Why egalitarians should prefer a recognition-based account of rights

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Abstract:
There has been growing attention to the politics of (in)equality in recent years, particularly since the 2008 financial crisis. While the literature on egalitarianism has been vast, little attention has been paid directly to how theories of human rights might affect egalitarianism and equality. This paper addresses this gap in the literature, and suggests that theories of human rights can make a difference to the politics and the theory of (in)equality. Further, and perhaps initially surprisingly, there are good reasons for egalitarians to subscribe to an account of human rights which holds that rights are created through intersubjective social recognition rather than to an account of human rights which sees them as innate or pre-political. While for innate theories of human rights, human rights remain, even if they are not respected, in greatly unequal societies, for recognition theories of human rights, such unequal societies pose an existential threat to human rights. Thus, recognition-based accounts of human rights take (in)equality much more seriously and should be preferred by egalitarians.

There is little doubt that interest in equality and egalitarianism has picked up in recent years. Although there has been a wealth of literature on equality and egalitarianism, including protracted debates about the merits and demerits of equalities of welfare, of resources or of access to welfare (to pick just three), and more recently a growth in interest in, and literature on, ‘relational’ rather than distributive egalitarianism, it is only comparatively very recently that egalitarianism has, I would suggest, caught the public imagination. Books such as Wilkinson and Pickett’s The Spirit Level and Owen Jones Chavs have been best sellers, and tackle inequality head on. Ed Miliband has indicated that he places equality at the heart of his agenda in the run up to the next general election; Thomas Piketty’s Capital in the Twenty-First Century is perhaps the most talked-about economics book for decades.

In this context of growing interest in equality, this paper is a suggestion regarding how egalitarians ought to confront debates about human rights, specifically the debate concerning how human rights can be justified, the questions ‘why and how do we have human rights?’ and ‘What justifies our claim to have rights as humans?’. It is fair to say that this question is not at the forefront of debate in egalitarian theory, yet this paper suggests that egalitarians have good reason to sign up to a recognition-based theory of rights over more orthodox ‘natural’ or ‘innate’ rights theories. I shall outline the differences between these approaches in more detail in the subsequent section.

Before that, a very brief word on definition. This paper does not take an exact stance on the ‘equality of what’ question, or on precisely how much equality is practical or workable. Neither is it committed explicitly to either relational or distributive equality. ‘Egalitarians’, here, is taken to denote a very broad church, consisting of those who, crudely put, consider a society with a minimal gap between right and poor to be better than a society with a very wide gap between the two. The key concept, as we shall see is ‘equality of access to rights recognition debates’, but what exactly this entails can be left open for now.

**Justifying Human Rights**

The question of how to justify human rights has attracted attention since the earliest declarations of the ‘rights of man’. Humans have been said to have rights, variously, because they are made in the image of god, because rights are bestowed by a god or ‘Creator’, or because of some innate properties of human nature. Sceptics of rights have long objected to many of these arguments, claiming them to be absurd – ‘nonsense of stilts’ or akin to a belief in unicorns. Even those sympathetic to the cause of human rights have found themselves struggling to explain precisely why we might be justified in claiming that all humans have them. In 1948, the framers of the Universal Declaration of Human Rights could, in Jacques Maritain’s oft-repeated anecdote, agree on which human rights there ought to be, but could not agree on why these rights should be said to exist.

An alternative approach to justifying human rights comes in the form of what has been termed the ‘rights recognition thesis’. Put simply, this line of argument holds that rights are constructed through social recognition. This school of thought takes its cue largely from the nineteenth-century British liberal socialist, Thomas Hill Green. Although Green and ‘British idealism’ more widely were seen by some as dominating philosophy in Britain in the early twentieth century, in the wake of stringent attacks by both New Liberals, such as L. T. Hobhouse, who went so far as to implicate idealism in contributing to the outbreak of the First World War, on the one hand, and by logical positivism and the analytical school, who wrote idealism off as meaningless and irrelevant, on the other, Green fell from philosophical fashion and remained relatively obscure for some decades. The last thirty years or so have seen a revival of interest in the British idealists, in Green and particularly in his work on rights, and the idea that rights require social recognition.

Although other theoretical approaches to human rights exist, this paper focuses on the dominant, mainstream position – that humans have rights simply by virtue of being human – and on recognition approaches to rights, an important and overlooked alternative conceptualisation.

