

9/11 – THE END OF HUMAN RIGHTS? Security vs Human Rights?

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Summary

Since 9/11 many of our assumptions concerning the role and relevance of human rights have been called into question, particularly when issues of national security are at stake. Whilst some see this as an erosion of human rights values, this is not the case. Rather, it suggests that human rights are being taken extremely seriously at the highest levels and that compliance with human rights standards is believed to be essential if executive action is to have legitimacy. If this means that those standards are being subjected to more rigorous scrutiny as a result, this is to be welcomed, indicating as it does that human rights have 'come of age' as key evaluative tools of good governance.

Introduction

It is incontestable that the events of 9/11 have had an indelible effect on the world in which we live. The political, economic and social consequences of those events and the forces that they unleashed are still being felt and will continue to reverberate for many years to come. 9/11 has had many victims – but is 'human rights' one of them? At one level, it is all too easy to reach this conclusion - one need only look to the horrors of the day itself and to the misery and suffering that millions have endured in the context of and as a consequence of the 'war on terror' in order to do so. This, however, would be a mistake. The UN continues to adopt new, standard-setting treaties and declarations; the newly constituted Human Rights Council is crafting an effective process out of the new device of Universal Periodic Review; bodies such as the European Court of Human Rights are receiving an ever-increasing number of applications and issuing significantly more judgements than hitherto. The political and institutional machinery of international human rights protection is fully engaged and is as active as it ever was – indeed, probably more so.

At another level, however, there has indeed been change, in that the events flowing from 9/11 have both challenged prevailing assumptions concerning human rights and made us all more aware of the complexities of human rights claims. Whilst 9/11 has not been the end of human rights, it may have marked the end of a comparatively simplistic, idealist notion of human rights, which failed to acknowledge properly the extent to which human rights claims were bearers of sets of legal, political and cultural assumptions – assumptions which are now more open to challenge. As a result, we may be entering into a phase

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in which human rights thinking becomes more nuanced and more complex – in short, a more mature approach. If as a result of 9/11 we find that in time, this indeed comes about, then human rights will have been strengthened rather than undermined by the events of that day. Nevertheless, the days in which it was possible to claim a moral advantage merely by levying a charge of abusing human rights at a practice are possibly over: whilst human rights as a legal and ethical concept have surmounted the challenge posed by 9/11, the potency of language of human rights has been diminished. If however, there is to be more focus on the substance of the claim than upon the language in which that claim is couched, then this will ultimately be to the good.

Torture

Perhaps no one single area has come in for more scrutiny than that of torture and ill treatment of those suspected of involvement in terrorist activities and so provides an illuminating example. Torture is possibly the most widely prohibited of all human rights. Historically, we associate torture with repressive regimes that can only maintain their power by terror. Outlawing torture stands alongside a rejection of tyranny and the espousal of democratic, liberal values. But when those values are themselves under assault, what should one do? Can vice ever be the handmaiden of virtue? After all, we countenance war in order to defend ourselves and our liberties – so why not torture? Yet in the wake of 9/11 this fundamental principle came under direct challenge, it being argued that absolute prohibition is not morally sustainable. It has become a commonplace to raise the 'ticking bomb' scenario in which it is assumed that a person in custody has, or may have, information necessary to save the lives of many others and that that information needs to be acquired and acted upon if significant loss of innocent life is to be avoided. This is a classic dilemma and it is usually countered by pointing out that the interrogator can never know whether the person being tortured does in fact have the information sought or whether the evidence acquired through torture is so inherently unreliable as to be worthless anyway.

However, the stark question remains: is it ever morally justifiable to inflict pain and suffering beyond the degree that would otherwise be considered permissible in order to seek to acquire information that would prevent the infliction of pain and suffering on others? Many writers engage in what might best be termed 'avoidance techniques' when faced with this question. Some have argued that since it is inevitable that – rightly or wrongly – torture will occur under such circumstances then the appropriate thing to do is to regulate its use, in order to ensure that resort to torture happens as rarely as possible and is subject to all appropriate safeguards. Others have argued that whilst the absolute prohibition must remain and that there should be no legal defence to the crime of torture, the circumstances in which torture took place should be taken into account in mitigation of sentence. Others accept that it may just be that whilst society as a whole cannot afford to decriminalise torture, there will be occasions when it will be ethically justified and at that point one must look to the individual to act in the interests of society even if he, as torturer, must bear the cost.

