

# The Crisis of Human Rights

Samuel Gregg

The concept of human rights evolved to buttress liberty by protecting people from excessive state power. Now it is being manipulated to expand the ambit of politics.



The beginning of a new century is always an opportunity to discern the lessons learnt over the past 100 years, and to speculate about the problems that may confront free societies of the future. In the case of the 20th century, it is surely with relief and shame that we leave behind the ruins of Auschwitz and the Gulag Archipelago, two world wars of unprecedented ferocity, not to mention nightmares such as the Marxist-inspired Killing Fields and the Maoist madness of China's Cultural Revolution.

Yet there is much about the 20th century to celebrate. Leaving aside the obvious economic and scientific advances, the degree of consensus following communism's demise is to be welcomed. Few would deny that, for all its faults, capitalism is preferable to socialism, or that constitutional democracy, for all its problems, is on the whole better than authoritarian systems.

More generally, the closing decades of the 20th century highlighted the limits of politics, and refocused attention on that rich web of intermediate associations that exist between the family and the state, collectively described as 'civil society'. This question of the limits of politics is one of the critical issues confronting free societies of the 21st century. We will explore these limits by focusing upon two key concepts that played a crucial role in the 20th century: the idea of liberty and the notion of human rights.

## Three concepts of liberty

People often use the term 'liberty' to conceptualise the relationship between the individual person and the political arrangements within which that individual lives

and acts. To this extent, the word 'liberty' signifies the extent to which the state is not coercive and the space that it allows for individual self-determination.

In his famous essay, 'Two Concepts of Liberty', Sir Isaiah Berlin defined this way of thinking about freedom as 'negative liberty'. According to Berlin, negative liberty is 'not being interfered with by others. The wider the area of non-interference the wider my freedom'.<sup>1</sup> Negative liberty thus seeks to guarantee the greatest possible domain for choice by resisting any claim to truth that might limit choice.

'Positive liberty', by contrast, is governed by the belief that while individuals may be formally free to do various things, many are not actually able to do such things because of a lack of resources. Hence, it is held, individuals need to be enabled to do things before they can be truly free. For most of the 20th century, many scholars concurred that the primary enabler of positive liberty should be the state.

Both concepts of liberty have their place, but also their limitations. By definition, any free society must allow room for individual self-determination; that is, negative liberty. Nonetheless, politics has a role here insofar as it involves making decisions about the *rules* that allow coordination

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**Samuel Gregg** is Director of the Center for Economic Personalism at the Acton Institute (USA) and former Director of the Religion and the Free Society research programme at The Centre for Independent Studies (CIS). This is an extract from his last lecture for CIS—*The Limits of Politics*—on 31 January 2001. A full text version can be found at <http://www.cis.org.au/CISlectures/310101sgregg.htm>



of the subsequent actions of individuals. Without such coordination—a type of positive liberty—negative liberty would quickly degenerate into anarchy.

Yet we also know that political programmes designed to enhance positive liberty in a more incremental manner, such as state-based welfare policies, have had a range of negative moral-cultural effects that actually help to emasculate people's capacity to engage in individual self-determination. In more recent decades, these 'positive liberty programmes' have embraced 'affirmative action' and 'anti-discrimination' policies.

Leaving aside the ongoing debates about the relevant effectiveness, let alone justice, of such programmes, Berlin was surely correct to stress that the political difficulty with any promotion of positive liberty is that it assumes an answer to the question of 'who or what is the source of power or intervention that can decide someone to do this and not that, to be such and no other'.

Until recently, much of the world was plagued by political systems that effectively suppressed negative liberty in the name of speeding up the so-called dialectics of history. In this sense, Berlin's warnings concerning the implications of the pursuit of positive liberty reflect his 20th century consciousness of the crippling effects upon freedom of collectivist policies, be they communist, socialist or fascist in character.

Berlin, however, is less convincing when he claims that there is a direct relationship between the existence of ultimate principles, the public assertion of truth-claims and despotism. Totalitarian rule is risked not by the acknowledgment of truth but by the claim to control it. Indeed, it may be the case that Berlin neglected the danger to freedom posed by negative liberty's wariness about truth claims.