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1. Innate, pre-political or natural rights and equality

Despite recent increases in interest in recognition-based theories of rights, since the immediate post-war period the dominant theory of rights has been, and remains, what Peter Jones refers to as the ‘moral’ theory of human rights, and what we can also term ‘pre-political’ rights or (more controversially, perhaps) ‘natural rights’. Within this grouping there exists, to be sure, a wide variety of specific theories, some with great contrasts between them; all however, subscribe to the notion that humans have rights simply by virtue of their humanity. The terms ‘innate’, ‘pre-political’ and ‘natural’ will be used interchangeably in this paper to refer to theories of rights which subscribe to this notion.

It is perhaps impossible – as Darby notes – to ‘prove’ that humans do not have rights in this innate, moral, pre-political way. Rather, this paper, in common with Darby, seeks to make a political (rather than philosophical) argument in favour of recognition theories of rights. We can remain agnostic, acknowledging our epistemological shortcomings, about whether humans have natural, innate rights – and about what those rights might be, should they exist – and instead make the case that in the face of such uncertainty it would be better if we based rights on recognition rather than on potential innate human qualities.

The key contention in this paper is that, for egalitarians, recognition theories of rights ought to be preferable to innate, pre-political theories of rights. Three arguments (at least) can be advanced in support of this position. The first, while it might well prompt egalitarians to at least ask questions of natural rights theories, is not in itself a sufficiently strong argument to be ultimately convincing. The second and third arguments, this paper suggests, provide a good deal more motivation for egalitarians to embrace recognition theories of rights. Simply advancing an argument on this topic may well at least prompt egalitarians to pay attention to theories of rights – the question of the theoretical basis of human rights has certainly not so far occupied a central place in the literature on egalitarianism.

The first argument relies on contrasting the extent to which equality is necessary for natural rights theories, on the one hand, and recognition theories of rights, on the other. As we shall explore further on, for recognition accounts of rights, equality plays a central role: rights cannot exist without equality. In the case of natural, pre-political rights this is much less clear cut. Among theories of natural rights we can count the work of both Robert Nozick and John Finnis.

Nozick’s Anarchy, the State and Utopia provides one answer to the question of what happens if we design a state from the premise that all ‘individuals have rights and there are things no person or group may do to them (without violating their rights)’. His answer comes in the form of a minimal state, which is ‘limited ... to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on’, for ‘any more extensive state will violate persons’ rights not to be forced to do certain things, and is unjustified’. This minimal state does not aim at equality, or at redistribution of any sort:

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5 Peter Jones, “Moral Rights, Human Rights and Social Recognition”, Political Studies 61:2
6 Darby, Rights, Race, and Recognition, p. 177; though his position does perhaps run the risk of conceding too much ground. See: Matt Hann, “Rights, Race, and Recognition”, Contemporary Political Theory 10:1, p. 129
7 Nozick, Anarchy, State, and Utopia, p. ix
8 Ibid., p. ix
Nozick argues, rather, that an individual’s natural right to property and freedom is interfered with by redistributive taxation to the point of making work ‘forced labor’. The contention of Nozick is clear (and well known) – we cannot have equality or redistribution of wealth through taxation because this interferes with individual’s natural rights. Nozick, then, takes the opposite stance to recognition theories. Rather than being a prerequisite for rights, equality is a serious threat to, indeed breach of, human rights. Egalitarians will need little persuasion not to adopt Nozick’s theory, or other natural rights theories along similar lines. The claim that all is well so long as the individual has life, liberty and property is, egalitarians would argue, to miss the point fundamentally: this should give egalitarians cause to consider the question of the theoretical basis of rights an important one.

