

Human Rights Fundamentalisms[†]

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Abstract

At the same time as the power and prevalence of human rights is growing within political, legal, social and even economic discourse, their foundations are being undermined by two insidious forces: one that values human rights too little, and the other which values them too much. Especially in the new world order of post 9/11, human rights are seen by those in the first camp to be dispensable privileges, while those in the second camp overstate the human rights cause and are resistant to any sort of criticism of their form or substance. This paper critiques the dimensions and dangers of both these fundamentalist perspectives in Australian and international contexts, and offers some suggestions as to how human rights might be rescued from their debilitating grasp.

1. Preface

In 1964 Brendan Behan — that irrepressible writer, wit and Irish rebel — died in Dublin at the age of 41. Shortly before, upon the completion of the last instalment of his autobiography, he remarked with characteristic shenanigans that had it not been for the assistance he received in researching and writing his autobiography, he would not have been able to finish the task until many years after his death!¹ I feel something vaguely similar regarding the delivery of this Inaugural Lecture; fully 18 months after I took up the Chair. Though, I have to say that my reasons have less to do with drink taken in tremendously self-destructive quantities (as was Behan's excuse) and more to do with quantities of tremendous reorientation.

The allusion to Behan is further advertent, for the Irish connection to the promotion of the idea of human rights and to the implementation of the idea in practice is especially strong. Perhaps, given the experiences of the Island's political and social history, the temperament of its people (a mixture of passion,

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1 Brendan Behan, in the 'Dedication' to *Confessions of An Irish Rebel* (1991).

stubbornness and irreverent wit) and until very recently the colossal exportation of so many of its men and women to all corners of the earth, it is not surprising that we find the Irish conspicuously represented in the global ranks of human rights advocates, activists, lawyers and scholars.

Of course, *all* who practice in the area are coloured by their personal experiences as much as by any intellectual conviction. In my case, I was no doubt shaped by growing up in Belfast, which in the 1970s presented a range of social, political and diplomatic challenges for a teenager. My family, like so many, was directly affected by the violence; but it was perhaps the indirect effects that were more telling: the social, psychological and physical atmosphere of Northern Ireland during ‘The Troubles’ was an unavoidably influential factor in one’s whole personal development. A Jewish friend of mine at the time was once cornered by a street gang of one or other persuasion, intent on finding out which side he belonged to. Once they established his religion, they paused momentarily and then demanded to know whether he was a Protestant Jew or a Catholic Jew. Such sardonically amusing stories represent what was in fact a dark and often deadly division in society.

So, there and then, in Belfast, in the 1970s, you could not avoid the Byzantine matrices of historical prejudices, modern injustices and rights claims — whichever side of the city you were born and brought up on. To be sure, there was an ‘us and them’ divide in society; indeed, that was the whole sorry and bloody problem. But, it was *not* a divide based on those who thought human rights were important and those who thought they were not: at least, not to them.

2. *Introduction*

This leads me to the core of what I want to address in this paper: namely, human rights fundamentalisms. That is, fundamentalisms *plural*, as I want to examine two different types of deep-seated human rights perspectives.

The first of these is the belief that human rights are the fundamental, immutable and transcendent principles upon which our political, social and legal orders are based today. I call this belief ‘*Transcendental Fundamentalism*’. What is significant about it for me is that it is increasingly recognised in its *non-observance*. This non-observance stems from the growing pervasiveness of at least two notions that undermine the relevance and application of human rights, not only in the West, but in developing states as well, albeit for different reasons. The first notion is that human rights are privileges or optional extras that can be bestowed or denied as circumstances demand. The second is the notion that such a discretionary state of human rights really only applies to certain *unworthy* groups or categories of people. For the worthy (or at least powerful), human rights are more assured because they are seldom directly violated. The consequence of such partiality is that there is now a cleavage *within* our political, social and legal orders, and *between* the fundamental origins, nature, utility and legitimacy of human rights, and their current application in practice. This disconnect is a threat to the transcendental fundamentalism of human rights. So, my first fundamentalism is a ‘good’ fundamentalism, too much ignored.

The second fundamentalism is a ‘bad’ fundamentalism; that is, one where the object is too readily revered. The object here is human rights and the fundamentalism comprises a fetishization of human rights within certain circles of rights advocacy; or, to put it another way, a tendency towards human rights evangelicalism where human rights are touted as a panacea for many or all social, political, legal and economic ills. As such, human rights are considered to be beyond reproval or even critique. I refer to such a phenomenon as ‘*Reactionary Fundamentalism*’, and see the threat it poses to human rights as coming from the devitalisation of the body of human rights discourse and argument that is the inevitable consequence of all dogma that eschews the rigours of intellectual inquiry and challenge.

This paper focuses on the problems associated with both of these fundamentalist perspectives on human rights; the first because the fundamentalism is undervalued, and the second because it is overvalued. But first, I shall provide something of an overview of the nature and origins of human rights out of which context these fundamentalisms have emerged.

A. *Talking Human Rights*

Much has been said and claimed of human rights over the centuries regarding their ontology, utility, format, and future.²

Immanuel Kant considered human rights to be the transcendental emanations of our collective consciences³ (echoing Tom Paine); and John Stuart Mill followed both of them by stressing that they constituted the natural essence of the liberated, rational individual.⁴ John Locke was the first to declare them to be inalienable,⁵ which was the precise term used to describe them in the American Declaration of Independence (and also, many years subsequently in the Universal Declaration of Human Rights (‘UDHR’)). The French *Déclaration des droits de l’homme et du citoyen* drew upon the same sentiment by pronouncing them to be natural and imprescriptible.⁶

The framers of the UDHR further considered human rights to be constituent of the ‘inherent dignity ... of all members of the human family’.⁷ Somewhat differently, the Japanese cross-cultural theorist, Onuma Yasuaki, thinks that human rights are more concerned with ‘realizing the spiritual and material well-being of

2 See generally Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2003); Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (2004); Jerome Shestack, ‘The Philosophic Foundations of Human Rights’ (1998) 20 *Human Rights Quarterly* 201.