The idea that torture can be considered an ethically acceptable response to the perils that face society, speaks of values that many will find impossible to accept. However, this does not prevent a rather more subtle challenge – that of seeking to 'redefine' our understanding of what comprises an act of torture, as for example in the infamous and now repudiated US 'torture' memoranda issued in the course of 2002 which attempted to argue that only the most egregious forms of ill-treatment (such as the use of electric shocks, prolonged beatings causing severe injury, etc) were sufficiently severe to be described as torture, whilst 'lesser' forms of ill-treatment (such as 'waterboarding' – involving the simulation of suffocation/drowning) could be described as being 'merely' inhuman or degrading' and thus – somehow – less objectionable. Yet another challenge comes from the practice of 'extraordinary rendition', as a result of which suspects are sent to other countries whose techniques may be more 'vigorous' than those of the

'rendering' state for purposes of interrogation - a seemingly attractive proposition to those who do not wish to be too closely acquainted or associated with the trade of the torturer. A further issue concerns the use to which information acquired as a result of torture might be put. In the UK, for example, it has been judicially determined that evidence acquired as a result of torture, including torture undertaken by non-UK nationals in other countries, may not be used in court proceedings but it was also made clear that this 'exclusionary rule' did not apply to evidence acquired as a result of ill-treatment falling short of torture (even though such treatment may itself be in violation of human rights). Moreover, the rule only applied to the use of evidence in court, so the security services remain free to act on the basis of information acquired as a result of torture by foreign nationals (and, one presumes, UK nationals as well).

Human Rights and state law

It is easy to point to examples such as these as providing evidence of the erosion of human rights and civil liberties. But it is equally true that the debates surrounding the use of torture, and of evidence acquired as a result of torture, have been driven by the desire to protect democratic societies from those who, it is believed, are seeking to destroy them, or at the very least, kill or injure those resident within them. How do the rights of the suspect and those of the individuals who comprise that broader society relate? This is no more than a reflection of the increasingly prominent debate within the criminal justice process concerning the extent to which the rights of the accused are to be calibrated against those of the 'victim'. As the 'individual'-orientation of society is more generally placed under scrutiny and the relevance of the broader community interests are increasingly brought into play, it is hardly surprising that the (arguably) overly individualistic focus of traditional human rights thinking has come under challenge. Whether or not this is related to the effect of 9/11 is a matter for debate, but there is certainly a confluence in trajectory towards re-evaluating the nature of the balances struck between the rights of individuals and of those of the communities of which they form a part. For some, this is no more than a reflection of a heightened sense of social cohesion, for others it is a fundamental challenge to the foundations of western liberalism. The essential point is that there is indeed such a debate taking place and it is centred on the nature of the political and social structures - and associated sets of values - which both inform and inspire the legal frameworks that regulate the conduct of both citizens and State. Within that debate, the mere appeal to a matter - such as torture - being prohibited as a matter of 'human rights' is no longer determinative of the outcome; it is increasingly necessary to test out the rationale for existence of the right.

When does the abstract become concrete?

Is this a cause for concern? At one level, it is naturally disconcerting to see either the need for, or the generally accepted implications of, some of the most well-attested human rights commitments being called into question. At the same time, however, the *idea* of human rights remains as powerful as ever and it must not be forgotten that whilst the content and interpretation of human rights obligations have come in for scrutiny, the relevance of human rights obligations to the manner in which individuals are treated by those in authority has not been subject to serious or sustained challenge. Indeed, the lengths to which states have gone to justify their actions within the paradigms of the human rights framework is itself quite remarkable. None of the principle protagonists in the post 9/11 events has ever seriously attempted to withdraw from their human rights obligations as a matter of law (albeit that some, such as the UK, have taken advantage of the opportunity to derogate from some human rights commitments, but only to the extent that the legal instruments which are the source of these obligations expressly permit). Indeed, even the US torture memoranda themselves evidence a desire to offer a form of justification that acknowledges the potency of the overarching rights-based framework. The prominence given to human rights considerations in domestic legal discourse in both the UK and the US is considerably greater than previously and these are now brought to bear on the outcome of considerably more questions of law than was previously the case. Indeed, there may well have been a passing from the 'political' to

