



## MITCHELL ORATION\*

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### HUMAN RIGHTS AND HUMAN WRONGS

#### OPENING

I accepted the invitation to make this oration and come here tonight with some trepidation: the person being honoured tonight, Dame Roma Mitchell, was the first federal Human Rights Commissioner and this is the territory that has known the powers of persuasion, conviction and commitment of the best human rights minds in the country, including Dame Roma Mitchell herself. Yet I reminded myself that we are both cultivators in the same vineyard, albeit that I both lagged behind her and sought to learn from her. My work today is made easier by the clear and decisive path cut out by my predecessor.

Alas, I belong to the tribe of serious people of a philosophical bent and have chosen a particularly theoretical approach to the topic 'human rights and human wrongs'. I believe that the more seriously human rights are regarded, the more secure and elevated the human condition. And I know of few ways more serious than the philosophical.

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## I INTRODUCTION

‘Human rights’ has become easily the most popular coinage in the second half of the twentieth century. In the hands of politicians and citizens alike, it is freely circulated in some societies, both in true and false metal; in others it remains a secret dream, longed for, promised but never delivered by man or God. But, true or false, in possession or in hope, human rights as a moral or legal entitlement of all human beings to dignified living have marked the path of progress in moral sensitivities and produced improvements in social institutions.

Yet the term has often been loosely understood and carelessly grasped. There is often much wasteful confusion and misunderstanding among both promisors and promisees about just which human rights each is talking about. Misunderstandings over what is at stake in human rights have resulted in a proliferation of what could be termed human wrongs. What do we mean when we talk about human wrongs? There is a passage in Milan Kundera’s book *Immortality* which illustrates this conceptual confusion.

I don’t know a single politician who doesn’t mention ten times a day ‘the fight for human rights’ or ‘violations of human rights’. But because people in the West are not threatened by concentration camps and are free to say and write what they want, the more the fight for human rights gains in popularity, the more it loses any concrete content, becoming a kind of universal stance of everyone toward everything, a kind of energy that turns all human desires into rights. The world has become man’s [sic] right and everything in it has become a right: the desire for love the right to love, the desire for rest the right to rest, the desire for friendship the right to friendship, the desire to exceed the speed limit the right to exceed the speed limit, the desire for happiness the right to happiness.<sup>1</sup>

I believe that confusion over the nature of human rights has led to an inappropriate use of ‘rights’ terminology. Such confusion, combined with the growing popularity of rights talk, will continue to cause a proliferation of rights claims; an ad hoc expansion of human rights agendas that will ultimately devalue the very thing which we set out to protect — human dignity. When we find ourselves in a situation where human rights has become ‘a kind of universal stance of everyone toward everything, a kind of energy that turns all human desires into rights’ it is time for a backwards glance to establish exactly how we arrived at this spot and precisely what is needed to remain true to our original, our best, goals. We find ourselves at a critical historical juncture.

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1 Milan Kundera, *Immortality* (1991) 136.

In the fifty years since the modern revival of human rights discourse the growing number of theoretical perspectives has brought out an awareness of the difficulty of thinking about rights. Few people would now believe that the truth about rights is self-evident or that, if two people disagree about rights, one of them is either corrupt or morally blind. When people disagree about human rights, you cannot simply say that the one who provides the best theory of rights should prevail. Each viewpoint must be examined for its logical premises and ideological presuppositions. The truth does not lie in logic or law, but often in politics and always in values.

We have moved beyond the simplicity and moral certainty of early rights philosophy. Each of the competing contemporary theories brings a fresh perspective and often a corresponding ‘new’ approach to identifying and justifying rights. As a result we have multiple discourses, each generating their own rights claims based on their own rights reasoning.

Thus, understanding the nature of rights from one viewpoint or another is not a purely academic exercise. Any viewpoint adopted affects our judgment on issues such as which rights are regarded as universal, which should be given priority, which can be overruled by other interests, which call for international pressure, which can demand programs for implementation, and those for which we would be willing to fight. In a time when emerging rights are beginning to clash with established rights, when new needs are being claimed as basic, when others conflate rights and desires in a blur of individualistic pursuits, it is crucial to delineate what a human right is — or, equally importantly, what it is not.

*This is the Central Question I Seek to Address*

It would be useful to establish a common theoretical ground, to agree upon a translation formula which allows people to speak to each other across the gulfs of creed and dogma, as Jerome Shestack urges.<sup>2</sup> Some hold that answers have already begun to emerge through interpretations, legal decisions and pragmatic compromises. However I believe that, like the common law process of doing justice, the process of trial and error by which we recognise mistakes and check them, realise potentials and act on them, and continually strive toward the best we can do, is all we can do.

