



# **HUMAN RIGHTS**

**CONFRONTING  
MYTHS AND  
MISUNDERSTANDINGS**

**Andrew Fagan**

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Andrew Fagan

*Deputy Director, Human Rights Centre, University of Essex,  
UK*

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# Human Rights

**In ever loving memory of S.M. Fagan**

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# Introduction

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This book, as the sub-title indicates, aims to confront a number of enduring and significant myths and misunderstandings which afflict both the theory and the practice of human rights. Many other academic human rights books approach the subject by means of a conventional classificatory structure which distinguishes between such things as the different categories of human rights, enduring themes and concepts within the subject-matter and established issues in the application of human rights to the 'real world'. Many of these works have made a vitally important contribution to the understanding of human rights amongst students and practitioners alike. The extent of their success can be gauged by the relatively little that remains to be usefully written within this genre. In an effort to avoid mere repetition, I have opted for a different approach to the subject. Human rights have become, in many parts of the world, a household term. In some parts of the world, human rights have become a veritable totem around which campaigns for social justice and against oppression have taken root. An awareness of and an appeal to human rights have spread beyond the realm of elite political and intellectual communities and have come to exert a profound influence upon many people's political, economic and social projects and aspirations. It would be wrong, or at least deeply egocentric, to claim that we, that is everyone, now live in a veritable age of human rights. This is, if you will, the foremost myth in need of correction. After all, the ultimate criterion for determining whether we live in such an age is the extent to which all people everywhere can be said genuinely to possess and exercise their fundamental human rights. This age has yet to arrive, as evidenced by the countless millions, if not billions, of human beings whose basic human rights are systematically denied every waking day of their lives. Like many other so-called historical 'ages' or epochs before, the age of human rights remains a relatively rarefied property of the privileged few, who are sometimes too quick to misconstrue their own conditions for those of others. A commitment to human rights entails, however, a commitment to satisfactorily securing the conditions required for a world finally free from the effects of systematic misery and avoidable suffering. Only then can we genuinely declare ourselves to be the bearers of an age of human rights. In recent years, despite a number of deeply significant geo-political developments and ever-expanding global wealth, there have emerged a number of



challenges to human rights claims to normative hegemony. These have come from various quarters and have taken various forms. The principal aim of this book is to explore and respond to a selection of these challenges, which I have labelled, uncharitably perhaps to some, myths and misunderstandings.

The basis and the legitimate parameters of human rights cannot be excluded from critical analysis and scrutiny. To this extent, human rights are no different from any other potential subject of intellectual inquiry. I do not, therefore, consider all challenges to human rights as being merely wrong in a moral or an epistemological sense. However, a significant proportion of the intellectual 'friction' within the theory and practice of human rights needs to be confronted with slightly less intellectual tolerance than is appropriate for other forms of deliberative dispute and disagreement. A commitment to human rights is not equivalent to a preference for a particular art-work or a consumer commodity. Human rights, in so many ways, affect the very capacity and opportunity to engage in deliberation and differences of opinion in the first place. They are, in this sense, truly foundational. This does not absolve human rights from any and all criticism, but we need to remind those who challenge the basis and moral authority of human rights that they can do so only to the extent that their own human rights are not unduly restricted and denied in these respects. To amend von Neurath's familiar metaphor a little, we cannot dismantle the lifeboat our very existence is largely dependent upon so long as we remain on open and tempestuous seas.

Myths differ from mere misunderstandings in some important respects. Without resorting to the Oxford English Dictionary, I take myth to possess a decidedly and all-important intentional quality. Myths are deliberately created by some agent or collective body of agents with the aim of achieving some purpose or end through representing reality in a particular way. The reality represented is 'mythical' to the extent that it can be shown to be objectively 'false', partial or inaccurate. Misunderstandings can also be shown to be false or based upon erroneous reasoning, but lack the more overtly purposive and intentional quality of myths. The origins and motives of misunderstandings are typically far more random than their mythical counterparts. However, the ultimate distinction between the two is not completely cut and dried and, like many other discursive phenomena in these non-binary times, is better understood as marking opposing, idealised points on a spectrum. Having said that, it is useful to distinguish between the two in respect of human rights to the extent that it enables one to distinguish between the depth and potential intractability of the notion in question: misunderstandings are more easily overcome than more entrenched myths to the extent that the latter have more purposive 'weight' behind them. I draw the distinction in order to support the broader normative ambition of this work.