The work of John Finnis is perhaps the most significant recent project to argue explicitly in favour of a theory of natural rights. It would be perhaps a little far-fetched to place Finnis under the category ‘egalitarian’. Indeed, he shies away from talking of equality, preferring ‘proportionality’: ‘equality … must be taken in an analogical sense: that is to say, it can be present in quite various ways. There is, for example, the ‘arithmetical’ equality of $2 = 2$, and there is also the ‘geometrical’ equality of $1:1 = 2:2$, or $3:2 = 6:4$; to feed a large man the same rations as a small child both is and is not to treat the two ‘equally’. To avoid misunderstandings and over-simplifications, therefore, it may be better to think of proportionality, or even of equilibrium or balance.’ When it comes to equality’s role in justice, Finnis does not accord it central place (although he holds equality in a weak sense to be ‘fundamental’), but sees it as important only if other principles yield no guidance on the best course of justice: ‘all members of a community equally have the right to respectful consideration when the problem of distribution arises’. However, when it comes to distribution, ‘equality is residual principle, outweighed by other criteria and applicable only when those other criteria are inapplicable or fail to yield any conclusion.’ This is because, for Finnis, ‘the objective of justice is not equality but the common good, the flourishing of all members of the community, and there is no reason to suppose that this flourishing of all is enhanced by treating everyone identically when distributing roles, opportunities, and resources.’ Redistribution, on its own, is not considered to be important by Finnis, who argues that ‘If redistribution means no more than that more beer is going to be consumed morosely before television sets by the relatively many, and less fine wine consumed by the relatively few at salon concerts by select musicians, then it can scarcely be said to be a demand of justice.’

So, Nozick and Finnis, at least, provide two examples of theories which take (natural, innate) rights seriously, but which do not accord such a central role to equality of the sort which most egalitarians have in mind. This in itself, though, is not a sufficient argument for egalitarians to favour a recognition-based account of rights. For every rights theorist who does not take equality seriously, there may well be another who combines natural rights with serious attention to equality: Ronald Dworkin would be an obvious example. The first

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9 Nozick, Anarchy, State, and Utopia, p. 169
10 Finnis, p. 162
11 Finnis, p. 173
12 Finnis, NLNR, p. 174
argument, then, serves only to decouple the ideas of natural rights and equality: natural rights theorists do not necessarily pay sufficient attention to equality.

The second argument is more thorough-going, and turns on the idea that all theories of natural or pre-political rights inherently take equality less seriously. In the second half of this paper, we shall see that recognition theories of rights, in contrast, inherently take equality very seriously.

The key question on which this second argument turns is: what effect would a lack of inequality have on rights? For a recognition-based account, rights simply cannot be fully legitimate without meaningful equality – and without this legitimacy calling such powers or claims ‘rights’ is itself problematic. This significant claim will be unpackaged in the second half of the paper. For natural, pre-political rights, the implications of inequality are much less severe. As we have seen already, some innate rights theories do indeed square taking rights seriously with inequality. However, the claim of this second argument is that for all innate rights theories inequality has a less profound impact on the status of rights than it does in the case of recognition theories: inequality is less of a problem for innate theories of rights and thus egalitarians have good reason to prefer recognition theories of rights.

Let me unpack this slightly. For recognition theories of rights social conditions are vital: rights can only be created through recognition in situations of equality – the reasoning for this is elaborated in the second half of the paper. For natural or innate theories, these conditions do not matter so much, as there are no pre-requisites for rights. Rather, rights are something we simply have as humans, no matter what sort of society we find ourselves in. If rights are not being respected, then this is clearly regrettable, but theorists of innate rights hold that the rights themselves are not damaged. Further, social conditions do not matter because, argue the innate theorists, rights are not created through recognition, they are simply ‘there’ and are discovered or respected rather than being continuously created and re-created. Whereas a recognition theory recognises contingency, natural rights theories do not. Like the apocryphal cockroaches surviving nuclear apocalypse, natural rights will always somehow survive (as an unchanging law of nature), is the unspoken assumption. John Finnis provides a classic statement of what might be called the ‘cockroach survival hypothesis’ of natural rights:

‘Principles [of natural law] would hold good, as principles, however extensively they were overlooked, misapplied, or defied in practical thinking, and however little they were recognized by those who reflectively theorize about human thinking. That is to say, they would ‘hold good’ just as the mathematical principles of accounting ‘hold good’ even when, as in the medieval banking community, they are unknown or misunderstood ... Natural law could not rise, decline, be revived, or stage ‘eternal returns’. 13

Natural law will always be there; humans will always have natural rights. Social conditions should respect those rights, but if they do not, we can be assured that those rights have not gone away, and are there to be respected one day. There is no question of contingency, but rather an assurance that the law remains eternally, in all times and in all places. For innate theorists of rights, then, inequality is not fatal to rights.

