



The Risk of Freedom

briefing

Human Rights: an article of faith?

Ancient philosophers argued for a concept of natural justice, grounded in reason, and independent of policy. The concept was given theological backing by St Thomas Aquinas, for whom Natural Law was also divine law; subsequent thinkers, in more secular spirit, rewrote natural law as a charter of 'natural rights'. According to Locke and Rousseau the respect for 'natural rights' is a precondition of political legitimacy. For Enlightenment thinkers 'human rights' were to provide the foundation for a purely secular form of government. Hence the new political order of Revolutionary France began with a 'Declaration of the rights of man and of the citizen'. The immediate result, however, was the total collapse of the rule of law in France, and the first real genocide of modern history.

Rights have an absolute character that brings all legal argument to an end

It was another genocide that gave rise to the UN Declaration of Human Rights. Contemplating the holocaust, the Western powers felt the need for a framework for the protection of the ordinary citizen against the powers of the state. The UN Declaration envisaged a transnational order, that would offer protection to individual people from a place beyond the nation state. The same moral idea was enshrined in the European Convention of Human Rights. An idea that might have been discredited by the French Revolution, has thus become the credo against which every form of government is judged. In the words of Michael Ignatieff, 'human rights has become the major article of faith of a secular culture that fears it believes in nothing else'. Thus has arisen a new 'moral internationalism' which is steadily usurping the power and authority of the nation state.

This moral internationalism seems both to authorise military interventions, and also to condemn them. It lends authority to the United States in its efforts to export democracy, and also exposes the United States and its citizens to accusations from the alleged victims of 'human

rights abuses'. For many people the advocacy of human rights augurs a more just and more peaceful world. For others it is a recipe for instability, arbitrariness and injustice, whose principal effect will be to undermine the few genuinely law-governed states while doing nothing to bring law to the remainder. Perhaps the wisest stance is that adopted by Sergio de Mello, to whom we pay tribute in this *Briefing*. For de Mello the most fundamental human right is the right to a rule of law. Take away law, and the advocacy of rights becomes empty rhetoric. Establish law, and rights follow as a matter of course.

But how do we prove that something is or is not a human right? For Locke the right to life is possessed by every human being — including the child in the womb. Advocates of abortion, however, argue that there is no such right, or if it exists that it can be overridden by a woman's 'right to choose' what to do with her body. Some argue that the death penalty violates human rights; others argue that it is a human right of the victim.

Compounding the philosophical problem is an additional legal difficulty. As Thomas Cushman argues, rights are of two kinds — negative and positive, freedoms and claims. My right to walk in a public space is a freedom. My right to my wages is a claim. The 'right to health', or at any rate 'health care', and the 'right to education' are claims. By advocating them we assume that there is both a duty and a power to provide for them. In other words, we connive at the increased power of the state. As soon as we admit claim rights into our list of human rights, therefore, we have begun to reshape what was to be the individual's shield against the state as the state's sword against the individual.

The questions are not only philosophical. They are practical too. Rights have an absolute character that brings all legal argument to an end. Conflicts of rights are therefore irresolvable, and the one who can claim a right where another merely claims a privilege will always win the argument. We give an example of this, in the case of gypsies' rights and the havoc they are causing in Britain. One thing is sure: the invasion of public policy by the doctrine of human rights has brought neither security nor freedom to the individual. Whether it has acted as a restraint on the worst forms of state power is a matter that we do not pretend to decide.

issue no.20

July 2004

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Freedom and Rights:

Kenneth Minogue

A paradox emerges when you rub together two propositions. The first is that rights are moral 'trumps' that protect individuals against oppression by the state, or by a majority. The second is that where individuals are equipped with very many rights, conflicts will occur, and therefore the range of rights and their meaning will have to be adjudicated by lawyers and judges. Goodbye trump! Welcome to the rule of lawyers.

The rule of lawyers is a poor substitute for what we had before — the rule of law, just as rights are a poor substitute for what we had before — namely, freedom. The very image of the old British freedom was the slogan that an Englishman's home is his castle. Even authority could not enter its doors without a warrant. In our world of rights, a remarkable number of officials have acquired a right to enter our households, ranging from customs and excise officials to social workers who suspect that children are being maltreated. And looming ahead is the identity card, with its imposition of a duty to identify ourselves to our rulers.

