

Doing What Comes Naturally?

Asylum, Human Rights and Duties of Humanity

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FOCUSING ON FUNDAMENTALS

During his recent visit to Britain, in the course of the address he gave at Westminster Hall, Pope Benedict XVI asked two questions of our culture which are directly relevant to the situation in which asylum-seekers (and indeed increasingly refugees and even immigrants) find themselves today, both here and in Europe as a whole:

Each generation, as it seeks to advance the common good, must ask anew: what are the requirements that governments may reasonably impose upon citizens, and how far do they extend? By appeal to what authority can moral dilemmas be resolved?

To His Holiness, 'These questions take us directly to the ethical foundations of civil discourse.

If the moral principles underpinning the democratic process are themselves determined by nothing more solid than social consensus, then the fragility of the process becomes all too evident - herein lies the real challenge for democracy.'

We do not have to accept the Pope's answer to this conundrum to recognise that he is right about what he calls 'the central question at issue', namely 'where is the ethical foundation for political choices to be found?' And he is right too to assume that the first range of those involved in answering this question are citizens rather than visitors or those seeking refuge.

But suppose we say no to the belief that the Pope would want us to share with him, namely a respect for universal human dignity rooted which is rooted in a shared belief in 'objective norms governing right action' which 'are accessible to reason' and which in turn proceed 'from the content of revelation' (as the Pope describes the Catholic perspective). If this is not it, then to what do we fall back to explain and justify our right conduct, right conduct upon which we may have to insist even in the face of strong popular hostility, an alternative, nastier more insular 'common good' underpinned by the people but which we cannot share; indeed which we find repulsive?

We can clearly see why the Pope believes in 'effective action that will improve life conditions in many important areas, such as food production, clean water, job creation, education, support to families, especially migrants, and basic healthcare.'

But if we can't find a Christian (or even any) faith, and our culture doesn't care about such things, why should we? Where does our sense of moral obligation, our feeling of what it is right to do, come from?

TURNING UGLY

The title of this essay, to be delivered in Tuesday 2nd November to mark the twentieth anniversary of that excellent NGO ASYLUM AID, invites discussion of asylum in the context of human rights and the duties of humanity. I could just as easily add international law. For our approach to asylum is rooted in these three moral imperatives: the rights (of those seeking asylum); the duties (of the rest of us to respect those rights); and a determined respect for law (to ensure that these rights and duties are made real).

My fear is that the 'social consensus' which generated the circumstances in which these moral imperatives have thrived, which made sense of them and gave foundational support to those working in this area, is disappearing fast, and that in their place there is emerging a new kind of post-political, populist recklessness – the kind that not only regards the outsider as fair game (an old story, sadly) but increasingly also goes to great lengths to pick fights with the weak and vulnerable from far away in order to secure the popularity that those who succeed in these corrupted political cultures so desperately crave and need.

We are, I think, close to or at a paradigm shift in our approach to asylum-seekers and immigrants in Europe, that moment when we stop thinking in ways made inevitable by our past ethical truths, and start thinking and talking in a far nastier vein.

The second of these is becoming normal, the first increasingly the exception. The rule is drifting from civility to incivility, from respect for humanity to celebration of inhumanity, from universalist idealism to parochial hostility. And all of this is seemingly supported by a new, fast emerging 'social consensus'.

I think this is the biggest change to have occurred in the twenty year's of Asylum Aid's existence and I do not think it is over yet. The Pope may have had the Nazis in his thoughts when he worried about a social order without morality; I have our treatment of refugees and asylum seekers firmly in the forefront of my mind. Of course there is a vast difference of degree, but that is all it is, degree.

If the trend is to be first stalled and then reversed, the Pope's questions need a convincing answer. I will try at the end of this essay to rise to his implicit challenge, and suggest a solution rooted in both human rights and the duties of humanity. But first I need to say something about the circumstances of our present moment, where it comes from and why the changes for the worse that I have just mentioned have been happening.

