

# Individual and Human Rights

by Howard Richards

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Let's talk about natural rights. What shall we say? Well, let's begin the way students in law schools begin when they brief a legal opinion to prepare for a class. They read the dissenting opinion before they read the majority opinion. Starting with the dissent is a good way to bring the issues into focus.

But even before tackling the dissent we should consider the threshold question, why are we doing this? Why should we talk about something as old-fashioned as "natural rights" redolent as they are of the musty air of an old attic in Paris built in the 18th century? What relevance do they still have today in our 21<sup>st</sup> century when people live on the streets of Shanghai talking on cell phones and die in the deserts of Iraq and in the mountains of Afghanistan hit by drone strikes directed via satellite by computers in California and Florida? To ask these questions is already to begin to answer them: We need to talk about natural rights because today our human rights, especially our social rights, cannot become realities in the third world, or defended in the first world, precisely because we still live in the 21<sup>st</sup> century under a rule of law constructed by and for the 18<sup>th</sup> century. The triumphant revolutionaries of the 18<sup>th</sup> century lived and breathed natural rights.

Now: On to the dissent! When it comes to natural rights, the most famous and most influential dissenting opinion is that of the English philosopher Jeremy Bentham (1748-1832). According to Bentham we should expunge natural rights from our vocabulary. Natural rights is a bogus concept. It would better serve the common good if nobody ever talked about them, or if the idea had never been invented. The term "natural rights," Bentham wrote, "is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts."

What was Bentham's problem? Why did he complain about the natural rights that his revolutionary contemporaries including the authors of the United States Declaration of Independence (1776) and the authors of the French Declaration of the Rights of Man and the Citizen (1789) say are self-evident; indeed, they sometimes say that protecting and preserving them are the original and only purposes of government.

We can summarize Bentham's complaints under two headings: (1) Theoretical, and (2) Practical.

(1) Theoretical. The theory of natural rights is part and parcel of the theory that society began with a social contract. In a state of nature people already had rights. Most importantly they had property rights. They came together and decided to agree on a contract to form a society. The contract provided for someone to be the ruler (at first the King, later the elected government). The same contract provided that the ruler was bound to respect the natural (pre-existing) rights of the ruled.

Although Bentham did not have access to all the scholarly studies we have today, he knew enough about history to know that the social contract never happened. The concept of "natural rights" like any concept based on a false story was from a scientific and theoretical point of view off to a bad start.

(2) Practical. Bentham was known in his time as a "philosophical radical." He wanted to rebuild society from the ground up. The ground, the foundation, was the principle of the greatest happiness of the greatest number. In his *Principles of Morals and Legislation* Bentham proposed to evaluate every law, and then to accept it or reject it, by calculating how much happiness (or how much misery) it would bring to how many people. Natural rights got in his way. They are supposed to be universal and unchanging. You are not supposed to evaluate them and then either accept them or reject them. You are just supposed to respect them. From a practical standpoint, natural rights introduced rigidity where Bentham wanted flexibility.

Let this suffice for a brief of the dissent. Most of us today, even those of us who are foggy about what “natural” might mean or what a “natural right” might be hold the opinion that human rights are at the centre of an emerging global consensus on basic shared values. They are promulgated in numerous treaties and conventions, adhered to at least formally by virtually every nation, and in many cases incorporated in national constitutions.

Many people today can identify with the path followed by Nelson Mandela that led him to see individual and human rights as the basic framework defining what the social structure of his country South Africa should be. He grew up in the Xhosa-speaking Thembu tribe where he lived as a child the communitarian values that, as he said later, predisposed him to sympathize with socialist ideals. He was a convinced socialist before and during his long imprisonment on Robben Island. Not long after his release, when he had already become the presumptive President of the new South Africa but before he was inaugurated, he took a world tour visiting, among other places China and Vietnam, two countries that while remaining formally Communist had embraced capitalist economics. Those visits confirmed what he already tended to believe for other reasons: There was no place for a socialist South Africa in the world of the 1990s.

Mandela changed his views. But he did not change his ideals. He transposed them to the principle that human rights, especially social rights, would be the bedrock foundation for the new South African under construction. His views are reflected in the new Constitution of South Africa written in 1994 which guarantees every South African thirty-five basic rights, including food, housing, employment, education, and pensions. Many of them are spelled out in great detail.

If we accept Nelson Mandela’s views on human rights as pretty close to or exactly like today’s majority opinion, how do we make a rational case defending the majority against dissenters like Bentham?

This question can also be divided into two, a theoretical question and a practical question.

Theoretically: If human rights do not come from an original social contract, where do they come from? What rational basis is there for believing in them?

