

Introduction

This book is about one of the great civilising achievements of the modern era. It traces the rise of human rights and explains why it is that their protection is now thought to be so important in so many walks of life, and across so many different continents and cultures. The chapters that follow cover the subject from its various angles, the legal, the political, the international, the philosophical and so on: if a concise account of human rights is what is desired, then these pages aim to deliver. But there is something else going on here as well, revealed by my title, ‘Can Human Rights Survive?’ This is not a book that celebrates the past while planning confidently for the future: there is no certainty of a happy ending. The idea of human rights is a fine one, and it has clearly been successful, but that does not mean that it is guaranteed to be so in perpetuity. A perspective on the world that is prospering today does not inevitably thrive tomorrow. The subject faces serious challenges. Unless these are squarely confronted and seen off, there is a risk that the idea will be destroyed for ever, or at best subverted out of all present recognition. In what follows I detail what these challenges to human rights are and I also provide a strategy for how I say we can rise above them. The book, therefore, is not only a retelling of the human rights story but is two other things as well: a warning against complacency and an intellectual manifesto for a successful human rights future.

The chapters that follow are also partly autobiographical, an exercise in a kind of old-style apologetics. I know firsthand of the seriousness of the threats posed by opponents of human rights because I used to be one of them myself. I had – and still have – a high regard for the arguments of the sceptics. My journey to and from human rights atheism began when I started teaching law in Britain in the early 1980s. Before then, educated in Ireland, I was an enthusiast for human rights of an entirely orthodox sort: bills of rights were great; judges even better; majoritarian democracy stinks; and so on. I took with gusto to the conversion of Britain to my human-rights-oriented point of view, one that I was delighted to find shared by almost all the public lawyers I met. Only the Westminster politicians took a different view, unreasonably clinging (as I saw it at the time) to the life-raft of parliamentary sovereignty, like a bunch of castaways from true, rights-based civilisation. Then I began to notice the cases that were flowing from the courts, a trickle at first but soon afterwards a flood: on the miners' strike, on *Spycatcher*, on Northern Ireland, above all on the various miscarriages of justice that came to dominate the legal scene in the 1980s and early 1990s.¹ I had to teach all these dreadful, coercive decisions while saying *at the same time* that the judges should be relied upon to defend freedom and human rights via a new constitutional settlement. It was absurd: manifestly these were not men (and they were practically all men) who could be relied upon to do this job. But they were the only judges we had and they were not likely to change anytime soon.

¹ For a fairly full account see K.D. Ewing and C.A. Gearty, *Freedom under Thatcher. Civil Liberties in Modern Britain* (Oxford University Press, Oxford, 1990).

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Further misgivings rushed into the breach in my beliefs opened up by the judges' bad behaviour, accelerating my drift to human rights hostility. Judges were bad everywhere, not just in Britain. They had been even worse in the past – there had never been a golden age of judicial good conduct; this was just a liberal myth.² Even seemingly progressive human rights cases, like the US decision permitting abortion *Roe v Wade*,³ were bad decisions when you looked more closely at them, causing more harm in the long term than the good they did in individual cases. And what was so awful about democracy anyway? It was a simple idea, the government of a community by its representatives: only those who wanted to subvert it fuzzed it up with pompous talk of inalienable rights and spurious fear-mongering about the 'tyranny of the majority'. To cap it all, there were no such things as human rights: they were a mere trick of the language, without any foundational base in truth or empirical reality. When I applied for my current job, as Rausing Director of the Centre for the Study of Human Rights at LSE, the first question at interview was why, given I was such a well-known opponent of human rights, I had bothered to apply.