VALUABLE ABSENCE

It is conventional to root the origins of the contemporary human rights movement in the Universal Declaration of Human Rights, agreed in 1948 and increasingly celebrated as evidence of a tremendous post World War two commitment to human rights. I say 'increasingly' because that is certainly not how it seemed at the time. See on this my [first common track](#) – in that track I discussed a new and important book by the Columbia scholar Sam Moyn (*The Last Utopia*). To my mind Moyn has convincingly demonstrated what a damp squib the Declaration was thought to be

when it first emerged, so much so that even that great protagonist of enforceable human rights Sir Hersch Lauterpacht dismissed it as a failure.

The Refugee Convention of 1951 flowed out of a different narrative than that which had produced the human rights declaration of 1948 but was equally located within the sovereign framework that this post war settlement had so clearly and so determinedly re-embedded as the key fact of international relations – at tremendous cost as Moyn shows to human rights.

So while the right to seek asylum was stoutly declared, the vital mechanical question of how to process this entitlement was left firmly in the hands of the states.

But I want to introduce a paradox here en route to a greater understanding of our present situation.

Despite this national supremacy having been so carefully preserved, and human rights been apparently so laid low, the three or so decades that followed the 1948 Declaration and the 1951 Convention constituted within the democracies in what we now think of as the Global North a time of unparalleled protection for individuals, a veritable golden age of practical human rights. The rights set out in the unenforceable Universal Declaration were being realised in practice in a way that has never been true before or since. Fairly operated by states, the 1951 Convention guaranteed to refugees an extensive range of right, embracing the whole menu of entitlements necessary to the flourishing of each of them as individuals.

During these thirty to forty years there was compassion both for the poorly-resourced insider and the persecuted outsider, but compassion of an active engaged sort, not the compassion of pity and heartbreak but that which leads to a commitment to improvement and change for the better.

This is the core human rights instinct and I will return to it later, but I think it is worth noting it now –

Human rights as a term works best when it is functioning not as an arid philosophical tool, an answer to a difficult hypothetical about the state of some imagined pre-political nature, but when it is being deployed to capture the essence of an essentially non-linguistic feeling about the dignity of man, qua man – that sense we have of us all mattering, whoever we are, wherever we are from and whatever our abilities.

I think this also explains the paradox of a golden age for human rights at a time of relative quiescence for human rights: *it all depends on how we are using the phrase.*

If we think of human rights as a term reflective of a truth capable of being captured only when the term itself is being used, then the forty or so years between the signing of the Universal Declaration and the end of the Cold War can hardly be counted as a success: slow progress on the international stage; a snail's pace at the regional level; little happening even in national legislatures or courts by way of the establishment of human rights commissions or dramatic human rights jurisprudence. But if we view the term more instrumentally, as the language we happen these days to use to describe the respect given by a culture to each and every one of its people, the phrase that operates today as shorthand for that commitment to the equal dignity of all that marks out a true human rights culture, then we can see that in the global north at least – the United States, Europe, the old commonwealth countries (and of course leaving colonial power to one side) – there was during this

time a tremendous respect for human rights and a determination to ensure that the rights of all were genuinely available to all.

This might not have been an age of human rights (as such) but it was the age of social democracy – and as you have seen in [Track One](#) I see social democracy as human rights in action.

In social democracy, political freedoms are guaranteed for sure but the vital social and economic rights so essential to a successful life are also firmly in place. Social democracy cherishes each of its citizens and is determined so far as is possible to give everyone a chance to thrive, whatever their background, ethnicity or gender.

And a society which cares so evidently for its own people does not have great difficulty in extending this solicitude to the visitor, or to those who arrive on their shores unwillingly, driven by desperation not desire. The habit of empathy, once formed, is gratifyingly hard to shake off. So during this phase of national self-expression it was not surprising that the system of refugee protection held together pretty well and that asylum was not an issue of great importance or controversy within the political mainstream. Indeed as we can now in retrospect see more clearly than was perhaps so obvious at the time, most social democratic cultures that encountered sharp increases in immigration at this time dealt with the challenge reasonably well, honing a commitment to diversity that made a virtue out of the newcomers' various differences, an approach made possible by a background of confidence-inspiring decent social provision.

