

## What are human rights?

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In an extremely interesting thread responding to an earlier article (Are rights universal), contributors discussed the metaphysical status of rights, their universal or local grounding and their political import. Zdenekv took me to task for not understanding that according to ‘moral realism’, people have rights ‘like any other natural property’, one could say like they have arms or legs. The answer to ‘moral realism’ was given by Jami and Barzo, failed’ asylum seekers, in Monday’s coverage of the report of refugee charity Parfras. A shadow humanity without shelter, food, the right to work lives a shadow life in our cities surviving on less than one dollar a day, Parfras reported. In the accompanying video, Jami who sleeps in parks quietly contrasts himself with his friends who have ‘papers’ and implicitly with the rest of us. ‘We both have two hands, two eyes, two legs. They are human like me’. Barzo ends his heart-rending description of destitution, homelessness and despair quietly accusing people like who, from our comfortable houses, keep proclaiming ‘human rights, human rights. But where are the human rights for the asylum seekers?’ Echoing a haunting line that links them to a suffering

humanity from Shylock to Primo Levi, these natural philosophers state an indisputably realistic truth: we may all be human but humanity has always excluded, despised and degraded some of its parts. Humanity is not one: it has always been split between full and lesser humans.

How can we understand this paradox that not all humans have humanity in a human rights culture? The inflation of rights-talk has obscured the terms. To understand what Jami and Barzo tell us, we need to clarify them again. 'Human rights' is a term combining law and morality. Legal rights have been the building block of western law since early modernity. As Human, rights refer to a type of morality and to the treatment individuals expect from public and private powers. Human rights are a hybrid category which in bringing together law and morality introduces a number of paradoxes at the heart of society.

Let me start with the legal aspect, the part that really counts in power's treatment of people. Private property and contractual rights were introduced in early modernity. They were both the result of the emergence of market economy and a contributed to its victory. Culturally, they were precipitated by what Alasdair McIntyre has called a 'moral catastrophe': the destruction of premodern communities of virtue and duty. Because capitalist society of individualism and free will lacks a universal moral code, restraints on private egotism must be external. Crime, tort and legal rights achieve precisely that. The law empowers individuals to enforce their rights but

also limits their exercise so that in theory we can all have an equal amount of rights. When disputes arise, it is the business of lawyers and judges to resolve them. These rule experts have propagated a common view that laws and rights are like facts: they have an 'objective' meaning which can be discovered by the professionals. Legal rules and rights however do not come with their meaning on their sleeve. They must be interpreted in order to be applied and most rights disputes involve at least two contradictory but plausible legal meanings.

Human rights provisions in particular are general and abstract. Take the 'right to life', which opens most bills of rights and human rights treaties. Its statement does not answer questions about abortion, the death penalty, euthanasia or indeed about whether this right protects the necessary prerequisites for survival such as food, shelter or health care. In most cases, a human rights claim is the beginning rather than the end of a dispute about the meaning of the right or its relative standing in relation to other conflicting rights. At this point, moral, political or ideological considerations unavoidably enter legal argumentation directly or indirectly. Deciding conflicts between liberty and security for example involves assumptions about the way a democratic society works. These partly depend on the decision-makers' ideological stance. Taking them from politicians and giving them to lawyers (with their establishment outlook) does not change this basic fact. Rights and law are supposed to use reason and precedent to make the exercise of power neutral and objective.

But the repressed always returns making rights adjudication ambiguous, open and potentially radical.

‘Human rights’ are also moral claims, recognised or not by law. A Chinese dissident who asserts the right to free political activity is both right and wrong. Her ‘right’ does not refer to an existing legal entitlement but to a claim about what morality (or ideology, or international law or some other higher source) demands. In this sense, the moral claim of human rights is always in potential conflict with their legal status. Human rights confound the real and the ideal. Take Article 1 of the Universal Declaration of Human Rights: ‘all human beings are born free and equal of right’. But as Jeremy Bentham noted first, newly-born infants depend for survival on their carers, while the claim that people are born equal flies in the face of huge disparities in the world. Biological and socio-historical nature distribute their wares unequally. Inequality is the unavoidable result of the accidents of birth and history. The heredity, standing and economic (dis) advantage of family and community largely determine our lives. Equality on the other hand is unnatural and must be fought for. Human rights statements are therefore prescriptions: people are not free and equal but they ought to become so. This becoming depends on political will and the social conditions within which the equality maxim is to be fought for. Equality is a call for action not a description of a state of affairs. When moral or legal philosophy forget this simple fact, they no longer deserve the adjective ‘moral’.