Without truth claims there is *nothing*—no objective standards—to which we can morally and politically appeal in order to defend freedom. For if there is only opinion but no truth, then there is no inherent reason why slavery should not be seen as the same as liberty, or coercion the same as equality. In such an atmosphere, political debates cease to be a matter of reasoned discussion of the *truth* of people's opinions. Instead, politics become reduced to a question of who is able to provide their opinion with legislative and judicial weight. Truth, it would seem, is not as great a threat to liberty as Berlin supposes. Absence of truth, however, certainly is.

### Liberty and truth

Politics cannot respond to this problem of how to reconcile liberty and truth. Nor should we expect it to do so. It is essentially a dilemma for philosophers to overcome. The beginnings of an answer might be found in the introduction of a third concept of liberty to Berlin's schema: liberty understood as *self-government*. This concept rejects the notion that truth is reducible to opinion. Instead, it attempts to link the *subjective* dimension of human existence manifest in the reality of free choice with the *objective* dimension that reflects man's unique capacity to recognise through reason that there are indeed truths—including moral truths—that transcend not only time, place and culture but also preference. Thus, liberty and responsibility become one with each 'liberty [becoming] coupled with, and ancillary to, a duty'.<sup>2</sup>

The manner in which people *learn* to become free in this sense does not occur primarily through politics. Certainly, politics and law can play a subsidiary role, but there is no such thing as a morally neutral law or piece of legislation. Scepticism about state power does not mean scepticism about the purposes that the state is to serve. Even a state that professes indifference to life 'in private' cannot escape bearing some responsibility for the conditions vitally affecting people's moral upbringing and common life. Hence, it is right that we assess the likely impact of changes in law upon the free society's delicate moral ecology. Ultimately, the liberty of self-government can only be attained by each person's free choice. Families as well as the associations of

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civil society have a critical role to play here in terms of forming people with the virtues necessary for self-government, not least because they normally have more intimate connections to most individuals' lives than the state.

The free society's long-term stability depends more upon such virtues than we often realise. It is nonsense, James Madison once noted, to imagine that a free political community can survive without virtue in its citizens.<sup>3</sup> When free societies began to emerge in the West, philosophers took for granted the existence of certain widespread moral habits. So pervasive were these habits—buttressed not only by the social inheritance that Edmund Burke warned us to avoid trying to manipulate,<sup>4</sup> but also the scholarship of ancient and



medieval thinkers—that they seemed second nature. Dramatic personal efforts by individuals to align their actions with these moral habits, thereby correcting and tempering their bad inclinations, made possible democratic political institutions as well as the act of market exchange.<sup>5</sup>

In the past 200 years, however, the centrality of the word ‘virtue’ has been largely supplanted in political and moral discourse by the term ‘rights’. The significance of this change in terms of its capacity to expand the boundaries for political action cannot be underestimated. For while the classical world understood that politics could play an indirect role in shaping a context that encouraged people to acquire virtue, one of the distinguishing features of modernity is the manner in which politics is regarded as a *direct* means of providing people with certain protections and entitlements often grouped together under the term ‘rights’.

### The problem of rights

Those who have spoken the language of rights constitute a varied group—Thomas Jefferson but also Maximilian Robespierre; John Paul II but also Peter Singer—indicating that the language of human rights is the most available discourse for universal deliberation about the dignity of the human person.

The idea that man has a right to life, to freedom of association, to religious liberty, and to property meets with widespread consensus today. The legal obligation to respect such inalienable human rights has been recognised by most states since the 1948 United Nations Declaration of Human Rights.

