

AN HERETICAL HISTORY:
RETHINKING THE FOUNDATIONS OF HUMAN RIGHTS

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Introduction

A new and startling original account of the history of human rights promises to reshape our understanding of the history of our subject and in particular its relationship with law and democratic society. Samuel Moyn's *The Last utopia. Human Rights in History* has little to say about philosophy, however, and it may be that whatever about the vagaries of the use of the term 'human rights' in the recent past, the idea behind it is of enduring worth, transcending political circumstance. In what follows I will first outline Moyn's view as to the origin of our contemporary usage of the phrase and in particular how it emerged out of a discourse of dissent and democratic activism that as we shall see has had little to do with the legal framework that grew up around 'international human rights law' in the decades after the Second World War. With this work done I will develop my view of the philosophical underpinnings of the subject, which I will argue neither subvert nor contradict Moyn's narrative but, on the contrary, add that valuable element of universality without which human rights cannot *truly* be human rights.

Confronting orthodoxy

To Moyn, the study of human rights is a subject whose understanding has been made more difficult by the series of fallacies on which in his view it is erected. The first of these, the most persuasive and pervasive, is that human rights start in the modern era with the triumph of the Universal Declaration of Human Rights (UDHR) in 1948. It has always been difficult to reconcile this account with the fact of the unenforceability of the UDHR, its very ethical ambition being made possible by its lack of international status – the fact that it is a mere declaration and not a

covenant or a properly policed international agreement. There has also always been a nagging doubt derived from the fact that the then leading figure in human rights Hersh Lauterpacht had condemned the UDHR as a terrible defeat for the ideals it so grandly asserted. Moyn shows how Lauterpacht could take this view, why in many ways it was inevitable given the gap between what was expected of human rights and what was actually delivered in the shape of the UDHR.

The 1948 Declaration was a consolation prize for the failure of universal ethics in the period of international rebuilding immediately after the Second World War. True the early commitment of President Franklin Roosevelt to the 'Four Freedoms' to speech and religion, and from fear and want, so dramatically declared in January 1941 had seemed to have been seriously meant when the Atlantic Charter of that year echoed similar themes. But was this to mean democratic freedom for all, both externally (the self-determination of peoples) and internally (the political freedom of liberated nations)? The colonial powers fought back hard and as the war's outcome became ever clearer their perspective came to dominate. The Dumbarton Oaks conference of 1944 set aside both self-determination of peoples and the human rights of people: *realpolitik* returned at the expense of both morality and law. Only a rearguard action by marginal actors saw human rights appear in the new UN system at all, and then (apart from some grand words in the Charter contradicted by the equal commitment to national sovereignty) merely tucked away in the deeper recesses of the Economic and Social Council, a place from which they have taken literally decades to emerge. Moyn says that human rights were already dead at the time of their birth in 1948 and while this is putting it rather strongly the fact is that if not dead they were certainly showing few signs of active life.

The second fallacy of human rights lies in their supposed apolitical nature, or – to put it another way – their transcendental discursive power. As the first fallacy shows, even at their modern inception they were part of politics, and part of politics they have always remained. The Soviet Union was an early enthusiast – Stalin's constitution of 1936 had inured the regime to the value of double standards. However when the anti-communist aspect to the subject became more and more

apparent, in the second half of the '40s, Soviet opposition became increasingly robust and voluble. Its interest in the term was thereafter to harness it to its own supposed economic and social goals, while ignoring the individualist conception promoted by the West in a way that the Soviets saw as contrived solely to promote its capitalistic interests. For their part, the US and its allies were content at this time to have a toothless human rights regime, one which emphasised the civil and political for sure but said little about self-determination of states or the actual well-being or life chances of individuals.

When the liberation struggles against colonial rule began to be routinely successful from the 1950s on, the low status of human rights is revealed by the fact that this was achieved without much or even any reliance on the language of human rights. The many new states to which these campaigns gave rise naturally brought a new dimension to the UN, and this translated into the language of human rights in the form of common article one to the two covenants agreed in 1966, on economic, social and cultural rights and on civil and political rights respectively. Disconnected from the rest of the two agreements, the right of self-determination of peoples set out here was a political righting of an earlier wrong, a late vindication of the wider radicalism of early ideas for the UN that had been battered down by the big powers whose interests were so dominant in 1945. But of course it fitted very uneasily (and still fits very uneasily) into a system of rights based on individual rather than collective dignity.