Human rights are therefore a subcategory of legal rights protecting important goods and activities and given to people on account of their humanity rather than membership of narrower categories such as state, nation or community. As a result, people like Jami and Barzo should be the prime beneficiaries of human rights. Without state, nation or law to protect them, they should be able to fall back to the safeguards of humanity. Their total absence of rights however means that despite the claims of moral philosophers bare humanity offers no protection. It also means that human rights do not belong to humans. Human rights help construct who and how one is human. Jami and Barzo have no rights at all. They are therefore treated as less than fully human.

The ideological power of human rights lies precisely in their rhetorical ambiguity and the oscillation between the real and the ideal, between humanity and national citizenship, the provider of legal rights. When human rights are part of the law, as is the case with our Human Rights Act, the law includes a principle of self-transcendence which pushes against the law's settled state. A legal system that includes human rights is paradoxically not equal to itself, since human rights call the whole of law to account everywhere not just in totalitarian states.

In this sense, human rights can become the latest expression of a human urge to resist domination and oppression and to dissent from the intolerance of public opinion. This was the case in the great re-

volutions of the 18th century, in the post-WWII 'never again' declarations, in popular uprisings against fascist and communist rule. They are part of a long and honourable tradition which started in the West with Antigone's defiance of an unjust law and surfaces in the struggles of people degraded, despised, enslaved or exploited. Those who defend Jami and Barzo belong to this tradition and redeem the value of rights. Those on the other hand who use human rights rhetoric to defend the pension rights of Mr Godwin or the 'human' rights of powerful companies in the developing world contribute to the banalisation and eventual atrophy of human rights.

The banalisation results from the way human rights have expanded in scope and have become a vernacular that can be used to describe every aspect of social life. As a result, their importance has both increased and diminished. Rights are presented as the key category of morality. Responsibility, virtue and duty on the other hand are presented as the preserve of backwardness and fanaticism. The recognition of rights seems to be the main stake in politics. Group claims and ideological positions, sectional interests and humanitarian campaigns must be routinely expressed in the language of rights for individuals. Rights are supposed to be above politics, neutral and rational, a 'trump card' that defeats state policies and priorities to support the liberty of the individual against an all-encroaching state. Finally, the recognition of rights is the main claim of identity politics. In postmodern societies 'I want X' or 'X should be given to me' has become

interchangeable with 'I have a right to X'. This linguistic inflation weakens the link of human rights with significant human goods. It indicates that the public recognition and satisfaction of individual desire has become a major way for the subjective, economic and ideological planning of late capitalist societies. When a minister argued that we have a human right to properly functioning kitchen appliances, he pointed to the way that when every desire can be turned into a human right nothing retains the dignity of right. The right to choose our kids school and the brand of refrigerators has nothing to do with the Enlightenment tradition of emancipation and self-development or with the radical tradition of dissent both represented in human rights.

There is more. Talk of rights has become an easy and simple way of describing complex historical, social and political situations, a type of 'cognitive mapping' particularly useful for media coverage. Take the miners strike, so much in the news recently. If it is presented as a conflict between the right to strike and the right to work (as was often the case), a complicated set of relations, histories, traditions and communities is reduced to a simple calculus of right versus right one of which must be wrong. But this translation hampers both the understanding and the resolution of the conflict. When rights become the main concepts of public morality, their scope increases but their specificity and usefulness is minimised and their absolutism makes the antagonists intransigent.