3 Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans, 1991 ed) at 44.

4 See especially Thomas Paine, *The Rights of Man* (1792); John Stuart Mill, *On Liberty* (1859).

5 Locke describes the natural state of all men and women as being ‘a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature; without asking leave, or depending upon the will of any other man’: see John Locke, ‘The Second Treatise: End of Civil Government’ in Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (2003) at 101.

6 ‘... des droits naturels et imprescriptibles de l’homme ...’: see *French Déclaration des droits de l’homme et du citoyen* 1789 (‘*Déclaration*’) art 2.

humanity' rather than merely individual dignity.⁸ The passage of the *Human Rights Act* in the United Kingdom ('UK') in 1998 prompted claims that human rights now provide 'values in a Godless age',⁹ though in sailing so close to the winds of theocracy others have warned that human rights might be in danger of adopting the 'sentimental vocabulary of devotion'.¹⁰

Such disparate sources as Plato, St Thomas Aquinas, Confucius and the Koran all variously emphasise that the essential rights to equality and liberty beget justice;¹¹ John Rawls developed his monumental theory of justice on the back of the catalytic effect of a sophisticated balance between equality and liberty rights.¹² For Costas Douzinas, more than merely catalytic, the great attribute of human rights is their revolutionary and transformative character borne of their utopianism which, although 'impossible' to attain, nonetheless provides an important social framework in which individuals relate to each other: '... in claiming and exercising our rights we reveal ourselves as beings addressed to an other. Having rights, living through rights, is therefore of greater ontological importance than the contents of these rights. Rights are our truthful lie.'¹³

Many of the Enlightenment's leading thinkers stressed the utility of rights as bulwarks against the state (as Hobbes saw them),¹⁴ or as the responsibilities of the state (as was the view of Locke¹⁵ and Rousseau).¹⁶ Within legal theory, Ronald Dworkin articulated such rights as 'trumps' in the card game of competing policy and legal claims;¹⁷ and H L A Hart considered the leverage they commanded to be

7 See the Preamble to the *Universal Declaration of Human Rights* (1948). The Declaration was adopted and proclaimed by the United Nations General Assembly resolution 217A(III) of 10 December 1948.

8 Onuma Yasuaki, 'Toward an Intercivilisational Approach to Human Rights' in Joanne Bauer & Daniel Bell (eds), *The East Asian Challenge for Human Rights* (1999) 103 at 123.

9 Francesca Klug, *Values for a Godless Age: The History of the Human Rights Act and its Political and Legal Consequences* (2000).

10 David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2001) 3 *European Human Rights Law Review* 245 at 257.

11 See Plato, *The Republic* at Book 4; St Thomas Aquinas, *Summa Theologica* at Question 50, art 9; Confucius, *Analecets* at Book 20, vole 2; *Surah* at 12:178.

12 John Rawls, *A Theory of Justice* (1971).

13 Costas Douzinas, *The End of Human Rights* (2000) at 321.

14 In Hobbes' view 'a Sovereign is as much subject, as any of the meanest of his People' to 'the Law of Nature': see Thomas Hobbes, *Leviathan* (rev ed, 2002) at 237.

15 For Locke, this meant '[a]bsolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government, which men would not quit the freedom of the state of nature for, and tie themselves up under, were it not to preserve their lives, liberties, and fortunes, and by stated rules of right and property to secure their peace and quiet': Locke, above n5 at 160–1.

16 '[T]he body politic or the Sovereign, drawing its being wholly from the sanctity of the contract, can never bind itself ... to do anything derogatory to the original act' [i.e. 'the social compact']. For Rousseau, the social compact is an 'association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before': see Jean-Jacques Rousseau, *The Social Contract* (G D H Cole trans, rev ed, 1978) at 17, 176.

17 Ronald Dworkin, *Taking Rights Seriously* (2nd ed, 1978) at xi.

such that they have displaced utilitarianism to become the ‘prime philosophical inspiration of political and social reform’.¹⁸

All that said, as a concept human rights have had their share of detractors: the conservative Edmund Burke considered them to be artificial, revolutionary and dangerously destabilising;¹⁹ Marx thought them to be quintessentially bourgeois (that is, selfish, egoistic and atomistic),²⁰ and Jeremy Bentham famously pronounced that claims as to their existence as part of natural law to be nonsense upon stilts.²¹ All sorts of relativists argue that rights — as proclaimed today as representing universal values — are nothing of the sort. Politics, philosophy, economics, social and religious traditions, geography and gender all particularise and distinguish human rights from the claimed universally set standards. Thus, for example, Asian,²² African,²³ socialist²⁴ and feminist commentators²⁵ have all expressed concerns over the confrontational tendencies of rights disputes, their focus on what separates right holders and duty holders rather than on what joins them, and their value-laden baggage and particularism despite their claims of value-neutrality and universalism. As Marie-Bénédict Dembour reflects in her candid and impressively insightful treatment of these varieties of scepticism,²⁶ questioning human rights claims to universality (which she does) cannot be simply seen as being ‘against human rights’; rather, it is for her, a valid intellectual and practical insistence ‘that each reference to human rights needs to be assessed morally on its own merits, by which I principally mean its outcome’.²⁷

The era of human rights has even been said to be ‘ending’ (in Michael Ignatieff’s view)²⁸ or at any rate (according to Douzinas)²⁹ showing signs of the

18 H L A Hart, *Essays in Jurisprudence and Philosophy* (1983) at 196–7.

19 Burke was scornful of rights advocates: ‘speculatists’ he called them, adding dismissively ‘I have nothing to say to the clumsy subtilty of their political metaphysics’: see Edmund Burke, *Reflections on the Revolution in France* (1790) (William Todd ed, 1965) at 69, 67–75.