This takes us to the third fallacy which on Moyn's account (with which I agree) a proper understanding of human rights requires us to expose and explode, one that is uncomfortable for lawyers to acknowledge: the myth of the lead role of law as the driver of the subject. Now its true that law in general and international law in particular was the main shelter for human rights in the decades of neglect and political manipulation that lasted from the end of the Second World War through to 1989, the Cold War era in other words. But before we lawyers become too excited by this stewardship, we should recall that the position of international law was itself enormously weak during this time, that it had barely survived the shift to realism

that had begun at Dumbarton Oaks and that had been solidified in the UN's amazing but entirely deliberate decision to refuse to pierce the sovereign veil, thereby marooning unlucky people subject to vicious governments to their fate, insisting so far as such places were concerned on *neither law nor* human rights. Furthermore international law itself was as a matter of theory and practice collusive of such a system of neglect in that it refused (and has refused until recently, and even now accepts only reluctantly) any acknowledgement of the rights of an individual in international affairs. So the UDHR did not lead international law on any journey to individual rights, but nor did the covenants finally and so painfully agreed in 1966: enforcement mechanisms continued to be slight and human rights remained peripheral to the mainstream not only of international relations but even of international law itself, a state of affairs that has only changed (as we shall see) very recently.

It follows from this third fallacy that we need to acknowledge that it is simply not the case that law has led the human rights revolution that sparked into life in the 1970s and which has been so evident since the end of the Cold War. This resurgence of human rights is a creature first of the politics of dissent that took off in the 1970s and then of certain manoeuvrings in international relations that were contrived off the back of such dissent during the same decade and well into the 1980s. These changes in our approach to human rights paved the way for the sudden explosion of rights from 1989 onwards.

So far as the first of this, dissent, is concerned, the human rights idea began as an effort by Soviet based intellectuals, scientists and literary figures (one thinks particularly of Andrei Sakharov and Alexander Solzhenitsyn) to carve out a space for the possibility of a better life under Communism under its generous and seemingly universally accepted cover. At around this time groups in the USSR began quite explicitly to use the language of human rights to turn the supposed standards of the Soviet system (in Stalin's 1936 constitution) against the regime and to force positive change through exposure of the gap between theory and practice. The failure of the Prague Spring of 1968 then greatly boosted dissidence beyond the borders of the

Soviet Union itself. Organisations like Charter 77 emerged, heroes like Vaclav Havel became widely known for their *samizdat* writings, and the notion of a moral (human rights) sphere in opposition to power (and it followed bankrupt politics) became prevalent. A continent away but at the same time, the apolitical cachet of human rights was fulfilling a similar function as a focus of plausible hope for the progressive forces that were being defeated and eviscerated by right wing military regimes across South America. This was where the coalitional power of human rights – its capacity to speak to factions and interest groups across society – first became so marked.

The second spur to the human rights renaissance, the international relations dimension, was supplied primarily by the United States. The Helsinki Final Act of 1975 was not intended to focus on Soviet ‘abuse’ of human rights but this was its definite effect. From the mid 1970s onwards the Soviet leadership found itself increasingly the subject of criticism for its position on human rights, especially among those political figures (whom we would eventually come to describe as neo-conservatives: Henry ‘Scoop’ Jackson and his followers) for whom détente was a betrayal of what should have been a world wide commitment to democracy. President Jimmy Carter put human rights at the centre of his inaugural presidential address on 20 January 1977, and his successor Ronald Reagan was to keep up this human-rights-based moral pressure on the US’s political opponents. It was during this period that democracy and human rights became inextricably intertwined and when the US (famously its UN ambassador Jeane Kirkpatrick) was forced to deploy Jesuitical reasoning to distinguish authoritarian from totalitarian regimes – the first though abusive of human rights were on the way to democracy and so sort-of okay (US allies, mainly in central and South America) while the second had no interest in human rights or democracy (the Soviets and their friends) and so were quite beyond the pale. (So we can see that in South America, the dissenting and international relations/*realpolitik* approach to human rights were frequently in conflict.)

It is worth repeating that none of this promotion of human rights was rooted in the international *law* of human rights – though that code was an undoubted

beneficiary of the attention the term was receiving. Helpful here was international law's growing receptivity to the idea of individual action and its gradual breaking free of its addiction to sovereign power – this fitted well with the new human rights atmosphere that was beginning to evolve. And of course when people began to think about what they meant by human rights and when dissidents tried to articulate their moral vision in opposition to totalitarian politics, it was to the framework of international human rights *law* that they naturally turned.

Rebirth

The end of the Cold War and the onset of globalisation gave human rights its final push onto the centre stage. Here was an ethical idea, the dignity of the human qua human, which transcended borders in the way that markets were increasingly doing in the new world of freedom (to trade). The capitalist system was just that, a system not a set of ideas, with no vision other than that of human rights now seemingly able to fill the space left by the collapse of socialist utopia, certainly neither religion (at least so far as the secular West was concerned) nor the nation state (once the source of great nationalist optimism but now increasingly seen as a key reason for bad government and therefore poor quality human lives). Already on the runway due to the activities of the dissidence and the neo-conservative case for democracy and human rights that was being made by successive administrations in the US, human rights took off after 1989.

