

There's No Such Thing as Trivial Rights

By Talina Hurzeler

The Conservative Party's proposal to repeal the *Human Rights Act 1998* (HRA), argues that one of the HRAs shortcomings is its failure to distinguish between so-called serious and trivial human rights.¹ In its place it recommends the introduction of a 'British Bill of Rights' which would not only draw this distinction but also enforce it by dismissing cases where human rights breaches were deemed 'trivial'.² Although the proposal fails to articulate how this distinction might be made, this article will, through a brief review of the historical development of human rights, demonstrate that this proposed adjustment represents a significant misconception of contemporary rights theory, regardless of its exact scope. The proposal misjudges the current law on valid distinctions between rights, most relevantly the derogable and non-derogable distinction, and it opens the floodgates to more disastrous violations. This paper will then use the Holocaust as an example of how seemingly trivial breaches can ultimately lead to catastrophic ones and of how abusive regimes do not appear overnight.

Where did human rights come from?

Human rights are often envisaged as a utopian ideal that rose from the ashes of the Second World War. The atrocities of that horrific period certainly brought about a significantly more concerted, radical and globalised commitment to the development and practical implementation of the idea. However its roots can be traced far further back to earlier notions of freedom, justice and morality. The belief that everybody should be bound and protected by the same law is an ancient one, first propounded by the likes of the legendary *Magna Carta 1215*, the *Charter of the Forest 1217*, the *Petition of Rights 1628* and the *English Bill of Rights 1689*, all of which served as testaments to the idea that human beings were endowed with certain 'natural rights.'³ These rights were understood as eternal and they could not be renounced even via the social contract or by the King's demand. They were understood as universal in that they pertained to all free men, although our understanding of universality and who constitutes a human being has

¹ Chris Grayling (2014) *Protecting Human Rights in the UK, The Conservative's Proposal for Changing Britain's Human Rights Laws*. London, page 7.

² Ibid.

³ There are many examples of these kinds of documents from all around the world; the *French Declaration of the Rights of Man 1789* or the *US Bill of Rights 1791*.

drastically expanded since then, thankfully no longer casually disregarding women, property-less workers or foreign peoples.

The understanding of natural rights was elaborated on by Enlightenment theorists from the 17th and 18th centuries, the most prominent of which was John Locke. He argued that, by entering the social contract, every man renounced his right to enforce his natural rights but not the rights themselves.⁴ Thus, a state which violated those rights was liable to being overthrown by a popular political revolution.⁵ Where legal rights were bestowed by a legal system designed by men, natural rights pertained to the individual owing to his humanity. They were inalienable and universal. Unlike contemporary human rights however, they were traditionally understood as negative rights only; that is the right to be free from governmental transgressions against the right to life, liberty and property, rather than the right to be supported by affirmative state action.

In the 19th and 20th centuries, with the emergence of socialist thinkers such as Marx, it became apparent that restraining government abuses did not ensure dignity, nor well-being.⁶ Underlying social and economic issues such as gender, race or class discrimination, poverty, disease and economic inequality or exploitation, were suddenly recognised as factors that degraded the well-being of the disenfranchised and perpetuated an unjust power system. It was further advanced that these power systems would remain entirely unaffected by the protection of the negative 'natural rights' agenda as discussed above. Since this development, and with the deconstruction and delegitimisation of systems that directly caused rights abuses such as slavery, social movements have been just as concerned with these new rights as with the classic set. Rights manifestos began to include so-called 'second and third generation rights', composed of economic, social and cultural rights which usually require the state to actively protect individuals from entrenched power dynamics rather than to simply refrain from actively abusing them.

Today, these positive second and third generation rights are an integral, intractable part of the human rights agenda. The corresponding vocabulary has developed so that positive and negative rights are equally important, and it is inconsistent to arbitrarily disregard certain rights on the grounds of their 'triviality'. In most countries, we have moved from the era of protecting

⁴ Locke, J (1689) *The Second Treatise of Government*. London: Hackett Publishing Co, Inc.

⁵ Ibid; Paine, T (1791) *Rights of Man*. New York: Dover Publications Inc.

⁶ Nickel, J (1987) *Making Sense of Human Rights*. London: University of California Press, Ltd.

the citizen from the rights-abusing state to the era of protecting the citizen from the underlying aftermath of these historical abuses; from ending slavery to ending lingering racist attitudes and behaviours.