20 ‘None of the so-called human rights then goes beyond the egoistic man, beyond man as member of civil society, namely withdrawn into his private interests and his private will, separated from the community’: see Karl Marx, ‘On the Jewish Question’ in *Early Political Writings* (1844) (Joseph O’Malley trans, 1994 ed) at 46.

21 Jeremy Bentham, ‘Rights, Representation, and Reform: Nonsense Upon Stilts and Other Writings on the French Revolution’ in Philip Schofield, Catherine Pease-Watkin & Cyprian Blamires (eds), *Essays on Legal Reform in French and English: Sixteen Scholarly Contributions* (2002) 317–401 at 330.

22 As discussed further in part 4 below, (*Reactionary Fundamentalism*).

23 As discussed further in part 4 below, (*Reactionary Fundamentalism*).

24 Steven Lukes, ‘Can a Marxist Believe in Human Rights?’ in Steven Lukes, *Moral Conflict and Politics* (1991) at 173–88.

25 See for example the ground-breaking work of Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (1982); Iris Young, *Justice and the Politics of Difference* (1990) at ch 4; Catharine MacKinnon, *Toward a Feminist Theory of the State* (1989).

26 Marie-Bénédict Dembour, *Who Believes in Human Rights: Reflections on the European Convention* (2006).

27 Id at 2–14; Locke, above n15.

28 Michael Ignatieff, ‘Is the Human Rights Era Ending?’ *New York Times* (5 February 2002) at 25.

29 Douzinas, above n13.

decay of human rights as an ideological force. On closer examination, rather than a comprehensive demise, both authors are pointing to paradigmatic shifts in the canon borne of particular challenges: that is, the atrocities in the United States of America ('US') of 11 September 2001 for Ignatieff, and the 'triumph' of liberalism after the collapse of the Soviet empire in 1990 for Douzinas. It may also be that these shifting contours of human rights understanding are merely representations of what Norberto Bobbio sees as the transformatory, evolutionary stage in which we now find human rights. That is, as Bobbio mapped out in *The Age of Rights*, the third and final significant stage of human rights development that follows the initial construction of their normative, philosophical foundations, and then (secondly) their assertive adaptation to the political ends of liberalism, to the present state where those statements and claims are being transformed into the laws, policies and practices that suit the many various domestic and international circumstances.³⁰

B. *Standardisation*

The divergent forms, perspectives of, and attitudes towards human rights are so many and various that one might sometimes despair of reaching any meaningful agreement as to the standards and values that they represent. And yet, should one be expecting anything *less* diverse given the nature of the project: namely, the universalisation of the norms inhering in the human condition that constitute the basis for mutual recognition of the dignity of all individuals, no matter what their circumstances? Encompassing such a breadth of purpose in a way that is both complete and uncontroversial is beyond the boundaries of reasonable expectation; but that is the nature of all ideal types; they are, at one and the same time, forever on the horizon while insisting on the taking of steps in that direction. Their *raison d'être* is the unending struggle for their attainment and, in the case of human rights, the promise of the betterment of the human condition that results from that very struggle.³¹ Upendra Baxi underlines this point in his grandiloquent pronouncement that 'the expression "human rights" ... carries the burden of a transformative vision of the world, in which the state ... incrementally becomes ethical, governance just and power ... accountable'.³² Even as human rights move from the poetry of philosophy to the prose of law, the expectations remain such that the UDHR is said to 'set out the minimum conditions for a dignified life worthy of

30 Norberto Bobbio, *The Age of Rights* (Allan Cameron trans, 1996 ed) at 15–6.

31 As Vaclav Havel frames it, '[p]oliticians at international forums may reiterate a thousand times that the basis of the new world order must be universal respect for human rights, but it will mean nothing as long as this imperative does not derive from the respect of the miracle of Being, the miracle of the universe, the miracle of nature, the miracle of our own existence. Only someone who submits in the authority of the universal order and creation, who values the right to be a part of it and a participant in it, can genuinely value himself and his neighbours, and thus honor their rights as well': Vaclav Havel, 'The Miracle of Being: Our Mysterious' (Speech delivered at the Sunrise Magazine Liberty Medal Award Ceremony, Independence Hall, Philadelphia, Pennsylvania, 4 July 1994) <<http://www.theosophy-nw.org/theosnw/issues/gl-hav1.htm>> accessed 29 September 2007.