13 John Finnis, *Natural Law and Natural Rights*, p. 24
The third argument to be advanced with regard to innate theories of rights and equality regards the content and provenance of rights. It has been pointed out on numerous occasions that human rights – at least in their currently prevailing form – are an idea that has its origins firmly in the Western, Judeo-Christian, tradition, despite the similarities or overlaps there might be with similar theories from other regions of the world. It has been argued that human rights amount to an imperialistic project in two key ways. On the one hand, the global human rights regime is a simple imposition of values on the world that are not always welcome. On the other hand, human rights act as a defence and justification for acts of imperialism. If we admit that there is an element of truth to these criticisms of human rights, we can see that human rights have had a deleterious effect on global equality, even at the same time that human rights as an ideal are being proclaimed as a key element of global justice.

In this regard, the content of human rights is important, and particularly the question of who decides what is and what is not a human right. This question is both important, and bound up with the potential for significant inequality. This is because for innate or pre-political theories of rights, there must be a right answer or a truth to the question: what should be a human right? The view that rights are held by humans innately and are prior to politics, is to dismiss Plato’s argument that ‘men are perpetually disputing about rights and altering them, and whatever alteration they make at any time is at that time authoritative’14, and instead, as we have seen, to insist that some rights exist or do not exist, and that stating a right’s existence or non-existence is a statement of fact or truth. If this happens to be the case, and, say, it is as true that humans have a right to X as much as it is true that gravity causes bodies to accelerate towards the earth at around 9.8m/s², then this objection, and this third argument do not matter. However, I would contend that, unlike in the case of gravity, it is impossible to prove that humans have a certain right. Given this, it is dangerous to proceed as though certain facts – rights claims – were indeed proven, and insusceptible to argument. Indeed, as Arendt points out, this is a form of coercion, ‘coercion by truth’15, whereby the argument – between equals – is shut down by expertise or privileged knowledge, which destroys the level playing field on which arguments occur. Natural or innate theories of rights, then, work against equality by allowing those in a position of power – whether academic, theoretical, religious or political – to claim a monopoly on the production of rights ‘truth’. In addition to being inequalitarian in itself, in simply shutting down the debate, this process tends to work further against equality in that, typically, the rights emphasised, or included in lists of rights, might well tend to benefit those who are in a position to claim insight on which rights are ‘natural’ or ‘innate’. As the second part of the paper makes clear, these problems do not apply to recognition approaches to rights.

To sum up, then, the foregoing section has sought to show that, at the very least, the connection between equality and innate theories of rights is far from a given. While innate theories of rights can take equality seriously, they can also not do so while remaining coherent. Further, although for pre-political rights, inequality can be a bad thing (if it interferes with rights, particularly), it is not fatal: rights are there regardless, and the overall

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15 Ibid., p. 222
system is preserved. It is the contention of this paper that in this there is a lack of urgency towards equality, in contrast to the urgent seriousness with which recognition theorists must treat the question of equality. Finally, innate theories of rights have a deleterious effect on equality through their shutting down of debate and claim to a monopoly on rights truth. The subsequent section will press the argument further by outlining the close relation between recognition theories of rights and social equality.

2. Recognition Accounts of Rights and Equality

Having shown that equality is not inherently important to innate rights theories, it remains for this paper to demonstrate that equality matters more to recognition theories of rights. Recognition accounts of rights largely build on the work of T.H. Green, who first combined elements of Hegelian and Fichtean thought on recognition with an understanding of the importance of rights and an analysis of the natural rights tradition. Consequently, in analysing the link between recognition theories of rights and egalitarianism, the work of Green will play a central role. Of key importance will be Green’s insistence that, to be properly termed ‘rights’ (as opposed to simply claims or powers), rights must contribute to the common good: recognition theories of rights are not simply an expression of the positivistic notion that only ‘conventional’ or ‘legal’ rights matter, regardless of the content of those rights. Rather, recognition theories of rights take the content of rights seriously – they must contribute to a common good – but argue that the best way of determining this content is through a process of claim advancement and recognition.

Green rejects natural, innate rights, and argues that ‘there is no such natural right to do as one likes irrespective of society’ for ‘[i]t is on the relation to a society, to other men recognising a common good, that the individual’s rights depend, as much as the gravity of a body depends on relations to other bodies.’ Green is sympathetic to the natural rights tradition, in that he sees human rights as valuable, indeed crucial, for human flourishing – he goes so far as to say that there ‘ought to be rights’. However, the question as to which rights varies according to time and from society to society; there is no single solution, valid for all times and in all places. Rather, it is up to society to decide, through recognition.

