

'The right to a healthy environment is a fundamental human right'

Introduction:

As the temperature rises, those who are concerned about the environment search to convince the unconcerned of the gravity of the situation. One approach has been to draw on the success enjoyed by the human rights movement which, following the Nuremberg trials, became arguably the dominant cultural paradigm of the late 20th and early 21st centuries. Hence the claim that 'the right to a healthy environment is a fundamental human right'. The claim capitalises on the urgency, unconditional normative value and immediate applicability¹ afforded to human rights. Of course, for those who support both human rights and sustainability, the strategy is attractive. But is it sensible? We have to ask what a "fundamental" right to a healthy environment really means. Are we ready to equate reckless consumption to a crime against humanity? Is it possible to enforce the universal duties required to turn the tide on climate change? Is a permissive and individualist "rights" agenda the correct structure in which to formulate a communal duty to protect the planet? Is there anything "human" about the right to a healthy environment? Using fundamental human rights to promote an austere environmental policy would require impossible trade-offs between existing freedoms and novel duties. However, the nexus between welfare rights and climate action holds potential for a complementary and progressive agenda.

"Fundamental"

Human rights are generally considered to fall into two groups: liberty rights and welfare rights. Liberty rights, such as the right to life are "universal, and claim that they can be justified without reference to Covenants or institutions."² Welfare rights on the other hand, such as the right to food tend to be rights to goods or services.³ While many such rights are identified as 'human rights' they do not share the universality of liberty rights. It is impossible to tell who violates the right to a good or service unless a specific duty bearer has been designated. Welfare rights tend to be ratified by treaties or institutions, whereas fundamental liberties ascribe their authority to unalienable and unalterable truths. If the proposed human right to a healthy environment is to be a 'fundamental' one, it follows that it must be a liberty right.

"Rights", "duties" and "crimes"

The finality of liberty rights should not be underestimated. An emphatic fundamentalist approach to human rights is adopted by McBride; who argues that "if someone has a human right not to be treated

¹ Rebecca Bratspies, 'Do We Need a Human Right to a Healthy Environment?' (2015) 13 Santa Clara Journal of International Law 36

² Onora O'Neill, 'The Dark Side of Human Rights.' (2005) 81 International Affairs 432

³ Ibid 427

in a certain way, then it would always be wrong to treat them in that way, no matter how beneficial the consequences of treating them in that way will be.”⁴ His own list includes only eight such crimes:

1. Executing someone else;
2. torturing someone else;
3. having sex with someone without their consent;
4. intentionally sterilising someone without their consent;
5. experimenting on someone without their consent;
6. depriving someone of their liberty for an indefinite period;
7. intentionally destroying or getting in the way of someone’s friendship with another;
8. treating someone with a contempt that is not based on an honest assessment of that person’s character.⁵

Fundamental human rights to freedom from these atrocities are ensured because each crime against humanity corresponds directly to a universal duty not to commit it. The claim of a fundamental freedom from an unhealthy environment fails to identify what behaviour it outlaws or what exact crime it proposes to protect us from. The current climate crisis can rarely be attributed to atrocities, on the contrary it is created largely by emissions from superficially innocuous consumption. Figure 1 shows the reduction in emissions that can be achieved by avoiding carbon-intensive actions. If we say that the fundamental right to a healthy environment demands a universal duty to emit less than 2.1 tCO₂-eq. per capita (as required to ensure a healthy environment within 2°C of pre-industrial levels) are we ready to rule that carbon emissions above that level constitute “crimes against humanity”? And, if so, are we all criminals?