At the global level, human rights have become the only universal ideology after 1989. It unites the North and the South, globalising imperialists and anti-globalisation protesters, first world liberals and third world revolutionaries. Human rights are used as a symbol or synonym for liberalism, capitalism or individualism by some and for development, social justice or peace by others. In the South, rights are seen as primarily collective rather than individual, social and economic rather than civil, associated with social justice rather than liberty. Rights can be all things to all people; whatever your politics, ideology or beliefs some type of rights theory can be found to accommodate even antagonistic interests, predilections and preferences. In this sense, their scope

In bringing together law and morality, human rights are given special status because of the importance of the goods or activities they protect, typically dignity, liberty and equality. Like all rights, human rights derive from national constitutions, legislation and case-law and increasingly, since 1945, form international law.

Human rights try to resist domination and oppression, by extending self determination and self development. No equality without freedom and vice versa.

What normative sources and argumentation can be used today to formulate rights and attract agreement about their principles? As moral standards, human rights derive from a group of anthropologi-

cal hypotheses and moral assertions about liberty, equality, the well-being of individuals and their relationship to wider society. It would be comforting to say that human rights are recognised and given to people on account of their participation in the human race rather than of more restrictive groups. Yet the only real rights are given by states to their citizens. Aliens, refugees, the stateless, those who have no state or government to protect them and who could have been expected to be the main beneficiaries of the rights of humanity, have very limited, if any, rights.

The change from natural to human rights marked a loss of faith in the ability to justify rights on the basis of transcendent revelation or generally acceptable truths about human nature. While arguments from human nature are still canvassed, the 'human' of human rights refers mainly to their scope (they are rights that should be given to human beings) rather than to their justification. Commonly accepted facts about human nature keep changing with scientific knowledge and, whatever their latest state, cannot generate moral commitments. The main current theoretical method for the justification of rights is constructivism. Starting from the basic assumptions of liberal democracy about individual dignity, equality and tolerance, the moral philosopher builds a coherent system of rights and expectations. This approach has been criticised as excessively abstract, formal and unrealistic. An alternative detects certain value commitments in the social mores or 'deep structure' of a society, which are then raised into

principles worthy of legal protection. But there is a problem; by extracting and promoting the values a society has already accepted, these theories neglect the forward looking and critical function human rights ought to have towards power and received opinion. In any case, human rights standards are today set by government representatives, diplomats and civil servants in international organisations. The normative sources are no longer to be found in divine omniscience, rational systematicity, natural or social integrity but in the interests, negotiations and compromises of states. Rights have moved away from the concerns and methods of moral and legal philosophers and towards the priorities of politicians. The attempt to embellish human rights with rational or moral coherence is doomed to fail both because of the heterogeneity of practices using the term and because even institutional and doctrinal texts cannot be rationally systematised. In pursuing the task of ironing out the inescapable ambiguities, contradictions and conflicts, liberal jurisprudence often appears as a post facto rationalisation of the workings of power.

This first generation of rights includes the protection of life, property, the liberty and security of the person, rights to fair trial, prohibition on torture and slavery and basic political rights such as the right to democratic elections. They are the civil and political rights of citizens, the backbone of the liberal state. Emerging out of the great upheavals of the 18th century, they aim at protecting the liberty, dignity and integrity of the person and promote the ability of citizens to participate in public life.

The democratic and socialist struggles and traditions of the 19th century led to the development of the second generation, economic, social and cultural rights. These rights aim to promote the well-being of people by guaranteeing a minimum standard of material life. They address groups of people, communities and classes rather than isolated individuals and assume that social solidarity is a central characteristic of societies. The rights to work and decent conditions of work, to education, health care, social security benefits, an adequate standard of life and participation in cultural life are central to this list. Their enforcement does not rely on legal and judicial procedures. Economic rights cannot be delivered if the state keeps out of society. On the contrary, economic rights are positive in outlook and request state intervention in economy and society in order to create the conditions necessary for their implementation. If civil and political rights underlie the values of liberty and dignity, economic and social rights promote equality, non-discrimination and a sense of community that cares for its members.

