

# THE LANGUAGE OF HUMAN RIGHTS

Isaiah Berlin, Raymond Aron and Leo Strauss

J. A. Colen

CEHUM (UNIVERSIDADE DO MINHO), CESPra (ÉCOLE DES HAUTES ÉTUDES EN SCIENCES SOCIALES)

## I. Introduction

29

**THE TOPIC OF THIS CONFERENCE AND THE QUESTIONS SUGGESTED BY THE ORGANIZERS ARE IMPORTANT AND,** most of all, very well-intentioned. They are even, in themselves, a proof of the good intentions we all share. The underlying ideas appear to be the sum of the following theories: 1) There are universal human rights, 2) These were formulated at an historic moment in the French Revolution; 3) Democracy is one of the ideas that has «conquered the world» (cfr. Mandelbaum 2002); 4) But the world is varied and sometimes resists our good intentions, and not everybody acknowledges the rights of man; 5) it is perhaps possible to arrive at a compromise, or a dialogue, between the various cultures as regards the rights of man; 6) lastly, we need to find effective ways of getting them respected in a world that is now global.

These ideas are so well-intentioned that they are very unlikely to lend themselves to provocation, but a glimpse at the program of this conference appears to show that we will not stop stirring things up and that we will manage to turn what should be simple into something problematic (cfr. Berlin, 1981: 143). Which is not necessarily a fault, because it is almost always important to manage to see where the hitch in a question is. Sometimes, before looking for solutions one needs to

THE LANGUAGE OF HUMAN RIGHTS

J. A. Colen

correctly identify the problem. We can even say that a serious doctor normally tries to identify an illness before suggesting treatment – even if placebos nevertheless lead to surprising results.

## II. The current situation

The problem, as I see it, can be formulated as follows: 1) the language of the rights of man is what gets closest today to a consensus in the global world and man's dignity appears to be a common moral and political reference point; 2) democracy is the regime with the best historical record as regards respecting the rights of man; 3) nevertheless we have, perhaps flippantly, stopped believing that democracies are government by the people and, in any case, present democracies are national, not global; and lastly 4) we have stopped believing that man is more than one animal among many. It is difficult not to see that there is a certain paradox, if not contradiction in terms, between these different opinions, but they are neither more nor less disturbing than expressions like “open secret”, “deafening silence” or “serious joke”.

We are going to attempt a brief sketch of the question, recalling: 1) how democracy has stopped being what it was; 2) which (metaphysical, epistemological) prerequisites to the language of rights are required; 3) the link between citizenship and rights. Perhaps at the end we can suggest a potential (and modest) role for the rights of man today.

I shall try to employ as a guide the words and ideas used by the cold war generation of political philosophers, partly because it had a special perspective on the question (some things can only be seen clearly in certain historical and social conditions) and partly because it managed to maintain an unstable balance on the question that seems enviable, in comparison, today.

Pierre Manent recently asserted that “the notion of the rights of man is today a common political and moral reference point for the West” (Manent, 2001: 163). He even goes as far as to suggest that such a homogeneity has not existed since the Great Schism of the West around 1300 A.D.. The very “right to difference” is based on this unquestionable foundation in the shape of the rights of man.

Our first difficulty, therefore, is to perceive whether there really is a philosophical problem to discuss – as opposed to procedural or practical questions – and, if there is, of what nature. If the rights of man are unanimously considered fundamental rights that should not be violated, the language of those rights gets transformed into a powerful banner that can be used as a lever to support every type of just human pretension and even – why not? – those of other sentient or even inanimate beings (Manent, 2001: 313) . But what are rights? What counts as a right? For example: should we consider only the right to life and property? How can we decide whether homosexuals have a natural right to adopt children or to use wombs for rent? Or if there is a right to a just pension or just taxes? Or to see my God and my prophet respected?

