Durham University

Insights

Institute *of* Advanced Study

Being Human, Human Rights and Modernity

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Volume 3 2010 Number 11

ISSN 1756-2074

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BEING HUMAN, HUMAN RIGHTS AND MODERNITY

This article seeks to examine some of the paradoxes associated with human rights in today's globalised world by investigating the juridical and philosophical history of the subject over the past three centuries of European history.

Paradoxes in Modern Human Rights Discourses

The early twenty-first century is the best of times and the worst of times for anyone interested in human rights. In the aftermath of World War II, the United Nations adopted a declaration of human rights, the first global document of its kind in recorded human history. The European Union agreed its own convention on human rights in the 1950s, and in 1998 a parliamentary statute incorporated this into British law. Judgments involving British subjects are now regularly produced by the European court of human rights. An all-time high in academic interest in the subject is reflected in hundreds of new books and articles each year, and Western governments regularly proclaim the recognition of human rights as a benchmark against which other regimes around the world should be measured.

Yet many people are aware that there is another side to the coin. Rights to free speech, assembly and privacy are routinely qualified in the interests of 'national security.' Politicians in countries such as the United States or Great Britain criticise 'human rights violations' in China or Muslim countries, while condoning torture and denying judicial hearings to imprisoned suspects and 'enemy combatants' in their own. The official government textbook for people intending to become British citizens informs them that the Human Rights Act of 1998 entitles them to 16 'basic rights,' ranging from the right to life to the right to education and the right to free elections, but it also points out that half of these rights might be qualified or modified in the interests of public safety or to protect the rights of others (*Life in the United Kingdom*, 2007, p. 93). It is not necessary to know about rights in order to prepare for the test that is a prerequisite of the citizenship process, which focuses instead on questions about the number of seats in parliament, the national holidays and ethnic make-ups of the constituent parts of the United Kingdom, and who resides in No. 10 Downing Street. While some recent newspaper articles have reported that current British undergraduates are particularly interested in human rights (Swain, 2009), others suggest that there is little knowledge of the subject. It is evidently difficult to have much faith in rights proclaimed by political institutions that are themselves short on moral credibility. Indeed, some students apparently agree with former US Vice President Dick Cheney in thinking that the measure of torture should be its efficacy in producing information rather than its moral or legal legitimacy (Freedman, 2009). Human rights are in some respects a triumph of modernity, but they also raise difficult and largely unresolved philosophical problems. Furthermore, the history of the subject since the French Revolution is more problematic than is sometimes recognised. Human rights did not find fertile ground in the democratic nation state of the nineteenth and twentieth centuries, and this legacy continues to cast a long shadow.

Being Human and Human Rights

Anglo-European thinking about human rights has traditionally been based on assumptions about human nature, raised questions about how men and women organise themselves into associations of one kind or another, and considered the position of the individual person within a broader collective, be it a tribe, a village or a state. The idea that human beings thrive best in society with other members of the species was put forward by the ancient Greek philosopher Aristotle. Building on this tradition, the subject was pursued prior to 1700 mainly by scholars in universities, many of whom were trained in the Western legal tradition associated with canon and Roman law (Tierney, 1997). Today human rights are once again the focus of work in law faculties, but over the past three hundred years anthropologists, philosophers and evolutionary biologists have made increasingly important interventions. For example, newer theories in the field of cognitive sciences have put forward the view that human beings are 'hard wired' for culture, not least because of their capacity for speech, but also because they have the unique ability to put together ideas and perceptions in creative ways that can generate structures such as governments, or documents such as declarations of human rights (Turner, 2006). Yet, as valuable as this insight is, it does little to help us identify how human rights should be defined or enforced. Human beings might be designed to produce political cultures, but the mechanisms can break down or lead to perverse results. People can appear stupid by making mistakes in the way they put together what would appear to be perfectly sensible precepts, or indeed in evaluating their own self interests. Why else do poor blue-collar workers in American states such as Ohio and West Virginia consistently vote in significant majorities for Republican presidential candidates? Indeed, whole societies of human beings can evidently go off the rails, like the Third Reich during the 1930s and 1940s, or the so-called failed states that we hear of today. In many contemporary cultures around the world, westerners encounter practices relating to very basic issues such as family and gender relationships that seem at best strange and at worst dehumanising. It seems self-evident that a human right should be a value that is demonstrably valid and universally practised, yet it is clear that Anglo-European views of human rights do not invariably fulfil these criteria in an age of globalisation. Apart from anything else, they are formulated with little regard for the juristic traditions of great civilisations such as those of the Arab world or the Chinese, and they do not easily accommodate the local customs of tribal peoples in Africa or Papua New Guinea (e.g. Baderin, 2003; Wan, 2007; Qi, 2005). It is not difficult to understand how the use of the language of human rights by Western political leaders to justify negotiating positions or armed intervention might be dismissed in the Middle East or Asia as little more than the rhetoric of a new breed of crusaders.