From the beginning, however, there have been questions concerning the philosophical basis of these rights. One of the members of the commission that drafted the Declaration stated at the time that ‘We are unanimous about these rights on condition that no one asks why’.<sup>6</sup> According to Michael Novak, the participants ‘recognised quickly that agreement on common principles—a common philosophy of human nature and destiny—was out of the question’.<sup>7</sup> The various individuals involved disagreed about the premises of morality. But whether it was from witnessing the terrible consequences of a world without universal standards, or a belief in the prevailing wisdom of three millennia of Judeo-Christian wisdom, they were ready to agree that various practices must not occur ever again.

There are two likely reasons why the language of rights was used to express this conviction. First, ‘rights language’ is the contemporary coinage as far as moral discourse is concerned: if one is going to try to make a case of morality in modern times, it is nearly impossible to do so without recourse to ‘rights language’. Second, ‘rights language’ provides an important corrective to the modern cult of relativism. Whereas relativism dominates modern moral judgments, ‘rights language’, with its reference to inalienable rights, suggests that there is a universal and absolute set of moral demands, true at all times and places.

There are deep problems, however, with the notion of rights. The number of human rights, for example, has multiplied to the point where the very idea of rights is dangerously diluted. The UN Declaration of Human Rights is neither exhaustive nor perfect in its articulation of rights. But the essential rights specified by the Declaration have surely been weakened by the multiplying

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number of interests, goods and desires elevated to the status of rights since 1948. This in turn has magnified the expectations of people who are told that they are less than human if they do not possess a whole host of ‘rights’.

There is also much confusion concerning what a ‘right’ is. Some rights, often called ‘negative rights’, describe what is known as a ‘zone of non-interference’. To state, for instance, that one has a ‘right to life’ or a ‘right to privacy’ means that there are very few justifications for taking another’s life and that no one should violate another’s privacy. Other rights, known as ‘positive rights’, make claims on others to provide something to others. Children are said to have a right to food, shelter and clothing from their parents.

But it is not always clear whether a right is a negative or positive right or, in the case of positive rights, who has the obligation to supply the need. It is not immediately obvious, for instance, whether a ‘right to work’ or a ‘right to healthcare’ are negative or positive rights, or (assuming that these are indeed rights) who has the obligation to provide jobs and healthcare. Moreover, as John Paul II warns, ‘The State could not directly ensure the right to work for all its citizens unless it controlled every aspect of economic life and restricted the free initiative of individuals’.<sup>8</sup> Finally, as Harvard



Law Professor Mary Ann Glendon has pointed out, ‘rights language’ has contributed to the contemporary impoverishment of moral discourse insofar as it reduces all moral arguments to claims of justice.<sup>9</sup> We no longer speak of virtue (though there are currently powerful attempts to reinsert virtue language into our moral discourse)<sup>10</sup> or of duty. That health, for instance, is a human good that people have a duty to seek and preserve is a foreign concept to many.

### A confused heritage

A major cause of these problems with contemporary thinking about rights is that it draws on a variety of political traditions that often contradict each other. In classical and medieval thought, for example, politics was attached to a sense of promoting the rules of life. Man was understood to be animated by a sense of vocation. Politics was consequently regarded as being at the service of the good life, of the *bona vita multitudinis*. The idea of rights was therefore associated with the concept of a duty to fulfil one’s vocation as a human person.

By contrast, modern political thought rejects the idea that the *bona vita* should be a guide to political action. It asserts that people either lack such a thing as a natural vocation or that they disagree about the nature of such a vocation. This, it is claimed, necessitates a rethinking of politics so that it focuses upon arranging human affairs in a way that allows those who are divided about what constitutes the good life to live together peacefully.

This modern approach of establishing the ‘rules of the game’ (rather than the rules of life) pioneered by Machiavelli, Hobbes and still further by John Locke, results in procedural solutions. These largely diminish the duties of man to minimal observance of rules that allow people who differ about the purpose of life to pursue their own interests. Human rights are a key dimension of this modern promise insofar as they serve to guarantee individual liberty and peace for all.

Initially, this modern solution was a moderate one. For Locke and the American founders, the objective was to establish a new political order that permitted people to follow often very different interests. Nevertheless, these thinkers considered it obvious that this order would be limited by moderating influences such as family, education, religion, and natural law.<sup>11</sup> While the *bona vita* was excluded from politics, there remained traditional rules about how to live properly and with honour.

