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What can rights discourse cover up?

[November 2003: This paper came out of the work on human rights and liberalism I was doing with Bronwyn Winter and Sheila Jeffreys. I presented it at the APSA conference at ANU in October 2000, at the same session where Sheila gave her paper on the sex trafficking of women. We had an audience of four, as I remember.

Other papers that came out of the work on liberalism are:

'Marcuse and his critics' (2002)

'Power and distaste: tolerance and its limitations' (2002)

'Freedom for whom? Liberalism as ideology' (2003).

With the exception of the paper on 'Tolerance', they were not sent to academic journals, but instead were presented as conference/seminar papers. All are included on UNSWorks.]

(A paper presented at the Australasian Political Science Association conference, Australian National University, 3-6 October, 2000).

Introduction: The paper I'm about to present is not quite as advertised. In the first place, there has been a slight change in the title, from 'What Can Rights Discourse Cover?' [as it appeared in the conference program] to 'What Can Rights Discourse Cover *Up*?' The reason for the change will hopefully become clear as I proceed. In the second place, the abstract [in the conference program] is not an accurate summary of what I'm saying here. So I need to start with a brief account of what I *am* saying. In the most general terms, the paper presents a number of objections which have been raised against doctrines of rights. It starts with Jeremy Bentham's and Edmund Burke's arguments at the end of the 18th century to the effect that the doctrine of the 'Rights of Man' was tyrannical, individualistic and meaningless. I point to some problems with their arguments, and then go on to say that a similar argument has recently surfaced as a charge that the notion of human rights is 'essentialist'. I counter this 'essentialist' argument with a reminder of Marx's objections to the doctrine of the 'Rights of Man', that it was entirely compatible with the social relations of capitalist domination. I then ask: Does this mean that rights claims are useless for redressing social wrongs? and answer: That depends on whether or not those claims recognise the existence of social domination. The cover-up is the extent to which rights claims ignore the social conditions of domination responsible for violating people's human rights. I conclude by arguing that the relations of domination of concern to feminism are those of male supremacy.

The notion of human rights is one of those ideas which at first sight appear to be wholly positive. As Carol Smart has remarked: 'It is almost as hard to be against rights as it is to be against virtue' (Smart, 1989: 143). Everybody is in favour of rights, and no one is against them. Even the tyrants who habitually violate and trample over people's rights agree that rights are a good thing—they simply deny they are doing any trampling. So the idea of human rights is one which seems to meet with general approval.

Nonetheless, there have been criticisms. I want to look at some of those criticisms here. I also provide one of my own, although not with the aim of rejecting the idea of rights altogether. I do think that that idea is an important aspect of any attempt to

secure peace and justice in the world. But there is a major problem with the notion of rights, and that is the extent to which it substitutes for identifying social structures of domination.

Criticisms of doctrines of rights are as old as those doctrines themselves. At the end of the 18th century, both Jeremy Bentham and Edmund Burke perceived the idea of 'natural rights' contained in the French 'Declaration of the Rights of Man and the Citizen', as tyrannical, individualistic and meaningless. Now, it might seem that it doesn't make much sense to say that something's meaningless, and then go on and give it a meaning by saying it's tyrannical and individualistic. But for Bentham and Burke, the doctrine of 'natural rights' was tyrannical and individualistic *because* it was meaningless. 'Natural rights' were meaningless because they didn't exist. They weren't legislative enactments by the properly constituted governmental authorities, and they owed nothing to custom and tradition. 'There are', Bentham roundly declared, 'no such things as natural rights anterior to the establishment of government—no such things as natural rights opposed to, in contradistinction to, legal' (Waldron, ed., 1987: 52). 'Natural rights', he said, 'is simple nonsense'; and the idea of 'imprescriptible rights' (the wording of the French Declaration), that is, rights which could not be abrogated by any law or decree under any circumstances, was 'rhetorical nonsense, —nonsense upon stilts' (p.53). It was 'terrorist language' to speak of rights which could never be abolished, because it took no account of particular conditions and changing circumstances. It was 'the spawn of despotism'. Because it was immune to argument and evidence, its ultimate recourse was the violence of those with the hardest hearts and the sharpest daggers (p.73-4).

Burke agreed. Because government required more wisdom and experience than any one individual could acquire in a whole lifetime, it 'is not made in virtue of natural rights', he said. Rather, good government can provide for human wants only by thwarting the inclinations of individual men (and they *were* only talking about men), controlling their wills and bringing their passions into subjection (p.105-6). Without the continuity provided by law, custom and tradition, the links between the generations are broken, and 'Men ... become little better than the flies of a summer' (p.116). Worse, they become 'a nation of gross, stupid, ferocious, and at the same

time, poor and sordid barbarians, destitute of religion, honour, or manly pride' (p.113).