The answer I gave then is the bridge across which I have ever since been shuffling the intellectual material with which I have reconstructed my belief in human rights, recovering my enthusiasm for the subject, while at the same time not reneging on the perspective that had fuelled my earlier

² For the best development of this point that I have read see K.D. Ewing, 'The Bill of Rights Debate: Democracy or Juristocracy in Britain', in K.D. Ewing, C.A. Gearty, and B.A. Hepple (eds.), *Human Rights and Labour Law* (Mansell, London, 1994). ³ 410 US 113 (1973).

scepticism. Bills of rights, written constitutions, judicial decisions on rights and so on are not, I said, the whole of the human rights story; they are merely means to an end. That end is the proper achievement of human rights. If these methods of securing this end fail then they should be condemned. Judicially-enforced bills of rights do fail. It followed that to deplore such defective means was to be more of a human rights enthusiast than those who promoted their mere existence as sufficient in itself to warrant celebration. And as to the nature of these human rights goals to which all else was subject? Here the answer became and still is rather general. 'Human rights' is the phrase that comes to mind when we want to capture in words a particular view of the world that we share with others and that we aspire to share with still greater numbers of people. That view is one rooted in the simple insight that each of us counts, that we are each equally worthy of esteem. This esteem is not on account of what we do, or how we look, or how bright we are, or what colour we are, or where we come from, or our ethnic group: it is simply on account of the fact that we are.

To esteem someone is not necessarily to like that person, still less to have to admire or approve of him or her. All these states of mind suggest attributes in the other that warrant or justify such feelings on our part. Esteem does none of those things; it involves no one in any kind of talent or beauty contest. There is no entry fee or preliminary judgment day. What esteem requires of us is that we see individuals as exactly that, as first and foremost particular persons, just like us. Human rights is in this sense a visibility project: its driving focus is to get us to see the people around us, particularly those

whom we might otherwise (only slightly metaphorically speaking) not see at all, or those whom we would try to ignore if we did catch a glimpse of them. It follows that, at its core, human rights is a subject that is concerned with the outsider, with the marginalised, and with the powerless – these are the various individuals and groups of individuals who in any given culture or time are most likely to be invisible to those around them, who are most liable to find themselves pushed beyond the periphery of a community's field of vision, or who are viewed as non- or sub-human if they are seen. It is these people who need human rights protection the most.

This right of each individual to be treated with as much esteem as any other unfolds into two further categories of entitlements, each derived from this insight about esteem but carrying the concept closer to practical realisation in our daily lives. The first emphasises what the idea of human rights demands should *not* be done, the second speaks in more positive terms about what *ought* to be striven for. Turning to the first of these, it is clear that closest of all to our macro-principle of esteem is the idea of equality which in this context manifests itself as a prohibition on unjustifiable discrimination: the insistence that none of us should find ourselves treated disadvantageously solely on account of some characteristic – our colour, our ethnicity, our gender for example – which is not clearly germane to the task at hand or to the service we desire to receive. Human rights also insists that none of us should be used as mere instruments of another, reduced to a means deployed by another for his or her ends. We each of us have a right to life and also a right not to be treated cruelly, by being tortured or subjected to inhuman or degrading treatment. We have a similarly

absolute right not to be reduced to slavery or otherwise forced into servitude at the command of another. These various rights follow from the duty imposed on all of us not to reduce our fellow individuals to non-human packages to do with what we will. Where their breach occurs in a discriminatory way we have the most horrific human rights abuse of all, genocide.

This negative side of human rights, the version of the subject that is all about bad news, human horrors and how to prevent them, is an important strand to our subject, but it is not the only one. It is clear both from the way in which we use the term and from the breadth, range and aspirations of the international human rights movement that there is more to the phrase than this bleak prospectus. This is where our second category comes into play. Human rights has an upbeat dimension as well, one that stresses positive human potentialities rather than our dismally ineradicable inclination to harm each other. This strand speaks to the right that each of us has in view of our humanity to make the best of our capacities, to do well, to lead lives that close to their end we will be able to look back upon and call successful. Human flourishing has been brought by linguistic usage and the actions of activist civil society well within the rubric of the term human rights. This part of our subject speaks to our right to thrive, not only as individuals but also through those associations and connections – with family, community, culture, national identity and so on – by which our humanity is further enriched. This is the part of the human rights story that celebrates difference and diversity. It recognises that we do not all have to follow the same pathways to this kind of success. So whereas the universals in the first branch of our subject are clear for all to see – do not discriminate unjustly;

do not use others solely as instruments of your own will – the generalisations here are broader, less prescriptive, more emancipatory – give everybody a chance; open up opportunities for all; empower people to do the best they can.