32 Upendra Baxi, *The Future of Human Rights* (2002) at 8.

a fully *human* being, requirements so basic that they must be recognised as rights/titles/claims, with all that entails.³³

What we see in these proclamations is the ‘human’ component of human rights evoked in ontological terms, sitting alongside the ‘rights’ component of human rights representing their jurisprudential nature. The legal clothing of human rights, though certainly a phenomenon appropriately associated with the explosion of international human rights laws after 1945, has far more ancient origins. The political and legal orders upon which our modern polities are based all provided recognition and protection of human rights as legal entitlements of some sort or other. Thus, (i) the exclusive citizenship rights of the city-states of Ancient Greece and Renaissance Italy (and the Roman Empire in between),³⁴ (ii) the rights protections bestowed upon the barons by the Magna Carta in feudal England and the rights and responsibilities imposed upon Parliamentarians by the English Bill of Rights nearly 500 years later; and (iii) the somewhat more plenary guarantees provided by the revolutionary declarations of the French and American republics in the late 1700s.

The melding of the philosophical and jurisprudential inquiries on rights during the Enlightenment was achieved through the medium of liberalism with its individualist focus on human beings as rational actors, and its group focus on the social contract that individuals collectively agree to forge with their few chosen leaders. Drawing directly upon the work of Locke and Rousseau in this respect, Kant was able to assert that ‘[t]he legislative authority can belong only to the united will of the people. For since all Right is to proceed from it, it *cannot* do anyone wrong by its law’.³⁵

So, at base, not only do rights guarantee the individual certain freedoms to act within the body politic, they constitute the very rationale for its existence in the first place. And it is this history and political and legal heritage that lies at the heart of my notion of *transcendental fundamentalism* and the importance one must attach to ensuring that its precepts are not taken lightly — or lightly taken away.

3. *Transcendental Fundamentalism*

In respect of those political systems characterised as democracies, their association with human rights is both fundamental and transcendent. The relationship is certainly complex, but it is nonetheless manifest in all of the variegated forms of democracy which today underpin western liberal states. Thus, the foundations of *political* democracy are located in the protection and promotion of such civil and political rights as non-discrimination and equality before the law, privacy, the right to vote, and freedoms of expression, assembly, movement, thought and conviction;³⁶ the foundations of *social* democracy are located in the fair and equal

33 Jack Donnelly, *The Concept of Human Rights* (1985) at 33.

34 Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (2004) at 32–3, 38–9.

35 Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans, 1996 ed) at 91.

36 See Conor Gearty, *Principles of Human Rights Adjudication* (2004) at 33–37.

access to (or provision of) economic and social rights to housing, sustenance, education, health, employment and a clean environment; and the foundations of a *plural* democracy are located in protection of rights against discrimination on racial, ethnic, religious or other culturally-related grounds.³⁷

Historically, this has always been so. That is, from the American Declaration of Independence holding as ‘self-evident truths’ certain civil rights including, necessarily, the right of the people ‘to alter or abolish’ a government or ‘institute a new government’³⁸ (and the similar guarantee to respect the ‘demands of citizens’ in the French *Déclaration*),³⁹ through to Franklin D Roosevelt’s enunciation of ‘four freedoms’ (from want and fear, as well as to expression and belief) as ‘the foundations of a healthy and strong democracy’;⁴⁰ to the United Nation’s Vienna Declaration in 1993 that ‘democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing’.⁴¹ The European Union (‘EU’) too has found itself inexorably drawn towards the symbiotic relationship between democratic government and respect for human rights, as its original economic community objectives expanded (as they had to) into labour, social, environmental, political, justice and even security concerns. The EU’s 2000 Charter of Fundamental Rights declares that the EU is founded on ‘the indivisible, universal values of human dignity, freedom, equality and solidarity, [and] ... based on the principles of democracy and the rule of law’.⁴²

Today, the interdependence of the two notions is almost invariably assumed. Google — that crude but irresistibly immediate empirical tool for the desk-bound

37 See generally David Beetham, *Democracy and Human Rights* (1999) at 84–114; especially at 114.

38 *United States Declaration of Independence* (1776).

39 ‘... les réclamations des citoyens ...’: *Déclaration*, above nImmanuel Kant considered human rights to be the transcendental emanations of our collective consciences (echoing Tom Paine); and John Stuart Mill followed both of them by stressing that they constituted the natural essence of the liberated, rational individual. John Locke was the first to declare them to be inalienable, which was the precise term used to describe them in the American Declaration of Independence (and also, many years subsequently in the Universal Declaration of Human Rights (‘UDHR’)). The French *Déclaration des droits de l’homme et du citoyen* drew upon the same sentiment by pronouncing them to be natural and imprescriptible. at Préambule.

40 Franklin D Roosevelt, ‘The Four Freedoms’ (Speech delivered at the 77th meeting of US Congress, Washington DC, 6 January 1941).

41 *Vienna Declaration and Programme of Action*, para 8, UN Doc A/CONF.157/23 (1993).

42 See the Preamble to the *Charter of Fundamental Rights of the European Union* (2000) OJ C 364/1. The Charter was signed and proclaimed by the Presidents of the European Parliament, the Council, and the Commission on behalf of their institutions on 7 December 2000 in Nice. It was then incorporated as Part II of the draft Constitution for Europe, which was submitted by the Convention on the Future of Europe to the European Council on 20 June 2003. An Intergovernmental Conference was convened to debate the draft Constitution. On 29 October 2004, the 25 Member States of the European Union signed the *Treaty Establishing a Constitution for Europe*. Member States are currently in the process of ratifying the Constitution. However, referendums in France on 29 May 2005, and in the Netherlands on 1 June 2005, rejected ratification of the Constitution. On the *Charter of Fundamental Rights* see further <http://ec.europa.eu/justice_home/unit/charte/index_en.html> accessed 15 June 2007. For the status of Member State ratifications of the Constitution, see <http://www.europa.eu/constitution/ratification_en.htm> accessed 15 June 2007.

