

# THE END OF HUMAN RIGHTS?

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*Raymond Wacks\**

## Introduction

Human rights are under siege. How is it that so powerful an idea, which achieved a certain apotheosis in the post-war era, seems embattled and imperilled at the end of this turbulent century?

The concept of human rights has recently been exalted by the Argentinian jurist, Carlos Nino, as 'one of the greatest inventions of our civilization (which) can be compared in its impact on human social life to the development of modern technological resources and their application to medicine, communication, and transportation.'<sup>1</sup> And similar encomiums abound.

The recognition in the eighteenth century of the apparently simple idea of human rights was plainly a significant intellectual moment in our history. The adoption by the United Nations, in the grim shadow of the Holocaust, of the Universal Declaration of Human Rights in 1948, and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights in 1976, demonstrates, even to the most sceptical observer, a commitment by the international community to the universal conception and protection of human rights.

This so-called International Bill of Rights reflects an extraordinary measure of cross-cultural consensus among nations. Its inevitably protean and slightly kaleidoscopic ideological character emerges from the following comment of the chairman of the committee that formulated the text:

The Atlantic world stressed principally civil, political and personal liberties; the Soviet world advocated economic and social rights; the Latin American world concerned itself with the rule of law; the Scandinavians underlined equality between the sexes; India and China stood for non-discrimination, especially in relation to the downtrodden, underdeveloped and underprivileged; and were also intensely interested in the right to education; others argued for the origin of these rights in the very nature of man itself; those with a dominant religious outlook wanted to safeguard religious freedoms.<sup>2</sup>

\* Professor of Law, University of Hong Kong. This is the text of an inaugural lecture from the Chair of Law delivered at the University of Hong Kong on 19 May 1994.

<sup>1</sup> C Nino, *The Ethics of Human Rights* (Oxford: Clarendon Press, 1991), p 1.

<sup>2</sup> Address of Ambassador Charles H Malik to the opening plenary session of the Conference of Non-Governmental Organisations in Observance of the 25th Anniversary of the Universal Declaration, 10 December 1973, quoted by N Jayawickrama, 'Hong Kong and the International Protection of Human Rights' in R Wacks (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992), p 121. See too J P Humphrey, 'The World Revolution and Human Rights' in A E Gottlieb (ed), *Human Rights, Federalism and Minorities* (Toronto: Canadian Institute of International Affairs, 1970), p 155.

The notion of human rights has passed through three generations paralleled in the French revolutionary themes of liberty, equality, and fraternity.<sup>3</sup> The first generation (liberty) were the seventeenth and eighteenth century, mostly negative civil and political rights. The second generation (equality) consist in the essentially positive economic, social, and cultural rights. The third generation (fraternity) are primarily collective rights; they are foreshadowed in Article 28 of the Universal Declaration, which declares that 'everyone is entitled to a social and international order in which the rights set forth in this Declaration can be fully realised.' These 'solidarity' rights include the right to social and economic development and to participate in and benefit from the resources of the earth and space, scientific and technical information (which are especially important to the Third World), the right to a healthy environment, peace, and humanitarian disaster relief.

We should not of course be seduced into equating the formal declaration or even acceptance of international rights by nations with the rights that human beings actually enjoy. Moreover, it is no surprise to discover that there are numerous challenges deployed against the concept, the content, and the metaethics of international human rights. Indeed, such challenges incorporate unsettling political dimensions. Richard Falk demonstrates how six different 'ordering logics' operate to resist aspirations of universal acceptance of human rights:<sup>4</sup> these include a 'statist logic' (with its jealous protection of exclusive sovereignty), a 'hegemonial logic' ('an exemption for the strong from the constraints of "statist logic"'), and a 'naturalist logic' (which rests on normative claims that human rights are inherent, prior to politics).

The predominant ordering logic (at least since the Peace of Westphalia ended the Thirty Years War in 1648 and created a new world order) is the statist logic. It constitutes a serious impediment to the international protection of human rights:

The pure morality of the states system is, in its essence, both anti-interventionary and anti-imperial. The main contention, which continues to attract modern champions, is that only imperial actors have, in general, the will and capability to do anything significant about abuses of human rights, and yet it is precisely these actors that are least trustworthy because of their own wider, selfish interests.<sup>5</sup>

<sup>3</sup> K Vasek, 'A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights,' UNESCO Courier, November 1977, pp 29-32, quoted by B H Weston, 'Human Rights' in R P Claude and B H Weston (eds), *Human Rights in the World Community: Issues and Actions* (Philadelphia: University of Pennsylvania Press, 2nd ed 1992), pp 18-20.

<sup>4</sup> R Falk, 'Theoretical Foundations of Human Rights' in Claude and Weston (note 3 above).

<sup>5</sup> Falk (note 4 above), p 33. Support for this view is expressed by R J Vincent, 'Western Conceptions of a Universal Moral Order' in R Pettiman (ed), *Moral Claims in World Affairs* (New York: St Martin's Press, 1979), pp 68-72.

The concept of rights has long exerted formidable power in moral discourse. Moral claims are routinely translated into moral rights: individuals assert their rights to life, work, health, education, housing. Communities and putative nations demand a right to self-determination, sovereignty, free trade. In the legal context rights have assumed a prominence so great that they are sometimes regarded as synonymous with law itself;<sup>6</sup> declarations of political rights are often conceived to be the hallmark of the modern democratic state. And the unavoidable contest between competing rights is one of the self-justifying characteristics of a liberal society.

Yet the idea both of rights and of human rights continues to be attacked. My purpose here is to illuminate the nature and scope of this onslaught, and to respond to it, though it would be quixotic to attempt to do more than scratch the surface of what is a large and difficult debate. It is one, moreover, that is of more than passing academic interest in Hong Kong.

We stand at a precarious moment in our history. Despite the pledges that are contained in the Sino-British Joint Declaration or that find expression in the Basic Law and (should it survive after 30 June 1997) the Bill of Rights Ordinance, the future of the people of Hong Kong is inseparable from the uncertain future of China. And our metamorphosis from British colony to Special Administrative Region is, above all, a matter of law. It requires no small leap of faith to embrace, even guardedly, the improbable notion of 'one country, two systems.'

Yet this creative totem of ideological pragmatism, in the face of both the vicissitudes of political power and the fragility of political promises, affords, through the legal structure it guarantees, the most palpable (or, at any rate, the least perilous) statement of hope for the future. And to the compelling rejoinder that, in the absence of genuine political will, the Basic Law and the Joint Declaration are not worth the paper they are written on, one is bound to question what realistic alternatives exist.

The urgency and intensity of our drama require an exercise of social responsibility that keenly tests the maturity and vision, especially of our politicians and those who purport to represent the wishes of the people of this remarkable place. Educators too have a heavy burden. Not only must we stand ready to defend the freedom and autonomy of our university, but our curriculum cannot afford to neglect the realities and challenges of the new Hong Kong. In this, I believe, law teachers have a special obligation. The law does not always embody what is just. Nor, of course, does it exhaust moral enquiry or truth. Yet its normative power provides a critical means by which to secure individual and social justice.

The cycle of injustice, war, hunger, exploitation, corruption, racism, sexism, disease, and poverty seems an inevitable feature of our planet, a fifth of whose

<sup>6</sup> See R Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, rev ed 1978).

population lives in poverty, earning less than US\$1 per day (which is roughly the World Bank's definition of absolute poverty).<sup>7</sup> About 500 million of the world's poor are in Asia, 360 million in sub-Saharan Africa, and 340 million in Latin America. Africa's development crisis suggests that by 2000, half of all Africans could be living below the poverty line. The gap between the rich North and the poor South continues to grow. The average GDP per capita in the North is eighteen times that of the South. A quarter of the world's population enjoys the fruits of wealth and consumerism as it expends 80 per cent of the planet's resources.

In developing countries one person in five goes hungry every day. Two out of every three lack safe drinking water. Illiteracy and unemployment are rife. A quarter of adult men and half the women of the South are illiterate.

One child in six is born underweight. Every year one child in ten dies from waterborne diseases or malnutrition. Women constitute 70 per cent of the world's poor and, in much of the South, they work harder but earn less than men; they are more likely to be undernourished as a consequence of discrimination in the allocation of food.