It is a cliché to say that the world changed forever that year, but it is certainly true of human rights. Where once they occupied a small tent in the no-mans-land that divided the two great Cold War ideologies, believers in the independent integrity of human rights now found their patch of land being visited in ever-increasing numbers. The dissidents and peace activists from the former Soviet bloc and in South America were there already, of course, as we have seen. But the subject quickly transcended its recent origins. Traditional human rights activists who cared about individual freedom of conscience and liberty of movement were soon joined by those for whom the new discourse of human rights was fast becoming an

increasingly attractive substitute for a Marxism that seemed now in permanent decline. Rooting around for a fresh rhetorical basis for their commitment to collective bargaining, trade unions also found in the language of social and economic rights a more attractive explanation for their activities than a mere assertion of industrial muscle linked to their members' selfishness. A new tranche of supporters then came on board as enthusiasts for the market system, getting fully into their post Cold War stride, set about dismantling the social democratic forms that they now viewed as unnecessary concessions to prevent a revolution that would in fact (it was now clear) never come. The impact of this new, privatised version of 'freedom' on the poor, the old, the unemployed and others without means became a concern even for those who did not object to the market in principle, and for these squeamish capitalists a commitment to human rights became a tempting means of having it both ways. As the human rights plane hit the sky, many other groups had grabbed hold of its valuable wings, hoping that their particular causes could also hitch a ride. Political activists everywhere characterised their goals as human rights - outcomes to which they had a right not towards which they were (merely) determined to struggle.

Human rights are socialism without ideology, religion without God. Seen in this light, allegations of the cultural specificity of human rights talk fade away, the consequence of poor exposition of the idea rather than any underlying imperialist inclination. Most importantly, across the industrial and the developing world, the language of human rights opens doors for victims by helping them to articulate their plight in a way that the powerful can understand. It gives leverage to opponents of unregulated globalisation across the world by providing a powerful set of phrases with which to condemn the way in which market power impacts on the many. And because the critique is couched in the language of human rights, rather than in talk of communism or religious fundamentalism, the powerful – who only very rarely these days deny the idea entirely – feel bound to listen. This coalitional power enjoyed by human rights, to which I have already adverted, is of particular significance. A believer in religious truth can feel as at home in human rights as a socialist, a post-modernist and a political activist. Its mutable character perfectly

chimes with the uncertainty that is so much a part of contemporary intellectual inquiry, its lack of confidence in its own foundations a strength rather than a weakness. Even the very richest of the world's peoples have difficulty in wholly disregarding allegations of hypocrisy and double standards, and it is in exploiting the opportunities this honesty occasionally throws up that human rights does its most effective, practical work.

This contemporary appreciation of the value of human rights does not absolutely depend upon a commitment to a set of objective truths lying outside the person and beyond our language towards an understanding of which we are all obliged to strive. But nor is it narrowly rooted in the specific circumstances of its own recent birth, circumstances so carefully and so brilliantly explained by Moyn. In these times of the apparent hegemony of global capital, the idea provides us with a way of saying things, a perspective on human relations, which stresses our judgment as to what it is that is valuable to us about being human: respect for others; the dignity of the individual; fairness; the avoidance of cruelty; and the importance of solidarity and community.

Understood in this way, it is clear that while the subject as we understand it today can be traced more to the 1970s, this does not mean that earlier times cannot be harnessed to the human rights case – human rights advocacy has become adept at grabbing the best parts of our past and rearticulating them as childhood scenes in the early life of human rights. That the words were never then uttered or had any meaning is neither here nor there. The human rights idea of dignity draws unselfconsciously upon both religious traditions of human worth and socialist ideals of man as a species being. Its advocacy of the rule of law rather than of men allows it shamelessly to invent heroic human rights moments from the past include Magna Carta 1215 and the law of habeas corpus. Its assertion that a government based on the democratic principle is the likeliest to achieve the maximum amount of human dignity makes it look back fondly on England's Bill of Rights 1689 and the French Declaration of the Rights of Man as anticipators of today's great human rights movement rather than the outcomes of specific historical struggles that they in fact

were. In this Whiggish account, the good bits of the past are recast as steps on the road to the human rights success we enjoy today – it does not matter that there were many breaks on the road that supposedly led from there to here, or even that there is no road at all, just a multiple of pathways that are said (again only with the wisdom of hindsight) to have been on a convergent course.

Conclusion

There seems little doubt that whether or not equipped with natural foundations, the subject of human rights will continue to burgeon in the coming decades. Indeed it is not at all obvious what competition it faces in the contemporary market-place of ideas critical of the current status quo. Its knack of managing to be both part of and at the same time (somewhat) opposed to the prevailing capitalist model gives it a purchase across the globe and in all sectors of society that no other ideas can presently match. Whether the subject flourishes as well as grows depends on how it develops, and this in turn hinges on how effectively it achieves a balance between its three parts of respect for human dignity, legality and democracy, and in how successfully it manages to root itself as a universal truth in the world. The international standards on human rights that currently exist constitute an extensive guide to the requirements of human dignity. Of course more can be done, on the disabled and the indigenous for example (though recent progress has been made with regard to both) and displaced persons, but generally speaking the standards are there, and they are likely to remain into the foreseeable future, expanding as and when they are required.

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