— reveals more than 57 million hits for the phrase ‘democracy and human rights’ — as against a paltry 1.3 million for ‘dictatorship and human rights’!⁴³ Even in a country such as Australia which has chosen not to articulate in a federal bill of rights the human rights standards against which it is prepared to be measured, some such rights have necessarily been read into our Constitution as a direct consequence of its express recognition of the democratic foundations of our system of representative government.⁴⁴ ‘Democracy ... in Australia’, as Justice Kirby puts it ‘is far more complex than simple majoritarian rule. It is a sophisticated form of government which involves the general ability of the will of the majority to prevail but in a legal and social context in which the rights of vulnerable minorities are respected and defended — particularly where such minorities are unpopular.’⁴⁵

A. *Demonising Human Rights*

Yet, despite this rich heritage there is a mounting incidence of ambivalence, disregard or even antagonism towards human rights in key sectors of our political and economic leadership, their acolytes and, crucially, the community at large. In Australia there seems at times to be a concerted campaign mounted against the legitimacy of human rights and against the integrity of those who seek to promote or claim them. Human rights talk and human rights advocates have been marginalised — branded as products of special pleading and/or elitism inapplicable to mature democracies such as ours (a viewpoint which Di Otto calls ‘democratic exceptionalism’).⁴⁶ They are even criticised for being un-Australian in the rather simplistic sense that what Australia *does* in respect of human rights in Australia is no-one else’s business.⁴⁷

Thus, for example, the Editorials of *The Australian* scorn what they call the ‘moral middle class’⁴⁸ for its members latching onto human rights causes that allow them to ‘demonstrate [their] innate superiority over common folk’. The Prime Minister espouses the principle of ‘mutual obligation’ as a central plank in

43 Google searches as at 13 June 2007: ‘democracy and human rights’ 57,500,000 hits; ‘dictatorship and human rights’ 1,320,000 hits.

44 Namely, the *Australian Constitution* ss 7, 24. On the High Court’s jurisprudence on the question, see further Fleur Johns, ‘Human Rights in the High Court of Australia, 1976–2003: The Righting of Australian Law’ (2005) 33 *Federal Law Review* 291.

45 Michael Kirby, ‘Democracy and Human Rights’ (Speech delivered at Melbourne High School, 16 August 2000) <<http://www.lawfoundation.net.au/ljf/app/&id=A2D967AED399D622CA2571A3007F84A9>> accessed 15 June 2007. See further Justice Michael Kirby’s remarks in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 623–4 (Kirby J) on the need for judges to interpret the Constitution to reflect Australia’s international human rights obligations.

46 Dianne Otto, ‘From “Reluctance” to “Exceptionalism”: The Australian Approach to Domestic Implementation of Human Rights’ (2001) 25 *Alternative Law Journal* 219.

47 See remarks made by Prime Minister John Howard to this effect, as quoted in David Kinley & Penny Martin, ‘International Human Rights at Home: Addressing the Politics of Denial’ (2002) 26 *Melbourne University Law Review* 466 at footnote 14 and accompanying text.

48 ‘Refugee cause is not helped in our courts’ *The Australian* (29 December 2003). See also ‘A certain maritime mess haunts Howard’ *The Australian* (17 August 2004); ‘This is a war that is not of our making’ *The Australian* (13 July 2005).

his vision of social policy which requires that there be an acceptance of greater 'personal responsibility' before the state will meet its human rights obligations.⁴⁹ And John Hirst observes that today '[t]here is a widespread belief in Australian society ... that the disadvantaged and minorities have been given far too much attention' and that the successes of One Nation and the Liberal/National Party Coalition were and are rooted in their common appeal to 'the mainstream and battlers whose life is not easy but who have been neglected while career women, gays, ethnics and Aborigines have been claiming successfully to have their rights respected'.⁵⁰

The result has been divisive on the question of who has, who should have, and who should not have, human rights. There has been a marking out of 'Us and Them' camps which, as Marian Sawer argues ruefully 'pits ordinary Australians against this self-serving elite [of rights advocates] with its moralising political attitudes and doubtful allegiance to Australia's national interest'.⁵¹ The gerrymandering of these two constituencies that has permitted the erstwhile elites of the establishment: namely, the bastions of industry, finance, politics and the law — to be redeployed in the 'us' camp of 'ordinary' Australians, is as masterful ('a stunning public relations success' as one critic puts it)⁵² as it is fraudulent.

The demonisation of human rights and of those who claim them directly impacts upon our levels of tolerance as a community. So, for example, in the current global wave of anti-terror legislation, the democracy/human rights partnership has been broken in the name of national security, typically invoked to protect our free and democratic way of life, but with the resultant consequence that certain human rights will have to be curtailed. Human rights are here no longer seen as inextricably associated with democracy, but rather as dispensable, optional extras to the democratic vehicle. Human rights are not, of course, absolute; nor are they perfect complements to each other. Invariably, utilitarian allowances have to be made for the limiting of certain rights⁵³ in times of public emergency, or in the interests of national security or public health.

49 See Prime Minister John Howard, 'A Sense of Balance: The Australian Achievement in 2006' (Speech delivered at the National Press Club, Great Hall Parliament House Canberra, 25 January 2006) <<http://www.pm.gov.au/media/Speech/2006/speech1754.cfm>> accessed 28 September 2007.