Practically: How can we transform the human rights that are promised on paper to real human rights that are respected and guaranteed? The case of Irene Grootboom, a homeless woman, is a case in point. Aided by volunteer lawyers she demanded that the Constitutional Court order the government to provide her with the home she was promised by Article 27 of the South African Constitution. The Court ordered the government to redouble its efforts to house the homeless, but it also held that immediately providing a house to everyone in her condition could not be a legal obligation because it would be impossible. The government could not afford it. She died still homeless in 2008.

(1) Theory: An answer to the question, “If human rights were not created by nature or by a social contract, how were they created?” is “They were created by history.” Human rights are historically constructed social realities. Simplifying – not simplifying in a misleading way but simplifying in a way that could be confirmed if there were space to add more detail – two key historical times when long periods of gestation culminated in declarations of rights were the time of the French Revolution, and the time of the Second World War. The first gave us the *Déclaration des Droits de l’Homme et du Citoyen* (1789). The second gave us the Universal Declaration of Human Rights (1948).

What rational basis is there for believing in rights? Otherwise put, as speakers responsible for our choices when we decide to use some words and not others, how can we justify doing rights-talk? Here I propose to take a cue from the protestant theologian Paul Tillich, whose ideas were further developed by Martin Luther King Jr. in his doctoral dissertation. Love is the fundamental ethical commandment. Justice (and therefore rights-talk) is a means for doing the work of love. In Tillich’s language, love has “being” while justice has no separate being apart from being a way to put into practice the principle “Love one another as I have loved you.”

Human rights, then, are a gift of history that help us to put into practice the fundamental ethic of love, also known as solidarity. Rights give love the force of law. For those who are not religious, Mahatma Gandhi offered a secular argument for a love ethic: if love were not the law of our species, our species would never have survived and we would not be here today.

- (1) Practice: In principle a love theory of human rights solves Jeremy Bentham's practical problem: Rights do not have to be thought of as rigid rules (read "neurotic rules" since in psychology rigidity defines what it means to be neurotic). Like the ancient Hebrews (but unfortunately unlike the contemporary European Central Bank in its dealings with Greece) believers in human rights can forgive debts even when in strict justice the creditors have a right to be paid.

This does not mean there is no place for natural law in contemporary philosophy and theology, nor does it mean Bentham's philosophy was better than Aristotle's. It does mean that whatever philosophy we hold should support us and not tie us in knots when we organize to get houses built for people like Irene Grootboom.

Nevertheless, even though we would not be in trouble if everybody took an unbounded approach that derives from traditional wisdom basic moral guidance but does not establish rigid institutions unsuited to practical problem solving, in fact, as things stand, we are in trouble. Irene Grootboom was in trouble and so are we. Today our human rights, especially our social rights, cannot become realities in the third world, or defended in the first world, within a legal framework created by and for the 18<sup>th</sup> century and not fundamentally changed since then.

The winners of the French Revolution and similar winners in other places unseated the old aristocracies, the old monarchies, and the old empires. They set up republics. The rule of law that guaranteed basic rights in the new republics also guaranteed *limited government*. To nail down limitations on the powers of governments the 18<sup>th</sup> century winners established modern states as what the great economist and historian of economics Joseph Schumpeter called *Steuerstaaten*, tax states. Their life blood, what they lived on, what they still live on, is taxes.

It is not that there were too few resources in South Africa to build houses for all the Grootbooms. South Africa has its share of the world's billionaires. It has today the world's highest Gini coefficient, making it the most unequal society in the world.

Nevertheless, the Constitutional Court was correct when it said it was impossible for the government to house the homeless because the government did not have and could not get the funds needed to house them. It acknowledged that the government led by Mandela's ANC was trying. It had already, among other things, slashed the military budget by almost half and shifted the funds it was not spending on armaments to the social budget.

Nevertheless, the ANC was caught in the trap that nearly all contemporary governments are caught in, aptly described by Jürgen Habermas in *The Legitimation Crisis* as a permanent fiscal crisis of the state. The state is perpetually lowering taxes to stimulate the economy by putting money in the pockets of consumers so they can spend it, or in the pockets of investors by making investment more profitable than it already is. At the same time, it is perpetually raising taxes to try to pay its bills. The see-saw never stops.

The state is permanently competing with every other state to persuade capital from elsewhere to come into the country and to persuade the capital that is already in the country not to leave. Thomas Piketty calls this "tax competition."

Piketty calculates that in the countries for which data is available public wealth is approximately zero. The sum total of all public assets is approximately equal to the sum total of all public debts. Virtually all the world's wealth is in private hands.

The permanent fiscal crisis of the state means that governments go ever more deeply into debt. It means that governments become ever more unpopular as they fail to keep their promises. They promise to improve the performance of the economy and to fund compliance with the social rights—employment, health care, pensions, education, etc. -- promised by the Universal Declaration of Human Rights. They cannot keep their promises. This is why Habermas writes of a “legitimation crisis.”