Green is perplexingly silent on the actual process of mechanism of rights recognition. Here, however, we can turn to another thinker influenced by Aristotle and Kant (amongst others) who was sceptical about natural rights – Hannah Arendt. Her account of judgment gives us a process by which rights recognition occurs, or at least an idealised account of it, and thereby a yardstick by which to measure actually occurring processes of rights creation and judgment.

In his account of rights recognition, Green lays down three stipulations which must be met for legitimate rights – including human rights – to exist. The first two are as follows:


'No one … can have a right except (1) as a member of a society, and (2) of a society in which some common good is recognised by the members of the society as their own ideal good'. Furthermore, ‘rights have no being except in a society of men recognising each other as ἴσοι καὶ ὁμοίοι’, which may be translated as ‘equals and similars’. Scholars of Green have paid much attention to the first two of Green’s stipulations – membership of a society and the common good – but his third stipulation, that societies be ‘equal and similar’ has often been overlooked, even by scholars keen to present Green’s egalitarian credentials.

This prompts the question of what sort of equality Green’s theory holds to be necessary. We can garner some clues from Green’s work and praxis. Green discusses with evident approval the process by which the law ‘of civilised nations’, the ‘law of opinion’, ‘social sentiments and expectations’ and the ‘formulae [of] philosophers’ have come to agree with Ulpian, who declared that ‘omnes homines aequales sunt’ – ‘all men are equal’. This is formal equality which should extend to all races: he expresses disappointment that, despite holding that ‘all men are born free and equal’, some Americans still tried to justify the enslavement of African Americans.

In addition to this, Green was more committed than most in the nineteenth century to sexual equality, including opening up education to girls and women; to equality of the franchise, including parliamentary reform and opening up voting to the working classes; to opening up education and particularly the university to a much wider section of society; to participation in government so that all in society are ‘intelligent patriots’. Formal, legal equality is minimum requirement for Green, then. Beyond this, Nettleship, Green’s biographer, writes that ‘no man had a truer love for social equality’, and a remark of Green reported by Nettleship seems characteristic: ‘Let the flag of England be dragged through the dirt rather than sixpence be added to the taxes which weigh on the poor’.

The relationship of Arendt with equality is, at first glance, more problematic, and her work may seem at first a surprising resource for work on egalitarianism. Some have suggested that elements of her thought are elitist and opposed to authority. Her reliance on the Greek polis and her praise of revolutionary America, though both societies were founded

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18 Green, *Lectures on the Principles of Political Obligation*, p. 350
19 Green, *LPPO*, p. 144, §139. See also p. 145, §141: ‘a right against any group of associated men depends on association, as ἴσος καὶ ὁμοίος’; and p. 154, §148: ‘[rights] depend for their existence, indeed, on society a society of men who recognise each other as ἴσοι καὶ ὁμοίοι’.
20 For example, Colin Tyler, *Civil Society, Capitalism and the State*, pp. 143-146
21 Gnaeus Domitius Annius Ulpianus (c. CE170 – 228), anglicized as Ulpian. A Roman jurist.
22 Green, *Prolegomena*, §209, p. 249
27 Green, *Lectures*, §122, pp. 130
to some extent on slavery, have attracted criticism; so too have her criticism of the French revolution and her remarks about poverty, politics and necessity.29

However, at the heart of an Arendtian conception of politics is the process of judgment, a process which can only take place in a society of free and equal people. Judgment is an answer to the void presented by the collapse of established morality and ethics in the early twentieth century, documented notably by the works of author Hermann Broch (who I believe was an influence on Arendt in this regard30), which enables politics to proceed by thinking ‘without banisters’. Judgment also, as previously noted, provides a compelling account of a mechanism by which rights recognition occurs. Arendt draws on Kant’s critique of aesthetic judgment in this. In cases where there is no accepted ‘right’ answer, such as the question ‘is this flower, or piece of music, or work of art beautiful?’, we cannot fall back on rules. Rather, as Kant puts it, we must ‘woo’ the consent of the other.31 So it is, argues Arendt, in politics after the break with traditional ethics. There are no longer universally accepted ‘right’ answers, or revealed truth, so we can only hope to persuade others. Judgment, then, consists of activities corresponding to the Greek terms ‘phronesis’ and ‘peithein’; here ‘phronesis’ – as deployed by Arendt – corresponds with Kant’s ‘erweiterte Denkungsart’ and means thinking from the point of view of as many as possible. ‘Peithein’ is the act of persuasion or wooing. Both are egalitarian in import: on the one hand, the views of many are important, and the more viewpoints taken into account, the better the quality of the judgment. On the other hand, persuasion in the true sense of the word can only happen between equals: when there are differences in power, status, wealth or capacity for force or violence, then it is not persuasion that is occurring, but coercion.