We can provide two replies: we are able to recognize what the rights of man are through the public exchange of opinions and arguments, by identifying the solutions and discussing the merits of each one of them. It is the point of view of deliberative democracy, which we might say gets defined by the assertion “it is public and free deliberation by citizens who are equal that is the foundation for political legitimacy” (Cohen *apud* Girard and Le Goff, 2010). This appears today to dominate the constitutional theory of democracy (Dryzek, 2000).

The other is a reply that some say is “out-of-date”: it is the aggregative paradigm of representative democracy (cfr. Girard and Le Goff, 2010: 20). Deliberative democracy emerged precisely at the end of the cold war because today a) there is a refusal of the idea of common good, assimilated by its defenders to “general will” (*Idem*: 26-27); b) there is a denial of the figure of an active citizen intervening in politics, a denial apparently shared both by the “elitist” conception of democracy (Schumpeter, 1976: 329-330) and by the theories of social choice and by democratic pluralist models (Dahl, 2000, 2006). The crisis of the aggregative paradigm arises when democracy gets defined as a competitive game, the aggregation appears inconsistent (Arrow 1963), and what is fundamental in democracy becomes the competition among various leaderships and the existence of alternatives. Fortunately “the market and the forum” (cfr. Elster 2010) and other ideas arose to replace this “failed” theory. The first formulations of this are by the “second Rawls” (Rawls, 2005) and the “second Habermas” (Habermas, 2004).

I do not think I am very wrong if I say that the present approaches to the problem of the rights of man, i.e. the approaches subsequent to Rawls (Rawls, 1971), take the precedence of right or justice over good as a given. And if I say that, in the ideas evolving after Rawls and Habermas, right is merely the result of public reason or is procedural, in spite of talk about procedural and substantial tendencies (Girard and Le Goff: 31), even for the latter substance is nothing more than the result of a procedure. They are all formal solutions, where the content of proposals for living is subordinated to procedures legitimating it – for example, and in the best cases, revealing on the basis of an original position (Rawls, 1971) or the equitable result of fair distributions of capacities and resources (Sen, 2009), etc.

What we have in common today is that we have stopped believing in three things: government by the people, the common good (or if we like, aggregative solutions) and justice as a citizen's duty. How do the rights of man fit into our current view of things, when they are an old idea which, in their old version, depended on democratic citizenship and, in their new one, on the dignity of man – which was still missing in 1789? (cfr. Manent, 2001, 319-321) There is no unanimity about the foundations. In contemporary discussions there are many different competing philosophical justifications of these rights.

Can the rights of man continue to be a reference point, or are we in the presence of one of those cases about which Hegel said that “The owls of Minerva fly only by night?”? This is, nevertheless, a problem which has less consequences when the various justifications arrive at the same conclusion, i.e., that man has fundamental rights that cannot be violated (e. g. Nozick, 1974). In this case the problem is only practical, i.e., to decide what forms the institutionalization and guaranteeing of the rights of man should take on a global level, given that the rights of man have never been less the rights of an Englishman. The right institutions have to be deduced on the basis of some formal revelation procedures.

In the world, global democracy or justice is, nevertheless, a new question, since, even when it was proclaimed to be universal, the traditional picture of the rights of man was implicitly or explicitly *de facto* that of a national state or of a property-owners democracy. Given that both the defense of the rights of man and democracy are positive things,

it is to be hoped that they go hand-in-hand and, in fact, it is possible to say generally that the historical behavior of democracies as regards the rights of man is better, for example, than that of totalitarian regimes or many other regimes generally, like kleptomaniac dictatorships, and we can provide statistics that confirm this assertion (cfr. Przeworski, 2000, Epstein, 2006).

The situation may seem, as we said, paradoxical: it is possible to say that, if the rights of man were the manifesto of the earliest modern democracies, we should like to maintain and defend them in spite of already not believing either that man has natural rights and that democracy is government by the people. We do not even believe that man is more than a biped without feathers (cfr. *Statesman*).