The rhetoric of those who wrote the US Constitution certainly invoked rights, but also morality, virtue and

obligation. Rights did not mean the freedom to be one’s own judge, or to define the proper standard of behaviour for oneself. Standards of behaviour were real and embodied in the common law. While the focus was upon limiting government power, it was presumed that people would behave responsibly. Rights did not trump these common law standards; rather, rights ensured that there were certain paths that the state—by which was meant the executive and legislature rather than the courts—could not tread.

Unfortunately, the moderns unwittingly created an intellectual timebomb. Beginning with the individual and his rights while renouncing the idea of a universal human vocation set in motion a process that leads to the limitless sovereignty of the individual unbound by any ties to natural law. The French Revolution proclaimed the rights of man but did not respect its own principles precisely because of its refusal to acknowledge that these rights were guaranteed by anything except state power. In June 1793, for example, Robespierre and the Jacobins issued a new Declaration of Rights in which they reaffirmed the principle of liberty and the right to resist oppression at the very moment that they launched a systematic war of terror against their own population.

It would, however, be wrong to see any contradiction between the Jacobin use of the term ‘rights of man’ and practice. From the very beginning, the French Revolution had advanced two distinct sets of principles: those that were universalist in the sense of being beyond man; and those that were ideological in the sense that they constituted a political programme of action. Almost immediately, the ideological overwhelmed the universal. Robespierre’s famous assertion concerning the despotism of liberty against tyranny would have been a contradiction in terms had it not been for the fact that, in Jacobin thought, liberty was once and for all incarnated in a given ideological camp (that is, the Jacobins) who therefore enjoyed complete freedom to suppress the liberty of those who did not agree with their vision of freedom.

### The modern human rights project

Despite these problems with the modern human rights project, its political promise has in some senses been kept. The conduct of domestic politics in the West is no longer a dangerous business; no one will lose their head for it. Human rights have played a role in domesticating and limiting political power.

But there is another dimension to the story. In promoting people’s ability to pursue what Hobbes called



the 'delightful life' rather than the *bona vita*, the subsequent detachment of rights from any transcendental reference point has caused Western societies, to a certain extent, to be subverted by their own principles. The rights of man were born in a Christian world, and for a long time the roots of the connection were maintained. Only in our own time do we find people earnestly using the language of rights while simultaneously insisting that there are no moral truths. It would never have occurred to the American founders to claim rights that were not grounded in truth.

The modern elevation of sincerity over truth has shattered classic normative distinctions between virtue and value, power and authority, reason and emotion, objectivity and subjectivity, the ethical and the aesthetic, male and female, and even human and animal. Such distinctions are widely viewed as atavistic, logocentric illusions that screen the exercise of self or group interests. Contemporary tenured Freudians, Gramscian-Marxists and Deconstructionists, who have a grim hold on much of the humanities as well as many scholarly publications and publishing houses, preach relativity and the exercise of power for its own sake. As a result, we cannot now even agree in the West what constitutes a human being.

Given this prevailing intellectual culture, it is hardly surprising that the language of rights is used with ever greater frequency to circumvent reasoned political discussion and to foist specific political programmes upon us. A classic example of this was the 1995 United Nations Conference on Women, held in that contemporary exemplar of human rights, the People's Republic of China. The initial drafting of the conference's documents were significantly impeded by the European Union delegates, who attempted to eliminate routine cross references to certain provisions of the UN Declaration of Human Rights. Such provisions included the principle that the family as the fundamental social unit is entitled to protection from the state; the standard guarantee of religious liberty; any reference to parental rights and responsibilities; as well as the Declaration's statement that motherhood and childhood are entitled to special protection.