Why is equality necessary for recognition theories of rights?

If we are interested in human rights, then we are interested, ipso facto, in rights that apply equally to all humans.32 If we are interested in civil or social rights within a political community or society, then, by the same token, we are interested in rights which apply equally to all within that society. Any ‘rights’ which do not fit this description are not ‘rights’ but are rather privileges or benefits of some other kind. T.H. Green had this in mind when he made it clear that rights, in order to be called rights, rather than any other sort of power, must contribute to the ‘common good’ – in other words, they must benefit all, or potentially all, within a rights recognising society.

30 Particularly the sections on ‘The Disintegration of Values’ in the third volume, ‘Huguenau the Realist’ of his novel ‘The Sleepwalkers’ (London, Quartet Books, 1986), as well as in various letters exchanged between Broch and Arendt.
32 Though there is no need necessarily to limit this to *homo sapiens*: if we accept members of other species as ‘persons’, recognition theories of rights are equally applicable to them.
Let me explain this qualifier, ‘potentially all’. When I argue that rights must benefit all, I do not mean that they should do this completely equally all of the time. Let us take the right not to be tortured: we all have this right, but clearly, if enforced, it benefits the helpless prisoner more than the general public at large. These positions, however, are contingent: we could all be that prisoner, if circumstances changed. Thus it benefits all in society, even if not all the time. This is contrast to a ‘right’ (not a real right, I would argue, but a power) of men to have power over women, say, or a ‘right’ (again, not a real one) of white people to own black people: these cannot be real rights for they can never benefit some people in society – women or black people – let alone benefit all equally.

In this sense, then, rights recognition theories maintain an element of ethics: it is not (legal) positivism. I do not think this is smuggling a brand of natural law in through the back door, however. Rather, rights recognition, at least in the way I conceptualise it, is, unlike natural law theories, aware of its contingency (and this is an advantage, as I shall explore further on). It could be that societal norms change to such an extent that many people feel only particular groups should have ‘rights’, or that rights are entirely the wrong way of going about things. However, so long as debate remains about rights, and we think that rights are important for whatever reason (we might have views about human flourishing, for example), we can stick to the idea that rights have a strict meaning, as outlined above, and are different from powers or other claims. As Green puts it, rights are ‘powers ... contributory to a common good’.33 In other words, rights benefit, or potentially benefit, all within the society that recognises them.

This equality within the concept of rights is made particularly explicit when we talk of human rights. To subscribe to this notion in any meaningful way is to subscribe to the idea that there are some rights which all humans ought to have, and in this, if in nothing else, these humans are equal. Embedded within the claim to a human right (which is socially recognised and becomes a right) is the content that the right being claimed should be held by all humans. It is only in respect of this content that human rights claims differ from other rights claims.

If we accept that rights are created through social recognition, and that rights should apply equally to all, then there are very good reasons for insisting that the process of rights recognition ought to occur in a state of equality. As we have seen, Green insists that rights recognition can occur only in a society of equals and Arendt makes the same claim with regards to the process of judging. History offers ample illustration of the pitfalls of creating rights with the input of only men, with the input of only white people, with the input of only Europeans, English speakers, and so on.

However, correlation does not prove causation: in the following paragraphs this paper aims to show more clearly precisely why rights recognition requires equality. These remarks will be divided into two sections. The first takes its cue largely from Green and is concerned with the equality of access to rights recognition debates. The second draws on Arendt and is concerned with the type of discourse used in the judgment at the heart of rights recognition.