THE DANGEROUS APPEAL OF FINE WORDS....

All this changed with the end of the Cold War in 1989. Now we confront a second (and I promise final!) paradox, that it has been during our supposed post-Soviet 'age of human rights' that human rights have become so endangered – and that this has been an endangerment that has played out in a way which has been particularly damaging for refugees and asylum seekers.

Since 1989 there has been a blizzard of initiatives on human rights at every level, the international, the regional and the national. The phrase has never had wider currency, or enjoyed greater support across political divides: even the UK Conservative Party declares itself committed to human rights, albeit in a way that does not seem to embrace the UK Human Rights Act (on which more shortly). But this gratifying emphasis on human rights should not blind us to the fact that the idea of equality, the commitment to the dignity of all that has been so long at the core of western polity has been under direct attack.

But we have to face the harsh truth that social democracy thrived within capitalism as a bulwark against the threat of its communist alternative, and with that danger having disappeared, power and capital see no reason to spend so much on a defensive resource that they believe is no longer needed and that gets in the way of the accumulation of capital.

To put it crudely, capitalism no longer feels the need to defend itself against revolution with the shields of fairness and justice.

That is not to say that these words are not used by our political leaders: they are used all the time, thrown about with the reckless abandon of those who know they mean nothing.

So over the past twenty years we have seen the dismantling of the security offered by social democracy – no guarantee of work; a lowering of financial returns for those in work and a sharp reduction in the protection afforded those without employment, or in bad health; a resiling from the commitment to equal access to educational excellence; and the result of all this – a vast and increasing gulf between the ‘haves’ and the ‘have-nots’ – a gulf that is no longer the source of unending anger and determined activism but one that is accepted fatalistically, as the way things inevitably are now.

A community that so devalues its own people is not likely long to retain its good manners so far as visitors are concerned, and so it has proved.

The economic and social precariousness of the great majority of citizens produces an unease which manifests itself in anger at the fact that visitors still seem to enjoy vestiges of the old deal. If we have to suffer then they should be made to as well: there should be fewer of them; their life here should be worse than ours; we should have priority over them so far as ‘our’ services are concerned.

In this new age of brutality, what David Hume called ‘the circumstance of justice’ is eroding, and eroding fast. To Hume, ‘the rules of equity or justice depend entirely on the particular state and condition in which men are placed, and owe their origin and existence to that utility, which results to the public from their strict and regular observance’ (*Treatise of Human Nature*, 1739-40). He thought justice could never work if as Martha Nussbaum puts it ‘human beings are utterly wicked and rapacious and utterly lacking in their ability to conform their conduct to morality and law’ (*Frontiers of Justice* 2006, pp 46-47).

I have already indicated at the start of this essay that I do not believe it is alarmist to say that we are close to reaching this point so far as immigrants (and therefore asylum seekers) are concerned. To those who think I exaggerate what else can explain the public, indeed proud, nature of Nicolas Sarkozy’s brutal attack on the Roma people within France’s borders and then the hysterical nature of his anger at those who have sought to constrain him? Here is the head of state of the nation most identified with the emancipatory force of human rights leading the charge away from morality, away even from law, into an abyss of immorality in which there is not to be even the fig-leaf of fairness or of respect for human rights.

Sarkozy’s violent intervention resembled in many ways the hysterical aggression of Berlusconi towards asylum seekers some years before, and the actions of John Howard in Australia at around the same time. Viewed together, they show us something else which has happened since 1989, another and important consequence of globalisation.

Nation states have not disappeared as the power of their leaders to impact on the situation of their peoples has seeped away. Far from it: globalisation has seen a renaissance of the nation state just when the forces that drive globalisation have been depriving such territorial units of any real capacity to set their own agendas.

And these empty states – old and new – these zombie nations – are invariably democratic these days.