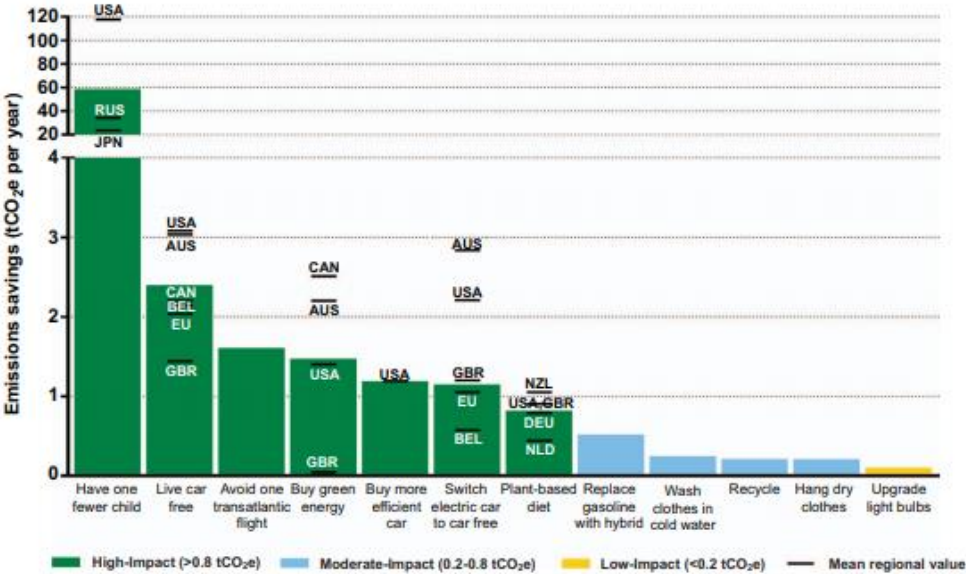


Figure 1: A comparison of the emissions reductions from various individual actions⁶

⁴ Nick McBride, *Letters to a Law Student*. (2nd edn, Pearson 2007) 137

⁵ Ibid 137

⁶ Seth Wynes and Kimberly Nicholas, ‘The climate mitigation gap: education and government recommendations miss the most effective individual actions’ (2017) 12 *Environmental Research Letters*

A legal duty to have fewer children and/or live car free and/or avoid transatlantic flights, could see individuals directly deprived of their rights to family, possessions and freedom to travel. This may sound appealing to the climate-conscious ascetic or eco-authoritarian; but a normative and fundamental approach to a healthy environment as a liberty right appears politically impossible in light of current unwillingness to comply with the kinds of responsibilities required to avoid dangerous climate change⁷.

Dispensing with democracy?

Faced with this political impossibility Zellentini suggests there are “good reasons to doubt whether democracy – as currently understood – is the right institutional setting for bringing about just climate policies.”⁸ The voices of the developing world, as well as those of the young, or of future generations are underrepresented in the elections of the handful of countries with the power to instigate meaningful change. Democracy struggles to achieve justice where, first the actions of the individuals of a nation have international consequences; second where cost of current behaviour is met in an uncertain future; and third where dangers and benefits are hard to foresee⁹.

Of course the difficulties faced by change-makers in democratic societies are not faced everywhere. Since Trump’s ascendance to the US presidency, the isolationist stance of his administration and the US’ withdrawal from the Paris Agreement have created an opportunity for a new player to emerge. Headlines were made at the World Economic Forum in 2017 as China asserted its new leading role in global affairs, particularly on climate issues. China, once infamous for its reliance on coal, is now “at the centre of a global energy transformation.”¹⁰ The world’s most populous nation has been hailed the “undisputed renewable growth leader.”¹¹ Furthermore the Asian giant’s infamous ‘one child policy’ was, even in 2007, credited with avoiding 300 million births and averting 1.3 billion tonnes of CO² emissions in 2005¹². To put this in context the United States, China, Russia, India and Japan were the only countries in the world emitting more 1.3 billion tonnes a year at the time. If freedom from an unhealthy environment is to be considered a fundamental human right, then Xi Jinping, “the president of the world’s largest authoritarian state”¹³ would be set to emerge as its principal proponent. A fine

⁷ Simon Caney ‘Climate Change and Non-Ideal Theory. Six Ways of Responding to Non Compliance’ in Claire Heyward and Dominic Roser ‘Climate Justice in a Non-Ideal World. (Oxford University Press 2016)26

⁸ Alexa Zellentini ‘How to Do Climate Justice’ in Thom Brooks ‘Current Controversies in Political Philosophy’ (Routledge 2016) 126

