

TRACK 20

ENFORCEMENT IS NINE-TENTHS OF THE LAW

THE RIGHT RIGHTS' FUTURE

What are the main distinguishing features of a person dedicated to human rights?

Activism: an energetic commitment to engage with the world, either on behalf of others or to assert – in common with others – rights of one's own.

Empathy: a feel for the humanity of others, an ability to see others in the world as though you were they, a capacity for spontaneous solidarity.

Impact: the desire to make a difference, to achieve tangible outcomes – a freed prisoner; a humanely treated detainee; the previously hungry now well fed; liberation of a people from tyranny.

Impact is linked to achievability, as Paul Bernal and others of you remind us in your responses to track 19 (on which more later this week, in my final post). The narrower the goal, the greater the likelihood that it is both achievable and can be seen to have been achieved. But if they are defined in this way, human rights victories will inevitably be highly particularised, always peripheral to the main action in society – the small change of a state whose paper currency is power and inequality.

How do you drive forward *large-scale* change to achieve a better human rights future for all?

And linked to this, how do you sustain such improvements, protect them from future drift back into the failed space from which you have just managed to escape?

This track – the final track in our project – is about *securing* the right human rights future, and then *keeping* it.

I get to law at the end, but must first prepare the way.

CIRCLES OF BELONGING

A brief synopsis of my approach to rights:

The very core of the human rights idea is this propensity to care for others: summarised at [track nineteen](#).

The first circle around this core is where we find the values that flow from the realisation of this propensity in culture: our commitment to equality of esteem and to the freedom of all to lead successful lives.

These values of equality and liberty are universal, natural and contingent.

Every culture has these qualities, however they might be described and however eclipsed they might be by circumstance – even the vilest place in the world has glimpses of them, albeit they might have been reduced to sporadic acts of heroism on the margins of overwhelming evil. An evil polity is one

in which the capacity to reflect the values of equality and liberty in public discourse has been obliterated. And a good society is one in which they are given a generously free rein.

If we need a theory to be able to call one of these situations good and the other one bad, we can call it a theory of justice. To me this is not much more than a description of why we ought to nurture the better part of our nature, to the advantage of other tendencies we might have. I know philosophers tell us to be on our guard about deducing an 'ought' from an 'is' – they call it the [naturalistic fallacy](#) – but what should we do if there is nowhere else to turn, give up on morality altogether? My theory of justice turns one part of what 'is' into 'an ought' and the other, (I say darker) bits of us into an 'ought not'.

The second, wider human rights circle, which surrounds the values of equality and liberty (themselves enclosing the core of caring) locate these values in a set of principles which can guide a society on how it should realise these values in action.

Here we are getting closer to the human rights idea in concrete form:

- The principle of respect for human dignity: to release the human flourishing that equality and liberty demand
- The principle of representative government: to guarantee equality of esteem in the public sphere, with each of us counting equally as citizens simply in view of our being
- The principle of legality: a necessary correlative of representative government and a hedge against violations of dignity, with only actions mandated by the people's representatives being allowed to the state

This is the right human rights model, a series of ever wider circles with our inclination towards goodness being buttressed by values and principles pointing in the same direction with ever greater concreteness.

THE POLITICS OF DOING GOOD

Where do rights fit in this world of ever-broadening circles of instinct, values and principles?

Human rights flow out of this process of increasing specification. They emerge as the finished product in an assembly line in which all the worker/creators agree in general terms about what they are doing but then argue vociferously about how best to go about achieving it.

In human rights, politics is this process of manufacture and human rights law its end result.

The people's representatives approach the public forum with whatever words are to hand to promote their view of the world. The human rights activist will deploy the language of rights to drive home the importance of action on the values and principles of good behaviour that matter to him or her. Others might root their calls for action in different terms, words like 'fairness' and 'justice,' or even 'community' and 'national security'.

There will be many arguments on the margins about how the various ideas behind these words might best be traded – in terms either of what they mean or of how they need to be reined in for the greater good of all.

Law emerges from this process of disputation. The human rights activist hopes for laws which promote the values of equality and liberty and the principles of dignity, democracy and legality in which he or she believes. These are human rights laws: sometimes they are described exactly in these terms (like the UK's [Human Rights Act](#)); more often the human rights dimension needs to be spotted in the substance of the measure itself, what it is aimed at and how this goal is in fact informed by the ideals of equality and freedom that lie behind the human rights project.

The human rights agenda is bound to be a radical one if pursued with honesty in the political arena. It stands for a commitment to equality of esteem and a commitment to human flourishing which

- demands a much leveller playing field on issues such as schools, housing and health.
- sees immediately the disastrous effects of autocracy in the world and campaigns for democratic change to come from within such places, whatever the short term impact on the interests of our own country
- indignantly rejects the brand of 'muscular liberalism' promoted by the UK prime minister in a recent speech in [Munich](#) as wholly destructive of the cultural aspect to identity which is such a part of human flourishing for so many. (I was so affronted by this speech that I have devoted [my last sidetrack](#) to it, appearing at the same time as this essay).

In short: human rights gives us a way of looking at things in general, a perspective rooted in a moral theory, and an argument about what can best be done to make our society better – a political as well as a moral theory.

A NECESSARY DIVERSION

Law soon, but some necessary ground-clearing first.

I can't end this project without once again addressing an issue that comes up time and again.

Is all this really global? Can there be universal human rights?

For human rights to be an authentic activity there have to be. But in saying this we must not fall into the trap of cultural imperialism. But nor should we simply cry triumphantly 'Look at Tunisia and Egypt!' and rest our case (though it is tempting).

How do we steer a path between the unreal ambition of a global rights' absolutism and the quiescence of 'anything goes' relativism?

Here is how I think it works.