Nor is the situation improving. Famine, environmental degradation, disease (including the devastation of AIDS), deforestation, natural disasters, and war are almost endemic to the Third World. In the face of this agonising misery and suffering, the futility of academic discourse often appears overwhelming, or worse. Chomsky may be right:

By entering the arena of argument and counter-argument, of technical feasibility and tactics, of footnotes and citation, by accepting the legitimacy of debate on certain issues, one has already lost one's humanity.<sup>8</sup>

I hope he is wrong, and that it is possible for moral sensibility and logical argument to co-exist. It seems important to me that they can.

Attempting, especially in the limited time available to me, an excursus on the complex question of human rights is almost certainly an act of supreme folly. Not only does it require an analysis of the notoriously intractable problems of moral and legal rights (which have exercised the minds of jurists and philosophers for centuries) but it cannot be done properly (or so it seems to me) without a consideration of the social, economic, political, and cultural aspects of the idea and practice of human rights. Indeed, the more I reflect on this matter, the less it yields conclusions that admit of a straightforward, let alone simple, solution.

<sup>7</sup> World Bank, *Development Report 1990* (Washington DC: World Bank, 1990), quoted in J Davidson and D Myers with M Chakraborty, *No Time to Waste: Poverty and the Global Environment* (Oxford: Oxfam, 1992). See too UNDP, *Human Development Report 1993* (Oxford: Oxford University Press, 1993).

<sup>8</sup> N Chomsky, *American Power and the New Mandarins* (Harmondsworth: Penguin, 1969), p 11, quoted in S Clark, *The Moral Status of Animals* (Oxford: Clarendon Press, 1977), p 1.

My guilty plea to the indictable offence of intellectual imprudence permits me, I hope, a plea in mitigation. It is this: I confess that I know what I am doing is wrong. But I crave your indulgence on the ground that the narrower question that I shall seek to address strikes me, in Hong Kong here and now, to be of fundamental importance as we stand on the threshold of an unpredictable future.

This will not let me off the hook altogether, for (at least in my own mind) I shall need to be clear about the numerous perplexing theories of moral and legal rights. Such clarity (or lack of it) ought to be evident as I proceed through the thicket of the impenetrable forest I have so rashly chosen to traverse.

To spare you even further pain, I want to make the following assumptions, neither of which is uncontentious. First, I assume, following Joseph Raz,<sup>9</sup> that an individual has a right if their interest is sufficient to hold another to be subject to a duty. And I acknowledge the dangers he identifies both of taking legal rights as a model for the explanation of rights in general, and of basing one's account on the institutional features of the law which are absent in non-institutional, moral rights.<sup>10</sup>

Second, the concept of human rights makes little sense unless it is understood as fundamental and inalienable, whether or not such rights are legally recognised and regardless of whether they emanate from a 'higher' natural law.<sup>11</sup>

Whatever the force and attraction of the the idea of human rights which I celebrated a moment ago, the fortress is surrounded. Among the numerous adversaries, I have selected nine which seem to me to pose the greatest danger. Their weapons are of varying type, accuracy, and calibre. Some threaten the foundation of rights; others set their sights on the superstructure of human rights. An attack on the former normally entails enmity towards the latter. But the reverse is not necessarily true. The categories are convenient, but not comprehensive.

Some opponents share certain features and act in concert. Others are lone gunmen. I shall consider each of them briefly in an attempt to provide an answer to at least one sense of the question I have posed: do we face (or have we already witnessed) the end of human rights?

### **The communitarian challenge**

In many ways, this is the most subversive of the invaders, and its influence pervades most of the sceptics' opposition to rights-talk. In this respect, communitariansim is something of a Trojan Horse, containing a number of

<sup>9</sup> J Raz, 'Legal Rights' (1984) 4 *Oxford Journal of Legal Studies* 1, 14.

<sup>10</sup> *Ibid.*

<sup>11</sup> See generally, J Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

other associated challenges. I want therefore to look at its major claims a little more closely.

Among communitarians, the individualism of theories of rights has generated widespread unease concerning the extent to which such theories neglect the interests of the community, civic virtue, and social solidarity.

The notions of rights (and justice) feature prominently in the theory of deontological liberalism which owes much to Kant. It is this political theory which communitarians so strongly invoke; the idea that

society, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not *themselves* presuppose any particular conception of the good; what justifies these regulative principles above all is not that they maximise the social welfare or otherwise promote the good, but rather that they conform to the concept of *right*, a moral category given prior to the good and independent of it.<sup>12</sup>

And this priority is, according to Kant, derived entirely from the concept of freedom in the relations between individuals; it has nothing to do with achieving happiness. Justice and right are antecedent to all other values which depend on want-satisfaction because justice and right are derived from the concept of freedom which, in turn, is a prerequisite of all human ends. In Kant's words, 'the concept of good and evil must be defined after and by means of the (moral) law'.<sup>13</sup> Thus, since justice is an end in itself, deontological liberalism stands opposed both to consequentialism and teleology.

For present purposes, I want to mention only one aspect of liberal, and particularly Kantian, epistemology: the concept of the human subject, for it goes to the heart of liberal theory and hence is central to the communitarian (and, I shall suggest later, the postmodern) attack on human rights. It is an atomistic conception of the autonomous individual — which is found in 'those philosophical traditions which come to us from the seventeenth century and which started with the postulation of an extensionless subject, epistemologically a *tabula rasa* and politically a presuppositionless bearer of rights.'<sup>14</sup> For Kant, the subject of practical reason has an autonomous will which enables him to participate in an ideal, unconditioned realm which is independent of our teleological, social, and psychological inclinations.<sup>15</sup>

<sup>12</sup> M Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), p 1.

<sup>13</sup> I Kant, *Critique of Practical Reason*, 1788, trans L W Beck (Indianapolis: Bobbs-Merill, 1956).

<sup>14</sup> C Taylor, 'Atomism' in his *Philosophical Papers*, ii. *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), p 210, quoted in S Lukes, *Moral Conflict and Politics* (Oxford: Clarendon Press, 1991), p 73. See too C B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962).

<sup>15</sup> Sandel (note 12 above), p 6.

This conception of the individual (which plainly has important consequences for liberal theories of rights and justice) is rejected by communitarians who conceive of persons, as Michael Sandel puts it, echoing the arguments of Hegel against Kant, as 'situated selves rather than unencumbered selves.'<sup>16</sup>

The communitarian response, articulated most effectively by Sandel, and Charles Taylor, is that individuals are partly defined by their communities. Moral obligation springs therefore from what Hegel called the '*Sittlichkeit*' of the society. The subject of deontological liberalism thus presents as a transcendental, detached, independent, and autonomous agent. For all its apparent freedom 'the deontological self, stripped of all possible constitutive attachments, is less liberated than disempowered.'<sup>17</sup> We cannot, in the view of communitarians, be understood as persons without reference to our social roles in the community: as citizens, members of a family, group, or nation.

This is an attractive idea which has exerted considerable influence in moral, political, and legal theory. And it appears to inflict serious damage on the concept of rights. But is a commitment to community antithetical to individual rights? Is it possible to preserve a broadly Kantian moral system of universal rights without adopting Kant's transcendental idealism? Keep the moral baby and throw out the metaphysical bathwater?

This is precisely what John Rawls seems to have attempted in his social contractarian theory of justice in which 'people in the original position' determine principles of justice beneath a veil of ignorance which insulates them from their social condition.<sup>18</sup>

I am not sure that a moral theory *needs* to be deontological in order to ground human rights. It may be teleological or even heteronomic, if it includes a commitment to human dignity or political quality such that this commitment trumps other values or objectives.<sup>19</sup> It requires both the establishment of a system of human rights, and that violations are regarded as what Dworkin calls 'special moral crimes, beyond the reach of ordinary utilitarian justification.'<sup>20</sup> In other words, 'in order to justify human rights a moral doctrine must simulate deontology for the political domain.'<sup>21</sup> I shall return to this point.

In fact, on closer inspection<sup>22</sup> the communitarian claim seems to break down into three relatively discrete positions; the adoption of one does not logically require the adoption of either or both of the others.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid, p 178.

<sup>18</sup> J Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1972); J Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

<sup>19</sup> I here follow T Lindholm, 'Prospects for Research on the Cultural Legitimacy of Human Rights: The Cases of Liberalism and Marxism' in A A An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992), p 406.