It does, however, help to analyse some of the philosophical foundations of human rights.

*A Role of Philosophy*

To me, philosophy, as the critical analysis of the human condition that prepares the mind for social action, is one of the essential preconditions to human rights perceptions. Human

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2 Jerome Shestack, ‘The Philosophic Foundations of Human Rights’ (1998) 20 *Human Rights Quarterly* 201.

rights are a conscious and self-conscious principle of social action. When faced with a human wrong, a blind alley, we should return to the philosophy of human rights to unravel the conundrums appearing in our pursuit of human rights aspirations, to help us crack the theoretical chestnuts of issues such as indivisibility, universality, cultural relativity and so forth.

However, in Australia public political discussion of these matters, like political life generally, is dominated by lawyers, not philosophers. This both expresses and encourages the Australian emphasis on practicality and the suspicion of abstract ideas, unless they can be fully expressed as symbols or simple slogans. Australian perspectives on human rights thus derive their specific character from Australia's legal and political traditions and institutions.

But there is a crucial philosophical evaluation to be made, both in Australia and elsewhere, if we are to avoid the simplification and sloganisation of human rights talk that lead to wrong-headed, expansionist claims. Human rights itself is a complex term, embracing a variety of relations, not all of them legal. It is also an age-old cry for justice and equality. Its historical roots lie in religion and in the various conceptions of the human, and its relation to God, nature and other humans.

*What are the Foundations on Which our Modern Conception of Human Rights is Laid?*

The first is religious thought. Whether from the Old or New Testament, the Koran, the Talmud or the Baghavad-Gita, the basic principle of human dignity is firmly embedded in religious doctrines. A concept of shared humanity and justice is grounded in the sacredness of the human being, derived from the creator or supreme being. The very act of being created, granted by a higher authority, ensures these rights cannot be subordinated to a mortal law.

Natural law, which has enjoyed a long, if interrupted, reign from the Greeks through to Grotius, Hobbes, Locke and Rousseau, is unmistakably the forebear of human rights theory in its modern form. It placed an obligation upon governments to protect the natural rights of citizens, or be faced with forfeiting office. And so it justified revolution in the name of human dignity, equality and autonomy.

Positivism raised the loudest dissent against natural law and natural rights. Its legal proponents maintained that there are no rights — moral, natural, human — other than legal rights. Rights are entirely dependent upon enactment in law as their singular source. Anything else, as Bentham so breezily put it, was 'nonsense upon stilts'.<sup>3</sup> Positivism

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3 Jeremy Bentham, 'Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued During the French Revolution' in Jeremy Waldron (ed), *'Nonsense Upon Stilts': Bentham, Burke and Marx on the Rights of Man* (1987) 53.

negated the moral basis of human rights. Belief in the higher source of rights independent of law was akin to belief in witches and unicorns.

The twentieth century has seen rapid advances across many academic disciplines as well as high technology and globalisation, all of which feed into our understanding of humanity. A hybrid body based on sociological approaches to rights theory has sprung from this fertile intellectual ground. Sometimes called the sociological school of jurisprudence, among other things, these theories attempt to focus on institutional, policy or other goal-based dimensions of human rights.

Within the history of Western philosophy there is yet another strand of moral and political thought which has had an impact on rights discourse. Utilitarianism judges the rightness of actions in terms of securing the greatest happiness to all concerned. Utilitarianism treats all people as equals in a largely mathematical sense, rather than recognising an individual's inherent worth. In doing so, morality is dissolved in a calculus of pleasure and pain.

Within each of these loosely organised foundations, a myriad of cultural, intellectual and practical differences emerge and generate debate, even among those of like mind. They add up to an inventory of our understandings of human rights. But behind all, or at least most, of these perspectives on human rights there lies a moral value, usually rooted in conceptions of human dignity and autonomy as experienced through a human journey of *becoming*. However it can be broadly agreed — among all but the positivists — that human rights are first and foremost moral rights.

In this sense all rights can be seen as part of more general moral questions grounded in such values as autonomy, the full development of the human personality, respect for persons, and cultural or utilitarian considerations. Since the reappearance of natural rights theory in the wake of the atrocities of the Second World War, human rights discourse has developed a common moral theme of sorts. In variant forms, modern human rights theories seem to be settling for concepts of natural necessity. By necessity one means prescribing a minimum definition of what it means to be human in any morally tolerable form of society.