50 John Hirst, 'From British Rights to Human Rights' (2004) 48 *Quadrant* 14.

51 Marian Sawer, 'Human Rights and the Australian Way of Life' (Speech delivered at the Equal Opportunity Commission, Victoria, 22 September 2004) at 9 <<http://www.equalopportunitycommission.vic.gov.au/pdf/Human%20Rights%20and%20the%20Australian%20Way%20of%20Life%20-%20Marian%20Sawer.pdf>> accessed 15 June 2007. See also Chris Sidoti, 'Beyond the Elites' (Speech delivered at the Human Rights and Global Challenges Conference, Monash University, 11 December 2001) <<http://www.law.monash.edu.au/castancentre/conference2001/papers/sidoti.html>> accessed 15 June 2007.

52 Spencer Zifcak, The Australia Institute: La Trobe University, *The New Anti-Internationalism: Australia and the United Nations Human Rights Treaty System: Discussion Paper No. 54* (2003) at 60 <http://www.tai.org.au/documents/dp_fulltext/DP54.pdf> accessed 15 June 2007.

53 See *International Covenant on Civil and Political Rights*, open for signature 16 December 1966, 999 UNTS 3, art 4 (entered into force 3 January 1976). 160 state parties as at 20 July 2007 <<http://www.ohchr.org/english/countries/ratification/4.htm>> accessed 26 September 2007.

Such limitations, however, are themselves hemmed in both by procedure (they must be legally validated) and principle (they must be truly exceptional, proportionate and necessary in a democratic society). In these circumstances, it clearly is possible for reasonable people to disagree about where the lines should be drawn. But, in a climate where concerted attempts have been made to instil a heightened sense of unease and even fear of the immanency of terrorism in the community, at the same time as there has been a largely successful devaluation of the human rights currency in political discourse, the scope for exploiting that margin of reasonable disagreement is much greater.⁵⁴

It is revealing in this context to reflect upon the unapologetic brazenness with which the American and Australian governments in particular have reacted to the manifest human rights abuses of the 380 detainees still being held in Guantánamo Bay.⁵⁵ This is despite conditions described recently by one of the American defence counsel appointed to represent a number of Kuwaitis being held there as being ‘a descent into hell into a universe where the principles on which America is based are flouted. I could never have imagined that my country would practice torture, humiliate and annihilate other men’.⁵⁶ Another attorney added ‘Kafka could not imagine anything worse’.⁵⁷ Major Michael Mori, the US Marine defence counsel who represented the Australian David Hicks, also made some telling comments regarding the serious due process concerns he had over the treatment of his client. When asked in August 2006 for instance whether he worried about being labelled a radical, he responded that on the contrary he saw himself as ‘being very close to the middle’, stressing that ‘saying, ‘give someone a fair trial’, is [not] some novel ... or radical idea.’⁵⁸ Such is the depth and longevity of this ‘legal black hole’ (as Lord Steyn dubbed it)⁵⁹ that it makes you ponder anew the old story of the Frenchman who, upon being shown the Statute of Liberty for the first time, remarked that ‘he was interested to find that in America as in Europe, monuments were raised to the illustrious dead’.⁶⁰

54 See Attorney-General Philip Ruddock’s justification of anti-terrorism laws on grounds of the necessity of protecting *certain* human rights (life, freedom from fear, etc) which, though arguable, is only half the story, as he makes no serious attempt to engage with the counter-claims of other human rights being unnecessarily abused by the new laws: ABC Radio, ‘Ruddock denies anti-terrorism law breaches human rights’, *The World Today*, 4 November 2005 <<http://www.abc.net.au/worldtoday/content/2005/s1497863.htm>> accessed 15 June 2007; ABC Radio, ‘Human rights expert questions anti-terrorism laws’, *Radio National*, 13 November 2006 <<http://www.abc.net.au/pm/content/2006/s1787584.htm>> accessed 15 June 2007.

55 US Department of Defense, ‘Detainee Transfer Announced (Australia)’ (Press Release, 19 May 2007) <<http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10898>> accessed 15 June 2007 (recording the transfer of David Hicks to Australia and noting that ‘approximately 380 detainees remain at Guantanamo’).

56 Tom Wilner quoted in Annick Cojean, ‘Lawyer in the Hell of Guantanamo’ *Le Monde* (14 November 2006).

57 David Remes quoted id.

58 ABC Television, ‘Major Michael Mori’, *Enough Rope with Andrew Denton*, 14 August 2006 <<http://www.abc.net.au/tv/enoughrope/transcripts/s1709428.htm>> accessed 15 June 2007.

59 Johan Steyn, ‘Guantánamo Bay: The Legal Black Hole’ (Speech delivered at the 27th FA Mann Lecture, Lincoln’s Inn Old Hall, 25 November 2003) <<http://www.nimj.com/documents/Guantanamo.PDF>> accessed 15 June 2007.