This is stirring stuff, and history would appear to be on their side, given what happened after the French revolution (and the Russian revolution over a century later). But it's also a profoundly conservative critique. It saw tyranny only on the part of the revolutionaries and not on the part of the entrenched powers-that-be. The only form of social change it allowed was that introduced by the properly constituted authorities, which in effect amounts to no change at all in the relations of ruling. In other words, it lacked a class analysis. And for all its castigation of 'natural rights', it relied heavily on a Hobbesian view of 'natural Man' as inherently nasty and brutish who must be civilised by being inserted into institutions which had stood the test of time.

So why bother with it? What does this eighteenth-century criticism of 'natural rights' have to do the 'human rights' of the second half of the 20th century? The answer is that the criticism of doctrines of rights as referring to non-existent entities somehow 'outside society' has re-emerged as a charge of 'essentialism'. You'll all be familiar with the term 'essentialism' used in a feminist context, where it functions to deny the existence of women's oppression by prohibiting any usage of the term 'women'. The reason for this, or so it is said, is that the category 'women' is so diverse and contains so many differences that using it covers up important distinctions between and among women. In my view, this objection against using the term 'women' is incoherent. It forbids the use of the term while continuing to use it to refer to differences among women. Indeed, it's not possible to talk about the differences *unless* we also talk about women. So 'women' remains a meaningful category as long as it's confined to talk about *differences* among women. It's only prohibited if we want to identify what all women have in common, that is, an interest in struggling against those male supremacist conditions which deny women a human status of our own.

I don't want to go into this any further here, controversial though what I have said might be. I raised it simply to remind you of a familiar context where the term 'essentialism' appears, and having raised it, I have to tell it the way I see it. For now, I want to go on to look at the stated purpose behind the 'anti-essentialist' position.

That purpose is to avoid positing a substantive view of a timeless, universal human nature. It's an attempt to avoid saying that human beings are such-and-such or so-and-so. The 'anti-essentialist' position is, as is so often said, a 'social constructionist' account. In the human rights context, the problem (as seen from the 'anti-essentialist' position) is that any notion of rights assumes that individuals exist with certain sorts of attributes already in place prior to their constitution as social beings. As Paul Hirst put it: "Rights" are conceived as the attributes of individual human subjects deriving from their nature or essence, i.e. from their being free beings, ends rather than means, and so on ... The subject becomes a constitutive entity independent of any social relations' (Hirst, 1980: 95, 103).

Of course, this is an attempt to avoid the kind of Hobbesian assumptions made by Bentham and Burke. It's saying that there's no point in speculating what 'Man' (and it's still men) might be outside society, since he never is. Now, this is true enough (as long as women are included, too). But leaving it there, simply with the abstract 'social constitution of the human subject', does not avoid a substantive view of what it is to be human. On the contrary, it says that to be human is to be nothing but a creature of the social environment. It has the same conservative implications as the arguments of Bentham and Burke, because it provides no grounds from which to challenge aspects of one's social environment. This is an ironic conclusion, given that the anti-essentialist position emanates from what is self-identified as the political Left.

The problem is that that position has divorced itself from its Marxist roots. Marx was as scathingly dismissive of 'the Rights of Man' as were Bentham and Burke. Marx, too, thought they were meaningless—he referred to them as 'ideological nonsense about rights and other trash so common among the democrats and French socialists' (Marx, 1875: 161). He, too, regarded them as individualistic—the subject whose rights were enshrined in the doctrine was 'egoistic man', the atomised, competitive individual 'intent on business' (Marx, 1867: 280), whose sole concern with other men was to fend off encroachments on his freedom to own property and accumulate wealth, and whose only god was money (Marx, 1843). And he also saw the doctrine as tyrannical. However, the source of the tyranny was different in Marx's account from what it was in the accounts of Bentham and Burke. The violence stemmed not

from the anarchy of the unsocialised individual, but from the power of the rising ruling class, the bourgeoisie, in its challenge to the waning power of feudalism: 'in its enjoyment of [its own liberties, the bourgeoisie] finds itself unhindered by the equal rights of the other classes' (Marx, 1852: 30). Far from being 'outside society', Marx's 'egoistic man' was thoroughly embedded in the social relations of capitalism. He was 'man just as he is, man as he has been corrupted, lost to himself, sold, and exposed to the rule of inhuman conditions and elements by the whole organization of our society' (Marx, 1843: 226).