Human rights are thus a distinct category in that they are a moral statement concerning human potential. They are intimately connected with what it is to be human in a full and developed sense. Of course, potential is variable and is often restricted by society, which determines which human potentials will be realised. That is to say, human rights are constructed from moral rights through society and realised by the organisation of social affairs, including law, in such a way as to promote such rights. Law is not the (moral) source of human rights. But through the human interactions of morality and politics, the individual and the state, human rights practices, including law, are shaped.

The formation of moral rights themselves takes place *within* the self, within the realm of human consciousness, ideology and philosophy. Rights are therefore not deduced from the nature or governance of the universe, but from a developing concept of what it is to be human, to lead a human life, to become a person. Far from being the foundation of morality in a historical sense, rights follow from our experience with moralities. It is from here that they may or may not be transformed into other kinds of rights — legal and actual.

### *B Essential Characteristics of Human Rights*

Professor James W Nickel in his *Making Sense of Human Rights*<sup>4</sup> identifies six salient characteristics of human rights, as conceived in twentieth century documents such as the Universal Declaration of Human Rights: first, they are rights. Whatever inexactitude this word carries, it suggests that such rights are definite and high priority norms whose pursuit is mandatory. Second, they are alleged to be universal, to be held by people simply as people. Thus characteristics such as race, sex, religion, social position and nationality are irrelevant to whether one has human rights. They are applicable all around the world, and, today, they are international rights. Compliance with such rights has come to be seen as a legitimate object of international concern and action. Third, they exist independently of recognition or implementation in the customs or legal systems of particular countries. These rights may not be effective rights until legally implemented, but they exist as standards of argument and criticism independently of legal implementation. Fourth, human rights are held to be important norms. Although they are not all absolute and exceptionless, they are strong enough as normative considerations to prevail in conflicts with contrary national norms and to justify international action on their behalf. Fifth, these rights imply duties for both individuals and governments. These duties, like the rights with which they are linked, are alleged to exist independently of acceptance, recognition, or implementation. Governments and people everywhere are obligated not to violate a person's rights: governments may be said to have the main responsibility to take positive measures to protect and uphold that person's rights. Finally, these rights establish minimum standards of decent social and government practice. But not all problems deriving from inhumanity or selfishness and stupidity are human rights problems.

These seemingly simple and obvious statements are in fact carefully chosen words and contain much thought, the logic of which can help us sort out many apparent contradictions or seemingly irresolvable tensions. These I cannot go into here.

Stressing the aspect of 'claiming things as one's due', Joel Feinberg adds a further characteristic, that of human dignity:

Even if there are conceivable circumstances in which one would admit rights diffidently, there is no doubt that their characteristic use and that for

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<sup>4</sup> James Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (1987) 3–4.

which they are distinctively well suited, is to be claimed, demanded, affirmed, insisted upon. ... Having rights, of course, makes claiming possible; but it is claiming that gives rights their special moral significance. ... Having rights enables us to 'stand up like men' [sic], to look others in the eye, and to feel in some fundamental way the equal of anyone.<sup>5</sup>

Confusions about these kinds of distinctions and the language employed to articulate their key concepts have contributed to both the misuse of rights talk and the lopsided legalistic approach to rights. These two combine to transform desires into rights with unchecked enthusiasm.

Let us examine some of these 'wrongs' in turn.

## II HUMAN WRONGS

Two key areas have a particular role in encouraging the proliferation of rights and derailing the serious agenda. They tend to form a circular argument, a symbiosis even, in which each feeds from the other until it becomes difficult to tell where one ends and the other begins. Both have repercussions for realisation of rights. Both create wasteful outcomes which impact on the day-to-day welfare of certain groups within our community.

The first realm of confusion is the misuse of rights talk. Here the public debate has tended to conflate human wants and human rights in an effort to secure legal guarantees for particular interests. It is likely that this blur arises from a misunderstanding of the nature of the moral content demanded by a human right. It undoubtedly leads to a culture of rights claims which denigrate core rights and makes it difficult to balance social concerns in any meaningful manner. In some cases 'human rights' has become just another slogan to be employed in the trenches of ideological warfare.