For liberals, civil and political rights have priority. Their aim is to place limits around state activities and this negative conception of freedom as the absence of state imposition, is the heart of human autonomy and rights. According to liberal theory, economic rights are not proper legal rights. They are claimed by groups, not individuals; they are 'positive' in their action, in other words, they call for state intervention in economy and society, for heavy

taxation and central planning, in order to deliver the necessary levels of employment presupposed by the right to work or the revenues necessary for welfare provision and free health care or education. Finally, economic and social rights are not 'justiciable': they cannot be guaranteed by legislation in a liberal state and, moreover, courts cannot enforce them. The appalling oppression of dissidents was seen as proof of the correctness of the western arguments and the assertion that the market is the superior, if not the only, mechanism of distribution was recited as a mantra in response to the communist claims about capitalist squalor and unemployment. These ideological conflicts made it impossible for the United Nations to draft a common international bill of rights. An indication of the liberal domination in the area is the fact that while the Covenant on Civil and Political rights creates strong individual legal entitlements and state duties, that on Economic, Social and Cultural rights requests only member states to take measures to implement these rights.

## **THEORIES OF RIGHTS**

Indeed, the change from natural to human rights marked a loss of faith in the ability to justify rights on the basis of generally acceptable truths about human nature. While arguments from human nature are still canvassed, the 'human' of human rights refers mainly to their scope (they are rights that should be given to all human beings) rather than to their justification. Commonly accepted facts about hu-

man nature keep changing with scientific knowledge and whatever they may be, they are not sufficient to generate moral commitments. The method used for justifying rights today is constructive. Starting from the basic assumptions of liberal democracy about individual dignity, equality and tolerance, the moral philosopher builds a coherent system of rights and expectations. This approach has been criticised as excessively abstract and unrealistic. An alternative detects certain common value commitments in the social mores or 'deep structure' of a society, which are then raised into principles worthy of legal protection. A problem with that approach is that it raises and enforces legally the values a society has already accepted and to that extent it neglects the forward looking and critical function of human rights in relation to power and to received opinion. In any case, human rights standard are set today in international organisations by government representatives, diplomats and civil servants and the work of moral philosophers takes often the form of post facto rationalisations.

## **UNIVERSALISM AND CULTURAL RELATIVISM**

The debate about the meaning and scope of human rights has been dominated recently by the argument between the so-called 'universalists' and 'cultural relativist'. The universalist claim is that cultural values and moral norms should pass a test of universal applicability and logical consistency.

Human rights have a necessary universalist aspect, partly legal and partly moral. Morally, the justifications behind human rights norms or standards claim universal validity and create a duty of compliance in all situations and irrespective of the state of national law. Human rights must be the same everywhere at least as to their essence, if not their actual formulation. Legally, the large number of human rights treaties and conventions accepted by almost every state in the world has formed a kind of universal law of nations and peoples.

The universalist believes that reason and law give the right answer to moral dilemmas. As a result, judgments which derive their legitimacy from local conditions are morally suspect. But as all life is situated, an 'unencumbered' self and judgment based on the protocols of reason goes against the grain of human experience. The counter-intuitive nature of universalism can lead its proponent to extreme arrogance: only myself as the real moral agent or as the ethical alliance or as the representative of the universal can understand what morality demands. If there is one moral truth but many errors, it is incumbent upon its agents to impose it on others. In such a case, the human rights universalist can turn into an imperialist, who promotes the 'civilising' mission by the force of arms.

Cultural relativists start from the opposite and commonsensical observation that values are context-bound, that they develop within particular histories and traditions. Relativism challenges the presumed

universality of normative standards and values. There are many competing views about what is right or wrong and no trans-cultural values exist to allow the comparison of competing views and provide the basis of universal legislation. Normality and morality are culture bound; human rights express the cultural assumptions of western societies. Their cultural and historical provenance makes human rights European creations and universal declarations of rights, a chapter of European idealism. International human rights law has taken little interest in the values, histories and traditions of non-western nations and societies. The African Charter of Human Rights includes an unprecedented part about the duties owed by individuals to African civilisation, their states, communities and families. This idea of a duty owed to one's community is largely unknown to the western human rights tradition, for which the individual is the centre of concern and rights are tools for his/her defence from the incursions of others.