<sup>20</sup> Dworkin (note 6 above), p xi.

<sup>21</sup> Lindholm (note 19 above), p 406.

<sup>22</sup> As revealed by S Gardbaum, 'Law, Politics, and the Claims of Community' (1992) 90 Michigan Law Review 685, whom I follow closely in this section. I have benefited greatly and plundered shamelessly from this important essay.

First, the problem of 'agency' (which entails the arguments about individual and community which I have just mentioned). The atomistic thesis may be traced to Hobbesian social contract theory. In legal theory the communitarian move is central to both the Critical Legal Studies project and the republican revival in the United States. It argues that the relationship between individual and community is constitutive, rather than merely contingent and instrumental. Legal republicanism spurns the dominant instrumental conception of politics as an arena in which self-interest is advanced, and argues instead for the transformative potential of dialogue in public space.<sup>23</sup> And Critical Legal Studies adherents depict the law as constitutive of key social relationships: marriage, employment, and so on.<sup>24</sup>

But there is a second strand of the communitarian claim. It is a metaethical one which goes to the origin and form of normative structures generally and attempts to resolve the classic tensions between universalism and particularism, foundationalism and contextualism, objectivism and relativism, rationalism and historicism.<sup>25</sup> It contends that 'the particular moral and political context in which values are affirmed is always crucial to their validity.'<sup>25</sup> It is important to note that metaethical communitarians assert that political values cannot be formulated in universal terms and hence why community is the necessary source of value.<sup>26</sup>

Two forms of this argument exist. The first 'derives from the postmodern strand in contemporary epistemology'<sup>27</sup> (well captured in Jean-Francois Lyotard's declaration: 'I define *postmodern* as incredulity towards metanarratives'<sup>28</sup>) which generally regards appeals to universal values as redundant if not meaningless. Writers such as Jürgen Habermas<sup>29</sup> and Richard Rorty<sup>30</sup> belong here. A second argument (advanced, for example, by Michael Walzer)<sup>31</sup> conceives of universal values as having 'no self-executing authority in the autonomous sphere of politics which has its own distinct criteria of validation based on the requirements of the political value of self-rule.'<sup>32</sup>

In legal theory this form of metaethical community is most conspicuously, and successfully, articulated by Ronald Dworkin whose conception of commu-

<sup>23</sup> See F Michelman, 'Law's Republic' (1988) 97 Yale Law Journal 1493.

<sup>24</sup> See J Balkin, 'Ideology as Constraint' (1991) 43 Stanford Law Review 1133 and R W Gordon, 'Critical Legal Histories' (1984) 36 Stanford Law Review 57, 111.

<sup>25</sup> Gardbaum (note 22 above), p 694.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge*, trans G Bennington and B Massumi (Manchester: Manchester University Press, 1984), p xxiv.

<sup>29</sup> See J Habermas, 'Philosophy as Stand-In and Interpreter' in K Baynes et al (eds), *After Philosophy: End or Transformation?* (Cambridge, Mass: MIT Press, 1987), pp 296-315. See generally J Habermas, *The Philosophical Discourse of Modernity*, trans F Lawrence (Boston: Polity Press, 1987) and J Habermas, *Moral Consciousness and Communicative Action* (Cambridge: Polity Press, 1990).

<sup>30</sup> See R Rorty, *Philosophy and the Mirror of Nature* (Oxford: Basil Blackwell, 1990).

<sup>31</sup> See M Walzer, 'Philosophy and Democracy' (1981) 9 Political Theory 379.

<sup>32</sup> Gardbaum (note 22 above), p 694.



nity is a metaethical one<sup>33</sup> in which the community is the source or the author of law. Right answers are products not of universal legal truths or the personal predilections of judges, but of interpreting 'community morality' as expressed in legal doctrine. Nonetheless if we are to take rights seriously they must, Dworkin argues, trump collective goals.

The third form of communitarianism explicitly attacks liberalism and (unlike the other two communitarian positions) postulates the substantive claim that the communitarian is a superior form of association. This position is taken by writers such as Sandel,<sup>34</sup> Alisdair MacIntyre,<sup>35</sup> and Hannah Arendt.<sup>36</sup> In the republican form of community 'politics plays not an instrumental or reflective role, as in both liberal and conservative political thought, but an essential and creative one. It is in the particular role of citizen within a common life mediated by the political community that the human good is attained.'<sup>37</sup> Communist community is the opposite of republicanism for, in the Marxist view, to which I shall return, politics is a historical, instrumental phenomenon lacking any intrinsic value.

Substantive communitarian paradigms constitute a direct, postmodern challenge to liberalism and rights that is sceptical of the rationality of the individual human subject, and rejects Enlightenment foundationalist and universalistic modes of normative argument in preference to discourse ethics, hermeneutics, and contextualism.<sup>38</sup> On the other hand, the agency and metaethical forms of communitarianism do not amount to a serious challenge to individual rights (though their concept of rights is autonomy — or choice-based rather than benefit- or interest-based).<sup>39</sup>

<sup>33</sup> As Gardbaum, *ibid*, p 742 rightly claims.

<sup>34</sup> Sandel (note 12 above). See too M Sandel (ed), *Liberalism and its Critics* (Oxford: Basil Blackwell, 1984).

<sup>35</sup> A MacIntyre, *After Virtue: A Study in Moral Theory* (London: Duckworth, 1982).

<sup>36</sup> H Arendt, *On Revolution* (Harmondsworth: Penguin, 1973) and H Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958).

<sup>37</sup> Gardbaum (note 22 above), p 723.

<sup>38</sup> *Ibid*, p 689.

<sup>39</sup> This seems to me an important, and often neglected, question. The 'choice' theory (advanced, most notably, by H L A Hart) holds that when I have a right to do something, what is essentially protected is my choice whether or not to do it. It stresses the freedom and individual self-fulfilment that are regarded as essential values which the law ought to guarantee. The 'interest' theory, on the other hand (most effectively espoused by D N MacCormick) claims that the purpose of rights is to protect, not individual choice, but certain interests of the rightholder. It should be noted that the advocates of both theories (though not Professor MacCormick) normally accept the correlativity of rights and duties; indeed, this is often central to their arguments. In attacking the choice theory, proponents of the interest theory raise two main arguments. First, they reject the view that the essence of a right is the power to waive someone else's duty. Sometimes, they argue, the law limits my power of waiver without destroying my substantive right (eg, I cannot consent to murder or to contract out of certain rights). Second, there is a distinction between the substantive right and the right to enforce it. MacCormick gives the example of children: their rights are exercised by their parents or guardians; how can it be said, therefore, that the right-holder (ie, the child) has any *choice* whether or not to waive such rights? It must, he argues, be concluded that children have no rights — which is absurd. And a similar point could be made in relation to animals. While the choice theory, by arguing that the enforcement of Y's duty requires the exercise of will by X (or someone else), rests on the assumption of the correlativity of rights and duties, it is possible to postulate the interest theory (as MacCormick does) independently. Thus, it may be argued that conferring a right on someone (eg to

## The utilitarian challenge

The utilitarian repudiation of the idea of individual rights, indeed the essential inconsistency between the two philosophies, continues to dominate political, moral, and legal thinking about rights.

This hostility to rights springs from the utilitarian concern to maximise general welfare. Individual interests may therefore be sacrificed at the altar of utility: so, for example, free speech is to be protected only where it will maximise the general welfare of the community. Rights are stigmatised as individualist. They operate formally but do not necessarily assist those (the poor, oppressed, alienated) who most need them. They are merely 'excess baggage,' superfluous in the condemnation of cruelty or exploitation.<sup>40</sup> All we need, it is argued, is a fully developed theory of right and wrong. Moreover, as Professor Hart puts it, in uncharacteristically strong terms:

Except for a few privileged and lucky persons, the ability to shape life for oneself and lead a meaningful life is something to be constructed by positive marshalling of social and economic resources. It is not something automatically guaranteed by a structure of negative rights. Nothing is more likely to bring freedom into contempt and so endanger it than failure to support those who lack, through no fault of their own, the material and social conditions and opportunities which are needed if a man's freedom is to contribute to his welfare.<sup>41</sup>

Utilitarianism's detractors considerably outnumber its supporters, and the attacks take numerous forms. As far as its approach to individual rights is concerned, it is criticised by both conservatives such as Robert Nozick<sup>42</sup> (for overriding what John Rawls calls 'the distinction between persons'<sup>43</sup>) and liberals like Ronald Dworkin<sup>44</sup> (for neglecting individuals' claim to equal concern and respect).

housing) constitutes an acceptance that the interest represented by that right ought to be recognised and protected. There are two main versions of this theory. One asserts that X has a right whenever he is in a position to benefit from the performance of a duty. The other claims that X has a right whenever the protection of his interest is recognised as a reason for imposing duties — whether or not they are actually imposed. See H L A Hart, 'Legal Rights' in *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982); D N MacCormick, *Legal Rights and Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Clarendon Press, 1982); D N MacCormick, 'Rights in Legislation' in P M S Hacker and J Raz (eds), *Law, Morality and Society: Essays in Honour of H L A Hart* (Oxford: Clarendon Press, 1977).