the 'practical', from a world in which the role of 'human rights' was in truth more rhetorical, more a means of promoting certain ethical approaches and inspiring political change, to being a tool with direct legal potency.

Post 9/11, the US and the UK, along with so many other states, have been challenged by the need to adhere to human rights principles whilst seeking to protect their national security - in a time of peace but which for those involved has been cast as a time of war. Rather than being a means of projecting liberal western values - being, in effect, little more than an agent of foreign policy with only limited domestic relevance - they have become significant obstacles to the achievement of critical national policy objectives. In such a context it was inevitable that human rights values would come under pressure and scrutiny - as indeed they have and continue to be. Yet it is precisely because of the practical significance that they have now acquired that this is so. Whereas in the past one might advocate for human rights abroad but continue with 'business as usual' at home, it is increasingly difficult to do so. The challenges to, and the refinement of, our understanding of human rights obligations is a necessary phase in the realisation of human rights, rather than an abandonment of them.

At a practical level, this means that we may expect to continue to see challenges to accepted understandings, as the increasing significance of human rights results in the need for more nuanced approaches. For example, and to draw on material of direct relevance to the community of religion, whilst it is easy to subscribe to the freedom of expression as an abstract concept, it is less easy to do so when the views expressed are hurtful and disrespectful of the views of others and very difficult to do so when they challenge in a hurtful fashion the foundations of a person's sense of religious identity. But at what point does such expression warrant a restraint on the freedom of expression, given the importance of that right to the flourishing of a democratic society? Likewise, should religious messages given to believers be subject to the same principles of mutual tolerance and respect that are demanded of other forms of expression or communication? Similarly, and like it or not, surveillance and intelligence gathering is (and always has been) a fundamental tool in the maintenance of public order. Are religious believers sacrosanct? If security forces can obtain access to our private phone calls, e-mails and text messages and subject them to critical scrutiny in the interests of public safety, should they not have access to religious ceremonies for similar purposes, or to the exchanges that may take place between believers and spiritual guides or leaders?

There is no easy answer to these questions, and raising them as human rights issues does nothing to help settle the outcomes. What it does do, however, is provide a framework and a set of values that help inform the discussion. During the 1990s the major 'debate' surrounding human rights was the so-called 'Asian Debate', concerning the universality of human rights obligations and the challenges of 'cultural relativism'. There was always a degree of artificiality to that 'debate' in that, as a matter of legal obligation, not all human rights obligations were universally applicable and, moreover, to be relevant in different cultural contexts human rights must be applied in a contextual fashion. What the post 9/11 debate has demonstrated is that human rights standards do indeed stand in a reflexive relationship, not only with cultural expectations but with more general political and societal (and this includes religious) expectations, aspirations and exigencies. This makes human rights less of a touchstone of legitimacy and so, to some, a lesser, diminished, commodity. On the other hand, it makes them much more of a dynamic element in the forming and un-forming of the societies they serve. Seen in this light, there is no more - and no less - of a tension between 'security' and 'human rights' than there is between any other informing value. What may have been lost is the late 20th century view of rights as 'trumps' held by the individual. Whilst an understanding of human rights, as being less of an evaluative tool and more of a set of guiding principles informing the practical outworking of societal inter-actions, will doubtless appear to some as being the end of human rights as we have known them, this does not mean that it is

the end of human rights. It makes for greater complexity – and greater risk – but also holds out the prospect of greater relevance and realisation. Arguably – and despite all the many violations of human rights that have taken place and continue to do so – the role of human rights thinking has, ultimately, been enhanced rather than diminished in the post 9/11 world as states wrestle with – rather than reject - the realities of its implications.