oxford: Blackwell.
- SEN, A. K. (1985), "The Moral Standing of the Market", en Paul, Paul and Miller (1985): 1-19.
- SEN, A. K. (1997), *Bienestar, justicia y mercado*, Barcelona: Paidós-ICE.
- SEN A. K. (2000), *Desarrollo y libertad*, Barcelona: Planeta.
- SEN, A. K. y WILLIAMS, B. (eds.) (1982), *Utilitarianism and Beyond*, Cambridge: University Press.