If all this sounds rather broad, then it is a breadth that has been increasingly embraced by legal and political communities across the world over the past several decades. I return to this in more detail when I trace the growth of human rights in chapter 2. For now it is enough to note that the Universal Declaration of Human Rights, agreed in 1948, reflects a broad commitment to our subject, one that embraces both of the aspects of it we have just been discussing. That acclaimed document contains not just the expected prohibitions on cruelty but also an agenda of action to improve the lives of the peoples of the world, the kinds of things we might come up if we were designing Nirvana from scratch. There are prohibitions on torture, on cruel, inhuman and degrading treatment, and an absolute ban on slavery, servitude and the slave trade. But there are also guarantees of the good life, ‘the economic, social and cultural rights’ that are ‘indispensable for [a person’s] dignity and the free development of his [or her] personality’.⁴ The same is true of the various other international agreements that have followed that declaration, in particular the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, both agreed in 1966. Here the rights set out in the Universal Declaration are fleshed out and given a degree of international enforceability. Regional bills of rights (such as the European Convention on Human Rights) provide

⁴ Article 22.

a similar kind of service for groups of states, albeit usually with a stronger enforcement arm. Most embedded of all are the domestic bills of rights now to be found scattered around the globe, some with very wide socio-economic reach, others with civil and political priorities but all taking the subject far further than the prohibition of cruelty and of unjustifiable discrimination. The South African bill of rights is the strongest example of this, but there are many others as well. We probe into these domestic human rights instruments in greater detail in chapter 3.

Matching this legal success has been the growing ascendancy of this broad version of human rights in the political sphere. This also bears closer examination later, in chapter 2, but what has been increasingly evident in recent years has been an increased sense of the need to articulate political goals in rights terms. This began with the post-World War II desire to reshape the concept of democracy to include rather than undermine the idea of rights. Since the end of the Cold War, human rights as a subject of political discourse has really taken off, with more and more of the peoples of the world embracing this language as a way of organising political debate and of informing their relations with the world. The category of human rights has increasingly appeared to be an open one, capable of being filled with meaning by those anxious to use it to improve the lot of their fellow beings, of achieving greater success for our species, and thereby handing on to the next generation a better set of prospects than they themselves have inherited. So all-embracing has been the language of human rights of late that it has seemed at times impossible to articulate a vision of the future without lapsing into its vernacular.

Where once we had ideas like ‘socialism’, ‘social justice’ and ‘fairness’, nowadays increasingly ‘human rights’ is being called upon to do all the moral work.

Here though is the beginning of the rub. True, this recent triumph of human rights idea suggests that it should be foolhardy or just besides the point to question its continued success. Part of me agrees: the phrase is doing broadly speaking good work, and surely it would be better now to suppress all those residual qualms that I might still have from my hostile past and join whole-heartedly in the celebration? But this is to do the subject what would ultimately be a disservice, for it is exactly at moments of apparently greatest triumph like these that dangers can be found lurking in the margins, perils which, if left unnoticed, could well soon spread and damage the whole. This is where the old sceptic returns, keen to destabilise – but not in order to destroy this time, rather with the purpose of re-securing and rebuilding for the future. Three areas of the subject as it has developed in recent years are a cause of particular concern, and these have stimulated the crises which I identify and tackle in the three chapters that are at the core of this book.