As one delegate to the Conference, Mary Ann Glendon, relates, the EU delegates (overwhelmingly

feminist in composition) were keen to suppress any reference to human rights that might impede the feminist agenda, but were anxious to use the language of human rights to achieve their objectives on other issues.<sup>12</sup> The right to religious freedom, for example, did not accord with their assertion that religion is essentially 'patriarchal'. Likewise, the duty to protect motherhood and family contradicted their claim that marriage is a 'patriarchal obstacle' to human advancement. It was a remarkable example of the contemporary inclination of many people to pick and choose among human rights, thus favouring some at the expense of weakening others.

Similar concerns can be raised about the United Nations Convention on the Rights of the Child.<sup>13</sup> This convention illustrates how the idea of human rights can be used to

allow state power to penetrate to the very heart of the most important human institution; that is, the family. The Convention claims to be a comprehensive listing of all rights of the child. It thus purports, among other things, to give children the right to express their own views freely in all matters,<sup>14</sup> to receive information of all kinds through 'media of the child's choice',<sup>15</sup> and to enjoy the right to 'rest and leisure'.<sup>16</sup>

Reflecting on these claims, one cannot help asking what do all these rights mean, how will they be enforced, and against whom? Do they mean that a child can refuse to do his homework and household chores because they interfere with his 'right' to rest and leisure? Do they indicate that a child can demand the right to watch television in order to receive media reports from national and international sources? The Convention provides no answers to these questions. Despite a vague reference to undefined 'rights and duties of parents', the Treaty does not recognise any specific parental right to make decisions for their non-adult children. These are real problems, not least because they have the potential to pit state power against parental authority, to the latter's obvious detriment.

### **The origins of rights**

At the heart of these questions about rights and the manner in which they can be used to enhance state power is the issue of their origin and nature. Does, for example, the state confer rights upon us or are they God-given? One

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could ask the same question differently: are rights derived from our nature properly understood, or are rights simply a legal invention? What is the good that rights serve? Do they serve human liberty, human dignity or both?

These difficulties could be overcome by simply stating that rights are a form of normative binding legal standard. Standards, however, require the existence of an authoritative evaluator. In the modern world, this creates a particular dilemma. Robert George correctly notes that no secular thinker has provided 'any plausible account of where rights comes from or why we should respect others' rights'.<sup>17</sup>

Modern philosophy cannot provide a moral account of anything insofar as it declines to—and cannot—identify an ultimately authoritative source of moral goodness. One need only think of all the unsuccessful modern attempts to establish a foundation for rights. These include the command of the sovereign; the majority of voters; the US Supreme Court's increasingly varying interpretations of the US Constitution; references to equality or autonomy; and, perhaps most bizarrely, John Rawls's imaginary social contract that abstract non-existent persons might adopt in an equally imaginary 'original position'.

In the 19th and early 20th century, many came to believe that human rights could be retained as truths quite independent of any rational affirmation of divine existence or what the American founders called 'nature's law'. Such affirmations were, it was held, to be removed into the realm of private 'personal' belief.

Today, public discourse and education are shaped around the belief that *every* moral, social or political judgement directing action is subjective, relative, personal and autonomous. Right and wrong are mere predicates to be treated as expressions of emotionally motivated decisions and social conventions. The question of right and wrong—and thus the idea of truly inalienable human rights—is therefore quietly replaced by the question of who is in charge, and the determination to be among those who hold power. The moral, political and juridical language of rights becomes the cloak that such self-will retains in order to mask purposes which, if frankly expressed, would arouse resistance from competing wills.

None of this should be construed as an argument against the idea of human rights *per se*. Rather, it is a suggestion that before we can even begin to consider the feasibility of something like a 'Bill of Rights' (or preferably a 'Bill of Rights and Duties'), we need to engage in more serious philosophical reflection upon the origins and



nature of the entitlements and protections that we currently call 'rights'. There is every possibility that such reasoning may conclude that, given current political and cultural conditions, such a Bill is more likely to undermine freedom than enhance it. In any event, modern politics is not designed to resolve these first-order issues. Yet they are critical for the political health of free societies, not least in terms of establishing clear limits to the state as a political actor.

