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Are human rights universal, and does it matter?

The Rt Hon Lord Justice Sedley
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To accept that what people collectively believe to be their fundamental rights changes over time and varies from place to place is to do no more than recognise reality.

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The Rt Hon Lord Justice Sedley



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It seems elementary that entitlements which are human rights must be part of every human being's birthright: in other words, that rights which are not recognised as universal cannot be human rights. It may be that in practice not all human beings enjoy them or even know what they are, but that doesn't make them, as entitlements, any less universal.

Other things, however, are no less obvious. What rights are taken to be fundamental human rights has changed dramatically, even among those who agree about them, from one period to another. Moreover, the idea of human rights varies radically from one culture to another. I will call the first form of variance vertical, to describe modification over time, and the second, because of its geographical dimension, horizontal.

The argument for universality does not ignore these differentials. But it tends to regard them as growing pains or as obstacles or diversions on a yellow brick road towards a global and timeless human rights project. There is of course an element of parody in this account: few universalists claim to be travelling towards a promised land or even a defined goal. They would say, rather, that the process of arguing, urging, campaigning, denouncing, encouraging and asserting advances the world's understanding of human rights and spreads acceptance of them. They point to the post-Helsinki pressure on the Soviet bloc which contributed to the final collapse of the communist system. But their notion of human rights tends to be fixed in their own time and place. Universalism is then a process of saying to others, as Dr Leavis used to say was the process of literary criticism: 'This is so, isn't it?' – even if, again as with Leavis, the tolerant ecumenism of the theory doesn't always reflect the dogmatism of what happens in practice.

The horizontal travel of human rights theory has not been random. It has been a geographic movement from west to east, for reasons which are readily seen. It was in the economically developed and aggressive societies of the west – Britain in the 17th century, France and North America in the 18th – that an ideology was needed to mark the overthrow of monarchical government and to legitimise the entrepreneurial polity which had replaced it. Much as the peasant risings of late-mediaeval Europe had raised the egalitarian banner of the Everlasting Gospel, the early-capitalist revolutions raised the banner of universal

rights. Men – and it was men – were born free; their property was sacrosanct; their consciences and beliefs were not the state's business. And although a good many of America's founding fathers owned slaves, it was the hundreds of thousands of more modest people who took their message of human brotherhood seriously and who, on both sides of the Atlantic, created the anti-slavery movement that finally made at least this much of the human rights project a reality.

There was, even so, a sobering note in the civil war which put an end to slavery in the United States. The South pointed out with some force that the poorest workers in the Northern cities lived in worse conditions than many Southern slaves. They were free to go cold and hungry, but little more. This atomised individualism continues to be visible in modern human rights instruments. There is little doubt, for example, that the dominant motive of the European Convention on Human Rights was the protection of the individual from the state. One can readily see why: the Convention was composed in 1950 in a continent still wracked by the aggression of one totalitarian state and facing what its drafters regarded as the threat of a new totalitarianism not only from eastern Europe but in the electorally powerful Communist parties of France and Italy. When the states of western Europe agreed, by article 8, to enshrine individuals' right to respect for their private and family life, they were thinking more of the jackboot at the front door and the informer in the apartment block than of celebrities being pestered by paparazzi or available young women kissing and telling on footballers. The Convention does not contain a right to basic nourishment and shelter; nor to a wholesome environment; nor to a life free of fear. Such rights made affirmative demands on states: they went beyond the task of restricting the state's power. If we were writing it today, there is little doubt that they would feature in it.