First there is the crisis of authority. Why is it that human rights has moved onto so much ethical territory, to the exclusion of other moral notions that have done useful work in their day? It suggests a subject with a strong set of foundations underpinning this moral colonialism, and indeed the idea of human rights has long been wedded to notions of truth and moral obligation. Its supporters have always needed to be able to answer convincingly the sort of questions that sceptics ask: ‘where do these human rights you insist on come from?’;

‘how do we know we have these human rights?’; ‘who tells us what the content of human rights is?’; crudest of all, ‘why should I care about my fellow humans, if they are not related to me or even from my community? – their suffering or failure to flourish is no concern of mine’. In the old days the response used to be fairly simple. The human rights advocate being questioned in this way could choose between two answers depending on which suited the sceptical questioner more. Either ‘Your God insists that you act towards others in this way, because these other people, these strangers, are special, made by your God and therefore have a right to your esteem’; or (for the more rationally inclined) ‘When you work through in your mind what it involves to be human, you will see that it makes sense to develop the kind of set of moral obligations that we are calling human rights.’ To anxieties about how to spot what the content of these human rights actually was, and therefore how to act in a practical way, the answer that used to work was simply to say that it was necessary to consult the moral boss, either the priest or the professor depending on which of the first alternates to the fundamental question had proved satisfactory.

Now it will be entirely clear that this sort of thing doesn’t work anymore, or at least does not do so effectively in twenty-first century developed society, precisely the environment in which the idea of human rights has risen to such prominence. In such places, neither religion nor reason has the hold that each once had. The philosophical movement since the end of the nineteenth century has been away from truth and external, observable realities, and towards doubt, indeterminacy and contingency. The talk has all been of talk – the

importance of words and language usage – and of agreement about meaning: not what the words actually mean but what we collectively say they mean, which it is now said is the very best we can hope for in this age of uncertainty. Despite its legal and political success, the idea of ‘human rights’ has been looking more and more like an awkward and ill-fitting old relative at the philosophical house parties of recent years, standing in the corner muttering about reality and ‘a sense of moral obligation’ while all about the young thinkers are jiving away grabbing what truth they can from the wordplay swirling about. So we have a paradox: the idea of human rights has been reaching dizzying heights in the worlds of politics and law whilst its philosophical base has been increasingly called into question, challenged as to its very existence in ways that would have been unthinkable in previous epochs, when the term was not nearly so powerful or so successful. This mismatch cannot go on indefinitely: the subject of human rights needs a better answer to the question of the basis of its authority than it seems currently able to provide, and if it fails to deliver such a response then its medium to long term future cannot be assured. In chapter 2 I seek to make the whole human rights building altogether more secure, or at least as secure as it can be in these insecure times.

The crises in chapters 3 and 4 grow out of the philosophical vacuum that is the subject of chapter 2. Each reflects what can happen to a term which achieves popularity without clarity as to its meaning. The ‘crisis of legalism’ discussed in chapter 3 explores the various problems that come with the successful embedding of the term ‘human rights’ in our legal discourse. It is at one level a wonderful thing for any idea to be

made part of the law, and even more marvellous for it to be included in a country's fundamental code such as its constitution or its basic bill of rights. Human rights often achieve the latter state of supreme legal authority, as high a summit as it is possible for any mere notion to aspire to within the discourse of law. But if we recall that our subject is primarily about empowering the voiceless and the marginalised and then remind ourselves that law is not generally seen as a radical or even a progressive tool – quite the reverse in fact – when we do this, we are left with the problem of *authentic* enforcement. What I mean by this is that we have to recognise that we are relying on a largely speaking conservative force – the law, the judges, the legal profession – to carry our radical project through to completion. But which great social movement has ever before put the lawyers in its front-line? What kind of a war-strategy is it to entrust our greatest emancipatory tasks to judges, a sub-category of precisely the kind of well-off, already empowered person who ought to be terrified by the prospect of true human rights? In this chapter we ask how human rights can be carried forward into law, as carried forward they must be, without being drained of all their energy and zest in the process. In particular, we consider how they can be kept part of the maelstrom of the politics that has given rise to them and not quarantined in the reactionary but omnipotent realms of the law. Bridging the gap that has opened up between the two ways in which law and politics treat human rights is the key to the survival of our subject in the face of the particular challenge considered in chapter 3.