<sup>40</sup> For a lucid, provocative account of this view, see R G Frey, *Interests and Rights: The Case Against Animals* (Oxford: Clarendon Press, 1980).

<sup>41</sup> H L A Hart, 'Between Utility and Rights' in *Essays on Bentham* (note 39 above), pp 207–8.

<sup>42</sup> R Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974).

<sup>43</sup> J Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1973), p 187.

<sup>44</sup> Dworkin (note 6 above); R Dworkin, *A Matter of Principle* (Cambridge, Mass; London: Harvard University Press, 1985); R Dworkin, *Law's Empire* (Cambridge, Mass & London: Bellknapp, 1986).

## The socialist challenge

The incompatibility of individual rights and socialism has become something of a truism.<sup>45</sup> In brief and crude terms, the argument normally rests on both the irreconcilable conflict between the egotism of liberal theory and the communitarianism of socialism, and the denial that conditions of morality are inherent in human life.

Marxists therefore tend to reject the concept and language of rights (except perhaps for advancing short-term tactical objectives). They argue that social change does not occur as a consequence of our moralising about rights. Though neither Marx nor Engels addressed himself explicitly to the nature of rights in a socialist society, there are a number of (sometimes ambiguous) statements in their work which may be read to suggest that in a socialist society individual rights will not be necessary.

For Marx (at least in his early writing) the achievement of political revolution would be to end the separation between civil society and the state. As he declares in *On the Jewish Question*:<sup>46</sup>

the citizen is proclaimed the servant of egoistic man ... the sphere in which man behaves as a communal being is degraded to a level below the sphere in which he behaves as a partial being.

... man as a member of civil society counts for true man, for man as distinct from the citizen, because he is man in his sensuous, individual, immediate existence, while political man is only the abstract fictional man, man as an allegorical or moral person.

The actual individual man must take the abstract citizen back into himself and, as an individual man in his empirical life, in his individual work and individual relationships become a species-being; man must recognise his own forces as social forces, organise them, and thus no longer separate social forces from himself in the form of political forces. Only when this has been achieved will human emancipation be completed.

Marx argues that democratic participation is the only way of ending the alienation of the people from the state. His own view of socialist rights (or rights under socialism) therefore seems to rest upon his rejection of the essential characteristics of a capitalist society: the exploitation and alienation it causes. He distinguishes the 'rights of citizens' from the 'rights of man.' The former are political rights exercised in common with others and involve participation in the community. The latter, on the other hand, are private rights exercised in isolation from others and involve withdrawal from the community.

<sup>45</sup> See S Lukes, 'Can a Marxist Believe in Human Rights?' in Lukes (note 14 above).

<sup>46</sup> K Marx, 'On the Jewish Question' in D McLellan (ed), *Karl Marx: Selected Writings* (Oxford: Oxford University Press, 1977), pp 39-62.

In the same essay he says: '[n]ot one of the so-called rights of man goes beyond egoistic man ... an individual withdrawn into himself, his private interests and his private desires.' And, most importantly, from the point of view of Marx's central argument concerning private property: 'The practical application of the right of man to freedom is the right of man to private property.'

Some commentators have argued that Marx should not here be taken to mean that these 'rights of man' (equality before the law, security, property, liberty) are not important, but rather that the very *concept* of such rights is endemic to a society based on capitalist relations of production. This is a difficult argument to sustain, for in much of his writing Marx sought to show that these rights had no independent significance.

Marxists generally claim that capitalism is destructive of real individual liberty. According to Marx, private property represents the dominance of the material world over the 'human element,' while communism represents the triumph of the human element over the material world. Marx employed the concept of 'reification' to describe the process under which social relations assume the form of relations between things. In a capitalist society, he saw this reification as the result of the alienation of workers from the product of their work: the 'general social form of labour appears as the property of a thing' it is 'reified through the "fetishism of commodities."'

Capitalist relations *appear* to protect individual freedom (for example 'freedom of contract') but the reality is very different: equality before the law is merely a *formal* property of exchange relations between private property owners: 'Equal right ... is a right of inequality in its context, like every right.'<sup>47</sup>

Revolutionary Marxists have little truck with rights (largely because they are an expression of a capitalist economy and will not be required in a classless, socialist society). This rejection appears to be based on four objections to rights:<sup>48</sup>

- (a) their *legalism*: rights subject human behaviour to the governance of *rules*;
- (b) their *coerciveness*: law is a coercive device; rights are tainted for they protect the interests of capital;
- (c) their *individualism*: they protect self-interested atomised individuals; and
- (d) their *moralism*: they are essentially moral and utopian, and hence irrelevant to the economic base.

Professor Campbell has, however, suggested that by adopting an interest-based theory of rights (as opposed to choice- or contract-based theories) socialist rights become an important element in ensuring democracy. He

<sup>47</sup> K Marx, *Critique of the Gotha Programme* in *ibid*, pp 564–70, at p 569.

<sup>48</sup> Identified by T Campbell, *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights* (London: Routledge & Kegan Paul, 1983).

argues<sup>49</sup> that any form of socialism will require authoritative rules — if only to facilitate co-operative and educational activities. Some of these rules will be directed toward the protection of the individual — rights are therefore constituted. The interests (and hence the rights) of the individual are distinguishable from the acceptance of society as an ‘aggregate of competitive and egoistic individuals.’ This permits an accommodation of human rights in a socialist society.

The view that rights are necessarily ‘individualistic’ in the sense intended by Campbell has been attacked from a number of perspectives.<sup>50</sup> One writer<sup>51</sup> criticises, inter alia, Campbell’s equation of individual rights and alienated society: ‘In the search for a vehicle which mediates the relations of individuals with the community, socialists should look to law which upon its restructuring in the transformation of economic and political relations, will better fulfil the bourgeois promises of liberty and equality.’

This sort of critique is strongly reminiscent of Edward Thompson’s view of the rule of law expressed in his *Whigs and Hunters*.<sup>52</sup> After a detailed investigation of the effects of the so-called Black Act in the eighteenth century in England, Thompson considers some of the threats to civil liberties and democratic rights emanating from the modern state. He argues that Marxists tend to dismiss all law as merely an instrument of class rule and to treat civil liberties as no more than an illusion which obscures the realities of class rule. But law, he says, is not merely an instrument of class domination, but also a ‘form of mediation’ between and within the classes. Its function is not only to serve power and wealth, but also to impose ‘effective inhibitions upon power’ and to subject ‘the ruling class to its own rules.’ He rejects the Marxist isolation of law as a distinctive part of the superstructure separate from its base; in his study of the Black Act he says he discovered that law ‘was deeply imbricated within the very basis of productive relations, ... we cannot ... simply separate off all law as ideology, and assimilate this also to the state apparatus of a ruling class.’<sup>53</sup>

But the socialist critique has also an important institutional perspective:

Abstract individuality and external relations of mutual utility, exploitation and antagonism together make up a social ontology which is presupposed in the liberal discourse on rights and justice. On the one hand, the promises of

<sup>49</sup> Ibid, p 123.

<sup>50</sup> Simmonds contends that Campbell’s description of liberal theory as implying a society of ‘competitive and egoistic individuals’ is too crude. See N E Simmonds, ‘Rights, Socialism and Liberalism’ (1985) 5 *Legal Studies* 1. But see Campbell’s reply in the same journal at p 14.

<sup>51</sup> C Sypnowich, ‘Law as a Vehicle of Altruism’ (1985) 5 *Oxford Journal of Legal Studies* 284. See too Sypnowich, *The Concept of Socialist Law* (Oxford: Clarendon Press, 1990).

