



Beyond rights: the morality of rights-language

by Julian Rivers

*The Christian is a totally free lord of all,
subject to none;
The Christian is a servant of all,
fully subject to everyone.*

Martin Luther, *Treatise on Christian Freedom*, 1520

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Summary

This paper considers the current tendency to talk about justice in terms of rights. It analyses biblical material and suggests that in spite of the immoral tendency of rights-language, rights can perform a useful role in identifying aspects of human dignity. After briefly considering the proposed Bill of Rights for the UK, it concludes with three strategies for dealing with rights.

Introduction

The language of rights has become endemic within Western societies. It is no longer good enough to say, 'thou shalt not kill'; instead we have rights to life. If animals are to be treated compassionately, they too must have rights. From the Universal Declaration of Human Rights to the Patients' Charter, rights have become the *lingua franca* of modern moral discourse. Christians tend to be unhappy with this trend. Is it not inherently selfish, always to be insisting on my rights? Does not Christ command us to give up our rights? How do rights fit within a Christian worldview?¹

A brief history of rights

The concept of a right first emerged within European culture about 800 years ago when mediaeval jurists combined two Roman law concepts, *dominium* and *ius*². *Dominium* (ownership) in Roman law was not a set of rights to an object, but primarily a relationship of real power over an object. *Ius*, by contrast, was either justice in the abstract or the legal consequences attaching to a contract or property: 'the what's right'³, rather than a right. When *dominium* and *ius* were eventually combined, one could be said to have power over a particular legal consequence or aspect of justice. Bits of justice could start belonging to people as their rights. A right, then, was a piece of 'normative property' (H.L.A. Hart).

Rights entered moral and political discourse generally through the works of seventeenth-century writers. The Authorised Version of the Bible (1611) was translated just before this period, which partly explains its relative lack of rights-language. A vigorous flowering during the eighteenth-century Enlightenment in the form of natural rights theory issued most notably in the English Bill of Rights (1689), the Bill of Rights of Virginia (1776) and the French Declaration of the Rights of Man and the Citizen (1789). Rights theories then collapsed in the nineteenth century under the onslaught of utilitarianism, recovering only after the Second World War in the guise of the international human rights movement, and after 1972⁴ in political theory generally.

1 K. Cronin, *Rights and Christian Ethics*, (CUP, 1992).

M. Cromartie (ed.) *A Preserving Grace: Protestants, Catholics and Natural Law*, ch.4. (Eerdmans, 1997).

2 R. Tuck, *Natural Rights Theories*, (CUP, 1979).

3 J. Finnis, *Natural Law and Natural Rights*, ch. 8. (OUP, 1980).

4 J. Rawls, *A Theory of Justice*, (OUP, 1972).

Rights, duties and virtues

Rights as interests or benefits

A small, but increasing, minority of theorists have argued that rights are fundamental interests⁵. This makes the scope of rights extremely broad. Children, animals and even plants could conceivably have rights on this account. 'Third generation' rights in international law become possible, such as the right to peace and to a clean environment. More prosaically, the criminal law can also become a matter of rights, instead of duties owed to society, because we undoubtedly benefit from our mutual restraint in not killing, wounding and defrauding each other. However, the 'interest-theory' is flawed because having an interest, or benefiting, is neither necessary nor sufficient for having a right. It is not necessary, because we all have many rights in which we have no interest at all (e.g. the right to worship at a mosque), although of course rights are usually in somebody's interest. Having an interest is not sufficient, because we are all beneficially affected by other people's behaviour in myriad ways, without having rights to that behaviour. I benefit from the birthday presents I am given, without having rights to them.

Rights as justified powers over others

We have already seen that historically a right is a piece of normative property. That sounds like a relationship between a person and a thing, but this is shorthand for what is really a relationship between people. My property right to sit quietly in my back garden, is a right that no-one disturb me. My contractual right to a salary, is a right that my employer transfer the appropriate sum of money. So rights are better seen not as basic interests, but as forms of legitimate control over other people's behaviour, and the two examples given illustrate two basic types of right: defensive or liberty rights (stopping others from doing things to me), and entitlements or claim rights (making others do things for me). From the point of view of the other person, my right implies their duty – a duty not to interfere in my enjoyment of property, or a duty to keep their side of the employment contract. The correlation is not always one-to-one, but any coherent statement of a right can always be worked out in terms of the set of duties that correspond to it, the behaviour required of the people over whom the right-holder has legitimate power.

Legal and moral rights are distinct. A legal right formally recognises an element of justice as it applies to an individual, and empowers that individual to achieve justice through a legal system. The granting of legal rights may not necessarily be the best way of achieving justice; in the case of criminal law, for example, it is the state that seeks to ensure that wrongdoers are punished, not the individual. A moral right, by contrast, is a justified power that one person has over another because of who they are. In short, legal rights are granted and moral rights are 'inherent', and it is possible to accept the practical need for legal rights while denying the existence of moral rights⁶.

