

IS DEMOCRACY NECESSARY FOR HUMAN RIGHTS?

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Abstract

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Like Flaubert's 'Charbovary', Western Europeans often use the phrase 'democracy and human rights' as if it were a single word. On closer inspection, however, one could argue that the two ideas share little in common.

Notions of individual 'right' first emerged in the West as protections for propertied classes against monarchical overreach. That conception did not wholly change with democratisation, as the 'tyranny of the majority' was deemed to be as dangerous as any monarch. The French revolution did largely assimilate the two terms: the ideal of the *Déclaration des droits de l'homme et du citoyen* (1789), inspired by Rousseau's postulate of a 'general will' (*volonté générale*), was that, in a true assembly of the people, the good of the nation and the good of individuals would always coincide. Short of that high ideal, however, the concept of 'human rights' continues to presuppose suspicion towards any type of government. To this day, radical democrats dislike notions of rights as 'trumps', as it seems to remove controversies from open deliberation, handing them over to a judicial elite.

For mainstream liberals, by contrast, democracy and human rights are complementary. For John Rawls or Ronald Dworkin fundamental rights provide democratic legitimacy. The same holds for Jürgen Habermas – not altogether a liberal in other respects. Democracy, for these writers, is more than the brute majoritarianism of a sheer head count. Certain individual interests, such as life or bodily integrity, must first be protected *from* the majority if all citizens are to come together as civic equals to deliberate about the public good – or, by extension, if elected representatives are to do so on their behalf.

We end up with two opposing models. For sceptics, human rights represent the antithesis of democracy, the foreclosure of decision-making that ought to remain in the public sphere. For believers, rights represent a necessary safeguard, a barrier standing between democracy and mob rule. Some scholars have approached the question from the other side, asking not whether human rights are good for democracy, but whether democracy is good for human rights. They approach the task empirically, concluding that, on observable measures, democracy is the regime most conducive to human rights. That's a good start, but points only to an observed correlation, not to an inherently necessary link. After all, if the same empirical criteria could show that some dictatorial model delivers human rights to a comparable degree, then we could not claim that democracy is strictly necessary. My question, then, is not whether democracy just happens to correlate with human rights, but whether the very concept of human rights presupposes democracy. In my view it does.

Internationalist pluralism

At first glance, the concept of 'human rights' seems to travel well. Many aid workers will confirm that people living through poverty, political repression, or armed conflict eagerly embrace human rights. Democracy often sparks less enthusiasm, seen as tied to Western societies, which are viewed as the cause rather than the cure for local ills. The concept of 'human rights' has better managed to shed its Western brand.

Some scholars argue, for example, that Islam entails human rights. While they also maintain Islam is *compatible* with democracy, none have seriously argued that democracy is strictly required. Nor could they easily take that view if democracy is to maintain its core demand of all citizens guaranteed constitutive (as opposed to merely consultative) standing within decision-making processes. In a word, Islam's link to human rights is more easily presented as categorical and unconditional. Its link

to democracy, by contrast, is contingent and conditional. In that respect, Islam recalls strands of Christianity which developed models of natural rights while resisting democratic reforms.

The United Nations mirrors those ambiguities. To be sure, several UN bodies do adopt parliamentary and voting procedures. Moreover, countless treaties, declarations, reports, and pronouncements suggest that democracy provides the best vehicle for achieving human rights, and that human rights provide vital guarantors of democracy.

But that is only one story. The aspirations of the 1990s, when in the wake of the Cold War the UN championed the marriage of democracy and human rights, emerge as an historical aberration. The longer history of the UN reveals an ethos not of democracy, but of what I would call internationalist pluralism, whereby democracies and non-democracies are deemed to enjoy equivalent political and moral stature. The UN has always welcomed non-democracies and systemic human rights abusers among its members.

Some observers justify this step on diplomatic grounds: 'Better to maintain open communication with brutal regimes than to isolate them. Good politics is often about dodgy deals, not high principles.' Whatever the best strategies may be, however, core principles cannot simply be shoved aside without hollowing out the very notion of human rights. Yet the fundamental moral equality of democracies and non-democracies has remained sacrosanct at the UN. Particularly glaring examples emanate from human rights bodies themselves. There are of course many of them, and they cannot all be painted with the same brush. Still, a particularly high-profile body, the Human Rights Council, far from censuring abusive states, vigorously shelters and indeed openly elevates them.

When a democracy criticises the human rights records of non-democracies they commonly strike back with counter-charges. That standoff is more than rhetorical. It reflects inveterate divisions. Tracing back to the UN's founding in 1945, it became a commonplace for democratic states to advocate civil and political rights while socialist states championed social and economic rights. That division certainly was never air-tight. By the 1970s northern European democracies led the world in both sets of rights. In the 1990s, as activists aimed to bridge that divide, an 'indivisibility' principle became established doctrine, to the effect that those various sets of rights would be recognised as sharing equal and mutual importance.