### *A Misuse of Rights Talk*

In the public sphere, the idea of rights has often been seized upon by various interests as a way of avoiding complex moral reasoning and rationale building necessary to secure that interest, a form of moral shortcut on the quest for the pursuit of happiness. Yet this tendency overlooks the fact that rights themselves are morally complex. And complex questions, one may be forgiven for presuming, require complex solutions. When attempting to argue for a common moral core in the foundations of disparate human rights theories, to claim that this moral core is the basis of our belief in fundamental, universal human rights, it becomes apparent that moral philosophy is no the longer common currency in the hearts and minds of modern individuals.

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5 Joel Feinberg, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (1980) 151.

*Misunderstanding of the Moral Content of Rights*

It is not that the relationship between moral rights and human rights is particularly difficult, it is merely that we have become unaccustomed to thinking and talking about morality in specific or philosophical ways. Today morality is the domain of the popular press and perhaps the US Special Prosecutor. Cast in terms of extreme vice and virtue, the language of morality has become the language of scandal rather than the key to unlocking the questions of human worth and the human experience.

A variety of detailed analyses splinter moral rights philosophy. Let us begin with conventional morality. The term 'conventional morality' in this context refers to the various systems of norms which combine to give us middle-class morality, Catholic morality, ancient Spartan morality and so on. These various systems of norms for the most part contain many prescriptions and injunctions in common, but they also differ in important ways. Within the experiences of these moralities it is possible to identify certain reference points which seem to be immune to the fluctuations in context, and which seem to stand at the core of humanity. This core morality, sometimes called true morality, or most commonly in human rights dialogue the Kantian-style universal morality, provides the standards and principles by which to judge the actual institutions of any given society, including its conventional morality — the rules and principles established in that society, for better or worse.

A moral right in this sense may be unrecognised by both a society's conventional morality and its legal system, but will remain a true moral right anyway. The right to free exercise of Bahai religion in Iran, the rights of Indian widows not to incinerate themselves, and the rights of the daughters of Cairo garbage collectors not to be sexually mutilated come within this category. Arguably, in each of these cases, critical morality confers a genuine moral right that is unrecognised, indeed explicitly denied, both by the conventional morality of the group and by its legal system. The inability to overtly exercise a right does not invalidate its existence, it simply adds an obstacle to the realisation process.

The process of identifying, declaring and realising human rights is not unanimous or atemporal. Conflicts do and should arise as we continue on our shared discovery of what it means to be human in an ever-changing world. Thus conflicts over which rights deserve recognition often encapsulate the passions and formulations of the time. This process has recently begun to produce rights that overlap and conflict — particularly in the area of cultural rights within the Australian context, and more generally in the collective versus individual rights dilemma. The intractability of these conflicts is possibly a manifestation of the human wrongs generated by conceptual misunderstanding, a point I will return to later.



*Why do we Need to Understand the Moral Character of Rights?*

Appreciating the moral content of human rights is the first step in avoiding human wrongs as we steer our way through the uncharted waters of emerging and competing rights. Once we remind ourselves of the nature of moral rights, it becomes easier to delineate what sets human rights apart as a category of those moral rights. One of the most illuminating efforts at defining this delineation is found in the work of Maurice Cranston. To Cranston a human right ‘is something that everybody has. They are not rights a man [sic] acquires by doing certain work, enacting a certain role, or discharging certain duties; they belong to him simply because he is a human being’.<sup>6</sup>

As indicated above, moral rights are of a broader nature; they may be universal or they may belong to one individual or a limited class of individuals by virtue of some special distinguishing quality or by doing something to earn the entitlement in question, although the standard way of justifying a moral right is to demonstrate that that right has been earned, as by labour to acquire a right of property. Here morality and legality join hands to create enforceable rights. But the most important of moral rights are human rights, many of which cannot be justified as earned rights. Nor should they be.

If we overlook this important distinction between moral and human rights, we are freed (improperly) to pursue any number of expansive, inappropriate individual or group interests under the rubric of human rights. This is precisely the kind of expansion foretold by Kundera: human rights becomes a universal stance of everyone toward everything, a kind of energy that turns all human desires into rights. Cranston attempts to give us a definition of human rights that will allow us to avoid the improper expansion of human rights: each right must have that universal moral content which sets it apart from other rights. He says:

A human right, by definition, is something that no one, anywhere, may be deprived of without a grave affront to justice. ... If a declaration of human rights is to be what it purports to be, a declaration of universal moral rights, it must be confined to this sphere of discourse. If rights of a different order are introduced, everything is immediately slackened.<sup>7</sup>

In this sense we need to separate those rights which contain the essence of our humanity from those that are merely desires or wants best pursued outside the human rights framework. Again, Cranston suggests some criteria for the recognition of essential human rights: practicability, universality, being of paramount importance, and immediacy or urgency.<sup>8</sup>

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6 Maurice Cranston, ‘Are There Any Human Rights?’ (1983) 112(4) *Daedalus* 1, 11.