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33 Green, Lectures, §26, p. 45
Inequality and access to rights recognition debates

If rights recognition is to produce rights that benefit all equally (or at least potentially do so), then the debate that produces these rights, through a process of advancing and either recognising or rejecting rights-claims, needs to be open to all within a society equally. To argue this point, let us imagine two counter-examples: three societies with different varieties of inequalities, which lead to flawed processes of rights recognition, and thus to less legitimate rights. In the first case, a minority of citizens in a society have the vast majority of votes in a broadly (otherwise) democratic system; in the second, a minority of citizens have the vast majority of resources. In the third a final case, rights recognition debates are in theory open to all, and there is broad economic equality. However, the way in which debates are held bars some from taking part. It will become obvious that these three cases are idealised forms of actually-existing problems.

We can widen the first case to include informal as well as formal processes. A group might have disproportionately many votes (formal) or a disproportionate presence in the public sphere or in messages relayed by the media (informal). In both cases, the rights recognised in debates held in that context would be distorted, through the over-representation of one group and the underrepresentation or exclusion of another. With one group over-represented, it is likely any ‘common good’ would not be truly common, but actually rather particular; ‘rights’ would probably benefit the over-represented group the most — either through self-interest or through sheer ignorance of the problems faced by the rest of a society.

The second case concerns not inequality of representation or voice per se but inequality of resources. The result, however, remains much the same. In this scenario, a minority of people controls a majority of the wealth. This has several effects. First, with considerable wealth comes the possibility of more leisure time (the pressing need to support oneself by earning money is largely met). This means that the wealthy group has more time to enter into rights recognition debates (should they choose); correspondingly, there is a group of people who have less time to devote to politics — their voice is muted in the debates while the voice of the wealthy is amplified. The ‘rights’ recognised are likely to be similarly unbalanced. Further, wealth disparities allow the wealthier to ‘buy’ opinion, either through direct economic pressure, or through the possibility of buying and controlling large swathes of the media (the next section of this paper will elaborate more on the effect of wealth on the manner of the discourse itself).

A third scenario presents a society which is democratic and in which resources are, broadly speaking, distributed equally (or at least in which the inequalities are minor). However, in this society, rights recognition debates are held in a way which means only some — not all — of the society can participate. This could be due to a number of factors or rationales: ‘strong’ examples could include a belief that only men are bestowed with rationality, for example; or a belief that debates should be held in a language that only a few are taught. ‘Weaker’ examples could include societies with only limited universal education or societies that make little or no effort to enable people with disabilities to have access to public debates. Here, the allusion is to matters of ‘relational’ equality – despite political and economic equality, and even, to a degree, an equality of welfare, it is clearly easier for some to participate than for others. Again, it seems highly likely that any ‘rights’ recognised...
through such processes would not take into account a full range of views, and would mostly likely no benefit all within that society equally.

Inequality and the discourse of judgment

Having outlined the detrimental effects of inequality on access to rights recognition debates, we can now turn our attention to the effects of inequality within such debates, particularly in terms of the effect of inequality on the discourse of judgment. Arendt argues that the discourse in judging is peithein, or persuasion. This is a mode of discourse only possible under conditions of equality, as this section will set out. Without equality, and without peithein, free judgment is not possible. Rather, what emerges is a serious of flawed decisions based on forms of coercion, reflecting power inequalities in the society.

Peithein means at the very least a formally equal society. It would be absurd to talk of ‘persuasion’ in a hierarchical group, such as the military, for example. Rather, in the military there is command and obedience, superiority and subordinance. Peithein would seem to imply economic equality too. Economic inequality clearly has the potential to damage the process of judging, and to corrupt the egalitarian persuasion implied by peithein. Knowing that someone has a lot of money, and is thus in a position to help you, is something that is likely to have an effect on the receptiveness you display to their argument, whether consciously or unconsciously. Further, with wealth comes the possibility of corruption, of people’s judgment being bought under the guise of persuasion. Wealth can also enable an argument to be made more persuasive, either with evidence (though, of course, persuasion rules out arguments from fact\textsuperscript{34}) or through propaganda or control of the media.