But the Convention is a living instrument, and the European Court of Human Rights has come increasingly to acknowledge that the state is not, or not just, the natural enemy of the individual but his or her constitutional guardian and protector. It has teased out of the Convention a succession of positive obligations resting on states to protect the rights of individuals from invasion by other individuals or corporations: an obligation to protect legitimate protests from being broken up by violent opponents, for example, or to inquire publicly

and objectively into a death at the hands of the state, or to tell people when environmental pollution is putting their health at risk. And it has also recognised that the ways in which basic rights get violated have changed radically over the succeeding half-century. Your private life, at least in this country, is much more likely to be invaded today by noise, by toxic emissions or – if you are any kind of a public figure - by prying journalists than by state thugs or police informers. The jurisprudence of the Strasbourg court has moved with these times, and so it should.

The argument for universalism has to account for such changes. The simple way is to accept that rights are not vertically constant at all, and to stick to arguing for horizontal universality: in other words, to acknowledge that change occurs over time in the accepted canon of fundamental rights but to continue to insist that, however they stand at any single moment of history, they apply equally to everyone. The difficulty with this is that it abandons one of the key attractions of universalism, the non-negotiability of basic rights.

The more complex response is to resist changes in the human rights agenda and to accord recognition only to those which have nevertheless become irresistible. An example might be the inclusion of gender among the forbidden grounds for discrimination. In the conventional wisdom of western societies until the early part of the 20th century, gender equality was absurd, unthinkable. Since then it is the contrary which has become absurd and – on the surface at least – unthinkable. There has been, in other words, a vertical revolution in the western human rights agenda. Yet in a large number of other societies no such shift has happened. Vertical change has actually increased the horizontal disparity.

This is why it seems to me that the human rights project faces break-up if it insists upon either vertical or horizontal universality. Confronted with the historical and geographical differentials in the concept of human rights, universalism ceases to be simply a victim of imperfect attainment or changing paradigms and becomes a form of increasingly solitary megaphone diplomacy: this is how to do it, and we are the people who can tell you. When in a moment of almost comical hubris the American historian Francis Fukuyama in 1989 announced the end of history (although he did take the precaution of putting

a question-mark after it), it was exactly this kind of export of human rights which he believed had won out: the world was embracing the liberal democracy of western capitalism; our model of human rights had triumphed.

In contending, as I do, for a quite different understanding of human rights, I recognise how much is forfeited in abandoning the claim to universality. The adjective 'human' can lose its meaning. Fundamental rights become the property of those lucky enough to live in societies which both recognise and enforce them. This is no doubt unpalatable, but it is at least closer to reality. The big question is where one goes from here. Universalism argues that you can go nowhere except into a mire of relativism which accepts that each society and each era will define human rights in whatever way suits it – or, rather, suits those who hold power. I don't doubt that that can happen: indeed the 'margin of appreciation' accorded by the Strasbourg court to – in practice – intolerant decisions of member states on issues of blasphemy and obscenity is on one view a capitulation to exactly this kind of relativism. But does it have to happen?

I want to take a particular human right – the right to life – and to consider how, in spite of – indeed, I will argue, because of – both vertical and horizontal mutations in its content, it still forms a sheet-anchor which can properly be called a universal human right. In other words, it is its very adaptability which gives it its power. The fact that it is a forum for argument and not an iron rule is, I want to suggest, a strength.

To take another example for a moment, the prohibition of torture has by long and painful stages come to be accepted by the international community as absolute. The fact that it is routinely practised in a good many states (all of whom profess to abjure it) does nothing to diminish its normative power; arguably the contrary. But does the assault upon the underlying principle, emanating chiefly at present from the United States, demonstrate the fragility of a less than absolute approach to human rights? Does a conditional approach mean that even an absolute right has only to be challenged, at least if it is by a powerful actor, to become enfeebled? There is no reason why it should be so. The current endeavours to give intellectual and humanitarian respectability to torture themselves recognise the potency of the international prohibition of it. They enable the undermining of the prohibition to be confronted publicly and

debated openly. If the dominant common sense of the international community were to change in response and to tolerate torture in certain circumstances, I would think it an appalling mistake; but it might be better even so to recognise that inhumane shift than to let the human rights movement founder on it.