Virtues

Virtues are good dispositions or character traits. The New Testament has many lists of virtues (e.g. Galatians 5:22–23), which can be seen as aspects of the godly moral character modelled on Jesus Christ. It has recently been suggested that the distinction between rights and virtues matches that between 'perfect' and 'imperfect' obligations or duties⁷. A perfect obligation is one owed to another specified individual, over which that other has control, and hence a right. An imperfect obligation is one not owed to a specific individual, such as the duty to be charitable or patient. Justice and virtue, the right and the good, are distinguished by their concern with two different types of obligation.

In one sense, all obligations are perfect, in that we have a duty

to God to be completely virtuous. Nonetheless, my duty (to God and to you) to give back the car you lent me is different from my duty (to God alone) to forgive you when you wrong me. For in the case of the first duty, you do have legitimate control over me. And while you also owe duties to God as to how you go about dealing with my forgetfulness, unwillingness or inability to hand back your car, I cannot complain if you ask it from me. You have a right to the car but you do not have a right to be forgiven. The mistake is to assume that any situation can be evaluated solely in terms of one relationship between two people; in fact we are caught up in networks of relationships with God and each other, and the same action can be a matter of right as regards one relationship, but duty or virtue as regards another. There can be vicious and virtuous uses of one's rights.

Rights in the Bible

The Old Testament

In common with all ancient legal systems, Hebrew contains no word that corresponds to our concept of a right. *Dîn* comes from a root meaning to act as a judge, advocate or ruler and can refer to the place of judgement, the cause of action and the judgement itself. Where *dîn* means cause of action, it gets quite close to our concept of a right. In Proverbs 31:8 King Lemuel is urged to advocate the *dîn* of the destitute, and Jeremiah criticises his people for failing to plead the *dîn* of the fatherless in such a way as to succeed (5:28). So a *dîn* can be a justified plea, which is almost a legal right. *Tsedek*, by contrast, refers to justice and righteousness as abstract qualities, and only in Isaiah 5:23 could it plausibly be translated by 'rights'.

Where English translations use rights-language, the commonest Hebrew word is *mišpaṭ*. *Mišpaṭ* has a large range of meanings, covering everything to do with justice from *dîn* to *tsedek*. It can refer to the practical aspects of litigation, to abstract justice, to a law, to a series of legal decisions, and to that which is customary and conventional. Hebrew dictionaries also state that it can refer to a person's legal right, but this is anachronistic. *Mišpaṭ* indeed is often linked to certain categories of people (e.g. the *mišpaṭ* of daughters), but here it always appears in the singular (this is the other reason why the Authorised Version prefers 'my right' to 'my rights'). And it is rare to find *mišpaṭ* with an object, as we would say rights to life, property etc. There would appear to be only three examples, namely the *mišpaṭ* of 'firstbirth' (Deuteronomy 21:17), redemption (Jeremiah 32:7) and possession (Jeremiah 32:8). The content of *mišpaṭ* is thus usually worked out not in terms of specific rights over others, but as divine commands or rules which benefit certain categories of people.

If one accepts the interest-theory, that to have a right is simply to benefit from a duty owed by one to another, then *mišpaṭ* can be translated quite often with rights-language. Follow God's law and people will get their *mišpaṭ*. If, however, key to rights is the idea of legitimate power over the behaviour of others, then clear instances of *mišpaṭ* as a right are rare. In the case of the Jeremiah passage just cited, one needs to know the extent to which the redeemer was free to choose to redeem the property, and the New International Version (for example) is ambiguous on this point, referring to the right and duty to buy (cf. Leviticus 25:25 with Ruth 4:4). Indeed, in the clearest instances of rights in the Old Testament, there is no normative word at all. For example, the various rights of redemption contained in Leviticus 25:29, 32 and 48 are properly so called, because they are powers held by original proprietors over existing ones. Yet in the Hebrew, the original owner simply has 'his redemption'. In short, *mišpaṭ*, like the Latin *ius*, is better seen as 'the what's right' for a person, and although we, with our twentieth-century concepts, can identify cases where individuals had what we call rights, the Old Testament does not think like that.

5 e.g. N. McCormick, 'Children's Rights: A Test-Case for Theories of Rights' in C. Nino (ed.) *Rights*, (Dartmouth, 1992).

6 e.g. P. Marshall, 'Does the creation have rights?' in *Studies in Christian Ethics*, vol. 6 no. 2 (1993).