What are these things called 'rights' whose spread has brought us to our present pass? The first thing to recognise about them is that they are remarkably popular. People tend to think that governments are giving them something they did not have before. It is another paradox of this field that according a right to a Briton is actually taking something away. It brings something that previously was an insouciant exercise of his freedom under the jurisdiction of the state.

Rights are a form of technology often useful when society has broken down. To put the matter at its most elementary, rights may well be valuable for people without experience of freedom, or perhaps whose freedoms had collapsed — the situation of the Germans emerging from Nazi tyranny, for example — but (and it is a further paradox) their effect on us, who have long enjoyed a free constitution, is actually a very serious erosion of what we used to enjoy. For us, they are an encumbrance which undermines our sophisticated moral instincts and puts us at the mercy of casuists, bureaucrats and lawyers.

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Planning Law and Gypsy Lore in the UK

Sophie Jeffreys

The UN Declaration, the European Convention and UK Human Rights law all assume that 'human rights' are rights that we possess as individuals, regardless of our group, tribe, race, class or status. Judicial activism, however, has meant that human rights legislation is being refashioned as a kind of 'affirmative action', granting rights to favoured groups and removing rights from their alleged 'oppressors'.

Gypsies are singled out as a minority for special attention by the Council of Europe (Recommendation 1203 (1993) on *Gypsies in Europe*). European Human Rights legislation is therefore interpreted as entitling Gypsies to pursue their own lifestyle. Definitions of this lifestyle are varied, but there is some presumption that it is nomadic.

Although it is no longer a statutory requirement, most UK local Councils provide gypsy sites. A judgement made in the European Court in May 2004 means that henceforth gypsies have the same security of tenure as that granted to Council house tenants. The judgement was made against Leeds County Council which had attempted to evict a family from a Council-run camp site. In his summing up the Judge said 'there was a positive obligation on the United Kingdom to facilitate the gypsy way of life'.

This obligation is also being felt by the planning system. With 330 local authority sites, accommodating 20,000 gypsies and with a further 21,000 gypsies living in caravans (of a total population of between 90,000 - 120,000), gypsies are making their own provision through the market. They approach hard-up small farmers, offering to buy land for cash at as much as 30 times its agricultural value. In a matter of 48 hrs from the purchase they take possession, scraping away top-soil, putting down tarmac, and installing water and electricity. The result is little short of an American-style trailer park; there is scant evidence of the nomadic lifestyle. The ensuing legal battle with the Council lasts a minimum of a year and seems to be part of the settlement process itself, giving time for the development to be finished off and made permanent. In one instance, at the village of Cottenham near Cambridge, the incomers have achieved a population of 800, creating unmanageable problems of waste, noise, pollution and crime.

Local residents have obeyed planning law in the expectation that the regulations will be impartially enforced. But rights offered to gypsies, because they are 'human rights', trump the merely conventional rights offered by the laws on planning. In this way the European Court of Human Rights can casually overturn, at no cost to itself, 50 years of carefully considered planning law which has brought peace between neighbours in an overcrowded land.

In the Right — A Tribute to Sergio de Mello:

Those who put peace before retribution and the rights of everyone before the demands of some are the first targets of the fanatics. So it was with Ghandi, murdered by a Hindu extremist; so it was with Sergio Vieira de Mello, murdered in Baghdad 19 August 2003 for his advocacy of law and order.

Sergio de Mello was born in Rio in 1948, and appointed UN High Commissioner for Human Rights — the culmination of a distinguished UN career — in 2002. A much loved man, with a scrupulous respect for others, he was entirely without the moralising and anti-Western bias that has tainted the UN in recent years. He believed that the UN would be doing its job if it successfully imposed minimum standards on its members, but not if it unsuccessfully belaboured them with idealistic demands. In the matter of human rights, he argued, the minimum standard must be the rule of law, together with a willingness to ratify the core human rights conventions. Without a rule of law, there are no rights at all, and almost all conflicts begin, de Mello suggested, in the collapse of the rule of law and the assumption of power without legality.