The right to life, by contrast, has never been regarded as an unqualified right. The revolutionary constitutions of France and US qualified it by allowing capital punishment, as the US still does. (Florida, in fact, has recently adopted a shoot-first law of self-defence which puts almost everyone's right to life under threat.) But all modern human rights instruments have made an exception for the carrying out of lawfully imposed death sentences, even though the European Convention, by its Sixth Protocol, required member states to abolish the death penalty except in time of war. Killing according to the rules of war is a further admitted qualification upon the right to life. So are domestic laws of self-defence. The European Convention also, and more dubiously, permits killing in order to effect an arrest, to prevent an escape from custody or to quell a riot. Yet none of this is taken to detract from the fundamentality of the right to life, nor from the primacy which both religious and secular world views set upon it; and the Strasbourg court has built upon the right an impressive jurisprudence of affirmative obligations resting on the state to account for any death at the hands of its personnel. There is, in other words, no reason to equate the qualification of a fundamental right with its abandonment, and no reason either for not recognising that such qualifications are artefacts of time and place. A time may come when the execution of a judicial sentence will no longer be an accepted qualification of the right to life; but it will not be until the collective common sense of both China and the United States, as well as of a large number of Islamic states, changes. A time may also come - indeed is visibly coming - when the choice of the time and manner of one's own death will become a recognised aspect of the right.

From a theologically-determined situation in which suicide was, absurdly, a crime, we have now come to accept that the right to life, as an aspect of personal autonomy, includes a right to die. But it is a right which is heavily constrained. It permits you at least to take your own life without becoming a criminal in the process. It enables you, if you are in command of your faculties, to refuse treatment both now and - subject to sensible statutory conditions -

prospectively. But it does not allow anyone to help you die. Nor does it, at present, allow you prospectively to request termination by making a living will.

The case for changing these aspects of the law in favour of greater personal autonomy is heavily contested. I am not going to try to grapple with the arguments advanced from positions of faith which have rarely had a problem about endorsing hanging or war, but which here seek to deny people the power to assure for themselves the quietus that the virtuous have always been prepared hand out to the wicked. I do acknowledge the secular concern that it may be principally women who choose to die rather than be a burden to their families, replicating life's inequalities in death. I acknowledge also the legitimate concern that relatives who stand to benefit by a patient's death will try to accelerate it: where there's a will, there's a relative, as the saying is. Yet, acknowledging all this, it remains increasingly hard to deny to sane people facing a drawn-out and degrading death – not necessarily a painful one – the right to say they've had enough. If human dignity and autonomy are among the core values which shape the human rights agenda, the case for a right to die with dignity is a powerful one. If so, a need for help in the process is often an inescapable part of the right.

The high-profile cases are not these, however, but those of victims of brain trauma in a persistent vegetative state, who today can be kept almost indefinitely alive by mechanical intervention. Parliaments have tended in the past to steer away from these cases, partly because a satisfactory legislative formula is likely to be very hard to find, but partly also because there are few votes to be gained and many to be lost by grasping this particular nettle. But when in the early 1990s the case of the young Hillsborough victim Tony Bland came before the English courts, the judges had the easy option – which twenty years earlier they would almost certainly have taken – of saying that they would not answer hypothetical questions: let the doctors switch off the life support equipment, and if they were prosecuted for murder, a criminal court would say whether they should have done it. It's to the credit of our legal system that instead the courts took the hard option of making a decision precisely because of the absence of Parliamentary guidance. The judgments in the Court of Appeal and House of Lords, all of which concluded that the right course was to allow Tony Bland to die, are worth reading in their entirety. They reason out humanely and

compellingly why the right to a dignified death is part of the right to life. It is perhaps a pity, though the reasons for it were intelligible, that both our courts and the European Court of Human Rights declined to give a similar anticipatory ruling that the DPP should not prosecute Diane Pretty's husband if he helped her, as she wanted him to, to bring her increasing suffering from motor neurone disease to a peaceful conclusion.

