Are Rights Anything More Than Legal Conventions?

We live in an age of human rights. The language of human rights has become ubiquitous, a *lingua franca* used for expressing the most basic demands of justice. Some are old demands, such as the prohibition of torture and slavery. Others are newer, such as claims to internet access or same-sex marriage. But what are human rights, and where do they come from? This question is made urgent by a disquieting thought. Perhaps people with clashing values and convictions can so easily appeal to 'human rights' only because, ultimately, they don't agree on what they are talking about? Maybe the apparently widespread consensus on the significance of human rights depends on the emptiness of that very notion? If this is true, then talk of human rights is rhetorical window-dressing, masking deeper ethical and political divisions.

Philosophers have debated the nature of human rights since at least the 12th century, often under the name of 'natural rights'. These natural rights were supposed to be possessed by everyone and discoverable with the aid of our ordinary powers of reason (our 'natural reason'), as opposed to rights established by law or disclosed through divine revelation. Wherever there are philosophers, however, there is disagreement. Belief in human rights left open how we go about making the case for them – are they, for example, protections of human needs generally or only of freedom of choice? There were also disagreements about the correct list of human rights – should it include socio-economic rights, like the rights to health or work, in addition to civil and political rights, such as the rights to a fair trial and political participation?

But many now argue that we should set aside philosophical

wrangles over the nature and origins of human rights. In the 21st century, they contend, human rights exist not in the nebulous ether of philosophical speculation, but in the black letter of law. Human rights are those laid down in *The Universal Declaration of Human Rights* (1948) and the various international and domestic laws that implement it. Some who adopt this line of thought might even invoke the 18th-century English philosopher Jeremy Bentham, who contemptuously dismissed the idea of natural rights existing independently of human-made laws as 'rhetorical nonsense – nonsense upon stilts'.

Now, it is true that since the middle of the previous century an elaborate architecture of human rights law has emerged at the international, regional and domestic levels, one that is effective to wildly varying degrees. And for most practical purposes, it might be that we can simply appeal to these laws when we talk about human rights. But, ultimately, this legalistic approach is unsatisfactory.

To begin with, the law does not always bind all those we believe should abide by human rights. For example, some states have not ratified human-rights treaties, or have ratified them subject to wide-ranging exceptions ('reservations') that blunt their critical edge. A country such as Saudi Arabia can have a seat on the UN Human Rights Council yet persist in severe forms of gender discrimination – for example, prohibiting women from driving – because it made its acceptance of human-rights treaties subject to an override in the case of conflict with Islamic law.

Moreover, the international law of human rights, like international law generally, almost exclusively binds states. Yet many believe that non-state agents, such as corporations, whose revenues in some instances exceed the GDP of all but the wealthiest nations, also bear grave human-rights responsibilities. When manufacturers such as Nike use 12-year-olds to stitch soccer balls in Pakistan, or internet service

providers such as Yahoo secretly hand over the emails of dissidents to the Chinese government, many critics decry not just corporate malfeasance but human-rights violations. And this is so even if the corporation has complied with the laws of the country in which it is operating.

It is precisely in response to the threat to human rights posed by corporations that the '[Guiding Principles on Business and Human Rights]' (2011), the brainchild of the Harvard political scientist John Ruggie, were established. Endorsed by the UN, the principles are not legally binding either on states or corporations. Instead, they aim to provide an authoritative statement of human-rights responsibilities that apply directly to corporations, quite apart from any legal obligations they might also bear. Ruggie's ambition is that the principles will eventually inform corporate decision-making at all levels, illustrating the fact that human rights go beyond law and its enforcement.

Yet there is a deeper problem with identifying human rights with existing laws. Laws are the creations of fallible human beings. They might be good or bad, and so are always subject to interpretation and criticism in terms of independent moral principles. The international law of human rights, on this view, does not establish which human rights exist; instead, its goal is to implement moral rights we already possess, simply by virtue of our humanity. Slavery, torture and racial discrimination did not suddenly become human-rights violations only when they were legally prohibited. It is the other way round: we have human-rights law in order to give force to human rights that in some sense pre-exist their legal recognition. Unfortunately, no consensus has yet emerged among philosophers or anyone else on how human rights are to be defended as objective truths, independent of law.

The late American philosopher Richard Rorty sought a way out of this impasse. Although a staunch liberal, he turned his back on the philosophical enterprise of attempting to give a

rational justification for human rights. He judged that activity to be pointless now that human rights are a deeply embedded fact of our culture, not just our law. How can we justify human rights when they seem more compelling to us liberal Westerners than any other idea we might use to justify them? The real task that confronts us, Rorty thought, was the practical one of enhancing compliance with human rights worldwide, not the intellectual one of grounding rights in the fabric of reality.

A similarly dismissive attitude is adopted by Ruggie, who conceives of his Guiding Principles not as reflecting 'true' moral demands, but as rooted in empirically measurable 'social norms and expectations'. At a more sophisticated level, the late American political philosopher John Rawls, in his last work *The Law of Peoples* (1999), insisted that in a pluralistic world we cannot build our public commitment to human rights on any controversial account of the 'truth' about humanity or the good. We have to return, instead, to shared ideas embedded in the culture of a liberal democracy.

But is it enough to rely on the supposed fact that human rights are embedded in a liberal democratic culture? Or do we need to be able to step back from that culture and offer an objective justification for the principles embedded in it, as the philosophers have long supposed? The problem is that social expectations and cultural assumptions not only vary significantly across societies, but that they are fragile: various forces ranging from globalisation to propaganda can cause them to change dramatically or even wither away. Would rights against gender or racial discrimination disappear if sexist or racist attitudes come to predominate?

The question is not fanciful. Once apparently settled beliefs about the impermissibility of torture or the rights of refugees have recently suffered a backlash. There can be backsliding as well as progress, with no guarantees either way. Social expectations and deep cultural assumptions are no

more a sufficient basis for human rights than the law is. There is a fatal contradiction in defending human rights against the rising authoritarianism of a 'post-truth' era while simultaneously abandoning the belief that our commitment to those rights is itself grounded in the truth, and being prepared to defend it on that basis.

My own view is that human rights are rooted in the universal interests of human beings, each and every one of whom possesses an equal moral status arising from their common humanity. In other words, in defending human rights, we will need to appeal to the inherent value of being a member of the human species and, in addition, the interests shared by all human beings in things like friendship, knowledge, achievement, play, and so on. And we will need to ask whether these considerations generate duties that are owed to each and every human being. This proposal is hardly uncontroversial. The appeal to the inherent value of humanity will be contested by some as a brute prejudice – a 'speciesism' on a par with racism. Similarly, the appeal to universal interests will be contested by those who think that human rights are ultimately about respecting individual freedom regardless of whether it advances the right-holder's well-being.

Whether I'm right or not, I am convinced that we cannot sustain our commitment to human rights on the cheap, by invoking only the law or the assumptions of our liberal democratic culture. Only a deeper justification can explain why we are right to embody them in the law, or maintain a liberal democratic culture, in the first place. This has precisely been the aim of philosophical defences of human rights from the 12th century up until very recent times. To keep our human rights culture in good order, we cannot avoid engaging with the question of justification. And we should think of this not as the exclusive domain of professional philosophers, but as a process of public reasoning to which all citizens are called to contribute.

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