Eighteenth-Century Antecedents

If philosophical and cultural relativism make the concept of a universal human right problematic, so too does the history of human rights within the Western tradition of legal and political thought. Although it is misleading to suggest that human rights were invented in the context of the French and American revolutions of the 1770s, 1780s and 1790s, this is probably the period that comes most immediately to the mind of anyone who has even the most passing interest in the modern history of the subject (Hunt, 2007). In fact, many of the core rights declared as part of the French National Assembly's demand for a radical break from the 'ancient regime' presided over by the Bourbons, or by Americans intent on justifying cutting their ties with the British monarchy, were already fairly familiar 100 years earlier, at least in the context of national legal regimes such as that of England. For instance, the

English jurist William Blackstone wrote about individual human rights in his *Commentaries on the Laws of England*, one of the most famous law books ever written, but he seamlessly, and un-self-consciously, elided absolute human rights with rights guaranteed by English law. What made the revolutionary thought of the Americans and French different was the proposition that there are a number of *universal* rights that can be deduced from the nature of man prior to his entry into political society. Once propounded, these justified making a clean break from aristocratic and monarchical government as it had previously been known, and for determining the character of the new political society that would take its place.

In the *Declaration of Independence* of 1776, Thomas Jefferson wrote that it was a 'self-evident' truth that all men were created equal, and 'that they were endowed by their Creator with certain unalienable Rights, among which were those of life, liberty and the pursuit of happiness.' The rest of the text demonstrates how the king of Great Britain had broken the implicit contract that authorised his authority over the American colonies by infringing on these rights. In the *Declaration of the Rights of Man and Citizen* (1789), the French National Assembly asserted that the ignorance and neglect of the rights of man constituted the sole cause of public misfortune and government corruption. Seventeen individual clauses then spelled out some of the details. Men were born and remain free and equal in rights. The sole purpose of all political association was the preservation of natural and unalterable rights to liberty, property, security and resistance to oppression. Since 'liberty' consisted of the ability to do whatever did not harm another, the exercise of natural rights had no limits except those ensuring that other members of society enjoyed the same rights, and these limits should be determined by law, which was the sole expression of the 'general will' of society.

In *The Rights of Man* (1791), 'citizen' Thomas Paine sought to explain and promote the doctrines of the revolutions in France and America to the British. Courting charges of sedition, Paine claimed that the 'vivifying influence of reason,' or common sense, had broken through centuries of bad custom, inspiring men with thoughts of rights they never had before. '[S]ociety would always come out right in any reform,' if it was left simply to the general sentiment (will) to act; civil power itself was a kind of aggregate of the natural rights of man. Yet, although his argument seems to demand an interrogation of how natural rights flow from human nature, Paine in fact relied on the rather old-fashioned technique of using the Biblical story of creation to provide historical precedents for the equality of rights between men. Furthermore, although he postulated that it was illogical that a man should enter into civil society to be worse off than he was in the state of nature, the entire thrust of his argument was that most of human history had been dominated by priest-craft and superstition. These malign influences served no other purpose than to justify the ridiculous proposition that hereditary kingship was the most legitimate form of government, even though it was in fact invariably founded by conquest and imposition (Paine, 1795, pp. iv–v, 9–10, 16–17, 49).

The Rights of Man aimed to draw a line under all of human history up to 1789. Yet, the truth is that the subsequent influence of the eighteenth-century declarations and their apologists were much more limited in the subsequent history of human rights than the resounding rhetoric might lead us to expect. Atrocities associated with the Terror, and then the European-wide war that resulted from French military ambitions up to 1815, led to both polemical and armed resistance to revolution, especially in Britain. In his *Reflections on the Revolution in France* (1790), for instance, the MP Edmund Burke drew on a well-established, and particularly English, move in legal and constitutional thought, in order to argue that it would be a mistake to overthrow an existing social and political order that had passed the test of time over the centuries merely on the basis of abstract and unproven speculations. Reflecting a conservative backlash, but based on a serious epistemological point, Burke's

work is justly famous. Nevertheless, the most profound, if less well-known, attack on the French *Declaration of the Rights of Man* was penned by Jeremy Bentham, a young writer on jurisprudence who went on to become one of the founding fathers of the philosophical school known as utilitarianism.