The rationality of the Tony Bland decision stands in contrast to the near-hysteria surrounding the recent American case of Terri Schiavo. She too was in a persistent vegetative state, and had been for many years. Her husband's decision that her life support should be turned off was opposed not only – and understandably – by her parents but by a large and vocal political and religious lobby. The Florida state courts declined to intervene, but a swiftly enacted power was exercised by the Governor, Jeb Bush, so as to require the temporary continuation of life support. The controversy culminated in both houses of Congress assembling, the Senate unprecedentedly in a weekend session, and passing a law to deal with this and similar cases. But rather than legislate, as one might have expected, to forbid the doctors to turn off the life support, a Republican-led assembly, wedded to the principle of states' rights, legislated to confer jurisdiction on the federal courts. And when the federal courts also refused to intervene, they were denounced, as usual, for judicial activism. When Terri Schiavo's feeding tube was finally removed, 19 judges in 6 different courts had ruled on her case, every time in favour of termination.

It is worth asking why, at the conclusion of this political travail, a legislative mouse was born. One reason may be that nationwide opinion polls, despite the populist decibel count, showed that more than two-thirds of Americans supported termination of Mrs Schiavo's life support. But another part of the answer may lie in the silence of one of the major players, the medical insurance industry. Every patient on life support is being paid for by someone, and in the United States that ordinarily means the totality of premium-payers. In Terri Schiavo's case it was the insurers paying out on the malpractice suit that her husband had brought as a result of the medical handling which had reduced her to a persistent vegetative state 15 years earlier. Everyone knew that legislating to keep brain-dead patients indefinitely ventilated and fed meant placing a huge and growing burden, initially on the insurers, but ultimately on those who paid

their premiums – including every legislator who voted that weekend. It would have been indecent for the insurance industry to remind them and the public of this, but it had no need to do so. It was the dog that didn't bark.

The Schiavo episode may nevertheless contain some pointers to our own future outlook on the right to life. The financial implications of an increasingly aged population, able to be kept alive much longer than before because of improvements in medical care but no longer contributing to the country's productivity, are well enough known. The financial burden of prolonged medical care for those who become ill or simply frail is another part of the calculus. For many, the quality of their lives will continue to make living worthwhile in spite of illness or frailty. For others, particularly those whose loss of autonomy and dignity is beyond palliative care, enough will be enough. For many of these, however, the time of rational decision-making will by then be past: nobody could decently secure their informed consent, in their declining state, to a quick and peaceful death. It will have been different when they were younger: they might then have been able rationally to dictate, in a living will, that if one day they deteriorated beyond a certain point, their lives should be brought to a dignified end. A modern philosophy of human rights would arguably accord recognition to such a request, and the new Mental Capacity Act has done so, but so far only by means of non-intervention.

Refusal of treatment aside, however, there is perceptibly growing support – public opinion polls have put it as high as 80% – for giving people in need of it the means of bringing forward their own end. In October 2005 Lord Joffe reintroduced his Assisted Dying for the Terminally Ill Bill. Recognising the strength of opposition, he had dropped the proposal to let doctors help in the process: the Bill, if passed, will be limited, subject to stringent safeguards, to furnishing the patient with the means of ending his or her own life. Joffe has at his elbow evidence from Oregon, Switzerland and Holland that it is not women rather than men who tend to opt for assisted suicide, and that the availability of good palliative care increases rather than shrinks where assisted suicide is lawful.

This year, too, the British Medical Association, following the lead of a number of medical colleges, changed its longstanding opposition to euthanasia to a position of neutrality. In the course of the public debate surrounding the decision, the Hippocratic Oath was cited: 'I will neither give a deadly drug to anybody who has asked for it, nor will I make a suggestion to this effect.' But Hippocrates too was a child of his time, a time when surgery was the province of barbers and butchers rather than of doctors, for the oath goes on to promise: 'I will not use the knife... but will leave it to those who are engaged in this work.' In its original form, too, the Hippocratic oath included a promise not to charge anyone for medical services.