<sup>52</sup> E P Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York: Pantheon, 1975), pp 258–69.

<sup>53</sup> Ibid, p 261.

liberal rights cannot be met under capitalism, but, on the other, it is only under capitalism that such promises need to be made in the first place.<sup>54</sup>

Against this position, Steven Lukes<sup>55</sup> argues that there are four conditions which combine to make rights necessary: scarcity, egoism, conflicting conceptions of the good, and imperfect knowledge and understanding.

The assault on 'bourgeois rights' has a strong hold on the apparently socialist policy pursued in China, though it is encouraging to detect, in the last few years, a remarkable willingness among a number of mainland legal scholars to develop what one of them, Professor Xu Bing of the Chinese Academy of Social Sciences, describes as 'a widening, deepening and continuing movement of enlightenment on human rights.'<sup>56</sup> This openness is, to a limited extent, evident in the State Council's singular espousal of some of the rhetoric of human rights in its 1991 White Paper, *Human Rights in China*.<sup>57</sup>

### The Confucian challenge

The assault on 'bourgeois rights' has a strong hold on ostensibly socialist policy in China, much of which is rooted in traditional Confucian views of law and rights. The Confucian emphasis on absolute fiduciary obligations (especially those of loyalty to the ruler and filial piety) appears to allow little space for the development of rights, though it is at least arguable that such duties established reciprocal (if unequal) rights: 'When sons had the duty to be filial, one may say that fathers had the right to expect filial piety. When subjects had the duty to be loyal, the ruler obviously had the right to expect loyalty. Then in return, sons could be said to have had the right to expect their fathers to do their duty and be righteous and protective and their mothers also to be loving and caring.'<sup>58</sup>

But this spirit of Confucianism appears to have been corrupted over the centuries. By the Sung dynasty the twin duties had become absolute. From the Han to the Tang dynasty, and especially by the Ming and Ching dynasties, oppressive rule obliterated even these circumscribed notions of rights.

<sup>54</sup> T Benton, *Natural Relations: Ecology, Animal Rights and Social Justice* (London: Verso, 1993), p 135.

<sup>55</sup> S Lukes, *Marxism and Morality* (Oxford: Clarendon Press, 1985), pp 56-7.

<sup>56</sup> Quoted in A H Y Chen, 'Developing Theories of Rights and Human Rights in China' in R Wacks (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993), p 136.

<sup>57</sup> The document declares that '[i]t has been a long-cherished ideal of mankind to enjoy human rights in the full sense of the term ... the Chinese government and people have spared no effort to safeguard human rights and steadily improve their human rights situation, and have achieved remarkable results': *Human Rights in China* (Beijing: Information Office of the State Council, 1991), p 1. The thrust of the paper is that the question of human rights is one that belongs within the exclusive sovereignty of nation-states. It predictably asserts both that 'the right to subsistence is the most important of all human rights' (p 1), and that 'no country in its effort to realise and protect human rights can take a route that is divorced from its history and its economic, political and cultural realities' (p 85).

<sup>58</sup> Wang Gungwu, 'Power, Rights, and Duties in Chinese History' in Wang Gungwu, *The Chineseness of China: Selected Essays* (Hong Kong: Oxford University Press, 1991), p 177.

The early part of this century, however, saw the emergence of what Wang Gungwu has characterised 'as a sort of Confucian Protestantism'<sup>59</sup> which called, among other things, for a return to the pre-imperialist recognition of the reciprocity that even this limited conception of duties implied, and the rights that they generated. In any event, while Confucianism is the most significant philosophical tradition in China, it is, by no means, the only one. The Legalists, for example, postulated a system which, in very general terms, approximates to what we would describe as the rule of law. And Mencius comes quite close to adopting a liberal vision of society.<sup>60</sup>

### The critical challenge

A wholesale assault on the concept of rights is an important feature of both the Critical Legal Studies movement and of postmodern accounts of society. To the (limited) extent that it is possible (within my time constraints) to identify, in this respect, their lowest common denominator, I think it resides in a deconstructive critique of both the indeterminacy of rights and their tendency to shore up prevailing social and political hierarchies.<sup>61</sup> This rights-scepticism engenders either an outright rejection of the concept of rights or the formulation of an alternative vision of rights that extends beyond the communitarian to what the Brazilian social theorist, Roberto Unger, champions as an element in a programme of 'empowered democracy'.<sup>62</sup> Rights, in Unger's prodigious (and occasionally impenetrable) writing, relate to all forms of human association, not merely to relations between individual and state, nor necessarily confrontational: not 'a loaded gun that the rightholder may shoot at will as his corner of town'.<sup>63</sup> In particular, he proposes four sorts of rights: market rights, community rights, destabilisation rights, and solidarity rights.

<sup>59</sup> Wang, *ibid*, p 170. On the general question of the concept of rights in traditional China, see H Rosemont, 'Why Take Rights Seriously? A Confucian Critique' in L S Rouner, *Human Rights and the World's Religions* (Notre Dame, Ind: University of Notre Dame Press, 1988); A H Y Chen, 'Human Rights in China: A Brief Historical Review' in Wacks (note 2 above); Chen (note 56 above); A Kent, *Between Freedom and Subsistence: China and Human Rights* (Hong Kong: Oxford University Press, 1993).

<sup>60</sup> See A J Nathan, 'Sources of Chinese Rights Thinking' in R R Edwards, L Henkin, and A J Nathan, *Human Rights in Contemporary China* (New York: Columbia University Press, 1986); J F Copper, F Michael, and Y L Wu, *Human Rights in Post-Mao China* (Boulder and London: Westview Press, 1985), p 12.

<sup>61</sup> See M Tushnet, 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363; A C Hutchinson and P J Monahan, 'The "Rights" Stuff: Roberto Unger and Beyond' (1984) 62 *Texas Law Review* 1477.

<sup>62</sup> See R Unger, *False Necessity: Anti-necessitarian Social Theory in the Service of Radical Democracy* (Cambridge: Cambridge University Press, 1987); R Unger, *Law in Modern Society: Toward A Criticism of Social Theory* (London: Collier-Macmillan, 1977). For a trenchant assault on this work, see W Ewald, 'Unger's Philosophy: A Critical Legal Study' (1988) 97 *Yale Law Journal* 88. A useful guide to part of the forbidding terrain is R W Lovin and M J Perry (eds), *Critique and Construction: A Symposium on Roberto Unger's Politics* (Cambridge: Cambridge University Press, 1990).

<sup>63</sup> R Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 561, 597. See too P Goodrich, 'Critical Legal Studies in England: Prospective Histories' (1992) 12 *Oxford Journal of Legal Studies* 195.

The postmodern assault on rights lies primarily in its hostility towards the possibility of an autonomous, rational, individuated subject. This controlling idea of rights discourse in the liberal tradition is 'trashed' by poststructuralists, and looks instead to 'what is negated and denied in the process of its construction: a poststructuralist critique of the totalising narratives of liberal political and legal thought would therefore expose how the latter tend to constitute the domain in which the subject may express itself politically in such a way as to effect a closure around the realm of the political itself.'<sup>64</sup>

In other words, the rights-bearing subject has been bled both of meaning and authentic existence. The structural, psychological, and linguistic patterns of this offensive constitute, through the analysis of social theorists like Michel Foucault,<sup>65</sup> Louis Althusser,<sup>66</sup> and Jacques Lacan,<sup>67</sup> a serious threat to the idea of the universal subject. The poststructuralist onslaught of, in particular, Jacques Derrida<sup>68</sup> denies the very idea of the subject having an 'essence,' and hence the impossibility (indeed, meaninglessness) of rights discourse.

The Critical Legal Studies movement is a postrealist coalition of legal theorists that appeared in the 1970s and continues to exert an important (though perhaps declining) influence on ideas about the politics of rights, which sometimes borders on the nihilistic.<sup>69</sup>

### The feminist challenge

The Critical Legal Studies hostility to rights has certain resonances in critical feminist theory, much of which eschews rights as formal, hierarchical, and patriarchal. Law in general, and rights in particular, reflect a male viewpoint 'characterised by objectivity, distance and abstraction.'<sup>70</sup> In the words of Catharine MacKinnon, 'Abstract rights ... authorize the male experience of the world.'<sup>71</sup>

<sup>64</sup> A Barron, 'The Illusion of the "I": Citizenship and the Politics of Identity' in A Norrie (ed), *Closure or Critique: New Directions in Legal Theory* (Edinburgh: Edinburgh University Press, 1993). See too W MacNeil, 'Righting and Difference' in Wacks (note 2 above).