The scope of the ensuing discussion is intended to provide a sufficiently

comprehensive and detailed engagement with human rights to enable a reader relatively new to the academic literature to gain a solid understanding and knowledge of the principal landmarks in this field. It is, however, necessarily limited and is not intended to address all of the most important aspects of understanding human rights in the current age. The content of this book is selective and some readers may lament the omission of their own particular areas of interest. I apologise for that. However, what is covered here aims to encourage all students and practitioners of human rights to reflect upon what they consider the basis and scope of human rights rightfully to be. To that extent, I have chosen to include myths and misunderstandings from across a wide range of specific positions within the academic human rights field. While some of the specific myths and misunderstandings considered have been chosen precisely because of their scepticism of or hostility to the doctrine, others have been chosen that are actually fully affirmative of the doctrine. I have chosen these because and only to the extent that their particular claims can be shown to be ultimately harmful to the moral authority and legitimacy of the doctrine: they ask for too much in the name of human rights and seek to extend human rights claims to areas of life where they do not apply.

Chapter 1 begins with an analysis of a misunderstanding and addresses an established tendency to confuse social privileges with human rights. I argue that this tendency has its roots within human rights theory and the difficulty in determining the basis and scope of what it means to be human in the first place. After considering the two dominant theoretical approaches to justifying human rights I propose an understanding which aims to restrict the application of human rights to essential conditions of human well-being.

Chapter 2 takes aim at a myth and engages with human rights as a distinct moral doctrine. The myth in question is that which views human rights in strictly legal terms and claims that human rights can only be said to legitimately exist as legal entities. Legal-positivism has had a profound effect upon the development of jurisprudence and has figured prominently in the critical literature upon human rights. My criticisms of these arguments offer nothing new to the debate but aim to remind us of the necessary persistence of the distinctly moral dimension of human rights, which is not reducible to, or dependent upon, legal recognition and codification.

Chapter 3 extends the argument of Chapter 2 to address the myth of human rights as a universally valid moral doctrine. This may appear, as stated, to be a simple contradiction on my part. Typically, refutations of legal-positivism have rested upon an appeal to moral universalism and a characterisation of legal-positivism as a form of moral relativism. This is correct. However, many, but not all, of the arguments presented in favour of human rights' universal validity have failed to engage with, or even acknowledge, the social basis to human rights. Continuing to insist or imply that human rights can be defended

without engaging in analysis of the social conditions which have influenced them is intellectually naïve. It has also consistently run the risk of being criticised as a form of Eurocentricism. This chapter argues that successfully extending human rights' legitimacy requires a serious engagement with society and culture and aims to develop an argument which goes beyond merely repeating the mantra that culture and society have no bearing upon globally acceptable justifications of human rights.

Chapter 4 shifts focus to the relationship between human rights principles and nation-states. There is an established misunderstanding of human rights as a doctrine which is ultimately incompatible with the modern state. The origins of this view lie, to some degree, in a latent form of cosmopolitanism which, on some readings, accords little constructive role to the state in initiating or instituting a global morality. The singular role of the state as an abuser of human rights has also reinforced this view. I argue that a correct understanding of human rights as a contemporary moral doctrine must include a comprehensive and accurate account of the institutional capacity of the state to protect and promote human rights. As the world is presently structured, human rights cannot be achieved without utilising state power and resources.

Chapter 5 retains this focus by challenging an important myth concerning the relationship between democracy and human rights. An argument supportive of the state's role in upholding human rights requires a determination of what kind of state is best suited to this end. The conventional response to this question identifies democracy as both necessary and sufficient to this end. However, democracy is a concept with many interpretations. One in particular has detrimentally affected the exercise of human rights, to the extent that it has been argued that democracy is based upon the enjoyment of civil and political rights and does not require any significant concern for their economic, social and cultural counterparts. I present an established argument against this particular myth which draws upon Henry Shue's notion of rights holism.