In January 1936 the comatose King George V's personal physician, Lord Dawson, with the agreement of the family, injected him with a lethal dose of morphia and cocaine to hasten the imminent end. We know from Dawson's personal papers that he chose the time so that the royal death would enjoy the dignity of being announced in the next morning's *Times* rather than sensationalised in the next day's evening papers. We know, too, from the diary of the then editor of *The Times* that, although the paper had gone to press and the first 30,000 copies had gone out, the last 300,000 were able, as hoped, to carry the news and an obituary.

Dawson's medical intervention was arguably only an extreme instance of much medical practice then and now. What was egregious was his political intervention in December of the same year in the House of Lords debate on the Voluntary Euthanasia (Legalisation) Bill. Having made some not uninteresting observations about changing attitudes – 'this age,' he said 'places less value on life when its usefulness has come to an end' – he submitted that it was the doctor, not the patient, who ought to have the power to draw down the curtain, because a doctor would only ever shorten life if doing so was an inevitable by-product of relieving pain. If Lord Dawson's royal patient was turning in his grave, their Lordships were unaware of it. On his urging, they voted not to legalise voluntary euthanasia.

But even without such duplicity of standards, all values change with time. Under the pressure of evolving circumstances, some of them humanitarian, some medical, some economic, the ethical consensus both about the right to life and about the concomitant right to die is changing. It cannot decently be left, I suggest, at its present point, where the only interventionist option often is – as it was with Terri Schiavo – to withdraw the feeding tube and let the patient, albeit unconscious, starve to death. It will go on changing through our lifetimes and our children's, and the accepted nature of the state's obligation to protect life will change with it. I do not see why this should be regarded as a blot on the escutcheon of human rights: rather the reverse. It is how content and meaning are given to a fundamental right in the vertical plane of time.

What then about horizontal divergences in the human rights agenda? Is there any serious prospect of some kind of convergence between the different social systems, value scales, theologies, ideologies, power relations and entrenched interests which influence – even determine – other societies' view of what, if anything, human rights mean? The answer looks depressingly bleak, not simply from a universalist standpoint – unless you are prepared to take mealy-mouthed statements of commitment for the real thing – but because it is the point at which relativism collapses into spinelessness, leaving human rights as porous and malleable as a sponge. But are these all there is to choose from?

Professor Yash Ghai has for a good many years argued that there is more. He is not seduced by eastern any more than by western exceptionalism, recognising that in many cases the insistence of Asian governments on their collectivist culture has been a stalking horse for authoritarianism, much as western insistence on individual rights has often been a flag of convenience for the free market. He recognises that it is for these and other reasons that universalism tends to come out of the west and relativism out of the east. He argues, as I would, that in the horizontal human rights dialogue cultural concerns are less potent, and so less relevant, than the distribution of power and the competition for resources. But he suggests, too, that as the cultural problems of states come to assume similar shapes, the possibilities of convergence improve.

The resulting position, which Ghai calls moderate cultural relativism, asserts that some human rights are non-negotiable and in that sense universal; others have to be allowed to accommodate differing standards. This, I know, begs as many questions as it answers. In particular, who is to say which are the non-negotiable rights? But it does nevertheless offer an alternative to the stand-off between two untenable forms of absolutism. And there are a good many universally shared values – of compassion (which Professor Conor Gearty has argued in his 2005 Hamlyn Lectures is the true organising principle of human rights), of sharing, of respect. In one sense all our fundamental values are contained in article 4 of the original Declaration of the Rights of Man and the Citizen proclaimed in 1789 in France:

Freedom consists in being able to do anything which harms nobody else.