The invocation of human rights rhetoric can also be used counter-factually, such as when President Bush and Prime Ministers Blair and Howard all couched their war on terrorism as one that precisely upholds democratic freedoms and liberty under the rule of law,⁶¹ while at the same time they (or members of their governments) argued matter-of-factly that given such dire circumstances we must all accept a diminution of human rights protection.⁶² The consequences of such open-ended reasoning for the rule of law are not to be underestimated as the reprehensible litany of injustices, prejudices and incompetence borne of anti-terrorist legislation in the UK in the 1970s and 1980s graphically illustrates. Though no excuse of course, those incursions on fair trial, privacy, liberty and equality before the law occurred in circumstances where there were actual terrorist atrocities taking place in Belfast, Birmingham and Knightsbridge. We in Australia have not reached such levels of terrorist activity on our shores, but yet we have the draconian laws, such that people have more to fear from “being innocently caught up in the new security laws than ... being harmed by a terrorist bomb”.⁶³

Neville Wran, in his 2006 Lionel Murphy Memorial Lecture, is correct in urging us in Australia today not to take incursions on these very same rights in recent Commonwealth, State and Territory legislation lying down. Wran was quite properly outraged over the particular reach of these laws that go so far as to ban Islamist texts from University libraries — which have been publicly available since 1984 and are still today easily downloadable from the Web! But we can see much else in our anti-terrorism laws (including extraordinary Australian Security Intelligence Organisation and police detention powers,⁶⁴ broadening of crimes by association; overextension of sedition offences; and severe gagging provisions)⁶⁵ that lead us to agree with Wran when he concludes that our present Government, and the Attorney-General in particular, are treating our ‘fundamental rights with scant respect.’⁶⁶

The British Government has similarly extended its Executive’s anti-terrorist reach post 9/11 and has been duly engaged in a jurisprudential arm-wrestle with senior members of the judiciary (both inside and outside the courts) over the human rights compatibility of such new powers.⁶⁷ But it is in the US that we have what are the most grotesque examples of rights and liberties breached in the name of counter-terrorism, with the recent passage of the new *Military Commissions Act* 2006 (US) which has the singular distinction of relegating to mere second page news the outright denial of the most ancient of writs — *habeas corpus* — to all those subject to the Commission’s jurisdiction.⁶⁸ The front page headlines have, of course, been captured by the legislation’s framework for endorsing the use of

60 Edith Somerville, *The States Through Irish Eyes* (1931) at 9.

61 Prime Minister John Howard, *Address to the Quadrant Magazine 50th Anniversary Dinner* (Speech delivered at the Quadrant Magazine 50th Anniversary Dinner, Four Seasons Hotel, Sydney, 4 October 2006) <<http://www.pm.gov.au/media/Speech/2006/speech2165.cfm>> accessed 28 September 2007; President George W Bush, ‘State of Union Address By the President’ (Speech delivered at The White House, Washington DC, 31 January 2006) <<http://www.whitehouse.gov/stateoftheunion/2006/>> accessed 15 June 2007; Prime Minister Tony Blair, (Speech delivered at Georgetown University, United States, 26 May 2006) <<http://www.number10.gov.uk/output/Page9549.asp>> accessed 15 June 2007.

inhumane, degrading and even torture techniques *directly* by US authorities (that is, the Central Intelligence Agency), as well as manifestly, no-holds-barred torture techniques *indirectly* through extraordinary renditions of detainees into the hands of third-party states whose interrogators have no qualms about using such methods.⁶⁹ From the revelation of the infamous Torture Memorandum in 2004, through to the eventual passage of the Military Commissions legislation, the Bush Administration has had few qualms about endorsing a multitude of inhuman and degrading interrogation techniques⁷⁰ — which are short of the Government’s definition of impermissible torture: namely, a level of ministrations ‘equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death.’⁷¹ And yet, these include (at the milder end of the spectrum) long-term standing and exposure to cold, water boarding, and sensory and sleep deprivation⁷² — which techniques, and their authorised use, are now the subject of a recent second universal jurisdiction claim before German courts.⁷³

Our own Attorney-General also appears to be untroubled, at least in respect of sleep deprivation, which he expressly rejects as amounting to torture.⁷⁴ Mr Philip Ruddock it seems, does not know his United Nations (‘UN’) Committee against Torture texts or his European Court of Human Rights jurisprudence,⁷⁵ and nor does he appear to be on top of Amnesty International reading — all of which contradict this contention.⁷⁶

62 For example, the United Kingdom’s Home Secretary, John Reid has said that ‘sometimes we may have to modify some of our own freedoms in the short term in order to prevent their misuse by those who oppose our fundamental values and would destroy all of our freedoms’: see Matthew Tempest, ‘“Britain Facing Most Sustained Threat since WWII”, says Reid’ *Guardian* (6 August 2006). For similar justifications by President George W Bush and former Attorney-General John Ashcroft in respect of the introduction of the *Patriot Act* in the United States see James Bovard, *Terrorism and Tyranny* (2003) at 63–80. In Australia, according to an AC Nielsen Poll conducted in August 2005 ‘two-thirds of Australians ... are willing to sacrifice privacy and civil liberties for protection from [terrorist attacks]’: see Mike Seccombe & Louise Dodson, ‘Safety Before Liberty, Say Most Voters’ *Sydney Morning Herald* (3 August 2005). Gerard Henderson has interpreted the electorate’s ‘silence’ over the Howard Government’s raft of anti-terrorism legislation as their tacit endorsement of the measures: see Gerard Henderson, ‘The Electorate’s Silence is Telling’ *Sydney Morning Herald* (13 September 2005). For a review of some of the legal issues involved, see Michael Kirby, ‘National Security: Proportionality, Restraint and Commonsense’ (Speech delivered at the National Security Law Conference, Australian Law Reform Commission, Sydney, 12 March 2005) <<http://www.alrc.gov.au/events/events/securitysymposium/Kirby.pdf>> accessed 15 June 2007. See also the work of The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights (an Initiative of the International Commission of Jurists) which has examined those of Australia’s laws, policies and practices which are justified expressly or implicitly as necessary to counter terrorism in order to assess whether those measures are compatible with international human rights law <http://ejp.icj.org/hearing2.php3?id_article=136&lang=en> accessed 26 September 2007.