Extending the notion of rights holism to another area of human rights concern, Chapter 6 proceeds to focus upon a significant misunderstanding concerning the relationship between rights and duties. I place this analysis in the context of a discussion of economic justice. Many have argued that human rights are insensitive to duties. Various explanations have been offered in support of this claim. For example, it is frequently argued that human rights are unduly influenced by moral egoism and the consolidation of self-interest. Something resembling this view is undeniably discernible in some accounts of human rights. However, I shall argue that these accounts are false to the extent that they fail adequately to conceptualise the necessary role of duty as a counterpart to the possession and effective exercise of any human right. If one takes seriously the view that rights are correlative with duties, one must draw a different conclusion from that which reduces the notion of duty to the status of a mere afterthought.

Chapter 7 concludes my discussion by bringing together all of the various strands and elements of the previous chapters. The purpose of this final chapter is to outline a positive and constructive vision and account of human rights in the contemporary age. This aims to transcend the more overtly negative purpose of demonstrating the errors and weaknesses of other approaches to specific aspects of human rights. My ambition is not thereby to end all subsequent discussion of the subject at this level, but rather to present an account which suffers less from those myths and misunderstandings which affect both our understanding of human rights and, more importantly, the prospects for their realisation. I leave it to individual readers to decide how successful I have been in this regard.

# 1. The basis and scope of human rights

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## INTRODUCTION

Chapter 1 delineates the basis and scope of human rights through the analysis of a misunderstanding. More often assumed than stated, this misunderstanding attributes too much to human rights as a consequence of perceiving the doctrine as a fully comprehensive morality for human life. This misunderstanding serves to blur the important distinction between human rights and social privileges; that is to say goods which are essential to human life and agency and those which may be objects of desire for some but are certainly not constitutive of human agency *per se*.

Misconceiving the basis and the legitimate scope of human rights has, at times, undermined the doctrine's legitimacy in the eyes of some. The human rights 'inflationism' which typically accompanies this misunderstanding is damaging to the doctrine in multiple ways. Thus, it runs the very real risk of trivialising human rights demands by over-extending their scope to cover what are widely considered to be mere social privileges. Similarly, it obscures the all-important issue of desert in the enjoyment of human rights, in so far as privileges are typically understood as entailing some reward process, which is absent from the grounds for possessing a human right. Most importantly of all, it serves to obscure the moral imperative for human rights and the very point of their existence in the first place. This chapter focuses, then, primarily upon the distinction between human rights and social privileges. This entails a return to a consideration of *the* two foundational questions of human rights: what is their purpose and why should they exist? I address these questions by analysing two different philosophical theories of human rights: the interest theory and the choice theory approaches. Ultimately, both of these approaches argue that the purpose of human rights and the justification for their existence lie in the essential contribution they make to human agency: both approaches present human rights as veritably constitutive attributes of human agency. I criticise this approach. Human rights exist not to ensure human life *per se* but to protect and promote the conditions for a certain quality of life for all. In this respect, human rights are inherently normative. Understanding the purpose and justification of human rights in this way raises questions over the proper scope of their application and at what level the quality of life criterion can

justifiably be set. I conclude this chapter with a discussion of this vitally important consideration.