<sup>65</sup> M Foucault, *The Order of Things: An Archaeology of Human Sciences* (New York: Pantheon, 1973).

<sup>66</sup> L Althusser, 'Ideology and Ideological State Apparatuses' in *Lenin and Philosophy and Other Essays* (London: New Left Books, 1971). See P Q Hirst, *On Law and Ideology* (London: Macmillan, 1979).

<sup>67</sup> J Lacan, *The Four Fundamental Concepts of Psychoanalysis*, trans A Sheridan, ed J-A Miller (Harmondsworth: Penguin, 1986). See D Milovanovic, 'The Postmodern Turn: Psychoanalytic Semiotics, and the Construction of Subjectivity in Law' (1994) 8 *Emory International Law Review* 67.

<sup>68</sup> J Derrida, 'Structure, Sign and Play' in *Writing and Difference*, trans A Bass (Chicago: University of Chicago Press, 1978).

<sup>69</sup> On the nihilistic strand in Critical Legal Studies see J W Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale Law Journal* 1; J Stick, 'Can Nihilism be Pragmatic?' (1986) 100 *Harvard Law Review* 332. On the Singer/Stick exchange, see S Fuller, 'Playing Without A Full Deck: Scientific Realism and the Cognitive Limits of Legal Theory' (1988) 97 *Yale Law Journal* 549.

<sup>70</sup> E M Schneider, 'The Dialectic of Rights and Politics: Perspectives from the Women's Movement' in K T Bartlett and R Kennedy, *Feminist Legal Theory: Readings in Law and Gender* (Boulder: Westview Press, 1991). For a consideration of feminist theory and Hong Kong law, see H Samuels, 'Women and the Law in Hong Kong: A Feminist Analysis' in Wacks (note 56 above).

<sup>71</sup> C MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs: Journal of Women, Culture & Society* 635, 658.



Feminists are not, of course, univocal; thus while Elizabeth Kingdom recommends 'abandoning the concept of rights as a means of pressing feminist claims in law,'<sup>72</sup> she restricts that rejection to the appeal to women's right to choose and the right to reproduce, resisting 'any extrapolation from that argument a kind of policy essentialism to the effect that every and any mention of rights must be expunged from the feminist dictionary of legal politics.'<sup>73</sup>

### The attack on natural rights

Though they are not synonymous, the ideas of natural and human rights share certain common ground. The notion that certain rights are 'natural' is expressed most cogently in the social contractarian political philosophies of Rousseau and Locke which inspired the French and American revolutions. But there are of course detractors who reject the concept of natural rights from a socialist perspective, as I have mentioned.

The lofty rhetoric of the Declaration of Independence of 1776 appealed to the natural rights of all Americans to 'life, liberty and the pursuit of happiness.' As the Declaration puts it: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights.' Similar sentiments were incorporated into the French 'Declaration of the Rights of Man and the Citizen' of 1789.

The moral scepticism that informs the writings especially of David Hume in the eighteenth century,<sup>74</sup> sought to deny the existence of objective values and, hence, natural rights, which were founded on what G E Moore was much later to call the 'naturalistic fallacy': deriving an 'ought' from an 'is.'<sup>75</sup>

To Jeremy Bentham natural rights were 'bawling upon paper':<sup>76</sup> 'the effusion of a hard heart operating on a cloudy mind. When a man is bent on having things his own way and gives no reason for it, he says: I have a right to have them so.' They are, moreover, a contradiction in terms: 'a son that never had a father,' 'a species of cold heat, a sort of dry moisture, a kind of resplendent darkness.'<sup>77</sup> 'Nonsense on stilts.'<sup>78</sup>

<sup>72</sup> C Smart, 'Feminism and the Law: Some Problems of Analysis and Strategy' (1986) 14 *International Journal of the Sociology of Law* 109.

<sup>73</sup> E F Kingdom, *What's Wrong with Rights? Problems for Feminist Politics of Law* (Edinburgh: Edinburgh University Press, 1991), p 148. Her argument is that appeals to rights often conceal inadequate theories of law in respect of women's social position. Such theories tend to be essentialist and therefore unacceptable.

<sup>74</sup> For an attempt to apply Hume's noncognitivism to Hong Kong see J Allan, 'Rights Without Anchors: Hong Kong Adrift' in Wacks (note 56 above).

<sup>75</sup> An error which Finnis claims natural lawyers have never made: see note 11 above, pp 33-42.

<sup>76</sup> J Bentham, *Anarchical Fallacies* in 2 *Works* 494 (Bowring ed, 1838-43), quoted in H L A Hart, 'Between Utility and Rights' in his *Essays on Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983), p 199.

<sup>77</sup> See J Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London and New York: Methuen, 1987), p 73.

<sup>78</sup> *Ibid.*

Much positivist and noncognitivist analysis therefore rejects rights-talk as meaningless or, at best, irrational 'emotional ejaculations.' I am not sure that this argument does not contain the seeds of its own destruction (since, as Karl Popper shows, it may be unable to justify itself on rational grounds).<sup>79</sup>

### The empirical challenge

This critique of human rights seeks to expose the dissonance between formal and substantive rights. It includes a number of associated claims that, like the socialist challenge, contest the ability of a capitalist society to deliver individual rights, because of the endemic inequalities of wealth and power which are concealed and mystified by the liberal discourse on rights.

Given that so many individuals daily encounter formidable adversity and misery (some of which I touched on earlier), an individualist notion of human rights, particularly when it excludes or neglects economic and social rights, is characterised as a remote, even a cruel, abstraction. Before we can take rights seriously, argues the Indian scholar, Upendra Baxi, we need to 'take suffering seriously.'<sup>80</sup>

This challenge is often only a partial one, for it may be combined with the view that civil and political rights cannot be divorced from social and economic rights. And several countries, notably India,<sup>81</sup> Germany, Spain, and Portugal, have accorded constitutional protection to such rights.<sup>82</sup>

### The relativist challenge

I have reserved the most destructive attack for last. Though cultural relativism has a fairly long pedigree in anthropology, it is only fairly recently that it has rejoined the assault on the human rights citadel. The doctrine maintains that 'there is an irreducible diversity among cultures because each culture is a unique whole with parts so intertwined that none of them can be understood or evaluated without reference to the other parts and so to the cultural whole, the

<sup>79</sup> K Popper, *The Open Society and Its Enemies* (London: Routledge & Kegan Paul, 5th ed 1969), p 230.

<sup>80</sup> U Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Indian Supreme Court' (1982) 29 *Review of the International Commission of Jurists* 37, 47 n 35.

<sup>81</sup> See B de Villiers, 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience' (1992) 8 *South African Journal on Human Rights* 29.

<sup>82</sup> These include health, nutrition, shelter, and employment, and the right to a minimum standard of education, and protection against eviction by public authorities where no alternative accommodation is available. See N Haysom, 'Constitutionalism, Majoritarian Democracy and Socio-economic Rights' (1992) 8 *South African Journal on Human Rights* 451, 453. On the general question of the enforceability of rights, see C Sunstein, 'Three Civil Rights Fallacies' (1991) 79 *California Law Review* 751 and R Wacks, 'Economic Rights and Relativism,' paper presented at the Commonwealth Legal Education Association Conference on the Implementation of Economic, Social and Cultural Rights in the Commonwealth, University of Warwick, 20-21 July 1994.

so-called pattern of culture.<sup>83</sup> The thesis implies *ethical* relativism which claims that 'the moral rightness and wrongness of actions varies from society to society and that there are no absolute moral standards binding on all men at all times.'<sup>84</sup> This doctrine has an even longer history and may be traced back to the Sophists of the fifth century BC.<sup>85</sup>

It has a familiar ring in Asia which issues not only from the authorities in Beijing and Singapore, but also from the Heung Yee Kuk and the Bangkok Declaration,<sup>86</sup> though I am not convinced that it is, strictly speaking, a relativist argument that is always in play here.<sup>87</sup>

Allowing the theory its most constructive interpretation, it appears to rest on the view that since moral beliefs depend on culture, language, economy, and so on, and since such factors vary from society to society, morality is relative to each society.