Bentham was far from a reactionary. His ideas inspired many of those who advocated reform and 'modernisation' of the 'old regime' British state between 1820 and 1860. In the twentieth century, his thought was resurrected by influential legal philosophers such as H. L. A. Hart. Yet, although he was not hostile to many of the aspirations reflected in the French *Declaration*, he wrote a devastating line-by-line critique of it in a work with the memorable title *Nonsense on Stilts*. Raising doubts about the *Declaration's* philosophical foundations as well as its practical implementation, some of Bentham's criticisms can come across as those of an undergraduate debater. Comparing the 1795 version of the declaration with that of 1791, for instance, he observed that rights that were evidently inalienable in 1791 had already been discarded by 1795. Although the *Declaration* proclaimed the equality of all men, it evidently did not take account of the obvious fact that some people were worth £5,000 a year while others were worth only £5. Only the arrogant French could declare the universal rights of man, and then justify waging war against any country in Europe that did not include them in their national constitution.

At the same time, Bentham had some serious points to make about the state of nature and the origins of government. He claimed that a consideration of the aboriginal 'savages' of New South Wales in Australia demonstrated that without government and civil society, there could be no pattern of obedience, no property, no liberty and no personal security. Contracts made in the state of nature were nonsense because a contract could only be enforced by law, and law could only exist in civil societies after the formation of some form of government. As far as human history enabled us to tell, moreover, the first governments were invariably the result of some act of conquest or oppression that was then elaborated on over time by the force of habit within the population concerned. Finally, Bentham claimed that the language of the *Declaration* addressed the passions rather than reason. In order to appeal to the masses, the French 'tutors of mankind and sovereigns of futurity' took their law from poetry and rhetoric rather than common sense. Many of the declared rights were fine as aspirations so long as the society in question was content to maintain them as such, but the claim to universality was undermined by provisions in the declaration itself which seemed to allow for future legislative change (Bentham, 1795, pp. 325–30). With reference to the right to express opinions, for example, Bentham identified precisely the problem that a concerned citizen today might have with the qualifications to 'rights' enumerated in the 1998 British Act.

> Every abuse of this branch of liberty is left exposed to punishment; and it is left to future legislatures to determine what shall be regarded as an abuse of it! What is the security worth that is thus given to the individual as against the encroachments of government? What does the barrier pretended to be set up against government amount to? A barrier which government is expressly called upon to set up where it pleases? (Bentham, 1795, p. 362.)

The Nation State and Positive Law

According to Bentham, we can have civil liberties established by custom or legislation in the society (or jurisdiction) in which we live, but the idea of inalienable natural human rights is philosophical and historical nonsense. It is an uncomfortable insight, but one that remains very difficult to ignore. Furthermore, as the nineteenth century unfolded, Bentham's

general approach to jurisprudence was influential in the widespread emergence, especially in Britain, of a highly positivistic view of law which maintained that the nature and scope of the laws we live under are determined almost exclusively by the command of a sovereign power, be it legislative or executive, rather than any more abstract set of values. Perhaps surprisingly, Burke's appropriation of the much older (English and European) idea that the laws and constitutional practices of a society developed gradually over time in a kind of dialectic between communities and legal custom seems to have found much more favour amongst German law professors than amongst the English or Americans, whose highly vocational processes of legal education concentrated on procedure, statutes and judicial decisions rather than on legal history or jurisprudence (Kelley, 1990). One illustration of this can be found in some of the writings of F. W. Maitland (1850–1906), the father of modern English legal history. Inspired by Germans, or Americans who were reading Germans, Maitland found in medieval corporations such as towns, a kind of bourgeois collectivism that satisfied the need amongst human beings for a reconciliation of the relationship between the individual person and the broader community. A medievalist, he seems to have disliked everything about the modern state that he observed from the time of Henry VIII in the sixteenth century onwards (Gierke, 1987).