The paradox that confronts us is that contemporary rights language seems increasingly predicated towards facilitating the use of political and legal power to sanctify certain ideological tendencies (most notably, various feminist assertions), to undermine core institutions such as the nuclear family in the name of 'diversity', or, as we have seen in more recent times, to attempt to restrict as fundamental a freedom as religious liberty to what occurs during church services.

It was precisely such freedoms that the acknowledgment of rights was supposed to protect from many societies' apparently inexhaustible tendencies to become slaves to whatever happens to be the prevailing intellectual fashion. In other words, a concept that evolved, in part, to protect man from excessive state power and which is a critical component of the idea of liberty as self-government, is now slowly but steadily being manipulated to expand the ambit of politics, particularly through the activities of quasi-judicial, institutionalised pressure groups such as our very own Human Rights and Equal Opportunity Commission.

### Conclusion

One of the challenges of the new century will be for us to realise that safeguarding what is called human rights is far too important a task to be entrusted to professional human rights activists. Ideas have consequences, for good or for evil, but they are not the toys of intellectuals. It follows that if rights become modern Trojan horses that help to turn politics from a process of *reasoned* deliberation and decision-making into what amounts to nothing less than, to paraphrase Clausewitz, war by other means, then we will have no one but ourselves to blame.

The number of people who suffered and died through the abuse of state power in the 20th century defies the imagination. Yet we also know that the utopian impulse remains deeply ingrained in the human

condition. The free society has only the most fragile of defences against the desire of some to try and build heaven-on-earth through politics: these protections include such humble institutions as the rule of law, not to mention the ever-evolving but delicate tapestry which we know

as the common law. To see these safeguards of our liberty undermined in the name of rights, both real and imagined, would surely be the cruellest paradox of all.

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#### Endnotes

- <sup>1</sup> Isaiah Berlin, 'Two Concepts of Liberty', in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 118.
- <sup>2</sup> John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), 283.
- <sup>3</sup> See *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (20 June 1788, Virginia), ed. Jonathon Elliot (Philadelphia: Lippincott Press, 1907).
- <sup>4</sup> See Edmund Burke, *Reflections on the Revolution in France*, ed. C.C. O'Brien (London: Penguin Books, [1790] 1986).
- <sup>5</sup> See Michael Novak, 'Truth and Liberty: The Foundations of the Republic', in *On Cultivating Liberty: Reflections on Moral Ecology*, ed. Brian Anderson (New York: Roman and Littlefield, 1999), 9-31.
- <sup>6</sup> Germain Thils, *Droits de l'homme et perspectives chrétiennes* (Louvain-la-neuve: Cerf, 1981), 51.
- <sup>7</sup> Michael Novak, 'Human Dignity, Human Rights', *First Things* 97 (1999), 40.
- <sup>8</sup> John Paul II, Encyclical Letter *Centesimus Annus* (Sydney: St Paul Publications, 1991), para. 48.
- <sup>9</sup> See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).
- <sup>10</sup> See, for example, Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, (Notre Dame: University of Notre Dame Press, 1981), 114-245.
- <sup>11</sup> This is illustrated in George Washington's 'Farewell Address' (19 September 1796), in *The Early Republic*, N.E. Cunningham (Columbia: University of South Carolina), 52-7.
- <sup>12</sup> See Mary Ann Glendon, 'Rights Babel: Thoughts on the Approaching 50th Anniversary of the Universal Declaration of Human Rights', Thomas J. Furphy Lecture (1996), 1-8.
- <sup>13</sup> For a powerful critique of the UN Convention on the Rights of the Child, see Barry Maley, *Children's Rights: Where the Law is Heading and What it Means for Families* (Sydney: The Centre for Independent Studies, 1999), 17-52.
- <sup>14</sup> United Nations Convention on the Rights of the Child (hereafter UNCROC), 2 September 1990, Article 12.
- <sup>15</sup> UNCROC, Article 13.
- <sup>16</sup> UNCROC, Article 31.
- <sup>17</sup> Robert George, 'A Clash of Orthodoxies', *First Things* 95 (1999), 35.