Two principal arguments may be mobilised against the relativist. The first denies that morality depends on social factors at all; it is therefore usefully described as the absolutist position.<sup>88</sup> The second denies the assertion that there has always been a diversity of cultures etc and a diversity of moral beliefs. This is helpfully called universalism.<sup>89</sup>

The absolutist position was held by Plato and claims that the validity of moral beliefs is logically independent of the social or cultural background of the person who accepts them; ethics is no less a scientific enterprise than mathematics. This so-called cognitivist position arises in two forms: *intuitionism* (which holds that ethical truths are known by a priori cognition, that is, intuitions) and *naturalism* (which holds that ethical truths are known empirically). Discrimination is wrong in the same way as  $1 + 1 = 2$ .

Cognitivism in ethics has had something of a rough ride from philosophers. It is particularly vulnerable to the charge that it divorces moral thinking from the 'real world,' it compels us to think about morality in a vacuum.

The universalist position is stigmatised as ethnocentric for its failure to apprehend cultural practices from the perspective of the culture in which a particular practice is transacted. I want to return to this point.

<sup>83</sup> J Ladd, 'Introduction' in J Ladd (ed), *Ethical Relativism* (Belmont: Wadsworth Publishing Co, 1973), 2. I rely strongly on this helpful introduction as well as his essay in the same volume, 'The Issue of Relativism.' Leading works are M J Herskovits, *Man and His Works* (New York: A Knopf, 1948), R Benedict, *Patterns of Culture* (New York: Pelican Books, 1946), and M Ginsberg, *On the Diversity of Morals* (New York: Macmillan, 1956).

<sup>84</sup> J Ladd, 'Introduction' in *Ethical Relativism* (note 80 above), p 1.

<sup>85</sup> The historian Herodotus acknowledged that 'Custom is the king o'er all': G Rawlinson, trans, *The History of Herodotus* (New York: D Appleton & Co, 1859-61).

<sup>86</sup> See Y Ghai, 'Asian Perspectives on Human Rights' (1993) 23 HKLJ 342.

<sup>87</sup> It frequently appears to be a communitarian position dressed up in relativist garments.

<sup>88</sup> By Ladd (note 80 above), p 3.

<sup>89</sup> *Ibid.*

## Conclusion

The bastion of human rights is encircled by the nine foes I have identified this evening. There are others charging the barricades. I have not mentioned, for example, the view that human rights are a Machiavellian plot by international capital to enslave the Third World. Or the Burkean conservatism that spurns human rights on the ground that they inspire 'false ideas and vain expectations in men destined to travel in the obscure walk of laborious life.'<sup>90</sup>

Against this onslaught, should adherents to the idea of human rights do the decent thing? Admit that the battle is lost and capitulate? Might we, perhaps seek alternative routes towards human dignity and freedom? A duties-based approach? A social contractarian paradigm? A personalist perspective (such as those adopted by Mounier and Maritain) which looks to the person rather than the individual as a means of bridging the gap between deontological liberalism and communitarianism?<sup>91</sup> Some version of Ungerian super-liberal transformative rights?

I think not. Whatever the attractions of these (and other) attempts to avoid the difficulties of rights discourse I have tried to describe, I believe that the concept of human rights, though bruised and battered, still breathes. Stripped of the tendentious polemic that frequently characterises the debate, the matter ultimately and, I think, inescapably boils down to the question of what it is to be a human being. The complex notion of the person, of the self, illuminated by Marcel Mauss over fifty years ago, is 'imprecise, delicate and fragile,'<sup>92</sup> but it lies at the heart of any concept of human rights.

This is not of course to deny that this notion is culturally or historically contingent. But reflection on what John Finnis calls the 'basic forms of human flourishing'<sup>93</sup> may reveal not only a considerable measure of common ground, but also that the competing perspectives are not nearly as irreconcilable as they may appear.

Thus the tension between communitarian and individualistic conceptions of rights need not take the stark form it so readily assumes. In particular, the idea of human rights does not require a solipsistic rejection of community. I think Michael Walzer is correct: the *source* of individualistic values is, in fact, the community, whose values are *common goods* 'owned' and generated by a society, and constitutive of it. They are embedded in our social practices and perpetu-

<sup>90</sup> E Burke, *Reflections on the Revolution in France*, ed C C O'Brien (Harmondsworth: Penguin, 1969).

<sup>91</sup> See V A Leary, 'Postliberal Strands in Western Human Rights Theory: Personalist-Communitarian Perspectives' in An-Na'im (note 19 above), p 105.

<sup>92</sup> M Mauss, 'Une categorie de l'esprit humain: La Notion de Personne, celle de "moi"' (1938), translated into English by W D Halls in M Carrithers, S Collins, and S Lukes (eds), *The Category of Person: Anthropology, Philosophy, History* (Cambridge: Cambridge University Press, 1985), quoted in Lukes (note 14 above).

<sup>93</sup> Finnis (note 11 above), p 59 ff.

ated and protected by education, culture, and so on.<sup>94</sup> To conflate this view with *strong* communitarianism is to miss the classic distinction between society and community, between *Gesellschaft* and *Gemeinschaft*. Moreover, this metaethical community must rest on reason. As Habermas argues, there must be a rational consensus for norms, obtained through undistorted communication.<sup>95</sup>

So where should we look for the normative source of human rights? The answer, I believe, is to be found where I began my search. The so-called International Bill of Rights, despite its imperfections and the claim that it does not enunciate justiciable rights, represents — even for the agnostic — a formidable, authoritative foundation for human rights norms. I agree with Richard Falk that:

[S]trengthening the naturalist logic may be the most important emphasis at this point in the transition process. It helps to orient other ordering logics around emergent values, building a normative foundation and social consensus that will help create a sort of community sentiments needed if a beneficial form of world order is to be brought into being some time early in the twenty-first century.<sup>96</sup>

If human rights are (as I believe them to be) an integral feature of both international law and custom,<sup>97</sup> the naturalist logic should operate considerably to undermine both the statist logic and the associated relativism that beset their effective protection. It is true that some relativists concede that certain human rights (the right to life, the right not to be tortured) are indeed absolute, but I want to claim that ethical and cultural relativism fly in the face of internationally accepted minimal standards of behaviour, albeit they are occasionally uncertain in their scope and unclear in their meaning.<sup>98</sup>

This is not to dismiss the argument, made most forcefully by the Sudanese writer Abdullahi Ahmed An-Na'im,<sup>99</sup> that 'since people are more likely to observe normative propositions if they believe them to be sanctioned by their

<sup>94</sup> M Walzer, 'The Communitarian Critique of Liberalism' (1990) 18 *Political Theory* 580.

<sup>95</sup> J Habermas, *The Theory of Communicative Action*, 2 vols (London: Heinemann, 1984–1987).

<sup>96</sup> Falk (note 4 above), p 41.

<sup>97</sup> See FR Tesón, 'The Kantian Theory of International Law' (1992) 92 *Columbia LR* 53; M Frost, *Towards a Normative Theory of International Relations* (Cambridge: Cambridge University Press, 1986). For a brief discussion of these and other approaches supporting such a view, see R Mushkat, 'Hong Kong's Quest for Autonomy: A Theoretical Reinforcement' in Wacks (note 56 above), pp 336–40.

<sup>98</sup> See FR Tesón, 'International Human Rights and Cultural Relativism' in Claude and Westin (note 3 above), p 42.

<sup>99</sup> See A A An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights' in An-Na'im and F Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (Washington DC: Brookings Institution, 1990), p 331; An-Na'im, 'Towards a Cross-Cultural Approach to Defining International Standards of Human Rights' in An-Na'im (note 19 above), p 19.

own cultural traditions, observance of human rights standards can be improved through the enhancement of the cultural legitimacy of those standards.' Nor is cultural imperialism, neo-colonialism, and ethnocentricity to be lightly dismissed. International human rights must be mediated through local cultural circumstances. Let me call my approach 'soft universalism.' It would be a historical (and self-defeating) if these norms were not to be subject to some local interpretive process, though it is one which, by definition, cannot be as extensive as the domestic interpretive process of the kind advanced by Dworkin. Nevertheless, there is, I think, considerable scope for the development of such a theory in international law and relations.<sup>100</sup>

In short, I think the process of Dworkinian constructive interpretation may usefully be deployed to resolve 'hard cases': the genuine conflicts between internationally accepted human rights norms and the cultural practices of a particular society. The interpretive enterprise would seek to apply 'community morality' — the *international* community's accepted rules and principles — on the domestic level in order to achieve what Rawls calls 'reflective equilibrium.'