But who, without particular malice, can be against sending a boat to pick up victims of the Vietnam War – an idea capable of uniting Jean-Paul Sartre and Raymond Aron around the same table? Who is not against torture in Guantanamo and the closing of that military prison? Or, generally, against the right to life, property and the search for happiness? – expressions that, even if much used, have still not lost their power (Strauss, 1992: 1-2). For sure, people with an iconoclastic personality, like Raymond Aron, did not fail to point out that what counted as a right in the context of the American Declaration of Independence and the French Revolution was not exactly the same as what counts as a right in the declaration of 1948 or other more recent ones (Aron, 1972). If, earlier on, the rights of man were mainly the rights a citizen had to defend himself against the state or against who was governing, later on these became rights that citizens could claim from the state and that the state has the duty to respect. And, among others, Aron, maliciously, also pointed out that the right to holidays with pay and to a peaceful and just world order or a decent standard of living perhaps did not possess the same universality and practicability as the earlier *Déclaration des droits de l'Homme et du citoyen* – which was also not free of paradoxes, because it asserted the obviousness of being born free and equal.

And, moreover, the list of the rights of man has now become much longer, thanks to social rights, and would be much longer still, if it included everything involving the last utopia resisting the end of history and the crisis of the markets – that of the global village – or,

after the crisis of the markets, that of global Social-Democracy (Judt, 2010) since we are not ready to do without either the welfare state or supermarkets with a variety of products and a greener world.

### III. The cold war liberals: a special insight

In interviews he had, towards the end of his life, even Isaiah Berlin, who had a strained relationship with many men of the Enlightenment, whom he considered enemies of freedom, and who suspected that there was no consistent and harmonious solution for human society, asserted that the Declaration of the Rights of Man was certainly the French Revolution's greatest civilizational acquisition, that it was practically equivalent to the minimum requirements of a decent society and that democracy was preferable to other regimes because it was based on the rights of man (Berlin and Jahanbegloo, 1992: 74, 114) .

We could remodel the question as follows: the problem is that either rights cannot be more than traditions and each society and each man has the right not only to follow their own path but also to define that there are paths (Aron, 1978) and that there is no Archimedean point on which to rely for judging other societies from the present or the past. Or, on the contrary, there is perhaps a standard by which we can judge social life. In other words, either there is no duty towards society and even talking about this makes us look like we belong to a long lost era or, on the contrary, there is no democracy without virtue and, even if democracy is the institution with the most varied lives in their colors and forms (*Rep.* Bk. VIII), the city can ask us for the supreme sacrifice – without mentioning other, lesser sacrifices like being part of a jury or expressing oneself frankly in a public assembly.

To express it another way, there are two mutually exclusive alternatives: either rights, or what is just, are natural, i.e., there is something objectively constituting people's rights or justice in a political system and individual people – and political systems may, or may not, be up to these universal standards. Or rights and justice are purely conventional and there are no universal or objective standards and rights and justice is entirely composed of the beliefs or practices of individual communities. Under these conditions democracy would be just in Athens and

unjust in Persia. Saying that every right is conventional is like saying that there is no external position from which to criticize the standards of any particular community.

We can start to see that the contours of the question are hard to make out if we consider how, on the rare occasions in which he dispensed with the immunity of a commentator and spoke with his own voice, Isaiah Berlin made it clear that he did not believe that there was a human nature that was constant (Berlin, 1997: 20-21, 29-30), even if perhaps there were some minimum requirements for what can still be considered human (*Idem*: 203-4). That is, man is a being that has rights, although the list of these rights today appears to be not only elastic but capable of being extended indefinitely and there are many incompatible and competing justifications for man's particular dignity, both by Christians believing in the human soul and by theists, or by materialists of various types who think there is no "ghost in the machine" and that man is nothing more than a set of electrically charged synapses. The problem about accepting many different justifications, however, is that one inevitably has the suspicion that, perhaps, none of them is true.