From indivisibility to necessary trade-offs

But the indivisibility principle is utopian. The day when all rights are respected will be the day when human problems will have come to an end. Human rights cannot be 'indivisibly' achieved for the simple reason that many of them are nowhere near being realised even in isolation. A chief ground for that failure is repeatedly recognised within the UN as insufficient resources. Civil and political rights had once been seen as 'inexpensive', that is, as 'negative' rights requiring only that states refrain from action – it would supposedly cost nothing for a state to avoid an unnecessary intrusion into private life or allow persons to observe their religious faith. But that myth has long been dismantled. The costs necessary for any human right to be ensured, including reliable oversight through the education and maintenance of a competent, independent judiciary, are always substantial – contrary to older doctrines holding that only economic and social rights imposed relative and progressive duties. Since most rights turn out to involve greater or lesser levels of expense, most of them end up in practice imposing only relative and progressive obligations.

Cost constraints follow from limited budgets, imposing in turn choices among rights. A country might well allocate resources to promote democratising norms, such as fair and secure voting procedures or free speech, but may then have to draw those resources away from hospitals or employment services. Some other country may instead choose to allocate funds for hospitals or employment services, with less spending on voting procedures or protections of free speech. Those two choices are treated at the UN as equally valid. If all rights are of equal value, then limiting one set is no worse than limiting another.

Few specialists would go so far as to claim that democratising rights are less important than others. Within the UN, however, they are in no sense treated as more important, since no right is accepted as more important than any other. The essence of internationalist pluralism is that democracy is considered no less, but also no more important than food, water, religious faith, privacy, employment, health care, or other interests. A dictatorship in which people are eating may not be much better than a democracy in which people are homeless but is not deemed to be worse.

UN agencies do recognise the importance of democratising rights, yet that only means that democracy is important alongside food, water, privacy, employment, health care, and all other interests that also happen to be human rights. When UN bodies say 'human rights require democracy' they are saying very little indeed, no more than that 'human rights require food', 'human rights require health care' –

in other words, human rights require human rights! But do human rights require democracy in a prior sense – yes, prior even to food or water?

Central to the traditional concept of human rights is their supposedly 'fundamental' character. To call human rights 'fundamental' is to say that they 'found' something within law, whilst themselves remaining 'un-found', that is, requiring no further foundation. On prevailing doctrine, human rights therefore apply to all states, irrespective of their internal political regimes. But that principle can mean very different things. Within the pristine ideal of indivisibility, it might appear to mean that states must democratise. After all, if democratising rights form part of the corpus then by definition human rights would require democracy. From the standpoint of cost, however, a different picture emerges. As states must always choose among rights they often choose against democratising ones. In so doing, they may well violate the indivisibility principle, but only in the trivial sense that virtually every state, as a matter of cost, ends up having to violate it.

Re-founding human rights

The question as to whether human rights require democracy becomes a serious and distinct one – that is, more than just tautologically implied from this or that supposedly democratising right – if there is some model of human rights within which they simply cannot exist outside democracy. Is there some model under which even violations of rights to privacy, health care, or fair trials would not wholly ruin the system, while inadequate democracy *would* ruin it? If there is such a concept, then it departs radically from any concept of human rights that we have assumed over the past few centuries. We cannot answer that question without re-building the concept of a human right from the ground up.

For the better part of a century, the social sciences have undergone what is commonly known as a 'linguistic turn'. In the 19th century, scientific knowledge pursued value-natural positivism and objectivism, assuming 'raw' facts about the social world to be self-contained and amenable to verification. A momentous shift began with Wittgenstein. Facts were now understood to be embedded in language and therefore in culture and interpretation, unable to describe the social world in such absolute terms. Facts about the social world, it is now widely held, are already theory-laden.

Human rights never had their linguistic turn. Theories of human rights claim to observe certain interests as universally shared among humans, such as our needs for basic access to food, clean water, privacy, employment, and other such things, which for ease of reference I shall now call basic human

goods. Whether or to what degree universality can be ascribed to such goods is a longstanding and difficult question. For present purposes let us simply assume some set of universal human goods. According to the traditional theories, once those goods have been identified, they then simply need to be incorporated into law in order to become human *rights*.