The rise of the nation state in the nineteenth and twentieth centuries, along with a positivistic view of law, meant that human rights discourse became less rather than more significant. Bentham had a more lasting impact than Tom Paine or the French National Assembly right up to the time of the declarations of human rights proclaimed by the newly-founded United Nations in the late 1940s, and by the Council of Europe in the early 1950s. The UN interest in a declaration of human rights was driven by the idea that establishing world-wide standards of behaviour would prevent injustice and another war as dreadful as the one that had just ended. Nazi atrocities, and the Holocaust in particular, were a significant part of the immediate context, but these arguably became more important in the development of human rights discourse from the 1960s onwards, or after the fact, than in the original formulations. In any case, the Germans were inevitably left out of the UN deliberations because of their role in the war, and while their institutions were purified by teams of New Deal American lawyers. This may have been unfortunate because nineteenth-century academic thinking about the relationship between law and rights had arguably been developed to its highest levels in Continental civil jurisprudence, particularly that of the 'German school.'

No less important, the two major world powers at the time, the United States and the Soviet Union were less than enthusiastic about human rights declarations. The Americans were worried about how the overt racial discrimination that infected so much US law would stand up against them. The Soviets were hostile to outside intervention in their affairs and sceptical about the applicability of Western ideas about the rule of law to a socialist state. Consequently, the British turned out to have a particularly heavy involvement in the UN project, but as Professor Brian Simpson has explained in his fine book on the subject, this was in many respects both unexpected and ironic. As we have seen, since the time of Bentham, English legal thought had been dominated largely by the positivist view that law was whatever the legislature said it was. Although the distinction between rights and law exists in the English language in a way that it does not in French or German, the British lawyers who were involved in formulating the UN convention, and the subsequent European ones, came from a legal tradition where liberty was often defined as what was left over after everything else had been made illegal. Furthermore, because the formulation of declarations of rights through an institution such as the United Nations was seen as a diplomatic exercise, the British lawyers involved in it were employed by the Foreign Office, rather than by the Home Office, the Lord Chancellor's office or the Colonial Office, despite the fact that all three eventually discovered that they

had practical reasons for worrying that the country might be caught out by potentially binding declarations of rights. One of the lawyers involved in the process apparently had never heard of the term 'human rights' before he stepped on to the plane to go to the negotiations. It is therefore remarkable that the existing declarations turned out to be as cogent as they are, and many of them reflect traditional English-speaking values, such as the right to due process at law. Nevertheless, although the Colonial Office produced declarations of rights for territories that were about to become decolonised, the British government itself did not fully accept the European convention until the passage of the Human Rights Act of 1998 (Simpson, 2001, pp. 1–5, 32, 28, 245, 301, 337, 347, 460, 873).

Current Dilemmas

The creation story of the modern human rights movement helps to explain its dilemmas and difficulties. As Bentham would point out, since the British version of the convention amounts to statute law, we have rights because the state says we do, not because of any very profound interrogation of the question of what human beings should expect from civil society, or, what amounts to the same thing, the fitness of particular laws to particular groups of people that might not have the same cultural orientation. There are no statements of first principles that might help us to understand why, for example, we should have a right to education, or to some of the so-called secondary social and economic rights that are contained in the UN declaration (equal pay for equal work, for example, or the right to work and social security). If the state can grant rights, it can also take them away according to the age-old principles of necessity in the face of threats to the public good or national security. On the other hand, and on a much more positive note, since it is possible for European citizens to bring legal actions before the European Court of Human Rights, there is a growing body of case law on the subject, which has had an impact on the laws of member states, including those of Britain. Nevertheless, it is important to keep in mind that law courts in Europe and the United States discuss rights in terms of those enumerated in documents such as the European Convention, or the Constitution, rather than according to abstract principles derived from human nature or anywhere else.

Although there has been an explosion of works on the subject by philosophers, social scientists and anthropologists, divergent interpretations abound, and many of the philosophical and juridical issues remain unresolved. Some scholars, such as the academic lawyer Ronald Dworkin (1977), and the philosopher John Rawls (1972), have tried to identify core rights and values that should form the foundation of any civilised society, but others accept the ultimate futility of establishing completely convincing arguments for human rights from first principles. They stress instead that human rights are best described as aspirational values and standards arrived at through the exercise of empathy or compassion. When such values become widely recognised within society at large through the development of public opinion, they can be used by individuals to calculate whatever actions they feel able to take on a personal level, and they can be given juridical force through the making of positive law (Sen, 2004). 'Compassion' was a word that was fairly commonly used in the eighteenth century, and some have identified it as a significant ingredient in the rights declarations of that era (Hunt, 2007). 'Empathy,' on the other hand, is described by the *Oxford English Dictionary* as the English translation of *einfühlung*, which comes from the toolkit of early twentieth-century German psychology, and is defined as 'the power of projecting one's personality into (and so fully comprehending) the object of contemplation.' Whatever else it means, this language suggests that the discussion of human rights has moved decisively away from the jurisprudential sphere, and even some academic lawyers regard this as a positive development. In Britain it is still widely thought

that judges are arbitrarily appointed and seriously over-represent the social elite. Lawyers have a tendency to parse away at arguments so that human rights laws are interpreted in ways that only dimly reflect the sentiments that gave rise to them. For all of these reasons in the Hamlyn Lectures on human rights that he gave a couple of years ago, Conor Gearty concluded that it is actually a good thing to keep human rights in the political arena, so that legislatures can make changes in them in accordance with the democratically expressed general will (Gearty, 2006, pp. 11–12, 70, 85, 95, 97).