Ken Livingstone once wrote a book, entitled ‘If voting changed anything they’d abolish it’. We still vote, but for leaders whose nationalism is no longer constructive and liberating but rather falsely

nostalgic and narcissistic and whose politics have long ago declined into a noisy populism. There are exceptions of course: the deeply serious Angela Merkl (though even she has lapsed recently with some ill-judged and ill-informed remarks about immigrants in Germany), the resolutely untelegenic Gordon Brown (writing in [The Guardian](#) today about the plight of the people of Burma), the mercurially progressive Barack Obama, perhaps Ed Miliband?

But does the future belong instead to the Berlusconi and Sarkozys; to Geert Wilders, the tea party and the taxpayers alliance? And if it does what will this mean for asylum-seekers, indeed for immigrants around the world? The Swedish election results of last September saw social democratic votes move straight across to the extreme right. If not even Sweden is safe, then those who value dignity and equality and who believe in their universal application need to think fast about what to do.

... AND THE FALSE PROMISE OF PAST CRUTCHES

One temptation is to sit back and rely on the law to protect the values we hold dear.

It seems the European Commission will be proceeding against France for its unlawful treatment of the Roma. We have seen plenty of examples of this in the United Kingdom, not least in the justly celebrated decision by the old House of Lords that depriving asylum-seekers of both sustenance and the opportunity to work was to treat them in a degrading manner for the purposes of Article 3 of the European Convention on Human Rights (*R v Secretary of State for the Home Department ex parte Limbuela*, 2003). In another case a massive fee imposed on those subject to immigration control who desired to marry was castigated by the same court as a breach of the right to marry (*R (Baia) v Secretary of State for the Home Department* 2008).

A flick through the pages of recent law reports shows our most senior judges much preoccupied with the task of drawing to the attention of government the mismatch between the law and its latest set of populist but discriminatory intentions. The government's proposals for a cap on immigration face legal challenge, just as did the changes to the points-based immigration system that were recently made. Colleagues of mine at Matrix Chambers have recently alerted the Home Office to the fact that its plan to have a language test for entry from some countries and not others would be discriminatory under the Human Rights Act. But did the Home Office really need to be told this? Are all the other plans that have been or are being hatched in this area likewise being produced in ignorance of the legal landscape that constrains ministers in this area?

This can hardly be the case.

The truth is that what we are seeing is what happens when an old order of right and wrong clashes with a new set of fast emerging but entirely different values, when the 'circumstance of justice' or (to put it as the Pope does) the 'social consensus' changes about us. We are still largely a law-abiding country here so efforts are made to stay within the old framework while delivering new, populist outcomes. When this fails, judgments are respected albeit perhaps minimally enforced, subjected to endless appeals or overturned by legislative retaliation.

Parliament offers some bulwarks of support against this kind of brutal opportunism but its strength is not great so far as preventing the executive's legislative agenda is concerned – it can worry

reactively around the edges of the worst proposals but do little itself that is new and game-changing in cultural terms.

And broadly respectful of law though we might still be here, we should remember that only one short step away is the leadership model offered by Sarkozy and Berlusconi: break the law, claim public support, and scream at people who point out to you the fact of your illegal actions. Debilitated by the discovery that he does not really run France, but that either the global markets or the labour unions do (we shall soon find out which), Sarkozy does not (so far as we know) beat up his wife and family – he beats up the weakest people around him, the Roma – the Jews of today. Nick Griffin has been seen off for now, and Cameron seems a decent kind of Tory, hemmed in by Liberal Democratic scruples – but we are about to embark on a conscious attack on the financial supports and public services offered to millions of people in this country, a policy strategy enthusiastically endorsed by that well known democratic and human rights body the IMF.

So we need to be ready for a reaction.

My main point for this essay is this:

a country that does not value its own people cannot be expected to value the outsider.

Unless we tackle the bad treatment of the citizens we can expect little support from them when it comes to our even worse treatment of the outsider. We need certainly to defend the laws we have but also to reassert the values that lie underneath them.