As we get closer to action what the values and principles that I have been discussing entail will inevitably differ, not only from place to place but (within a place) from culture to culture as well. What we are after is what [Ronald Dworkin](#) calls the right attitude to the person.

Let's take as an example some conduct which is said by those doing it to be consistent with human rights and by others not to be so. How do we resolve this argument? We should ask:

is the disputed action driven by a bona fide commitment to the values of equality and liberty and the principle of human dignity?

If yes it is an action whose outcome we must respect even if it is not what we ourselves would have done. The European Court of Human Rights has a legal name for this idea of respectful subsidiarity: [the margin of appreciation](#). In English law, judges are familiar with the same kind of idea, [Wednesbury Unreasonableness](#). They understand that public bodies can do things they disagree with, but they cannot for this reason alone conclude that they are legally impermissible: it just happens to be stuff the judges themselves would have done differently or not at all.

It is the same with countries around the world.

The key to universalism is understanding there are two kinds of wrong: the wrong of 'I would have done it differently' and the wrong of 'hey that is totally out-of-order'. The first is about the right thing to do in a particular place, the second is about the right attitude to have: the first is locally sensitive, the second a universal imperative.

TOUGHER THAN IT LOOKS

And so, it is clear that with human rights it's not true to say that 'Anything goes'.

Sure in a good society there will be near agreement about the centrality of equality and liberty – the argument will be about detail, with the attitude being taken for granted.

However this is not always guaranteed to be the case.

Sometimes to keep the right attitude the human rights themselves may need to be downplayed, or even breached

How can this happen?

Well there is an obvious risk of an open society being transformed from within, of people using its freedoms in order to grab the power then to transform it. In order better to protect itself from this moral calamity, many such societies simply do not allow the participation of anyone dedicated to an entirely different version of truth and goodness: to racial or gender supremacy for example, or to a political system driven by self-appointed elites (military; communist; theocratic), or (increasingly) to a point of view which regards certain kinds of sexual expression as intrinsically flawed and for that reason worthy of punishment. These kinds of wrong attitude bar entry to the body politic in many good societies, either as a matter of culture or even in some places as a matter of law.

So here is the first point, a human rights respecting polity has an entry test, only those with the right attitude are allowed in. It manages its polity to ensure that it accords with principle and human rights values even if this seems to breach human rights in particular cases.

Sometimes though it is the right attitude itself that is itself put under strain by events.

Suppose that laws with entirely the wrong attitude escape the process of manufacture unscathed – maybe the political situation has become desperate and decent people have panicked, or supposing that usually good people have succumbed to pressure to yield to their dark side. In other words in the language we have been using here, a good society is drifting to the bad, the right attitude is becoming less easy to take for granted, more often honoured in the breach than in the observance.

THE LAW TO THE RESCUE?

Many feel that the law has an important role in both these scenarios, as a defender of the process of democratic decision-making even from the democrats themselves.

This is where I part company with many proponents of human rights.

The temptation is to say, ‘let the courts protect us – the judges can act as our ethical referees, stopping us from breaking the ethical rules which underpin our political game’. Ronald Dworkin for example has consistently taken this line.

I think this is well-meaning but ill-advised, on two scores.

First, it is ineffective – judges cannot stand aside from the crowd indefinitely. Even with the best will in the world they are bound to succumb eventually, or be removed.

And second, relying on judges like this impoverishes the body politic by removing the seriousness that flows from its capacity for uncontrolled action. A political system overseen by judges lacks the depth that flows from an awareness that its decisions have real consequences. Politics becomes like a nursery game played with nannies stationed at every exit ‘in case the children go too far’.

As the great American judge the beautifully named [Judge Learned Hand](#) once said ‘Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.’

Enforcement is nine-tenths of the law.

And enforcement is not just about police and zealous officials. It’s about how we respond to laws, in our hearts as well as our minds.

I am confident enough that given an equal playing field, the human rights story is a persuasive one which will win out on the day. Liberty will stay in the heart if it is given a chance to make its home there. Laws like the UK Human Rights Act play a part in embedding right attitudes – but they must never do so at the expense of free and full debate, must never seek to close down discussion by appeals to truth outside the debate. It is because the Human Rights Act does not do this that I think of it as a model piece of human rights legislation: see [T7 – The Right Rights’ Model](#) .

However I must go back to the first scenario mentioned above – can we trust the political system to police itself? Should courts at least be able to protect the good health of the democratic system itself, the civil and political rights that are essential to its proper operation, even if they are rightly not able to evaluate outcomes for human rights consistency?

They may not be driving the human rights car to any particular destination, but surely they are responsible for ensuring that the vehicle is working properly and at least staying on the road?

This is trickier.

Many scholars unimpressed by substantive interferences with policy by the courts have found attractive this idea of the judges as referees of process rather than of play: John Hart Ely's [Democracy and Distrust](#) is probably the most famous.

It's a seductive idea – the courts ensuring that politics is fair and then keeping it fair – ensuring that the votes are equal; that all those entitled (eg prisoners?) get the vote; the constituencies are fairly constructed; the playing-field of political interaction remains level during election campaigns; the legislative process does not become suffocated by money-interests; and much else besides.

It is not just this list, it's the 'much else besides' that worries me. How far would this need to go? The guardianship of process sounds fine in theory but in reality it is likely to be messy, conflictual and highly political.

In the end I think that the protection of the integrity of the political must also remain within politics. My colleague at LSE Grégoire Webber has written a very good [book](#) along these lines.

Of course as human rights campaigners, we must argue for a better and a fairer and a less money-oriented political process. We must argue for legislation which helps transform the process into one in which each voice truly counts as much as any other.

But there are no short cuts.

The law must always be a messenger for our thoughts, not take their place.

This right rights' future is a matter for all of us. Law is a vital instrument but politics is inescapable.