⁹ Alexa Zellentini ‘How to Do Climate Justice’ in Thom Brooks ‘Current Controversies in Political Philosophy’ (Routledge 2016) 126

¹⁰ Jiang Kejun and Jonathan Woetzel, ‘How China is leading the renewable energy revolution’ (Weforum, 29 August 2017) <https://www.weforum.org/agenda/2017/08/how-china-is-leading-the-renewable-energy-revolution> > accessed 5 March 2018

¹¹ Rob Smith, ‘Three countries are leading the renewable energy revolution’ (Weforum, 26 February 2018) <https://www.weforum.org/agenda/2018/02/countries-behind-global-renewable-energy-growth/> > accessed 5 March 2018

¹² Alister Doyle, ‘CORRECTED: China says one-child policy helps protect climate’ (Reuters, 30 August 2007): <https://www.reuters.com/article/us-climate-population-correction/corrected-china-says-one-child-policy-helps-protect-climate-idUSL3047203920070830?feedType=RSS&feedName=environmentNews>

¹³ ‘The world’s most powerful man’ (The Economist, 14 October 2017): <https://www.economist.com/news/leaders/21730144-do-not-expect-mr-xi-change-china-or-world-better-xi-jinping-has-more-clout> > accessed 5 March 2018

irony given heavy criticism of his regime by both Human Rights Watch and Amnesty International for its “broad and sustained offensive on human rights”¹⁴ and lack of safeguards to protect the right to privacy, freedom of expression, freedom from arbitrary detention and other human rights.¹⁵ China, with its swift energy transition and one child policy, gives some idea of the kind of regime that would have the power to enforce a fundamental duty to protect the environment, but at what cost to established human rights?

Aspirational approaches: all bark and no rights

The alternative to a fundamental, universal and potentially authoritarian approach to imposing a healthy environment is to adopt an aspirational view of human rights. This type of reading is commonly encountered in attempts to extend the cultural prominence afforded to human rights issues to emerging social causes. With an aspirational approach it is easy to champion a cause, to imbue it superficially with the gravity and liberal values of human rights discourse without the political impracticalities of attempting to assign the relevant duties or the criminalisation of contrary behaviours. But this kind of vague, aspirational approach has led to emerging scepticism, allegations of “rights inflation”¹⁶ and perceived reluctance to acknowledge the necessary “trade-offs”¹⁷ between rights and duties required to make them meaningful. Rights are presented as entitlements that one party holds against another. This leads to a culture of blame, victim identification¹⁸, ego-centrism and permissiveness.¹⁹ Selfish assertions of what the individual is owed, or what they are allowed to do, are not conducive to the communal commitment to duty, benevolence and sacrifice needed to cut consumption to sustainable levels. Adopting an aspirational approach would both fail to make environmental duties enforceable and, in presenting this new human right as unenforceable, detract from the credibility of human rights more generally. Both human rights and climate action deserve to be taken seriously, the aspirational approach does justice to neither.

Nothing “human” about it...

The problems with the words “fundamental” and “rights” in this context are complex, the problem with the word “human” is comparatively straightforward: environmental discourse would do well to distance itself from the hubris and entitlement of drawing authority from a human-centric paradigm. Human rights are of vital importance to all of us, but to assert that there’s anything specifically human

¹⁴ ‘China: Events of 2017’ (Human Rights Watch, 2018) <https://www.hrw.org/world-report/2018/country-chapters/china-and-tibet> > accessed 5 March 2018

¹⁵ ‘China 2017/2018’ (Amnesty International 2018. <https://www.amnesty.org/en/countries/asia-and-the-pacific/china/report-china/> > accessed 5 March 2018

¹⁶ Joe Humphreys, ‘Have human rights created an ‘entitlement’ culture?’ (The Irish Times, 30 January 2018) <https://www.irishtimes.com/culture/have-human-rights-created-an-entitlement-culture-1.3369729> >Accessed 5th March 2018

¹⁷ Suella Fernandes MP, ‘Britain is so obsessed with human rights it has forgotten about human duties’ (The Telegraph, 16 December 2015) <https://www.telegraph.co.uk/news/uknews/law-and-order/12053319/Britain-is-so-obsessed-with-human-rights-it-has-forgotten-about-human-duties.html> >Accessed 5th March 2018