This suspicion could only be avoided while one believed in a justice above conventions to which one could appeal, but nowadays this belief has become dissipated, if it has not completely disappeared. It was this that Leo Strauss feared would happen in America, as he had already seen in his native Germany, so that the wise words of the Declaration of Independence, in the form taken up a century later by Abraham Lincoln, would be considered merely new identities and ideologies, or even "myths", formulated at the time of a Revolution promising a new social and political order.

Why do we need to maintain, or worse still, impose these identities, ideologies and myths on other cultures? Perhaps torture here, slavery there, or the immolation of widows on pyres are, in the end, part of the right to be different. Strauss felt that the rights of man could only be upheld if there was a natural right not depending on human arbitrariness (Strauss, 2012: 1).

Strauss was not unaware that it was possible to consider the rights of man as ideals to aspire to, but he stressed that "we do not understand the *duties* to be ideals" (Strauss, 2012: 2) and, in the end, considered the solution to be unsatisfactory, given that the Nazis

had just as much faith in their ideals as democrats in theirs. But, if he considered this problem the “most serious of problems” (*Idem*: 1), he also acknowledged that social utility should not be confused with truth. It might very well happen that the language used for rights by the Founding Fathers is nothing but a pious lie that it would perhaps be better not to unveil to non-philosophers, at the risk of weakening the social fabric, interwoven with common beliefs.

But Raymond Aron, curiously the only of these post-war philosophers to assert clearly the existence of human nature, asserted: “in the strict sense of the term, I do not partake of the philosophy of the rights of man” (Aron, 1978: 228-29). The philosophy of the rights of man gets its inspiration from religious beliefs, or a philosophy of natural law. The roots to this view of the world are perhaps, as Comte considered, fundamentally religious. For Christianity each soul has its own particular destiny, a belief however that has never stopped religion from adapting to every kind of social organization (*Ibidem*). Another tradition is that of the modern philosophy of natural rights, which discovers or reconstructs a “state of nature”, a stage earlier than, or external to, society (*Idem*: 229).

Berlin as well, considering these theories “metaphysical politics”, stated:

“closely related to and historically connected with this view [i. e. of natural law] is the doctrine that I possess certain rights, implanted in me by nature, or granted to me by God or by the sovereign, and that these cannot be exercised unless there is an appropriate code of laws enjoining obedience by some persons to others” (Berlin, 2006: 20, cfr. also: 45-46).

Although he acknowledges that “sometimes the existence of this ultimate metaphysical system is forgotten and natural rights are conceived as isolated entities or attributes or relations, ‘somehow’ inherent in moral agents in an altogether unique and inexplicable fashion: as imprescriptible or eternal ‘rights of man’ (...) though it is not made clear by what logic or cognitive process such conclusions are reached” (*Idem*, 164-165).

It is not therefore an exaggeration to assert that these political philosophers, the so-called liberals of the Cold War, like Raymond

Aron, Leo Strauss and Isaiah Berlin, were generally skeptical about the language of human rights.

#### IV. Reasons for the skepticism and skepticism about the capacity of reason

They all wrote long texts in which they traced the language of modern human rights back to the *Philosophes* of the 17<sup>th</sup> and 18th centuries, who won the argument at the time of the American Declaration of Independence and the French Revolution (cfr. *Idem*: 156). When Aron, or Berlin, or Strauss did not lend themselves to observing its metamorphosis in the manifestos of the day, they pointed out the romantic and irrationalistic reactions that destroyed this philosophy of the rights of man and faith in human progress. This did not stop them, evidently, from supporting concrete causes involving the rights of man. We can ascribe this skeptical attitude to a number of different reasons.

Some reasons are historical, like the disappointment with the efforts of the *Société des Nations*, which proved incapable of preventing wars and atrocities on an unheard of scale; or the contrast between the practices and, at the same time, the declarations of intent of the signatories of many Communist or African countries. It is historical reasons like this that help us to understand, for example, Strauss's words about the pitiful and powerless rights of man (Cfr. Strauss, 2002) or the sadness with which Raymond Aron recalled that declarations of rights meant little if they were not accompanied by political citizenship rights" (Aron, 1977: 1262). In fact, only a catastrophe was capable of bringing together countries with opposing principles in the same declaration – as Berlin recalled: only the tragedy of an unimaginable war resuscitated, in the post-war period, a rhetoric weakened by nationalisms.