Marx's 'egoistic man', in contrast to the nasty, brutish 'natural Man' assumed by Bentham and Burke, was very much a product of the corrupt and corrupting social conditions of capitalism, of 'the sphere of circulation or commodity exchange ... the society of capital and wage labour' (Marx, 1867: 280). It was capitalist society, 'in fact a very Eden of the innate rights of man', which created 'man' as an isolated individual, perpetually at war with every other individual. In doing so, it denied the existence of social structures of domination and of the ways in which individuals are constituted under conditions of domination. If only individuals exist, there is 'no society' (as Margaret Thatcher so famously pronounced). And if there is 'no society', there's no possibility of questioning social relations for the extent to which they are oppressive, exploitative and dehumanizing. In Marx's account, then, defending the interests of the poor and oppressed by appealing to the 'Rights of Man' was an exercise in futility. As long as the social conditions of capitalism remain in existence, the only 'rights' permitted will be those of the already powerful and privileged.

So where does that leave us with the notion of '*human rights*' (as opposed to 'natural rights')? Is the notion of human rights, too, so complicit with the social conditions of capitalist domination that it is nothing more than a superficial gloss on those conditions and a way of maintaining rather than challenging them? Well, that depends. If the notion of human rights remains at an abstract level divorced from the social conditions which make rights claims necessary, then the answer is: yes, claims for human rights are useless unless they are combined with a recognition of the kinds of social conditions which systematically violate people's human rights. Worse, rights claims are a major cover-up to the extent that they ignore domination, because they hold out a *false* promise of redress and reparation by failing to

challenge the real problem. On the other hand, however, they *are* a humanitarian response to social evils, and a well-intentioned attempt to rectify social wrongs. It has been argued, with some justification, that Marx was mistaken to dismiss doctrines of rights out of hand, as he did (Lukes 1985). Rights doctrines do provide a moral framework for clarifying what people ought to be entitled to if we are ever to live in a just society. But unless they are combined with an exposure of the actual mechanisms of power, they can be (and are) used by the powerful and privileged to defend their interests at the expense of other people. In that sense, Marx's critique can be taken as a warning—unless you identify where the power lies, you will find that those most in need are still excluded and marginalised.

Starting from the social conditions of domination promises to supply that social context which critics have found to be so lacking in doctrines of rights. The fact that rights do not already exist is an intrinsic part of what rights claims mean. They are ethical statements of what people *ought* to be able to have, to do or to be, in the face of social conditions which deprive them of the means to live in dignity, comfort, peace and security. As Norman E. Bowie and Robert L. Simon have pointed out, appeals to natural rights are indeed '*independent* of any given social and political order'. But the reason for this, they say, is so that 'they can serve as external standards for the evaluation of such institutional frameworks'. 'Natural rights', they argue, are 'a plea for human dignity and for the kind of treatment that makes at least a minimally decent life possible', a plea which is directed against social conditions of 'inequality and degradation' (Bowie and Simon, 1977: 61, 56—emphasis in the original). These authors, however, speaking as they were from within a liberal framework, don't tell us anything about what it is that causes the inequality and degradation. They leave us with the impression that 'inequality and degradation' are the result of some kind of accident, oversight, ignorance, or just plain bad management, which can be rectified through rational persuasion and with sufficient goodwill. They don't say so, of course. But neither do they locate inequality and degradation as a systematic requirement of a social order organised for the benefit of powerful vested interests.

From a feminist standpoint, powerful vested interests are always male supremacist interests, in the sense that they involve the privilege and prestige of some men at the

expense, firstly of women, but also of other men (and of children, too, who are essentially not in control of the conditions of their own existence). In other words, a feminist stance on human rights consists of a challenge to male domination. This challenge proceeds partly through identifying the ways in which women's human rights are violated, and by fighting to redress those wrongs. But it also proceeds through challenging the social structures of male domination directly by identifying those male supremacist interests served by women's subordination. So a feminist stance on human rights is not just a concern for women; it is also a struggle against a world ruled by men who are grossly out of touch with humanity, their own as well as anyone else's. This is indeed a grand project, but it's not as daunting as it might appear at first sight. Putting it in such grandiose terms is simply to clarify it. It is a reminder of where the real problem lies, not with women ourselves, but with those cultural meanings and values structured around the principle that only men count as 'human'. The culture of male supremacy is the real enemy, and we ignore that at our peril.

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