Chapter 4, 'the crisis of national security', looks at the price of success not in the legal but in a particular and

important political field. When human rights amounted to not much more than a tiny, faraway dot on our democratic radar they tended to be ignored by our political leadership, or turned into a tool of international relations if they were spotted at all. That changed with the success of the term in the post-Cold War era. When everybody started clambering aboard the human rights wagon, government leaders started to do so as well. In the old days, pre-1989, you could tell how undemocratic a country was by how loudly it proclaimed itself to be a democracy in its national description. Things are not quite as bad as this with human rights, but if we are not careful they will get there. Human rights protection is such an apparently self-evident good, so clearly the right thing to do, that leaders with ulterior motives have been unable to resist deploying the term as a basis for action. In the domestic sphere we have seen increasingly illiberal and restrictive terrorism laws being passed around the world, and these have been invariably presented not as in conflict with but rather as in accord with the prevailing human rights norms: either the declared emergency is a human-rights-consistent suspension of human rights or the attack on freedom under examination turns out on closer scrutiny not to be an attack at all, to be in fact compatible with human rights because ‘necessary in a democratic society’ or for some other such exculpatory but human-rights-based reason. Thus does the idea of human rights get punished for its success by being taken over and turned into a force for the legitimisation of cruelty and oppression.

As I say this has not happened yet to a very great extent, but unless we pay close attention to the foundations

of our subject and attend to its health as critical friends rather than bland cheerleaders, there is every possibility that it might do so. The point has a foreign policy dimension as well. The rallying power of the term human rights has proved itself very useful in those reasonably functioning democracies where the consent of the governed is more or less required for large-scale government decisions but where military action abroad has become increasingly unpopular as a tool for the promotion of a nation's interests overseas. In this final substantive chapter we also look at the damage done to the emancipatory power of human rights, and to its capacity to speak for the powerless and the disenfranchised, by its being deployed as a rationale for military action. Whatever the short-term benefits of such usage, the damaging long term effect on the integrity of human rights is immense: behind every Kosovo, there is, we are forced glumly to conclude, an Iraq waiting to happen.

The core chapters that follow this introduction provide an agenda for action so far as each of the particular themes with which they deal are concerned. A recurring leit-motif in this book is the idea of human rights as a mask – one of truth in chapter 2, of legality in chapter 3 and of national self-interest in chapter 4. My agenda for action requires us to think about what to do with each of these masks, whether to leave them on, allow them to be cast off if needs be or rejected completely – broadly speaking these are the three suggestions for chapters 2, 3 and 4 respectively. Another running theme is the contrast between the general and the particular. Human rights is by definition concerned with the individual, with ensuring that the vulnerable among us are noticed and then

given the solicitous attention each deserves. How can human rights realise this goal on a grand scale? Critics of the subject say that it is ultimately only about the occasional individual act of charity and that it has no coherent political framework for transforming its compassionate instincts into a truly progressive politics. They make the point that the concern demanded by human rights for the particular, for this or that individual, in the end holds back the subject, denies it the capacity for progress enjoyed by more robust and less sentimental philosophies (like utilitarianism and socialism for example). An answer to this powerful critique emerges from the way in which our subject is aligned with truth (in chapter 2) and with democracy (in chapter 3) – and because the point is so important I return to it again in chapter 4 where the dangers of turning human rights into a set of abstract values rather than an ethic with an individual focus are (I hope) laid out for all to see.

In my final chapter, I consider what more needs to be done to consolidate a successful future for human rights. I ask how the idea can be made to work properly to solve emerging problems such as those related to the right to life, to genetic engineering, and the right to die. I ask how human rights activists should relate to other social forces for change such as the environmental and animal rights movements. And I consider which kinds of attitudes should be considered as not capable of being preserved within the human rights tent, large though it is. My aim is to end on an upbeat note, to deliver a prognosis which is optimistic about the future but stern about what the patient must do now to avoid declining health later. Human rights can survive, but their supporters must think

harder, run with rather than against democracy, not be afraid of making powerful enemies, and be choosier about what they stand for while willing to build alliances with the forces of justice and fairness wherever they find them.