Nevertheless there were perhaps other, more important reasons, of a theoretical nature, for these thinkers' skepticism: they all shared a limited trust in the capacity of reason to encapsulate timeless values in a formula. None of them based his theories on any contractualistic formula, and no deliberation about public reason could replace principles, but the principles were difficult, if not impossible, to formulate.

In late interviews Berlin said frankly: I do not believe that it is possible to make a list of the rights of man (Berlin and Polanowska: 86).

It was the discovery of politics in the tumult of history that awakened them. For this reason they all insisted on the link between democratic citizenship and the rights of man (Aron, 1974). The rights of man were linked to the duties of a citizen. The rights required the mediation of the city. The city or nation to which they owed loyalty was characterized by each one of them in very different ways. The stress given to the city's institutions was different: Isaiah Berlin spoke of pluralism, Leo Strauss of loyalty to constitutionalism and Raymond Aron of defense of pluralist constitutional regimes, but they were not confused by outside appearances ( the fact that the bride wore a veil did not stop them recognizing her), because this difference in their characterization did not prevent all of them from being “friends but not adulators of democracy”, even after being warned by Schumpeter that a democratic majority was capable of condemning witches (or, if you like, Jews in concentration camps) to being burnt.

Were these political philosophers wrong to never separate democracy and *polis* or nation? To trust more in common democratic man or in a few statesmen, whose verve and greatness they admired, than in enlightened intellectuals, judges of a Supreme Court or institutional solutions? They all considered personal and institutional solutions to be fragile, and reckoned that the true battle was that about “ideas”, in philosophy and in sociology, considering that the Highest Court on earth is more likely to call on the social sciences than on biblical commandments.

## V. Conclusion: pious lies and the role of the rights of man today

Can this skepticism teach us anything? Teach, for example, that there are pious lies that are socially useful and the best thing is to cover them up with the chaste veil of silence? Or that the rights of man are an “open secret” or a “serious joke”, with a placebo effect, but no more than that? Not entirely. Even if imperfect, these political “manifestos”, even if historically located, implicitly acknowledge, ashamedly, that there is something timeless in man and in ethics. This “truth” about man

needs to be asserted in a positive way and transformed into institutions, even if any transformation is always problematical. At a first glimpse it even appears that a country endorses more and more human rights declarations if it is prone to human right violations.

How can human rights be defended on a global level? Current solutions include not only the international Declarations of Rights, Conventions, laws and even international criminal courts. If we follow these thinkers, any solution is only effective, if it is effective, when it is not disconnected from political rights – not least because the most serious cases always arise in each city with its metics. And in spite of the enormous difficulties in encapsulating “what man is” in a formula or a list, these manifestos would gain something if they did not include rights that are obviously only transitory and parochial, at the risk of losing part of their strength and relapsing more quickly into the ridiculousness of an ancient *bibelot*. Universality is a condition for the strength of this lever.

If we wanted to generalize, we could say that the institutionalization of this “practical truth” about man should only be entrusted to fully inclusive democratic mechanisms, in which both nationals and foreigners have full rights, at the risk of becoming empty rhetoric as regards those that most need to be protected. Which is not an authorization to transform everything, foreign policy or fiscal policy, into questions of rights. I would, however, add that a translation into the language of the rights of man cannot be a way of silencing political debate or transforming social and political programs into questions of principle, “that are not to be discussed”.

Just before finishing let me also suggest that, in the end, it is perhaps not possible to indefinitely ignore the question of the primacy of good which is the standard used by justice, or the question of men’s (natural) rights debated in a substantive and not formal way.

## Bibliography

ARON, Raymond, (1972), “Pensée sociologique et droits de l’homme”, in *Études politiques*, Paris, Gallimard.