Disingenuously to invoke the claim of relativism or contextualism to frustrate the legitimate and lawful expectations of individuals warrants our strongest condemnation. It grievously thwarts progress towards justice. Why, we must ask, is it the oppressor, rather than the victim, who cites local culture in support of an unjust practice?

If there is any validity in my suggestion that values, and hence individual human rights, derive from the community, the relativist claim loses much of its force. And if, as I have argued, the normative source of such rights is to be found in international law (that is, the international community) it collapses altogether.

I am unable to find any plausible rule or principle of international human rights law that permits governments to evade their obligation to recognise such rights on the ground that a certain right contradicts local culture or tradition.

I do not mean to imply that this is a simple matter. While many, sometimes illegitimate, governments postpone political rights in favour of economic ones, authentic tensions inevitably arise between the two. Political rights frequently serve, of course, as a potent vehicle by which to secure those very economic rights. I think the process of constructive interpretation may provide a useful vehicle with which to mediate competing rights, and, as I have said, especially the tension between local practice and international norms.

<sup>100</sup> Frost seeks to apply Dworkin's idea that settled norms provide a basis for the construction of a 'background theory' which facilitates solutions to hard cases. But while Frost's 'constitutive theory of individuality' offers useful support for international human rights norms, I think it could be pressed into further service in respect both of the Dworkinian metaethical concept of community (how might it be applied in the international context?) and to the question of domestic interpretive prospects (how might it be deployed to deal with specific cultural practices?).

Last year, on 25 June, representatives of 171 states adopted the Vienna Declaration and Programme of Action of the World Conference on Human Rights. Seven thousand participants, including representatives of more than eight hundred non-governmental organisations (who play a vital role in advancing human rights throughout the world)<sup>101</sup> affirmed 'that all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms ...'<sup>102</sup>

Membership of a particular group is not a *morally* relevant fact. Why should my moral worth depend on whether I was born in Chicago or Shanghai? Or whether I happen to be a woman in Tai Po or Tai Koo Shing? The pain suffered by the parents of a child who is detained, tortured, hanged, or shot is surely no different whether they are Rwandan or Russian, Chilean or Chinese. When cultural practices inflict harm or suffering they are unacceptable.<sup>103</sup> 'The primary ground for ethical reflection ... remains a capacity to identify the intolerable.'<sup>104</sup>

The doctrine 'one country, two systems' implies a high degree of relativism. Moreover, notwithstanding Annex 1 of the Sino-British Joint Declaration and Article 39 of the Basic Law that the two international covenants shall remain in force and shall be implemented through the laws of the HKSAR, China has acceded to neither covenant. Under these circumstances, the universalist concept of human rights has an additional, some might say decisive, appeal.

Suffering is not of course confined to *human* animals. The cultural relativism that seeks to justify cruelty to non-human animals is no less intolerable. Indeed,

<sup>101</sup> The importance of non-state actors in the promotion of human rights cannot be overstated. For a strong case in support of the role of NGOs in the protection of human rights in the Commonwealth, see *Put Our World to Rights: Towards A Commonwealth Human Rights Policy*, A Report by a Non-Governmental Advisory Group (London: 1991). Information about abuses is crucial; in 1987 the Paris-based League for Human Rights established a 24-hour international hotline for data on major human rights issues. Another international computerised information-sharing network, the Human Rights Information Documentation System (HURIDOCs), is used by hundreds of human rights groups worldwide. The Faculty of Law at the University of Hong Kong began in 1991 a project called Law-On-Line to provide electronic access to data in respect of human rights in Hong Kong and China. It includes five human rights and three law-related databases.

<sup>102</sup> *World Conference on Human Rights: The Vienna Declaration and Programme of Action* (New York: United Nations, 1993).

<sup>103</sup> This not to suggest, of course, that the test is a simple one. China's one-child policy, for example, and its associated inhumanities of coerced abortion, sterilisation, and female infanticide plainly violates Article 16 of the Universal Declaration of Human Rights (which protects the right 'to found a family'). But, '[g]iven the best demographic and agricultural projections, there is currently little doubt that mass malnutrition and even starvation — and a concomitant loss of human dignity — would ensue early in the next century if all Chinese were free to bear children whenever they choose': W P Alford, 'Making A Goddess of Democracy from Loose Sand: Thoughts on Human Rights in the People's Republic of China' in *Human Rights in Cross-Cultural Perspective* (note 96 above), p 74. See C Petersen, 'Reproduction and Family Planning: Individual Right or Public Policy?' in Wacks (note 56 above). A Liu, 'The Right to Life' in Wacks (note 2 above). 'Tradition' or 'culture' are all too easily deployed in an attempt to justify injustice and cruelty. See 'What's Culture Got To Do With It? Excising the Harmful Tradition of Female Circumcision' (1993) 106 *Harvard Law Review* 1944.

<sup>104</sup> R B J Walker, 'Ethics, Modernity, and the Theory of IR' (unpublished manuscript), quoted by R Falk, 'Cultural Foundations for the International Protection of Human Rights' in *An-Na'im* (note 19 above), p 49.

'it is quite inconceivable that that the extension of any right [or, at least, interest] should coincide exactly with the boundaries of our species.'<sup>105</sup>

In view of our planet's ecological despoliation and even potential nuclear immolation, it is necessary, I would say essential, to conceive of rights as a weapon by which both to safeguard the interests of living things against harm, and to promote the circumstances under which they are able to flourish.

A fundamental shift in our social and economic systems and structures may be the only way in which to secure a sustainable future for our world and its inhabitants. The universal recognition of human rights seems to me to be an indispensable element in this process.<sup>106</sup>

The potent rhetoric of the Marxist historian E P Thompson in defence of the rule of law<sup>107</sup> rings equally true in respect of the universality of human rights:

To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction. More than this, it is a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power. It is to throw away a whole inheritance of struggle *about* law, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger.

We ought not, however, to be under any illusion that international, or, indeed, domestic declarations or the agencies that exist to implement them are adequate. They provide the contours of a strategy for improved protection. The role of the numerous non-governmental organisations, independent human rights commissions, pressure groups, and courageous individuals are of paramount importance.

And while we should never abandon the quest for analytical clarity, we must remain deeply suspicious of abstract theories that attempt to camouflage the self-interest that lies beneath them, or masquerade as cultural sensitivity.

In the face of grave injustice, we have an obligation to resist allowing theory to displace action. From where I now speak, this will sound like a perverse, and manifestly unheeded, self-denying ordinance. But there are times when we may all have to acknowledge with the poet<sup>108</sup> that:

<sup>105</sup> L W Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987), p 206. The question of whether animals have rights has generated a substantial literature. The strongest argument in support of animals as right-bearers is made by T Regan, *The Case for Animal Rights* (London: Routledge, 1984). For assaults on this view, see R G Frey, *Rights, Killing and Suffering: Moral Vegetarianism and Applied Ethics* (Oxford: Basil Blackwell, 1983); cf my review in (1986) 49 MLR 403, and P Carruthers, *The Animals Issue: Moral Theory in Practice* (Cambridge: Cambridge University Press, 1992). I have considered these arguments in R Wacks, 'Sacrificed for Science: Are Animal Experiments Morally Justifiable?' (paper presented to the International Symposium on Biotechnology and Ethics, Hong Kong Baptist College, 26–27 November 1993).

<sup>106</sup> See Benton (note 54 above).

<sup>107</sup> Thompson (note 52 above), p 266.

<sup>108</sup> William Wordsworth, *The Tables Turned*.



One impulse from a vernal wood  
May teach you more of man;  
Of moral evil and of good,  
Than all the sages can.

Sweet is the lore which nature brings;  
Our meddling instinct  
Misshapes the beauteous forms of things;  
— We murder to dissect.

Enough of science and of art;  
Close up these barren leaves;  
Come forth, and bring with you a heart  
That watches and receives.