But the relativists have to struggle with a meta-ethical contradiction. They must deny all absolute claims to truth except for that made for the principle of relativism. Furthermore, the relativist position has been often adopted by oppressive governments as a defence against criticisms of their highly inegalitarian and repressive activities. Indeed the cultural embeddedness of self and value is a sociological truism; the context, as history, tradition and culture, is malleable, always under construction. History teaches nothing; it is historians and journalists, intellectuals and politicians, academics and ideo-

logues who turn historical events into stories and myths and in so doing construct ways of seeing the present through the lens of the past. Often the relativist turns local norms and traditional values into absolute truths and imposes them on those who disagree with the oppressiveness of tradition.

In these extreme cases, we can detect a certain similarity between universalists and relativists. The Kosovo war offers a good example. The Serbs massacred and ethnically cleansed the Albanians to protect the 'threatened' community of the Serb nation. The western allies, on the other hand, bombed the Serbs in the name of threatened humanity. Both principles, when they become absolute essences and define the meaning and value of humanity without remainder, can find everything that resists them expendable. Both positions exemplify, perhaps in different ways, the contemporary metaphysical urge: they have made an axiomatic decision as to what constitutes the essence of humanity and follow it with a stubborn disregard for opposing arguments and traditions. But humanity has no essence. The contribution of human rights lies precisely in the endless process of re-definition of humanity and its necessary but impossible attempt to escape external determination. Humanity has no foundation and no ends. Human rights, when not co-opted to the dubious cause of public and political power, are the definition of groundlessness.

Human rights are the most striking institutional expression of the project of the Enlightenment, of

the promise of emancipation through reason and law. The Americans rebelled against their colonial masters, the French against static and corrupt political and social power. That is why the early lists of human rights took a negative form and were predominantly defensive. They imposed restrictions upon state power thus creating spheres of unregulated activity in which citizens can exercise their rights. The First Amendment of the American Bill of Rights is a good example. 'Congress shall make no law abridging freedom of speech or of press'. By outlawing censorship, this article creates the conditions within which the right of free speech can be exercised.

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The differences between the two types of rights developed into a central aspect of the ideological cold war conducted in various meetings of the United Nations, in legal journals and the world media. The West claimed that the communist Gulags and lunatic asylums were logical extensions of Marxism's totalitarianism. The Soviets responded that social and economic rights are superior because material survival and decent conditions of life are more important than the right to vote. 'The right to a free press is of no interest to a starving and illiterate peasant in an African village' ran the argument.

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'Human rights' is a combined term. The 'human' refers to certain standards of treatment to which people are entitled and create a moral framework within which state policy, administration and the law

should operate. The reference to 'rights' returns us to the discipline of law. Rights were the creation of early modern legal systems and constitute the basic building block of western law. To have a legal right is a. to have an entitlement, for example, a property right, which can b. be realised through the respective action of one or many duty-bearers who must act or refrain from acting in certain ways (a property right creates a near universal duty in people not to interfere with my property) and c. can be legally enforced against duty-bearers who do not perform their obligations.

Human rights are a special category of right beset with a number of paradoxes. While they are legal rights, the main duty-bearer is the state. But it is state law that is called upon to enforce these rights creating tensions within the legal system. Secondly, they combine morality and law, prescription and description something that often leads to confusion and excessive rhetoric. In the expansive contemporary use of the term, human rights refer to moral or ideal rights that have no legal recognition. A South African during the apartheid regime or a political dissident in China could legitimately say that they have 'the right not to be discriminated against'. This is not a real, legally enforceable right, however but the aim behind the struggle against the social and political system that does not recognise the right

But the rhetorical force of human rights is part of their weakness. Over the long history of natural and human rights, their source has moved from purpo-

seful nature, to reason, to God and the Scriptures to human nature and, in their final mutation, to human rights to international law. What argumentation or procedure can be used today to attract wide agreement about their principles? As moral standards, human rights derive from a group of anthropological hypotheses and moral assertions about liberty, equality and the well-being of individuals and their relationship to wider society. Indeed it would be comforting to say that human rights are recognised and given to people on account of their participation in the human race and not of any restricted or regional membership, such as citizenship, national, class or group belonging. Yet it is quite clear that the only real rights are those given by states to their citizens. Aliens and refugees, those who have no state or government to protect them and who could have been expected to be the main beneficiaries of the rights of humanity, have very limited if any rights.

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