- ARON, Raymond, (1974), "Is multinational citizenship possible?", *Social Research*, Vol. 41, n. 4, pp. 638-642.
- ARON, Raymond, (1977), "Clausewitz et l'État", *Annales. Histoire, Sciences Sociales*, Vol. 32, n. 6, pp. 1255-1267.
- ARON, Raymond, (1978), "*Liberté, égalité*", Bibliothèque Nationale de France, *Manuscripts*, NAF NAF 28060 (Box. 33), [n. pub.].
- ARON, Raymond, (2006), "Une citoyenneté multinationale est-elle possible?", in *Les Société modernes*, Paris, PUF, 2006.
- ARROW, Kenneth, (1963), *Social choice and individual values*, New Haven and London, Yale University Press.
- BERLIN, Isaiah, (1983), "Does political theory still exist?" in *Concepts and categories. Philosophical essays*, Henry Hardy (ed.), London, Penguin Books, pp. 143-172.
- BERLIN, Isaiah, (2006), *Political Ideas in the Romantic Age: Their Rise and Influence on Modern Thought*, London, Chatto & Windus.
- BERLIN, Isaiah, (1997), *The Crooked Timber of Humanity: Chapters in the History of Ideas*, (ed. Henry Hardy), Princeton (NJ), Princeton University Press.
- BERLIN, Isaiah and POLANOWSKA-SYGULSKA, Beata, (2006), *Unfinished Dialogue*, Amherst (NY), Prometheus Books.
- BERLIN, Isaiah, and JAHANBEGLOO, Ramin, (1992), *Conversations with Isaiah Berlin*, New York, Charles Scribner's Sons (Macmillan).
- DAHL, Robert, (2000), *On Democracy*, New Haven, Yale University Press.
- DAHL, Robert, (2006), *A Preface to Democratic Theory*, Chicago, The University of Chicago Press.
- DRYZEK, John, S. (2000), *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford, Oxford University Press.
- ELSTER, Jon, (2010), "Le marché et le forum", in, GIRARD, Charles and LE GOFF, Alice, *La Démocratie délibérative. Anthologie de textes fondamentaux*, Paris, Éditions Hermann.
- EPSTEIN, David L., BATES, Robert, *et alii* (2006), "Democratic transitions", *American journal of political science*, Vol. 50, n. 3, Jul.
- GIRARD, Charles and LE GOFF, Alice, *La Démocratie délibérative. Anthologie de textes fondamentaux*, Paris, Éditions Hermann.
- HABERMAS, Jurgen, (2004), *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, Polity Press.
- MANDELBAUM, Michael, (2002), *The Ideas That Conquered the World: Peace, Democracy, and Free Markets in the Twenty-first century*, Public Affairs.
- MANENT, Pierre, (2001), *Cours familier de philosophie politique*, Paris, Fayard.,

- NOZICK, Robert (1974), *Anarchy, state and utopia*, New York, Basic Books.
- PRZEWORSKI, Adam *et alii*, *Democracy and development*, Nova York, Cambridge Univ. Press, 2000.
- RAWLS, John, (1971), *A Theory of Justice*, Cambridge (MA), The Belknap Press.
- RAWLS, John, (2005), *Political Liberalism*, New York, Columbia University Press.
- SEN, Amartya (2009), *The Idea of Justice*, Cambridge (MA), The Belknap Press.
- SCHUMPETER, Joseph A. (1976), *Capitalism, socialism and democracy*, Nova York, Harper Perennial.
- STRAUSS, Leo, (1992), *Natural right and history*, Chicago and London, The University of Chicago Press, 1992 (ed. orig. 1953).
- STRAUSS, Leo (2002), *Leo Strauss: The Early Writings (1921-1932)*, ed. Michael Zank, Albany, SUNY Press.
- STRAUSS, Leo, (2012), “As conferências de Annapolis sobre *Direito Natural*: um texto inédito de Leo Strauss”, *Diacritica*, Vol. 26, n.2.