¹⁸ Onora O’Neill, ‘The Dark Side of Human Rights.’ (2005) 81 International Affairs. 438

¹⁹ Suella Fernandes MP, ‘Britain is so obsessed with human rights it has forgotten about human duties’ (The Telegraph, 16 December 2015) <https://www.telegraph.co.uk/news/uknews/law-and-order/12053319/Britain-is-so-obsessed-with-human-rights-it-has-forgotten-about-human-duties.html> >Accessed 5th March 2018

about the right to a healthy environment shows a total disregard of our duties to ensure that millions of other species are not deprived of their environment. The language of “human” rights is not suitable for the climate and environment agendas.

A healthy environment is a pre-requisite for welfare rights

Aspirational approaches appear too light handed and fundamental approaches too heavy. Welfare rights, however, do offer some scope to bridge environmentalism and human rights issues to the benefit of both movements. ICESCR, Article 11 establishes a right to be free from hunger²⁰, so with climate change threatening to put close to 50 million more people at risk of hunger by 2020, and an additional 132 million people by 2050,²¹ it’s hard to see how this right can be upheld without a healthy environment. ICESCR, Article 12 recognises “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”²² It is also hard to see how this right can be guaranteed as increasing floods and droughts lead to more cases of diarrhoea and cholera, with 150,000 people currently estimated to die each year from diarrhoea, malaria, and malnutrition caused by climate change.²³ While the requirement for universal duties mean the right to a healthy environment itself should not be reduced to a welfare right, environmental issues can nevertheless be used to justify affirmative action in the delivering established welfare rights.

Welfare rights draw justification from covenants, treaties and institutions rather than fundamental principles; they also tend to place duties on states, institutions and organisations rather than individuals.²⁴ Whilst this may make them ideologically underwhelming in contrast to universal liberty rights, it nevertheless puts the corresponding duties into the hands of institutions that, practically, have the ability to bring about policy change and generate real impact. By acknowledging the nexus between the climate crisis and important welfare rights, states and international organisations can address both issues simultaneously.

There is no “fundamental” “human” “right” to a healthy environment

Given that both climate action and fundamental human rights are flagstones of the progressive agenda, the claim that ‘the right to a healthy environment is a fundamental human right’ is seductive. However, upon further examination it has been shown that, as far as environmental issues are concerned, the words “fundamental” “human” and “right” are each problematic in their own way. Firstly, “fundamental” human rights demand a universal duty that individuals not to commit crimes against humanity, so until we are ready to equate individual overconsumption to atrocity, then claims that the right to a healthy environment is “fundamental” will lack justification. Secondly the notion that the right to a healthy environment is specifically “human” is demonstrative of the disregard for the world around us that has led us into the present crisis. Thirdly a focus on “rights” in the climate crisis will only encourage people to identify as victims and attribute blame rather than assume

²⁰ International Covenant on Economic, Social and Cultural Rights (1976) a(11)

²¹ ‘Climate Wrongs and Human Rights’ (Oxfam Briefing Paper, 2008) 6

²² International Covenant on Economic, Social and Cultural Rights (1976) a(12)

²³ ‘Climate Wrongs and Human Rights’ (Oxfam Briefing Paper, 2008) 6

²⁴ Onora O’Neill, ‘The Dark Side of Human Rights.’ (2005) 81 *International Affairs*. 430

responsibility and take action. If the utilitarian necessities of climate action and the permissive nature of liberty rights make awkward bedfellows of these progressive ideals, there is nevertheless some scope to reconcile human rights and environmental dialogues by recognising a healthy environment as a vital precursor to delivering welfare rights. Most importantly though, every possible step must be taken encourage a democratic recognition of a fundamental human duty to maintain a healthy environment. Failure to assume duties in a democratic manner will lead either to environmental disaster and failure to ensure welfare rights or will see a rise in authoritarian and undemocratic climate action measures that will put the climate agenda on a collision course with fundamental human rights.

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