The authors of the Universal Declaration of Human Rights expected a future better than the present we who live in their future are now experiencing. The democracies had just won a war. They had promised their soldiers that after risking their lives on the battlefield they would not come home to another depression like that of the 1930s but instead to what USA President Roosevelt speaking in 1941 in the middle of the war called the Four Freedoms: freedom of speech and expression, freedom to worship God in one's own way, freedom from want, freedom from fear. Keynesian economics seemed to prove scientifically that governments could steer economies to shared prosperity. The Swedish Model seemed to be—leading architects of it like Dag Hammarskjöld and Gunnar Myrdal actually believed it was—a model that could be imitated everywhere. The deal was sealed by the vote of the General Assembly of the United Nations at the Palais de Chaillot in Paris when it approved the Universal Declaration of Human Rights on 10 December 1948. All the world's peoples were to enjoy the individual rights that were declared in the 18<sup>th</sup> century and to make those rights safe from the kinds of social breakdown that had proven to lead to fascism and war; and also to promote the general welfare all the world's peoples would enjoy in addition the social rights declared in the 20<sup>th</sup> century.

But the basic legal framework of modern republics established in the 18<sup>th</sup> century with its emphasis on individual rights does not lend itself to social democracy. The combination of limited government and almost unlimited property rights does not lend itself to making human rights real. Social democracy fizzled. It had to fizzle because of a fiscal crisis of the state made inevitable (as Habermas demonstrated) by the legal framework of the economy. In most of the world social rights never made it from paper to practice, and as the 21<sup>st</sup> century dawned social rights in the first world were suffering from chronic and accelerating erosion.

The optimism of 1948 did not last. Asia, Africa, the Middle East and Latin America did not replicate the social democracies of Western Europe. Instead Western Europe and the United States descended to levels of chaos and unpayable debt formerly associated with Banana Republics. The poor did not get justice and the rich did not get peace.

Do I exaggerate the facts, seeing only what is going wrong and overlooking what is going right? Maybe. My point is that there is a fundamental reason why amid all the ups and downs there is a generative causal power at work pushing toward the down side, even while other generative causal powers are pushing on the up side. The one pushing down is the fiscal crisis of the state.

At this point in history what do we do, apart from repeating, and spelling out all the consequences of Tillich's basic point that justice has no being (no “ontological reality”) separate from love?

Forgive me for making two simple points when you and I and everyone else knows that the world is very complicated and no simple one-dimensional solutions will work. That said, if there *were* simple solutions, if there were key changes that could make the

world governable they would be these two. These two would be giant steps toward turning paper rights into real rights.

- 1) Unbounded organization. This means alignment of all sectors to work for the common good. It means being clear that the goal is a fully nurturant society in harmony with the natural environment. It means rational flexibility in the constant improvement of institutions to make them better perform their life-serving functions. It means not treating human rights as something the government is expected to guarantee alone. Making sure there are no homeless Irene Grootbooms should be everybody's responsibility.
- 2) Put the finances of democratic governments on a sound and sustainable basis. This means ending the tax state. It means, to illustrate the principle with just two examples: (1) Follow the example of the settlers who came to New England in the 17<sup>th</sup> century who set aside in every town a tract of land belonging to the town whose rents would fill the town's public purse. (2) For another example take a cue from the days when Jesus could say "render unto Caesar that which is Caesar's." In those days money belonged to sovereigns and sovereigns used their financial privileges to defray their expenses, mainly the expenses of waging wars. Now banks and other financial institutions have privileges that the sovereign people should have and should use to make social rights real rights.

#### Recommended Reading

Glyn Davies (2002), *A History of Money*. Cardiff: University of Wales Press.

*Declaration of the Rights of Man and the Citizen* (1789)

[www.americanbar.org/.../human\\_rights/french\\_dec\\_rightsofman.authcheckdam.pdf](http://www.americanbar.org/.../human_rights/french_dec_rightsofman.authcheckdam.pdf)

Jürgen Habermas (1975), *The Legitimation Crisis*. Boston: Beacon Press

Howard Richards (2010) *Human Rights and the End of the Age of Keynes*

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Howard Richards and Joanna Swanger (2013) *Gandhi and the Future of Economics*. Lake Oswego: Dignity Press.

Howard Richards and Joanna Swanger (2006), *The Dilemmas of Social Democracies*. Lanham: Rowman and Littlefield.

*Universal Declaration of Human Rights* (1948) [www.un.org/en/universal-declaration-human-rights/](http://www.un.org/en/universal-declaration-human-rights/)