7 *Ibid.*, 12.

8 *Ibid.*, 13–15.

Such human rights are absolute; about them no decent human being can disagree. Even so, they are not absolute in the sense of always being enforceable without dispute — two or more such rights can be in conflict or at tension head-on, where one has to be chosen over another. Other human rights, economic and social rights, like the right to paid holidays or paid maternity leave, may be rights of another kind, as earned or inherited or purchased rights, requiring other justifications for their existence. These human rights are defeasible and may give way to other, more urgent claims.

And yet the expansionist tendencies persist as it seems that human wrongs tend to breed derivative wrongs. Both the successes and the failures of declaring human rights have fed the confusion between human rights and human wants. The relative success of the human rights movement tempts us, in the West, to seek further goals under the umbrella of human rights. The meaning, content, terminology and formulation of these further rights differ from essential claims and many of them may be quite unsatisfactory. There is a Russian proverb that says: 'The dog gets rabid from eating too much fat.'

To warn of this trend is not to assert that wants or needs are static: greater affluency breeds more wants; reduced affluence leads to more basic needs claims. The renewed impoverishment of Indonesia and the case of refugees fleeing war-torn homes tell us this story. There is a Chinese saying that captures this sentiment: 'Only the worm feels the heel.'

An expanding cache of claims, and subsequent failures to realise them, could generate a devaluation of human rights and a weakening of the moral content demanded of a human right. As a result, there is a tendency to try to cram into the language and concept of human rights whatever each of us supposes to be admirable or advantageous. This very scenario is painted by Milan Kundera: 'the more the fight for human rights gains in popularity, the more it loses any concrete content'.<sup>9</sup> Once set on these tracks, we tend to transform discussions of rights, and claims of rights, in the direction of an ideological warfare that slips further and further beyond the bounds of human rights discourse and beyond the reach of the shared humanity constituted by such discourse.

How we talk about human rights, the language that we choose, is very powerful and the impact that it has in the daily lives of individuals and communities can be profound. Let me give you just one current example: over the course of the last eighteen months words such as 'equality' and 'fairness' have been at the centre of national debate in newspapers, television and talkback radio.

The real problem in Australia lies in the lack of a commonly understood meaning for these words. If the opposite of racism is equality and the One Nation party constructs its platform on an appeal to equality, then you know you have a problem of understanding. Without a shred of irony, the most dispossessed and chronically disadvantaged people in

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9 Kundera, above n 1, 136.

Australia, Aboriginal and Torres Strait Islander people, are attacked as privileged and the recipients of preferential treatment. Ethnic minorities, because of their desire to maintain their distinct cultural traditions and identity, are stigmatised as a threat to nation unity and cohesion. Yet the assertion that it is never immoral to want to retain one's own independence and identity is a core principle of the One Nation immigration, population and social cohesion policies.

### *Rights Talk as a Means of Avoiding Responsibility*

A muddled misappropriation of rights talk has a further effect. It allows governments and societies to sidestep their shared responsibility to human rights and to sideline difficult moral choices by hiding behind the slogan 'rights talk'.

For example, by declaring that rights exist in law and hoping protections will follow from the trial and error of attempted claims, governments are able to sidestep the difficult choices required for actual protection of core values. A recent Commonwealth inquiry into Australia's efforts to promote and protect human rights supports this statement. It says: 'Human rights standards are aimed at improving the quality of life for ordinary people. They should be the central driving force of all governments' policies. As this report testifies, this is patently not so.'<sup>10</sup>

Similarly, by couching difficult moral choices in terms of rights talk, communities can avoid crucial decisions by placing them squarely within the legal discourse — by making them somehow *other*. This avoidance of responsibility — intentional or otherwise — is one of the most serious obstacles to overcoming human wrongs, as it encourages us to overlook the suite of options for human rights realisation.

At the risk of choosing a particularly contentious example, I believe that the achievement of economic and social rights can be managed by a multifaceted social and educational policy program. There is a particular danger in proclaiming these kinds of rights in law as it narrows their content and places the attendant duties and strategies for their realisation in a purely legal context. Formal legal texts and judicial decisions can have only a limited capacity to realise these rights and there is a paucity of organisations with a developed and sophisticated interest in pursuing these rights as such.