"My main message is rule of law. The weakness of the rule of law has brought about many tragedies in the history of Mankind. So, militating for the rule of law, for the strengthening of the international system, for multi-lateralism is, I think, more important than ever. I believe the UN has never been as relevant and as necessary as today."

Sergio de Mello in an interview with *Human Rights Features*, 22-5 April 2003

This message did not please the Saddamites and Islamists of Baghdad, who saw the UN, with its universalist code of rights, as simply another aspect of Western domination. The bomb that killed de Mello and many of his staff showed that human rights really are perceived as a threat by those who don't believe in them.

Is TV a human right?

What do you do when your neighbour's interests conflict with yours? One answer is: declare your interest to be a human right. A man from Dartford is preparing to argue in the European Court of Human Rights that his neighbour's trees, because they interfere with his satellite reception, must go, since 'TV is a human right'.

Positive or Negative?

Thomas Cushman

The recent evolution of human rights has been primarily toward 'positive rights.' These concern the obligations of government to provide for individuals and groups, rather than the protection of liberties against the

ism', repudiates the conception of individual liberty which was the original basis for the eighteenth-century declarations of 'the rights of man'. This movement favours group rights over individual rights, state power over individual liberty, and is thus tied to the dominant discourse of human rights. Indeed the opposition of the global human rights

Americans don't think or care about rights. They are quite wrong about this: Americans do think about rights, as instruments for limiting state power. Most Americans accept quite unproblematically the risks involved in liberty and see these risks as the price to pay for a free society. I write this a few days after the death of Ronald Reagan, whose fame and glory (he is seen by many as one of the greatest of American presidents) is primarily due to his well-kept promise to make negative rights salient again in American society: in his parlance: 'to get the government off the backs of the American people.'

There is a fundamental tension between Europe and America over the nature of rights . . .

government. Where positive rights are dominant, it is very rare to hear claims made for what the state may not do. In other words, what has been lost in the current evolution of human rights is a concern for 'negative rights', or the protection of liberty and individual freedom from governmental power. Individual liberty, particularly in the form of economic liberty, has not only dropped out of the equation, but is often seen as the enemy, or as a threat to social and economic rights. The anti-globalization movement, for instance, with its vicious attacks on 'neoliberal-

movement to the war in Iraq has much to do with the fact that liberty is no longer a central value of this movement.

It is not only the Iraq war which has intensified the estrangement between Europe and America. There is also a fundamental tension, exacerbated perhaps by the rise of the conservative movement in the US, over the nature of rights. Most Europeans don't seem to understand that Americans, for the most part, like their rights negative, while European welfare states like them positive. Europeans often say that

Given the fact that the human rights project is basically an imperial project of Europe, increasingly embodied in the European Union and the United Nations, it does not seem likely that the world will be receptive to the re-establishment of liberty and individual freedom as the central ideological cornerstone of the advancement of human rights. Especially if the impetus comes from America. Thomas Cushman is Editor of *The Journal of Human Rights*

"The promotion of human rights, conflict resolution, and reconciliation" will become a stated charitable purpose, according to the draft Charities Bill in the UK.

"In other words Amnesty International. Amnesty has been a cause célèbre in charity law since a landmark judgment in 1982 refused it charitable status, arguing that it was involved in international politics which should be the preserve of Government . . ."

(Alice Miles, ©*The Times*, London 26/5/04)

Amnesty's view:

Director of Amnesty International UK, Kate Allen, writing in ©*The Guardian*, London (20 December 2003):

"Well, it looks like a change in the law may finally be on the way. The great anomaly that has meant that the words 'charitable purpose' and Amnesty International could not appear in the same sentence could soon be a thing of the past.

According to a recent opinion poll, two-thirds of the UK population believe us already to be a charity. They expect that the vital work we do promoting and protecting human rights around the world entitles us to the benefits and status bestowed on charities.

It's reasonable for them to make this assumption — the world's largest and best known human rights organisation

and winner of the Nobel Peace prize and the UN Human Rights prize clearly passes those public benefit tests, but not the arcane requirements of a 400-year-old English Law.

