

CHAPTER 10

A “STRUGGLE APPROACH” TO HUMAN RIGHTS

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ABSTRACT

It is argued that legitimate resistance is the conceptual and historical counterpart, and the ultimate guarantor, of human rights. Human rights = legitimate resistance. Human rights find their most reliable roots in the struggles throughout history for the values that underlie these rights.

The history of the link between human rights and resistance is investigated. The implications of this approach for a number of human rights issues – identifying human rights claims; the relationship between civil and political and socio-economic rights; the counter-majoritarian dilemma and the universalist/relativist debate – are investigated.

The ongoing nature of history is emphasised, as well as the creative potential of members of the present generation to influence history, and as such the nature of human rights, through their struggles.

1. INTRODUCTION

Human rights is the flipside of the coin of legitimate resistance. To say that freedom of conscience is a basic human right, is in effect a licence ultimately to take the law into your own hands should you be forced to pray to a god in which you do not believe. And conversely, the argument that one can justifiably break the law as a last resort in cases of unfair discrimination is tantamount to claiming that equality and non-discrimination are basic human rights.

This approach, which I will call the “struggle approach” to human rights, may be captured in the equation *human rights = legitimate resistance*, an equation which may be read from both sides.

It is because of its link with resistance that the concept of human rights has such power: it is this connection that makes human rights a force to be reckoned with around the world. Whether one considers human rights “inalienable”, “fundamental” or “basic”, or refers to it as “trumps” or “natural entitlements”, the concept of human rights represents a countervailing force to the awesome power of the state and society at large. If rights are “inalienable”, this implies that should they be alienated they may be “taken back”, either by those whose rights have been violated, or by others on their behalf. Human rights are not about asking favours and they are not merely moral or rhetorical concepts; they are guides to action and triggers of resistance against what is perceived as the illegitimate use of power, in particular state power. As such, human rights is a potentially revolutionary concept, as is evidenced by the clampdown worldwide by authoritarian regimes on human rights organisations.

However, it should be noted that human rights doctrines do not operate within the context of the anarchist tradition – human rights proceed from the (often

unspoken) assumption that there is a general duty to political obedience, to which human rights norms constitute exceptions. The concept of human rights does not challenge the existence of the state as an institution; it in fact endorses it. However, it does challenge the illegitimate use of such power. Consequently, the concept of human rights in principle confirms existing power relations more than it challenges such power. The concept of human rights reserves a role for disobedience in extreme cases, but this comes into play against the broader backdrop of an obligation to obedience, to which exceptions must be justified. If constitutions are social contracts, bills of rights are the escape clauses; the concept of human rights is the ultimate guarantor of popular sovereignty. It is also the foundation for intervention by the international community in what would normally be considered domestic affairs, matters within the sovereign control of the state concerned.

2. THE HISTORY OF THE LINK BETWEEN HUMAN RIGHTS AND LEGITIMATE RESISTANCE

The link between human rights and legitimate resistance is not just conceptual. This link has been evident since the inception of the concept of human rights, both because human rights documents often emerge as part of a reaction against human rights violations, and because they sometimes explicitly recognise a right of resistance, should the human rights norms they espouse be violated.

In *Magna Carta* (1215), essentially a peace treaty between King John and his rebellious barons, King John recognised certain rights of the barons, and expressly recognised the “privilege” to oppose the royal command should this not be honoured.

John Locke, widely considered the father of the modern human rights concept, defended the “Glorious Revolution” of 1688 on the grounds that

[w]hensoever therefore the legislative ... endeavour to grasp ... absolute power over the lives, liberties, and estates of the people; by this breach of trust they forfeit the power, the people had put in their hands, for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty ...¹

Where “natural rights” are violated, even violence is justified: “Force is to be opposed to ... unjust and unlawful force.”² In opposition to the state, which was considered to be endowed with the authority of nature, the concept of “natural rights” claimed the same authority – nature – for the defence of these rights.

The idea of natural rights was incorporated into the American Declaration of Independence of 1776 which states that governments are formed to secure life, liberty and the pursuit of happiness. Whenever a government becomes “destructive

¹ Locke *Two treatises of government* 2.19.222.

² At 2.19.204.