Further, disparities in wealth (and the disparity in status that often accompanies them) go against the spirit of peithein. In conditions of inequality, the appeal is not to equals, but to people who are in some way (materially) inferior. Much like a hostile takeover, the attempt to persuade is backed up by the threat of destruction through economic means. The less wealthy person, the subject of the persuasion, is thus subjected to a politics of necessity smuggled in behind the ostensible politics of persuasion. It is for just such a reason that peithein cannot happen in public realms characterised by domination. Where the threat of force, economic or physical, lies behind politics, politics is reduced to an empty spectacle. This is made clear by Thucydides in the Melian dialogue: the political words, the attempt by Athens to persuade Melios to bend to their will is a charade. As Thucydides has the Melians say: ‘The quiet interchange of explanations is a reasonable thing, and we do not object to that. But your warlike movements, which are present not only to our fears but to our eyes, seem to belie your words.’\textsuperscript{35} When raw force stands behind politics, persuasion – peithein – is rendered meaningless.\textsuperscript{36}

\textsuperscript{34} Hannah Arendt, \textit{Between Past and Future: Six Exercises in Political Thought}, p. 222


\textsuperscript{36} The republican conception of freedom as ‘non-domination’ makes a similar point. See: James Bohman, “Citizens and Persons: Legal Status and Human Rights”, in Marco Goldoni and Christopher McCorkindale (Eds.), \textit{Hannah Arendt and the Law} (Oxford, Hart, 2012), pp. 321-334, pp. 324-325; see also: Quentin Skinner,
A final aspect of equality that peithein points towards is an equality of information. Judgment occurs in situations where there are no set, established rules, that is to say, in political situations, where Plato, translated by Arendt, has it that ‘men are perpetually disputing about rights and altering them, and whatever alteration they make at any time is at that time authoritative’. It is the outcome of the discussion, of the persuasive discourse that matters. This is undermined by expert appeals to fact or to unshifting foundation. Anything so resembling a fixed Platonic form undermines the radically democratic dimension of judging. Thus, peithein is undermined by expert discourse. This is not to say that expert discourse is, of itself, a bad thing: we cannot hope to persuade people through political discourse, for example, that gravity does not cause bodies to accelerate towards the earth at around $9.8\text{m/s}^2$. Rather, expert discourse on questions of what is excellent and what is the right course of action in the political sphere is more suspect. As we have noted already, such expert discourse can be exclusionary discourse, where the privilege expertise outweighs the arguments of those they act to exclude or discipline. The best amelioration for this is that judgment takes place in a political community characterised by wide access to knowledge, including the evidence upon which experts base their arguments.

Judgment, then, requires conditions of equality. As a key part of rights recognition, without judgment – and equality – rights recognition cannot occur in anything but a highly flawed way. Replacing persuasion with coercion means that the resulting ‘rights’ simply replicate existing power inequalities, but, more dangerously, confer them with an added veneer of legitimacy. Where previously it was embarrassing to point out that the emperor was naked, it is now illegal to do so: the emperor has a right to perceived as clothed.

To sum up the argument of the second section of the paper, we can see that theories which base human rights on recognition and equality are closely interlinked. Green and Arendt insist explicitly that rights recognition and judgment can only occur in conditions of equality. This commitment alone is perhaps enough to make egalitarians take note. A further analysis of the processes of rights recognition and judgment has suggested why equality is so important. Namely, without equality of access to rights recognition debates, and without equality permeating the discourse within these debates, the rights recognised are flawed and to an extent illegitimate, as they cannot benefit all within society equally – they are not powers which contribute to a common good, and thus they are not really ‘rights’ at all: for recognition approaches, equality is a pre-requisite for rights.

**Summary – contingency, rights, and equality**

This paper has set out some aspects of the relationship between recognition theories of rights, natural rights theories, and equality. It has been argued that whereas recognition theories of rights place equality at the centre of the process, natural rights theories are rather more ambiguous towards equality: innate theories of rights do not require equality and may indeed work against it.


Subscribing to a recognition theory is not to jump ship from all ideas of morality to a form of value-free positivism. We may hold that there are no rights save socially recognised rights, and still, with Green, hold that ‘there ought to be rights’ for without them there can be no human flourishing (however we define it). However, the recognition position is marked by an awareness of the contingency of all systems of rights. This contingency gives the theory great urgency: we cannot rely on rights to look after themselves, therefore, if we subscribe to recognition theories of rights, we must also pay close attention to the social conditions in which rights are created and re-created.

A key aspect of these social conditions is the aspect of equality. Without meaningful equality, as we have seen, there can be no fully legitimate rights, but only powers which benefit some to the detriment of others. Here, then, is the appeal to egalitarians: if you feel that equality is important, for whatever reason, then you would do well to subscribe not to a theory of natural rights, which is ambiguous about equality, but to a rights recognition approach, a theory of human rights which prizes equality equally highly.