Human Rights and the 'General Will': Historical Examples

Yet it is manifestly clear from British history that the 'general will' has not always been sympathetic to the maintenance of some rights we now take for granted. For instance, a plurality of religious opinions existed in England from at least the time that Henry VIII broke away from the Roman Catholic Church during the 1530s, but it took centuries before anything approaching freedom of religious belief was widely accepted by state or society. In the later 1640s, the Levellers, who had some support within the middling ranks of London society and, especially amongst the officers and soldiers of the Army that defeated King Charles I in the English Civil War, put forward a proposal for a new national constitution, *An Agreement of the People* (1647), which specifically excluded matters of individual conscience from those things over which the state might legislate. Yet, although one of our most important human rights had been declared, it was a long way from being achieved. The *Agreement*, and its supporters, was suppressed by the parliamentary regime that established the English republic, but it probably would not have been adopted even if it had been put forward to the nation in a referendum. Non-conformist sects, particularly the group still known today as Quakers, expanded in membership, but the Restoration of monarchy in 1660 was accompanied by parliamentary legislation that imposed severe penal laws and other political disabilities on Protestant non-conformists as well as Catholics. After nearly thirty years of discord and national hysteria, an Act of Toleration was passed in 1689, but despite the title this statute merely allowed for the licensed practice of their religion by Protestant non-conformists; it was not a principled expression of a right to religious toleration. Indeed, although the political philosopher John Locke wrote a path-breaking treatise about why matters of conscience were one of the key areas of human life that the state could not legitimately touch (*A Letter Concerning Toleration*, 1691), England maintains an established church to this day, and Catholics were not 'emancipated' from civil disabilities they faced until the early nineteenth century.

A not dissimilar story has to be told in connection with the issue of gender and human rights. This is tricky territory, but it is also profoundly important because relations between men and women and within families, including those between husbands and wives and parents and children, are in most societies the sites not only of law but of what appear to be firmly entrenched religious ideas and cultural customs that go to the heart of what many people consider being human to be. It is also in connection with the predicament of women that present-day Western values confront practices such as female circumcision (genital mutilation) in Africa, child prostitution in India, or the rules of Islamic law that require women to cover parts of their bodies to a greater or lesser degree (Cowan et al., 2001). Yet even the most under-informed consideration of the Western legal tradition points to the conclusion that arguments by feminists for equal rights went on for centuries without much sign of success. To be precise, it is necessary to point out that under English law in the medieval and early-modern periods (prior to 1700), women, or at least certain categories of women, actually had rights. The right of widows to dower (some form of support on the death of their husbands)

was enshrined in chapter 2 of Magna Carta. Although married women were said to be under the law of *coverture*, which subsumed their property into that of their husbands, they also enjoyed the so-called law of 'agency' which meant that husbands were required to pay for items wives bought on credit, such as food, clothing and medical aid (Brooks, 2008, ch. 12). According to the author of a work on women's property rights called the *Lawes Resolutions of Womens Rights* (T. E., 1632, pp. 4–8) most women knew how to 'shift it well enough' in terms of their economic interests, and in fact female litigants in courts were probably more common in 1600 than in 1900. Nevertheless, recalling the familiar story of Eve's role in the fall from the Garden of Eden, he also made the obvious points that 'law agreed with divinity' in precluding women from the making of laws and holding public office.