Let me take a brief look in this context at an issue which has been making headlines for some years in western Europe: the hijab. The Quran declares that women should not display their beauty except to their husbands, fathers, sons and brothers. It is only the exegesis of theologians which has translated the concealment of a woman's beauty into the covering of her hair. The hijab thus represents in one sense simply a cultural norm which women should be free to adopt if they wish. In another, however, it represents a male dictate and a denial of women's autonomy. In a third sense – the sense in which France has chosen to understand it – it is an overt religious symbol in a state which has chosen official secularity as its way of securing personal religious freedom, and is therefore not acceptable in the state's schools. Each of these views of the hijab is contested, and the contest is heightened by each position's invocation of one or more human rights: the right to personal autonomy, the right to gender equality, the right to manifest one's religion.

If you are to form a principled view, it is necessary to decide which of these is the predominant right. Modern human rights discourse in the west would probably prioritise gender equality as a right without which other rights become hollow. In this it runs headlong into traditional value systems which assert the opposite: that a woman's status is distinct from and inferior to a man's, and this order of things is God-given. But I think one can also say that in western

thinking today the egalitarian position is non-negotiable. Whether the traditionalist position, for its part, becomes negotiable is not likely to be a function of dialogue. It is much likelier to result from cultural and economic and political changes within those societies themselves: the kind of cultural convergence of which Yash Ghai speaks. But it is not unthinkable that part of the process may be a shift backwards – or rather upwards, to return to my metaphor of vertical change - in western societies. There is no Newtonian law that says that change will always go in the same direction. All one can say with confidence is that the terrain will continue to change, and that how it changes, and whether, from a human rights perspective, it changes for the better, will be decided by events over which no individual and probably no single state has control. What it will have a great deal to do with is how women in both western and eastern societies come to define themselves.

Let me come back, then, to universalism and relativism. I have explained why I think universalism is a flawed project. I acknowledge readily that relativism – at least if it takes the form of simply accepting that one version of human rights is as valid as another - is in the end an abandonment of any serious belief in such a thing as human rights. But these are not the only choices. To accept that what people collectively believe to be their fundamental rights changes over time and varies from place to place is to do no more than recognise reality. But if you are not going to slide into total relativism, where do you go from there?

You go, I suggest, back to the slow task of adjusting the tabulation and enforcement of human rights to the changing vertical consensus, and to making the case for a larger and better horizontal consensus. There is no place in this for the imposition of one society's standards on others, but there will be – as there already is – a process of pressure and example as more successful societies attract the emulation, or at least the acquiescence, of others. How many people in the west know what is in the Universal Islamic Declaration of Human Rights, adopted in London in 1981, or the 1990 Cairo Declaration on Human Rights in Islam? I do not say for a moment that these do more than set an agenda for negotiation, or that they do not contain propositions which I would consider unacceptable; but they undoubtedly matter.

Nothing, however, says that these more successful societies will be those of the West. It is perfectly possible to envisage a world in which the dominant common sense has become that of strong and successful traditionalist societies, and in which the human rights agenda has altered radically in consequence. Whether that will be the way the world goes, or whether the core values of western liberalism will increase their hegemony, one cannot predict. But it seems to me that if the idea is to prosper that certain rights belong to all human beings, the societies which have historically laid claim to them have got to be prepared to relinquish their hold on them to the extent of sharing them with the rest of humanity. What will be shared is, after all, not a set of commandments inscribed on stone but a regionally mutable and historically conditioned set of principles governing people's relationship to society.

The perspective I am offering is one which does not offer endorsement to either a universalist or a purely relativist position, and one which does not necessarily engender optimism; but I hope it has a measure of realism and a measure of principle which, in combination, may recommend it. What you stand to gain by it is a greater likelihood of global acceptance and implementation of shared principles, and that, it seems to me, is a gain worth going for. If Paris was worth a mass to Henri IV, a wider agreement about the content of human rights is worth a measured retreat from the polarities of universalism and relativism.

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