## METHADONE AND THE HOLOCAUST

What is the ultimate purpose of human rights? The modern human rights movement emerges out of a response to the Holocaust, that 'hideous icon of human suffering for post-war generations' (Fagan, 2008: 94). The Universal Declaration of Human Rights was certainly motivated, in part, by an attempt to place effective restrictions upon any state's ability systematically to annihilate whole populations. The response to the Holocaust and genocide marks the spot at which the modern human rights movement established an institutional foothold in the new world order which emerged after the end of the Second World War. No sane human being could possibly question the legitimacy and moral authority of human rights as a means for seeking to ensure that the very worst excesses of inhumanity would not be repeated. Contrast this with some more recent claims to human rights. In the UK in April 2008 a class-action case was successfully brought against the British government by 200 prisoners who claimed that the Prison Service violated their human rights through failing to provide them with a methadone substitute for their heroin addiction.<sup>1</sup> Inevitably this was reported as securing a human right to receive drugs paid for by UK taxpayers. Subsequent press reporting presented this as yet another absurd violation of common sense in the name of human rights. Protestations by civil liberty organisations and some medical professionals fell on mostly deaf ears. Popular opinion and the media should not be the ultimate arbiters of what human rights entitle anyone to. However, it would be foolish to deny that the scope of the application of human rights, from protection against genocide to a right to methadone, serves to raise very serious questions about the conditions under which human rights claims may legitimately be made. The scope of human rights obviously extends beyond seeking to protect populations from genocide, but how much further does it extend?

The misunderstanding of human rights this chapter focuses upon owes its existence to a complex relationship between the basis and the scope of human rights. There has been a tendency amongst some theorists of human rights to treat questions concerning the basis and the scope of human rights as separate, though related, concerns. In this way, one may identify that which grounds anyone's claim to possess human rights, before proceeding to delineate how far this claim extends and which human goods should be identified as human

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<sup>1</sup> See 'Inmates Win Cold Turkey Pay-out', *The Times*, 18 April 2008.



rights. Thus, Jack Donnelly combines an answer to the basis and scope questions when he writes that human rights 'are the rights one has because one is a human' (2002: 7). Donnelly's statement is certainly clear, concise and unequivocal concerning the basis of human rights but it fails to provide criteria for adequately addressing the scope dimension contained within his formulation. All human beings may legitimately claim human rights. This is fundamental, but not sufficient for the purposes of determining which aspects of human life and action should be identified as belonging to the category of human rights. One might be inclined to suggest that all those elements which make anyone 'human' can be legitimately identified as enjoying the status of human rights. On this view, human rights are instruments for being human in the first place. The purpose of human rights and the ultimate justification for their existence consist in their status as prerequisites for human agency. This is the approach which the vast majority of theorists of human rights take in their attempts to address the foundational questions. On this view, a human right to protection from genocide is obviously legitimate, whereas a human right to manage an addiction, on the face of it, is somewhat less indubitable. The one seems an unequivocal human right whereas the other appears to some just as unequivocally as a social privilege to which the beneficiaries are not entitled. The basis and the scope of human rights are closely, if not inextricably, related and consist of their necessity for being human in the first place. We have human rights because we are human, and they legitimately exist because they are a prerequisite for anyone being human in the first instance. This formulation is unmistakably tautological. It is surprising, therefore, to see just how central it is for many attempts to justify human rights and provide criteria for determining the legitimate scope of human rights and thereby providing for the separation of human rights from social privileges.

## BEING HUMAN AND CLAIMING HUMAN RIGHTS: INTEREST THEORY APPROACH

It is impossible to begin to engage with the foundational questions of human rights without delving into the theoretical terrain of the nature of being human. Typically, attempts to answer these questions and thereby provide a justification for human rights as a distinct moral doctrine seek to identify the fundamental elements or prerequisites for human agency. Theoretical justifications of human rights invariably begin and end with an attempt to identify what it is that ultimately constitutes us as human agents. All such attempts aim to identify what we all commonly share by virtue of being human and then construct from this commonality an account of the scope and application of human rights.

The specific subject-area of attempts to justify human rights tends to be dominated by philosophy. Despite contemporary philosophy's reluctance to engage with questions concerning a purported essence or first nature of humankind, the tradition of attempting to define and identify first principles and foundational conditions retains some adherents within philosophy, and some of these have turned their attention towards human rights as an appropriate domain for this type of exercise. Philosophy, though, does not enjoy a complete monopoly in this field as others have also sought to contribute justifications for human rights through the identification of some purported human essence. Different approaches to the same goal do exist but do not divide along academic disciplinary lines alone. The more appropriate distinction is that between interest theory and choice theory approaches to justifying human rights.<sup>2</sup> Interest theory provides the focus of this section and choice theory will be analysed in the following section.