Some of Amnesty International's work has already been seen as charitable in the UK — research, victim assistance and work against torture. Yet a High Court decision from the early 1980s prevented charities directly promoting changes in the law, government policy or the administrative decisions of government authorities.

This effectively meant that it was deemed charitable and to the public benefit to campaign for human rights in a country that had adopted a relevant human rights convention into its domestic law (for example the UK, which has now adopted the European Convention on Human Rights) but not charitable if it had not! How ridiculous is that?"

Is this controversial?

"Amnesty International has played a vital and unique role over 40 years in turning a spotlight on prisoners of conscience who would otherwise have languished forgotten in hellish jails. It has many dedicated staff who have worked tirelessly for little reward other than knowing that they were fighting for one of the truly great causes. They have succeeded in making human rights a mainstream concern and in mobilising ordinary people to light candles, write letters and influence the fate of writers, thinkers and dissidents from their homes. But a champion of human rights must be unequivocal and impartial in its condemnation of abuses. Amnesty's comments over

the past year, and in its latest annual report, imply that the organisation has become infused with a political correctness that is far from impartial. It has been quick to condemn the United States for real and imagined improprieties during the Iraq conflict, yet virtually silent about terrorist abuses. The accusation by its secretary-general this week, that America has damaged human rights more than any other country in the past 50 years, is as ludicrous as it is irresponsible. What about Pol Pot? Or Mao Zedong's China? Kim Il Sung's North Korea?

Concerns about the organisation are coming not only from America. Human rights campaigners in Moscow are furious that Amnesty has refused to declare the Russian billionaire Mikhail Khodorkovsky a political prisoner. They suspect that he is a little too wealthy to win Amnesty's support.

Could such attitudes partly explain why Amnesty's roster of political prisoners has shrunk? The organisation claims that its list has dwindled because of competition from other agencies and the understandable difficulties of tackling armed gangs which cannot be shamed into action as some governments can. Yet Amnesty's embrace of fashionable objectives must also dilute its commitment to prisoners. Domestic violence, its latest cause, is a completely different rights issue. There is a world of difference between holding governments to their obligation not to torture people, and promoting vague rights to health and welfare. It would be a shame if such a worthy organisation were to lose respect."

Leader 'Amnesty Time', ©*The Times*, London 29/5/04

What Rights to Smoke?

If you are looking for proof of how powerful is the new idea of human rights, as the state's way of enforcing political correctness, then consider the case of smoking. Smokers knowingly take a risk, and they like to do this in company, just as drinkers do. They harm only themselves through their habit, and the dangers of second-hand smoke are both unproven and in any case of quite another order from the dangers to others posed by drunkenness.

Classical liberalism would therefore recognize the right of people to congregate voluntarily in places where they can smoke and talk, provided others are in no way compelled to mix with them. Yet this right has been cancelled in New York, by an ostensibly freedom-loving mayor; it has been cancelled in Ireland and Norway, will soon be cancelled in London. A seemingly unstoppable chain reaction of edicts is now in motion, curtailing an evident freedom with no proof of benefit to anyone. Sometimes, it is true, the health fanatics invoke human rights. But the only right that interests them is the right of non-smokers to a smoke-free environment, a right that nobody denies. And why don't the rights of the sober to go unmolested cancel the right of people to assemble for the sake of drinking?

In this, as in all conflicts where political correctness has staked a claim, rights are shown to be playthings, which are set aside at once when nanny steps in to call a halt to the game.

Publications

Human Rights: The Midlife Crisis, by Michael Ignatieff in *The New York Review of Books* (20/5/99): an excellent overview of human rights principles during the course of a review of a number of important publications all listed at: http://www.nybooks.com/articles/article-preview?article_id=477

The Journal of Human Rights, Carfax Publishing, ed. Thomas Cushman <http://www.tandf.co.uk/journals/titles/14754835.asp>

The Carr Center for Human Rights Policy <http://www.ksg.harvard.edu/cchrp/index.shtml>. A commitment to make human rights principles central to the formulation of public policy in United States and throughout the world.