REACHING BEYOND TRUTH

This is where things get tricky, as it strikes me that we are in danger of forgetting why we believe in equality and human dignity in the first place. The Pope has no problems with this 'why?' question, secure as he and his fellow members of the Catholic Church are in the knowledge that human kind has a special place in a universe created by God.

Human rights may have been a revolutionary idea in America and France in the 18th Century – they meant something then, liberation from exploitation and oppression. But its post-war semi-revival in the shape of the Universal Declaration, and its subsequent successful embedding in the European Convention on Human Rights, has left meaning to one side in favour of the lowest common denominator of overlapping consensus or the crutch of law.

Clearly it is not enough today to tell the religious story when challenged to defend the old order of mutual respect and dignity for all. Nor (as I half-suggested earlier) can we simply mouth platitudes about some sort of notional contract which took us all out of a fantastical state of nature and into an organised world into which we all happen (for whatever reason) to be nice to each other. This just seems quaint and old-fashioned today – professional mind-workers (the 'scholars') writing vast tomes about abstract concepts like justice and right which purport to show how things really are.

Nietzsche saw through all this. He believed the true world had finally become a fable:

5 The "true" world—an idea which is no longer good for anything, not even obligating—an idea which has become useless and superfluous—consequently, a refuted idea: let us abolish it!

(Bright day; breakfast; return of bon sens and cheerfulness; Plato's embarrassed blush; pandemonium of all free spirits.)

6 We have abolished the true world: what world has remained? the apparent one perhaps? But no! With the true world we have also abolished the apparent one!

(I am grateful to a past student Bernard Keenan for drawing this to my attention, further proof that teaching is also learning and not only for the students in the room.)

Do we believe this? The fact is that in what we think of as the West today this kind of thinking has triumphed. It brings many benefits in its train, some of them – tolerance; freedom; diversity – part of the contemporary lexicon of human rights. Its darker side is its refusal to judge any conduct or words that accompany such conduct as right or wrong.

At heart this is what the Pope is concerned about, and which those of us who believe in the possibility of right and wrong behaviour cannot avoid.

Whatever Nietzsche says, I think we need do some new truth stories. Their accuracy matters less than the fact that they are told, and that we can persuade ourselves we believe them.

If we use him properly maybe we can conjure such stories from another nineteenth century colossus, Charles Darwin.

I end my essay with some speculation – necessarily fragmentary and only partly formed, as to what such a narrative might look like. For Darwin has made it possible to talk once more about human nature without being accused of being a closet Theist. And within that nature, deep in the recesses of this or that gene, there would seem to be some kind of inclination to do the decent thing by the stranger.

All of the scholars start their theories – no matter how grand – with intuitions about the way we are, and while they would only rarely concede it they do seem therefore to be depending on some kind of natural law to get their thoughts off the ground and into the rarefied world of the supremely rational.

But we must be careful not to overstate this. Nature has produced us with an inclination to do harm as well as good, to favour kith and kin over visitors, to defend as well as to reach out. As a recent important essay by Steven and Hilary Rose in *New Left Review* reminds us, we must be vigilant not glibly to find the answer to everything in our genes. Culture matters. The 'circumstances of justice' can and do change.

Maybe we can say no more than that there is in us an instinctive hospitality which for those who are inclined this way can be said to reveal that as Bernard Keenan has said there is more to us than our bare biological essence, that the mystery of what it is to be truly human lies beyond language and thought, being every now and again glimpsed in acts of generosity and courage and in displays of empathy which have produced action.

The wonder of social democracy is that born out of horror and fear – horror at the depression that preceded world war two; fear at the possibility of communist hegemony after it – we fashioned a

solution to the human situation which more than any other before or since reconciles the better part of our nature to the fact that, after all, try as we might we cannot escape our history.

If we can save social democracy we will protect the stranger in our midst.

And these days the best way to do this is to talk the language of human rights.

Even if we are not sure it is true, has not the time come to say that Nietzsche was wrong, that the truth of no-truth hurts too much and that our forefathers were cleverer than we are when they claimed to know less.

CONOR GEARTY, 1 November 2010