The full promotion of economic, social and cultural rights will demand a deep cultural change in many societies and across humanity as a whole. The accommodation of these rights clashes with powerful and established interests, particularly economic and property-holding interests. Some of these interests have legal rights and/or moral rights attached to them, thus we are faced with the ideological warfare foretold above. Tensions between

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10 Commonwealth, Joint Standing Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights* (1994) xxxix.

traditional customs and the common law within Australia itself, and between economic development and cultural autonomy in various parts of PNG, provide ample examples.

The clashes and conflicts of rights are now encroaching into the argument concerning the basic provisions of life, such as food and shelter, on the basis that these are basic human rights. The social and political climate points to seeing these needs as an integral part of the human rights discourse. Yet it has also bred an adversarial culture around rights — rights now have to fight each other for a place in the sun.

To believe in human rights is to believe that certain values essential to human dignity deserve special protection, and that they should not be sacrificed for the sake of greater efficiency or prosperity or for any aggregate of lesser interests which fall under the heading of rights.

To gain an advantage for a right, or claim, various means are employed: through the proceduralisation, legalisation or routinisation of rights talk we have managed to obfuscate the original aspiration, our commitment to human rights.

### *B The Legalistic Approach to Rights*

The second key area of confusion that has combined with misuse of rights talk to facilitate human *wrongs* is the legalistic approach to rights, an approach borne of blurring the distinctions between moral, legal and human rights. The most misunderstood and controversial aspect of human rights theory and perception is the distinction between human rights as a species of moral rights and human rights as a basis of legal rights.

#### *Blurring the Distinction Between Moral and Legal Rights*

While everyone in this room may easily appreciate the distinction, in the language of public debate this distinction is often lost. Legal rights are laws of a state while moral rights are claims of people. Legal rights by definition are enforceable, while moral rights may not be. Some moral rights are enforced, becoming legal rights, while others are not.

If one is of a positivist bent, one can get rid of moral rights talk by interpreting it as a confused and indirect way of referring to legal rights. This can be called the 'there ought to be a law' theory of moral rights, for it holds that the sentence 'A has a moral right to do (have or be) X' is to be understood, insofar as it makes any sense at all, to be saying 'A ought to have a legal right to do X'. It is a theory which ignores several things we have already discussed about the nature of human rights, along with the perpetual gap between the 'is' and the 'ought' in law.

It is true that many moral rights have become legal rights. This can be attributed to the strength of popular outrage against morally repugnant behaviour coupled with the politicisation of law in contemporary Australian society. It is true that the legal protection

of human rights is a distinguishing achievement of the twentieth century. Yet our confidence in the prominence we give to legally-supported rights carries with it grave specific dangers.

In recent years, as the powers of the state and the demands made upon it increase, many see law more and more as an instrument for social control and social change, not a tradition. They want to substitute social policies and administrative direction for law and legal values and procedures. They elevate purposes over tradition, the forward looking over the backward looking, the dynamic over the static. In fact we need both parts of each alleged dichotomy.

Law is rooted in the traditions of social stability and individual development, in moral values and in the realities of everyday life, in law that treats human beings and human activities as ends, not means, and sees itself as part of the community, not standing above it.

It follows that any developed legal system entails some central conception of rights and their corresponding duties. This relationship between rights and duties also tends to get lost in the expansionist culture of rights generated by rampant rights talk. Rights and duties of this kind are not *out there* in nature waiting to be uncovered by reason, they are part of and are derived from human arrangements, relations and beliefs. They are granted or asserted by a code or custom, by tradition or articles of association. Such codes may differ and compete — people in Europe may have legal rights which aren't available to people in Australia or Indonesia.

The assertion of a right, in short, involves reference to a body of law or rules or norms that vouchsafe or require such rights. The demand for rights is a demand that the claim be enforced and recognised in a social system either by making new rules or spelling out, interpreting and perhaps extending old rules.

Thus a mature legal system in a complex society performs more than one function and deals with other claims, demands and needs than those of human rights alone. Nevertheless, a complete, indeed, the best legal system must have room for human rights claims as well.

#### *The Lopsided Legalistic Approach as a Threat to Human Rights Realisation*

We are tempted to believe that in legal rights all good things are, or ought, to be found. In doing so we run the risk of believing that moral claims that cannot be formulated in terms of rights, or that are not reducible or derivable from legal rights, are therefore unintelligible. Yet we are confronted time and again with moral questions, with moral dimensions of our existence, that cannot be done justice in terms of legal rights.