Manifest Destiny — a new opera set in Guantanamo Bay. Music by Keith Burstein, libretto by Dic Edwards. Opens 27th June 2004, London, proceeds to: *The Redgrave Guantanamo Human Rights Commission*

Comments to: info@riskoffreedom.com

In Reply:

Benjamin Mancroft responds to Issue 19 of the *Risk of Freedom Briefing* about Cannabis Regulation.

Sir, The contributors to your Issue 19 on Cannabis broadly reflect the growing consensus that the 'war on drugs' is unwinnable, and that prohibition arguably causes more harm than drugs do. I strongly agree with this. It is also correct (as evidenced by the University of York research, commissioned by the Home Office) that the bulk of the cost (to the tax-payer) comes from the criminal justice system, while drug treatment represents a saving for the tax-payer.

I have noticed this 'growing consensus' increasing over the last few years in most areas, except one. Within the House of Commons, in all parties, there is very little weakening of the old consensus that the only way to 'fight the drug menace' is with increased policing, as if the forces of the criminal justice system had not really been trying their best for the last thirty years, and as if extra effort and resources would inevitably deliver the required result.

It is important to note, however, that recognising the failure of prohibition does not, as Susan Greenfield suggests, imply an acceptance of a drug culture, but rather, that prohibition does not work in reducing or eliminating drug use, and hence reducing its negative effects. Her analogy that we would not liberalise the laws relating to murder or burglary, simply because they aren't

100% effective, is irrelevant. The sole purpose of the Misuse of Drugs Act was to reduce or eliminate drug use: clearly, by any measure, not an overwhelming success.

Nor should Susan's concept that, because something is dangerous or injurious to health it should be banned, be accepted without closer examination. One of the most dangerous things in our society is the motor car; but it is not banned. Rather, it is licensed, the user is licensed, the manner of its use is strictly controlled, and users must have insurance against any damage they might cause. That, I suggest, is, roughly speaking, how we should control the supply of drugs, by licence and regulation as a means of control, rather than prohibition resulting in loss of control. Control of demand — the ultimate key to drug use — can only be achieved by professional treatment and evidence-based prevention strategies (NOT education), but both need to be adequately resourced, which will not happen while scarce and valuable resources are wasted on prohibition.

If, as it is correctly argued, drugs have the ability to cause illness and unhappiness as well as social unrest across communities, and amongst young people especially, it is surely madness to adopt a system whereby all the producers, importers, distributors and sellers of these dangerous commodities are criminal gangs operating outside the law.
Yours sincerely,
Benjamin Mancroft.

Lord Mancroft is vice chairman of the British Parliamentary All Party Group on Drug Misuse

WWW.

The United Nations and Human Rights 'The creation of a body of international human rights law is one of the great achievements of the United Nations': the theme of a useful summary of UN position: <http://www.unicef.org/crc/crc.html>

Amnesty International. 'Working to protect human rights worldwide' <http://www.amnesty.org/> Home page describing work and campaigns

Interview with Sergio de Mello conducted by South Asian Human Rights Features on the occasion of the 59th Session of the Commission on Human Rights. 'Membership entails Responsibility': Issue 56 of 'Human Rights Features' on the website of the South Asia Human Rights Documentation Centre (SAHRDC) <http://www.hrdc.net/sahrdc/hrfchr59/Issue6/interview.htm>. The SAHRDC has a wealth of other articles relating to human rights cases.

Speech by Sergio de Mello delivered from East Timor on the occasion of the Year of Volunteers (2001). Indicates how Sergio de Mello was successful in pursuing international diplomacy with a Human Rights foundation. http://www.worldvolunteerweb.org/dynamic/infobase/html/2000/00_11_28USA_SVM.htm

The Office of the Deputy Prime Minister (UK) for information about gypsies in the UK and planning guidance <http://www.odpm.gov.uk/>. For Council of Europe recommendation on *Gypsies in Europe* <http://assembly.coe.int/Documents/AdoptedTexts/TA93/erec1203.htm>

The Times www.timesonline.co.uk and **The Guardian** www.guardian.co.uk/online for full text of the quotations that appear inside about Charity Law and Amnesty International.

The Risk of Freedom Briefing is published quarterly. Sponsored by JT International
Editor Roger Scruton, editorial assistant Sophie Jeffreys. Back issues are available at www.riskoffreedom.com