Historians argue about what kind of patriarchy this sort of gender regime actually reflects, but significant legal change was very slow to develop (see, in particular, Pateman, 1988). Even amongst radical religious groups of the mid seventeenth century, who maintained that the god-head was androgynous or female, there was no corresponding demand for changes in the legal position of women or alterations in the way ordinary domestic relations were normally construed (Gibbons, 1996). In the late eighteenth century, the French declared the rights of man and even abolished slavery, but, while divorce was temporarily introduced by the National Assembly, women were not given the franchise or admitted to public office (Scott, 1996). Since Tom Paine took the Bible as one of his sources for the natural equality of man, he had to point out that this did not include equality for women (Paine, 1795, p. 9), and Jeremy Bentham was worried about how a declaration that everyone was equal would affect domestic economies, where someone, namely the husband, had to be in charge of the family, servants and apprentices (Bentham, 1795, p. 325). By contrast, in her famous *Vindication of the Rights of Women* (1792), the sometime school-mistress and author Mary Wollstonecraft maintained that the legal disabilities of women were part of an entire culture of gender relations that through failures in education and social convention not only deprived women of their natural rights, but rendered half of humankind less than human. Yet even before her untimely death in childbirth in 1797, English public opinion had taken a distinctive move to the right as a result of long years of war against France. The legal changes she called for, including the right to divorce and remarriage, and the recognition of the separate property rights of married women, did not come about for another half-century or so. English women did not get the right to vote until after the First World War. Whilst these changes would not have been made without the pressure applied by idealists, they only came about after demographic and cultural changes in the organisation of the family and reproduction helped make them acceptable to public opinion.

That some of the human rights we value most today have only been recognised after centuries of struggle and sacrifice does not of course invalidate the notion that human rights might be defined as abstract aspirational values based on a certain understanding of the nature of human dignity; indeed, it may even validate it. Yet the histories of the rights to religious toleration, or gender equality, are also reminders that in our own society changes in what once appeared to be self-evident truths have often occurred very slowly. In an era in which human rights, like so much else, are becoming increasingly globalised, this insight should at least make us more understanding of value systems that are not quite the same as ours, and aware that effective change can only come from within rather than being imposed from without. As long as there is a diversity of religions, cultures and languages, there are going to be differences of opinion about what constitutes a human right.

While there is little in the historical record to suggest that some other institution of the state, such as an enlightened monarch, for example, or a completely independent judiciary, would

have been all that much more effective in maintaining rights to gender equality or religious toleration, the reliance on a sovereign legislature to determine rights through the political process offers little protection against the power of majorities to suppress minorities, and hardly alleviates Bentham's concern that the state can abrogate rights as easily as it creates them. Parliamentary tyranny can be as oppressive as any other form of arbitrary state power. In this respect the creation of a European court of human rights to adjudicate cases brought to it from individuals in member states who have subscribed to a convention of rights is certainly a positive development. There is a cultural, philosophical and juridical logic to what might best be described as regional rather than universal human rights, and litigation before such a tribunal may well eventually contribute to the further development of a broader culture of rights within the member states. Thus far, however, this modern European experiment has not in Britain produced the kind of culture of human rights that can serve as a 'secular religion for a godless age' that was envisioned by some of the more enthusiastic advocates of the Human Rights Act of 1998 (Klug, 2000, pp. 17, 190ff). Instead, a perception of overweening state power and the development of a 'surveillance society' has resulted in political alienation on an unprecedented scale.

Conclusion

Far from reversing this trend, the concept of human rights has been undermined by responses to global terrorism and is challenged by arguments that too much emphasis on rights leads to too much disregard for the responsibilities of citizens to each other and the broader community. But at the level of individual nation state, it may be that we are asking too much of an abstract concept, and too little about our practical institutions. We could, instead, for example, aim to create a more compelling discourse of citizenship which interrogates the purposes of political society and the expectations individual human beings should enjoy as a result of committing themselves to participation in it, an approach that might more transparently reconcile clashes between private and public interests. Yet the problem here is that 'citizenship' hardly exists as a subject of British historical study, and it is difficult to see how the moral or philosophical prescriptions of individual thinkers might lead to the changes in collective thought and behaviour that a resolution of the problem seems to require (for a worthy, but ultimately unconvincing attempt see Marshall, 1950).

Alternatively, it might be wiser in the short term to confront more directly the fact that questions about rights, whether civil or universal, and the articulation of the relationship between individuals and the state, are inevitably going to be resolved within the force field known as law. It is easy to appreciate the argument that the law is too important to be left to the lawyers. But there may also be something to be said for the old-fashioned idea of looking to jurisprudence for ways of weighing the interests of one against those of the many. It is worth recalling, for instance, that pre-modern English liberties grew up within a monarchical society where what was known as the common law developed as a result of centuries of dialogue between litigants, their lawyers and the judiciary. Though not without faults, this process resulted eventually in popularly held notions about the rights of Englishmen that were in many respects the essence of citizenship, and which could be called upon to challenge monarch and parliament alike.

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Insights

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