7 O. O'Neill, *Towards Justice and Virtue*, ch. 5. (CUP, 1996).

The New Testament

In most cases where 'right' is used in modern translations of the New Testament, it is a translation of *exousia* (power, authority)⁸. Power in this context means not physical force but the power to command legitimately. In the New Testament this refers to the complete authority of God over all creation (Luke 12:5), Christ's authority, granted to him by the Father (Matthew 28:18), and also other forms of 'devolved' authority such as that of apostles and political rulers (1 Corinthians 9:4ff; Romans 13:1). Where this authority relates to a specific action or object, it looks very like a right.

Paul's first Corinthian letter is key to the understanding of *exousia* as rights. Already in chapters 6 and 7 he has given advice on how the Corinthians are (not) to use what we would see as their legal rights, rights to bring lawsuits, to sleep with prostitutes, and to marry. Then in chapter 8 he considers how believers are to use their *exousia* to eat food sacrificed to idols: although they have this right because idols are nothing, they are to have regard for those whose consciences are weak. Paul continues in chapter 9 with the way in which he also has not used his *exousia* as an apostle to food and financial support. While he had rights to these things from the Corinthian church, his Spirit-filled love for them enabled him to surpass justice and forgo his rights. Authority – justified power over others – is not denied; but it is to be used in certain ways.

The Christian then can accept the existence of rights, but must move beyond rights to consider how they should be exercised. Living the Christ-like, virtuous life involves reflection on how I can make best use of my 'normative property' in the knowledge that I am accountable to God for that use. This applies straightforwardly to the exercise of legal rights. Christ teaches that his followers must be prepared to give up their rights to life, physical integrity, liberty and property (Matthew 16:24; 5:39; 5:41; 5:40). While Paul suffered at times as an outcast, at other times he could insist on his rights as a Roman citizen, undoubtedly for the benefit of the fledgling church (Acts 16:37). Moreover, other non-legal relationships can also be considered in terms of rights and virtues. As Son of God, Christ has the right to be worshipped. But first he came in love, not insisting on this right, and he will come again and every knee will bow, whether willingly or not (Philippians 2:6ff.). True moral authority comes not from having no rights, but from having them and not using them.

The morality of rights

Regardless of how closely particular concepts in the biblical languages correspond to modern notions of rights, much modern rights-talk has connotations that are egoistic, licentious and antagonistic, in short, that are profoundly anti-Christian. For rights carry an inherent bias favouring individualism over collectivism, autonomy over heteronomy, and conflict over consensus.

Individualism

Rights belong to particular people, so the use of rights-language favours individual interests over group interests. In constitutional thought, the purpose of rights is to protect the individual from governments that are (at best) over-zealous in pursuing common interests. For example, there is undoubtedly a common interest in national security, but the pursuit of national security can lead to infringements of the democratic right to question government policy. Dangers start arising when the right is seen as more important than the common interest, or when the existence of common interests is denied altogether. This was well-exemplified by the difficulties arising from the Sunday Trading debate, in which a concrete individual interest (the freedom to trade when one pleased) had to be set against an abstract common benefit (a day of quiet, free from commerce). The only way to start arguing against a relaxation of the

law was by identifying those individual interests that were adversely affected (rights of shop-workers); once a majority had accepted that these were going to be adequately protected, the battle was effectively lost.

Christians would want to straddle the individualist-collectivist divide, the usual image being of one body with many parts. We are one in Christ, yet we have diverse gifts and roles (1 Corinthians 12:12–31). Rights are apt to protect one side of this tension – the element of individuality and diversity, but not the other – the element of community.

Autonomy

To be autonomous is to set laws for oneself, to be in control of one's own life; to be heteronomous is to be subject to another. Modern interpretations of autonomy tend to create a conflict with morality, since they see autonomy as the desirable capacity to set standards of morality for oneself (consistent with everyone else setting *their* own standards of morality). Thus, it has been claimed, there is a 'right to moral independence'⁹, and particular rights identify those areas of life in which the individual is free to decide 'what is good for them'. So, for example, while there could not be a right to assault another – since that would interfere with their autonomy – there might be a right to pornography, since why should you be subject to the wishes of others (heteronomy) in the privacy of your own sitting-room? Thus freedom drifts towards licence.

The autonomy-heteronomy divide is difficult to evaluate, since a key idea in Christian morality is the continually voluntary submission of self to God and each other (Ephesians 5:21). Such a person is simultaneously autonomous and heteronomous. In the political and legal context, there must be rights to certain freedoms, such as the freedom to worship God as one sees best, if not because it is good to choose how to worship God, at least because it is bad for the state to choose for you, but since moral perfection is commanded (Matthew 5:48), there can be at root no right to moral independence. Yet even though virtues such as love, patience and generosity are commanded by God, there is an element of human creativity and freedom in how we live out those virtues; in the classic example, the devotion of a mother is incompatible (in one life) with the devotion of a nun. Moral rights can be understood as preserving individual creativity in living diverse virtuous lives, free from the pressures of an authoritarian community.