The *interest theory* approach is a label applied to a number of theorists whose separate attempts to identify the basis and scope of human rights contain some significant similarities and differences. I shall discuss both in turn, beginning with the similarities. The label has been applied to the work of John Finnis, Bryan Turner, Martha Nussbaum and Amartya Sen, amongst others. The common basis for the interest theory approach consists of the appeal each theorist makes to the existence of fundamental human interests. Human beings are viewed as physiological and social agents who require the sufficient protection and promotion of certain interests in order to be human. These interests pre-exist, so to speak, the institution of human rights and social institutions more generally. That is to say, human rights are viewed as grounded in our very nature and exist in order to promote and protect those interests which constitute us: human rights are viewed as the mechanism through which these interests are best identified and secured. Historically and analytically, the concept of human interests precedes that of human rights. However, it would also be accurate to say that the language of human rights is fast replacing and superseding that of human interests, to the extent that the two are viewed in many quarters as simply synonymous. This can be unfortunate to the extent that it may obscure how some interest theorists conceive of human rights: as instrumental means for securing those 'goods' and interests which (purportedly) make us what we are. On this view, human rights are considered to be instrumentally valuable to realising our fundamental interests, rather than the form those interests must necessarily take.

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<sup>2</sup> The philosopher Bernard Williams (1985) argued that all moralities can ultimately be labelled as either interest or choice theories. The distinction is sometimes drawn between interest and *will* theories. I consider will and choice to be synonymous, but, like Williams, prefer the latter term.



Few interest theories foreground the concept of human nature in their formulations of the basis and scope of human rights, which is understandable, given the deeply controversial character of any such appeal. Many theorists for example, have rejected the very notion of some essence or first nature to humankind. Over the past fifty years or so, the discussion of what our nature may be has been completely transformed by the contributions of historians, social anthropologists and sociologists who have empirically challenged a conception of human 'nature' as timeless and unchanging. Appeals to human nature or essential human interests have increasingly provoked disagreement and dissensus, rather than agreement and consensus. This is also apparent within the interest theory approach, insofar as different interest theorists present different accounts of our fundamental interests.

Drawing upon a tradition of natural law, John Finnis (1980) argues that there are seven basic forms of human flourishing, which are universal and encompass social and physical attributes of the human condition, ranging from a capacity for practical reason, to play and recreation, culminating in a capacity for spiritual experience. He argues that this account is not beholden to some overly physiological conception of human nature and is comprehensive and robust enough to encompass the empirical diversity of human life. According to Finnis the function of human rights is to secure our access to and enjoyment of these seven basic forms of human flourishing and they are justified to the extent that they are successful in providing for this end. By contrast, the neo-Aristotelian philosopher Martha Nussbaum (2002) identifies ten basic goods, ranging from 'life', bodily health and bodily integrity to emotions, affiliation, which comprises friendship and respect, and finally, control over one's environment. Some may be inclined to dismiss the differences between Finnis and Nussbaum as mostly irrelevant to the underlying vision of humankind they seek to express. However, the differences are apparent enough and reveal the extent to which the two authors are influenced by different normative principles; visions of what humankind ought to be, rather than what it is. In this respect, they do share a somewhat 'idealised' account of humanity, which largely excludes human beings' capacity for inhumanity. It seems somewhat counter-intuitive to suggest that each and every one of us has a fundamental interest in our capacity for inhumanity, but perfectly reasonable to insist that an account of human rights takes this capacity into account. This line of reasoning raises a deeper issue for any attempt to justify human rights. After all, as I stated earlier, the modern human rights movement was motivated by the need to prevent the grossest forms of inhumanity. While the vision of humanity implied within the Universal Declaration of Human Rights (UDHR) owes much to the emancipatory and celebratory spirit of the Enlightenment, the Holocaust and not the Enlightenment underlies the drafting of the UDHR.

This raises what we may term the motivational question. The motivational