Even further, many crucial aspects of human rights cannot be adequately articulated in terms of legal rights, contractual obligations, or even mutual respect, but require in addition articulation in terms of duties, responsibilities and an ethic of care and solidarity that go well beyond legally-sanctioned individual rights.

A recent paper by Lyndel Prott highlighted some of the repercussions of the over-enthusiastic legal embrace of human rights, in particular, the disillusionment resulting from an assertion of new or emerging rights in law which could not be commensurately ensured within that legal framework. Taking cultural rights as an example, she says:

The relevance of these possible confusions to cultural rights is obvious. We may see the ethical argument for linguistic rights and an ethical obligation of individuals to respect the claims of others to use their own languages. Transferring these claims into a political strategy which would require states to provide government services and education in all languages on their territory might be another matter, given the great diversity of languages in some states — some of the poorest and smallest having a wealth of linguistic diversity.

Stating that such rights already exist in law may have the result of devaluing the rights for which a remedy is so patently not available, or of encouraging disparagement of the legal system which is so clearly unable to enforce them.<sup>11</sup>

Ten years ago the dangers of this trend had already been identified, particularly in relation to asserting the existence of new generation rights in law long before societies had the capacity to accommodate them. Ian Brownlie noted the risks involved in attempting to approach human rights *aspirations* through an inappropriately legal discourse:

As policy goals, as standards of morality, the so-called new generation of human rights would be acceptable and one could sit round a table with non-lawyers and agree on practical programmes for attaining these good ends. What concerns me as a lawyer is the casual introduction of serious confusions of thought, and this in the course of seeking to give the new rights an actual legal context. ... The type of law invention about which I have reservations involves a tendency to cut out the real pioneering — the process of persuasion and diplomacy — and to put in its place the premature announcement that the new settlement is built.<sup>12</sup>

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11 Lyndel Prott, 'Understanding One Another on Cultural Rights' in UNESCO, Institute of Art and Law (ed), *Cultural Rights and Wrongs: A Collection of Essays in Commemoration of the Fiftieth Anniversary of the Universal Declaration of Human Rights* (1998) 162.

12 Ian Brownlie, 'The Rights of Peoples in Modern International Law' in James Crawford (ed), *The Rights of Peoples* (1988) 14.

Yet the penchant for realising human rights only through the declaration of legal rights persists. Some theorists, such as Pete Schmidt, believe that asserting that rights exist is the best way of creating them and having them employed within the legal system. In fact Schmidt argues that an assertion-based approach to human rights has the potential to overcome the dichotomy between legal rights and moral rights. The argument sounds something like this:

Precisely because some human-rights declarations are weak without enforcement procedures, it is essential to build a political culture in which human-rights claims can be contested *in whatever arena* is available. This is the process that leads to validated rights — issuing from a political culture in which such expectations are derived from active claiming of human rights. Rights not claimed are rights not legally validated, defined, or enforced.<sup>13</sup>

The seductive nature of this rationale is indicative of the ease with which we can slip into dangerous habits. It tends to reinforce the thinking that the only real rights are those claimed and backed up by legal sanctions. There are secondary repercussions of this approach where it has been interpreted as a methodology of surreptitious law creation giving rise to dissent within political and legal spheres. The flow-on impacts on social perceptions of human rights remain to be seen, but can be detected in the backlash over analogous efforts to pursue indigenous rights through the Australian legal system.

On one hand the very attempt to allude to indigenous rights through constitutional reinterpretation led to cries of law making by stealth and brought the judiciary under intense fire. On the other hand, the limited success of these attempts to deliver any graspable outcome for indigenous Australians has justifiably led to disenchantment with this strategy of rights realisation.

The discovery that the language and framework of legal rights is incapable of fully embracing some of the most important dimensions of our moral situation as human beings may lead us to react with disillusionment. Allied with other relativist tendencies of contemporary thought, this experience threatens us with the thought that our commitment to human rights may, after all, be nothing more than that: nothing more than a conditioned world view we have inherited by chance or by some mysterious process of historical acculturation. In other words, we are all too easily left doubting whether there exists any genuinely rational argument underlying our most basic and treasured commitment to shared humanity.

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13 Peter Schmidt, 'The Human Rights Approach to a Cultural Heritage: African Applications' in Peter Schmidt and Roderick McIntosh (eds), *Plundering Africa's Past* (1996) 25 (emphasis original).