Conflict

The adversarial flavour of rights derives from the fact that rights developed first in a legal context, and only later became transferred to the realm of morality. A major function of law is dispute-resolution, and this resolution is traditionally achieved in the Western world not by negotiation and compromise, but by declaring one party in the right, by upholding their pre-existing rights. When rights get transferred to the moral realm, relationships with others suffer. For relationships flourish when people not only give others their due, but spontaneously give them more than their due in countless acts of unrequested goodwill. By contrast, an insistence on rights leads to inflexibility in relationships; each must give the other their due, no more and no less. Given human sinfulness, this leads to perpetual personal conflict.

Once again, the Christian is caught in the middle. There is a time to differ and a time to defer. Of course, there are appropriate ways of agreeing and disagreeing, and when it comes to the enforcement of rights, we should be quick to uphold the rights of others and slow to uphold our own. Yet rights are apt to express that which is non-negotiable as a matter of justice, that for which it is worth fighting.

In short, human beings, created in God's image, have dignity, expressed in an individuality and creativity that needs upholding and

8 Foerster in *Theologisches Wörterbuch des Neuen Testaments* 557–572.

9 R. Dworkin, 'Do we have a right to pornography?' in *A Matter of Principle* (Harvard UP, 1985).

protecting¹⁰. Rights-language used properly protects specific aspects of that human individuality and creativity, by recognising the moral power potential victims have over potential oppressors. The tragedy is that in much modern thought, rights have become a vehicle for the perversion of these values: individuality becomes egoism, creativity becomes licentiousness, and courage in upholding these values becomes antagonism to threats, whether perceived or real.

A Bill of Rights?¹¹

The UK is shortly to get a Bill of Rights when the European Convention for the Protection of Human Rights and Fundamental Freedoms is enacted as domestic law. The precise form of this enactment is unclear, but it will contain a standard set of civil and political rights, such as the right to life; freedom from slavery; the right to a fair trial; respect for family life; freedom of religion, conscience, expression, assembly and association; and the prohibition of discrimination. Many rights are limited by the need to preserve common interests such as national security, public health and morality.

The Bill of Rights will be useful where it prevents the government from 'cutting corners', causing unjust harm to the individual. The problem is that it is being enacted into a culture in which individual rights are already overemphasised, strengthening that trend still further. Rights of freedom and privacy can also be interpreted as expressions of the modern concept of autonomy that insulates the individual from the demands of personal morality. And rights that are primarily protections from unjustified governmental interference can be interpreted as structuring all relationships. Current fairly conservative interpretations of the ECHR by the Strasbourg Court will not necessarily be followed by an increasingly liberal British judiciary.

The UK is already obliged under international law to respect the standards set out in the ECHR, and the individual already has recourse to the Commission and Court of Human Rights. A good argument can be made that this is adequate. Furthermore, as Christians we must be quick to emphasise that society will only function well when individuals are prepared to forgo their rights. Of

course, there must be an individual right to demonstrate, and the government must also have the power to intervene when necessary to preserve public order, but best of all – as the marching season in Northern Ireland has again shown – we must be prepared to forgo these rights for the sake of our neighbour.

Conclusion: three strategies for dealing with rights

We have considered three different accounts of rights. First, we noticed a trend to redefine rights as fundamental interests or benefits, resulting in a massive expansion of potential rights. Then we sought to find an acceptable place for rights-language as expressive of elements of authority over others in a broader context of obligations and virtues. Finally, we rejected the morality implicit in much modern rights-talk, while recognising that the faults identified were perversions of something valuable.

Each of these accounts gives rise to a strategy. We could attempt to subvert the language of rights by adopting such an expansive definition via the interest-theory that we get nowhere. Just how do we balance the 'rights' of apple trees, maggots and human beings? The proliferation of rights-language is becoming increasingly bizarre and hence useless in the resolution of moral disagreement. The second strategy is to abandon rights-language out of protest at its current immoral tendency. If not conclusive, the relative absence of rights-language in the Bible should give us pause for thought, and at least in our own lives we can insist on thinking in terms of duties (What ought I to do?) and virtues (How will what I do impact on my character?). The third strategy is to reform rights-language. This involves challenging those who use rights to identify the persons against whom those rights are claimed, to specify the corresponding duties, and to consider whether there may not be vicious and virtuous uses of those rights.

Christians need not commit themselves to adopting the same strategy in every situation. The concept of a right is a powerful tool for doing certain limited moral and legal jobs. Like any powerful tool it needs to be used carefully, but it should be neither overworked nor abandoned.

10 J. Montgomery, *Human Rights and Human Dignity* (Canadian Institute for Law, Theology and Public Policy, 1986).

11 A.J. Rivers, 'A Bill of Rights for the UK?' in A. Beaumont (ed.), *Christian Approaches to Law Reform*, (Paternoster, 1997).

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