That process is invariably deemed to be a procedural and technical one. The absence of a linguistic turn means that any conceptual difference between human goods and human rights is scarcely noticed. Yet the problems I have mentioned stem largely from our failure to draw it. Unsurprisingly, when asked about failures of human rights – why genocides, crimes against humanity, and countless other abuses proceed unabated – specialists point mostly to procedural and technical rationales, amounting in one way or another to a lack of adequate implementation linked to inadequate resources. Such an account makes equal sense irrespective of whether we use the phrase 'human goods' or 'human rights', again underscoring our failure to distinguish the two. Many an activist would consider such terminological differences to be a waste of time: 'I'm just interested in concrete change on the ground. Whether you call it "human goods" or "human rights" is unimportant.' What, then, is the difference? What kind of linguistic turn is required?

Aside from Robinson Crusoe, few human beings can assume direct access to human goods. Even when we farm our own food or fetch our own water, we ordinarily do so subject to and mediated within legal regimes. That reality becomes obvious for those of us who do *not* farm our food or fetch our water. We rely on background legal arrangements to ensure our pursuit of human goods, whether they be food and water or privacy and religious activity.

When government, through action or omission, threatens those goods, then it is in the language of *rights* that we seek redress, at least under standard human rights doctrine. But what if the law, through misapplication or corruption, fails to provide redress? Our only recourse then is to speak out directly – to government, to the press, to our fellow citizens. The *ultima ratio* and therefore the ultimate foundation for our access to human goods is speech. When that is gone, then no recourse remains. At that point, we become at best wards of government, hoping it will ensure access to as many human goods as possible – goods we in no sense enjoy as a matter of *right*. We enjoy no access to human goods outside or beyond our status as legal subjects, and therefore we enjoy goods as a matter of right only insofar as we can speak. Only speech guarantees that we can make requests, file complaints, seek investigations, request hearings, and so forth.

Many specialists would agree, but would doubt that my claim here extends very far. Yes, they would concede, it is hard for us to pursue our rights without free speech, but it is just as hard to pursue our rights without food and water, without fair trials and safe prisons. Once again we slip into the tautological reasoning whereby human rights presuppose nothing but themselves. *That* is the mistake of collapsing human rights into sheer human goods. A human good becomes a human right only in and only through language. A human good is an object of *enjoyment*, in the sense that we benefit from privacy, religious activity, food, water, employment opportunities, health care, and the like. A human right, by contrast, is an object of *vindication*. To be clear, it presupposes not 'free speech absolutism', but rather what I have elsewhere called 'viewpoint absolutism', that is, every citizen's prerogative to expression within public discourse (*Öffentlichkeit*) with no threat of penalty based solely on the viewpoint adopted.

From human goods to human rights

A human right presupposes free speech not simply as one among a 'checklist' of human goods or indeed of human rights, but as the condition for the very possibility of human rights as something more than and distinct from sheer human goods. As a human good, free speech certainly is not more important than food and water, and indeed is arguably less important; by contrast, as a condition for the very possibility of human rights, free speech represents the only ultimate channel for laying claim to food and water within a legal regime.

Only by distinguishing between human rights and human goods can we come to appreciate the historical exceptionalism of the idea of a human *rights* regime, and how utterly removed the prevailing international regimes are from any such model. A regime of human rights necessarily presupposes democracy. History has certainly witnessed non-democracies in which speech was relatively free, as in various periods of English, Bourbon, Hapsburg, Russian, Prussian, or Ottoman monarchies, which retained the power to enhance but then also to contract individual free speech largely at will. As I have suggested in my book *Hate Speech and Democratic Citizenship*, by contrast, only democracy is necessarily defined and structurally constituted by the citizen prerogative of expression within public discourse.

Insofar as no such prerogative has either formally or practically been recognised within the dominant international human 'rights' regimes, which relegate speech solely to the status of one among many

rights, those regimes cannot properly be called human rights systems at all. They are at best managerial regimes of human goods, and even that description is rather generous, given that many states show little interest even in securing goods, let alone rights.

Democracy is by no means strictly necessary for current international mechanisms precisely because, as purely managerial systems of human goods, democratising norms are neither less nor more important than any other basic human goods, like food or water. By contrast, for a regime to take the leap from human goods to human rights is, as a purely conceptual matter, impossible outside a fully-fledged, viewpoint-absolutist democracy.

Today's human 'rights' specialists largely resemble the character of Christiane Kerner in the 2003 film *Good Bye Lenin!* Abandoned by her husband with three children, she throws herself into the life of the dictatorship in order to do the best she can with what she has. There is pretty much no compromise that today's human 'rights' professionals are unwilling to make with the worst possible dictatorships simply for the sake of keeping the UN machine running. 'After all, what's the alternative?' one famous specialist barked at me at a conference a few years ago. I by no means fault such experts. They are achieving nothing less than Kerner achieves – but also, to be absolutely clear, *nothing* more. Yes, there are human goods aplenty outside democracy. Just as surely, however, outside democracy there will never be any regime of human rights.



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