Having distinguished these two areas of confusion — and they are obviously only two among many — how then do we proceed from identifying human wrongs to remedying them?

### III RIGHTING WRONGS

#### *Toward Shared Norms, Accepted Universality and Self-Reflexivity in Theory and Practice*

To readjust habits of thought, and more importantly to reinvigorate a holistic commitment to human rights generally, we need to return again and again to the foundations of our belief: our hope for a humanity grounded in dignity, autonomy and the full realisation of human potential.

Viewed through the lens of experience, we can see the commitment to rights afresh, and its essentially difficult and controversial character. We can recognise again that shared beliefs are necessary to ground a commitment to rights. We recognise that these common beliefs already exist and can be accessed to overcome the obstacles we currently face. We transform mere *commitment* — that is, conformity — into critical, and therefore independent, assent. In the best sense, we cease to be slaves of our ideology or culture of rights and become freed people who truly own our rights, and thus truly own our selves, because we truly know who and what we are as human beings. This in itself is a positive gain in moral understanding and responsibility.

Henry James once said that we care what happens to people only in proportion to our knowledge of what people are. In confronting the errors of the theoretical and practical departures we have made from our original course, we come to understand the dangerous proclivities of humans in the postmodern era. We also see tangible proof that how human beings see and feel is a power in and of itself, and hence it can be either a constraint on, or resource within, every struggle for human rights. The choice is ours.

Confronting our wrongs and pursuing our rights will force us to see more clearly and precisely the controversial character of some of those rights. In order to establish ground with intellectually and morally powerful boundaries we will be obliged to come to terms with searching moral, religious and philosophic foundations which support our common vision for humanity and temper our expectations of the scope of human rights.

Addressing the future achievement of human rights goals demands that human rights become a meeting place between the various constituencies of human rights discourse. While all differ in their approaches to human rights and their attainment, they each share a common thread, a common belief, a moral compulsion to achieve human rights aspirations. Along with this compulsion, they also share a view that the definition and scope of human rights must have conceptual clarity before meaningful achievement of these goals will be possible.



Within our own region, the Asia-Pacific, we have already seen signs of successful human rights dialogue — with Australia a key participant — which cuts across the barriers of ideology, culture and philosophy. We have seen the suffering of some of our closest neighbours; we have heard their cries of distress; and we have shouldered the responsibility to work together to alleviate suffering, repair damage, protect values and sustain faith.

Furthering this constructive conversation about human rights is vital if we are to work through the different approaches and philosophies that people hold and claim our common ground. In this, the fiftieth anniversary of the Universal Declaration of Human Rights, such a conversation is even more important if we are to recognise and build on the successes, setbacks and challenges of the last five decades and reinvigorate the discussion of human rights with clear purpose.

In Australia, at least, one part of that discussion will take place between the 8th and the 10th of December 1998, when the Human Rights and Equal Opportunity Commission hosts a national conference to celebrate the fiftieth anniversary of the Universal Declaration. The themes of the conference are drawn directly from the preamble to the Declaration and include: 'a common standard of achievement for all people and nations, the highest aspiration of the common people, corporate responsibility in promoting social progress, friendly relations between nations and the rule of law'.

Speakers will represent a range of different political and cultural viewpoints and cover topics as diverse as religion and spirituality, art and culture, citizenship, sport, business and labour, media values, rural issues, the military, and law and reform. Such a structure ensures that human rights are seen in their broad context, rather than as the sole preserve of lawyers and academics.

The presence of Justice Albie Sachs of the Constitutional Court of South Africa; Richard Butler, Executive Officer of the UN Special Commission and responsible for the dismantling of Iraq's weapons of mass destruction; Marzuki Darusman from the Indonesian Human Rights Commission; and Elizabeth France, the UK's Data Protection Registrar, will provide a strong contribution to the discussion of human rights in the global context.

The view that human beings do not know what they are doing is poised uneasily between truism and absurdity. The expansion of rights talk at the expense of the concrete content of human rights is palpable proof that we have lost sight of our destination. But we know quite enough about what we have done wrong to see that it will be unforgivable if we do not do our collective best to right it. In fundamental human rights we see the possibility of the shared future that has been the dream of humanity. In the pursuit of this dream we have strayed from the path but we have also alleviated suffering, saved lives and realised

the value of humanity. We have struggled under opposing banners to claim this dream as a reality.