Hierarchy of Rights

Nevertheless, certain distinctions are legitimate in the field of human rights. The human rights community still makes a general distinction between first, second and third generation rights pertaining to the UN Conventions,⁷ though this does not relate strictly to enforceability. Another relevant distinction is the one between non-derogable and derogable rights: those that may never, under any circumstance, be set aside and those that may. This distinction is enshrined in Article 15 of the *European Convention on Human Rights 1950*, the most relevant international human rights treaty in the UK today. The key to this provision however is its specification that such derogation must only take place 'in time of war or other public emergency.'⁸ Accordingly, the so-called 'derogation regime' is far from a free pass to ignore rights that a government independently deems either serious or trivial, it is an entrenched legal mechanism aimed at striking a balance between the protection of individual human rights and the protection of national needs in times of crisis. It is subject to a number of requirements set out by treaty law,⁹ and exists to provide the state with increased power in situations of extreme urgency,¹⁰ not to legitimise a blanket refusal to enforce derogable rights for other reasons, such as administrative convenience, political expedience, even unlikely claims to national security. Thus, it is quite clear that relevant international law does not support the kind of distinction that the Conservatives hope to draw, even when one acknowledges a hierarchy which might be interpreted as a reflection on varying degrees of severity amongst rights.

Implications

The fact that it is unfounded in both law and history is not the only problem with the Conservative proposal to ignore 'trivial' human rights breaches. History shows that severe crimes against humanity, including genocides, have often followed a series of encroachments upon the human rights of certain

⁷ *The Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights 1966.*

⁸ Examples of emergency situations include, but are not limited to, armed conflicts, civil and violent unrest, environmental and natural disasters, etc see Karimova, T (2015) *Derogation from Human Rights Treaties in Situations of Emergency*, available at <http://www.geneva-academy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php> (Accessed: 18 February 2015)

⁹ Including amongst others the existence of a public emergency that threatens the life of the nation, the requirements of proclamation and notification, the principle of proportionality and the principle of consistency, see *ibid.*

¹⁰ *Ibid.*

minority groups. A popular argument advanced by numerous specialists indicates that crimes against humanity and genocide do not typically occur without warning, and are in this way preventable.¹¹ Edward Nalbandian, Minister of Foreign Affairs for Armenia identifies the promotion of human rights as one of the three pillars of genocide prevention, along with early warnings and public awareness and education campaigns.¹²

The Holocaust is a terrifying example of the way that disregard for certain rights are the gateway to more fundamental breaches. The persecution of the Jews and other 'undesirables' began with a steady erosion of their rights as citizens over a period of six years, not with the death camps.¹³ This slow decay, when juxtaposed against the *Universal Declaration of Human Rights 1948*, vividly showcases the way in which a law-abiding, rights-respecting society slowly disintegrated into one which committed atrocities on an industrial scale never witnessed before or since. In 1933, Jews and other non-Aryans were banned from working in the civil service or as lawyers, which clearly impeded the right to free choice of employment.¹⁴ In the same year, the Nazi government prohibited Kosher meat, contrary to the right to freedom of religion.¹⁵ They stripped the Gypsy population and Jews of Eastern European descent of their German citizenship, contrary to the right to have a nationality.¹⁶ They passed laws allowing forced sterilisation and/or euthanasia of those deemed 'unfit for life', contrary to freedom from torture, discrimination and the right to form a family.¹⁷ By 1934, German Jews were no longer entitled to health insurance, contrary to the right to social security.¹⁸ By 1936, all Jewish assets were taxed 25% and by 1937, many were forced to sell everything they owned and were prohibited from working in any office, both of which impeded the right to equal protection under the law.¹⁹

This is not to say that any encroachment upon any element of human rights will automatically lead to genocide or crimes against humanity. Neither is it true to assert that the fear of further violations is the only reason to protect against preliminary encroachments, as they are after all, violations in and of

¹¹ See, Eliasson, J (2015) *Why Have We Failed in Preventing Genocides and How to Change That*, 21 January 2015, New York.

¹² Nalbandian, E (2015) *Human Rights Council discusses the Prevention of Genocide*, 21 March 2014, New York, available at <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14334&LangID=E>>. (Accessed: 18 February 2015).

¹³ Wagner, A. (2012) 'We Should Support and not Condemn the Human Rights Act', *The Jewish Chronicle*, 6 November 2012.

¹⁴ *Universal Declaration of Human Rights 1948*, Article 23(1).

¹⁵ *Ibid*, art 18.

¹⁶ *Ibid*, art 15(1)-(2).

¹⁷ *Ibid*, art 5, art 7, art 16.

¹⁸ *Ibid*, art 22.

¹⁹ *Ibid*, art 7.

themselves.²⁰ Nevertheless it illustrates the way human rights abuses are a slippery slope and even societies with robust human rights records in the past are susceptible.

Conclusion

Outside of a very specific context, it is unacceptable and illegitimate to dismiss human rights breaches solely on the ground of their triviality. Human rights are the result of centuries of philosophical development that have ultimately led to a comprehensive framework which protects against not only direct state violations but from more insidious, underlying abuses. Although distinctions do exist in international law, they do not exist in a way that validates the Conservative proposal of distinguishing between so-called serious and trivial rights. Actively choosing to derogate some breaches outside of state emergencies ignores not only our considerable historical development but our current law, as well as the fundamental importance of economic, social and cultural rights. It ignores the fact that abusive regimes are not typically born from societies that promote and protect human rights as much needed safeguards, but from states that willingly allow those rights to be eroded.

²⁰ Above n 13.