63 Clive Walker ‘Fear of the Creeping Powers of the State’ *Sydney Morning Herald* (Spectrum, 7–9 Sept 2007) at 24–5. The constitutionality of certain aspects of these laws has been challenged before the High Court in *Thomas v Mowbray* (2007) 81 ALJR 1414. See also *Thomas v Mowbray* [2007] HCATrans 78; *Thomas v Mowbray* [2007] HCATrans 76; *Thomas v Mowbray* [2006] HCATrans 661; *Thomas v Mowbray* [2006] HCATrans 660.

In Australia, the roots of the separating of human rights protections into ‘Us and Them’ camps stretches way back to colonisation and later to the White Australia immigration policy, but more recently they can be traced to our treatment of refugees. It was a Labor Government in 1992 (under the Immigration Minister Gerry Hand) that introduced a mandatory detention policy for all asylum seekers and other unauthorised arrivals. The maturation of the mandatory detention regime over the past 14 years has travelled from ‘designated persons’, through the evisceration of normal judicial review mechanisms, to the ‘Pacific Solution’ and the manifest perversity of the jurisdictional excising off the mainland in order to force the processing of unauthorised asylum seekers off-shore.⁷⁷

We appear to have reached a depressing point today where the general community is apparently content to accept Government arguments that the protection of rights, such as fair trial, personal liberty and equality before the law can — and indeed *must* — be denied to those who, though falling within our jurisdictional responsibility, are undeserving because of the manner of their arrival here.⁷⁸ No serious commentator denies that there has to be limitations to the flow of immigrants (whether asylum seekers or not) and that appropriate screening and detention mechanisms must be employed as circumstances demand. But, to adopt a determinedly offensive and mandatory off-shore detention regime is mendacious and cynical. In the view of David Marr and Marian Wilkinson, it has been advanced in recent years by way of ‘a new political correctness [in which] the xenophobia of Australians was to be shown democratic respect. To contest the

64 Since a 2004 amendment to the so-called ‘dead time’ provision under the *Crimes Act* 1914, the law now allows indefinite detention without trial for reasons of needing time to collate and analyse information collected outside Australia regarding the detainee – s 23CA(8)(m). This was the provision that permitted Dr Mohamed Haneef to be detained 12 days beyond the otherwise maximum (of 1 day) in July 2007 regarding the June 2007 bombing of Glasgow Airport; see Nick Bryant, ‘Australia Terror Laws under Scrutiny’ *BBC News* (19 July 2007) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/6905907.stm>>.

65 See the 2007 alterations to section 9A of the *Classification (Publications, Films and Computer Games) ACT* 1995, which provide an ill-defined power to ban any publication, film or computer game that advocates, urges, counsels or praises the doing of a terrorist act, directly or indirectly. See further, Ben Saul, ‘Silencing Good Sense’ *The Age* (20 August 2007).

66 Neville Wran QC, ‘Civil Liberties: An Endangered Species’ (Speech delivered at the 20th Lionel Murphy Memorial Lecture, Canberra, 21 October 2006) at 3 <<http://law.anu.edu.au/nissl/Wran.pdf>> accessed 15 June 2007.

67 On 16 December 2004, the House of Lords ruled that United Kingdom (‘UK’) anti-terror legislation – which permitted detention without trial of foreign nationals – was contrary to the European Convention on Human Rights: *A & Ors v Secretary of State for the Home Department* [2005] 2 AC 68. On 1 August 2006, the UK Court of Appeal affirmed that six control orders made by the Secretary of State under the *Prevention of Terrorism Act* 2005 (UK) were contrary to Article 5 of the European Convention on Human Rights as they amounted to a deprivation of liberty: *Secretary of State for the Home Department v JJ & Ors* [2006] 3 WLR 866. See also Lord Phillips CJ, ‘Terrorism & Human Rights’ (Speech delivered at the University of Hertfordshire, Hertfordshire, 19 October 2006) <http://www.judiciary.gov.uk/publications_media/speeches/2006/sp191006.htm> accessed 15 June 2007.

68 See Jeannie Shawl, ‘Bush Signs Military Commissions Act’ *Jurist* (17 Oct 2006) <<http://jurist.law.pitt.edu/paperchase/2006/10/bush-signs-military-commissions-act.php>> accessed 15 June 2007.

prevailing fear of boat people was simply unpatriotic It was race wrapped in a flag.⁷⁹

The nurturing of such sentiments within the community at large has been successfully exploited to such an extent that the Commonwealth is now able to introduce the pointless sophistry of an Australian values declaration for all immigrants.⁸⁰ What more, one might ask, could it possibly secure over and above that which is already secured by the combination of an individual's good will, social mores and legal obligations? Such an initiative taps into a socio-political vein of isolationist, capriciously discriminatory and anti-democratic thinking in which there seems to be greater concern to establish what cultural values and attitudes separate us from others, rather than focusing — as human rights seek to do — on what unites us across cultures. The fact that all sides of politics support such an infantile initiative⁸¹ represents the degree to which our rightly vaunted adherence to the democratic ideals of tolerance and a fair go has withered across the board.

Human rights — both civil and political 'liberty' rights, and economic and social 'capacity' rights — are not only compatible with democracy, they are essential to its functioning and survival. For David Beetham in his treatise on democracy and human rights, this is so for two reasons. First, the protection of *liberty* rights is a *sine qua non* because 'democracies have necessarily to be self-limiting or self-limited if they are not to be self-contradictory, by undermining the rights through which popular control of government is secured;' and secondly, the guarantee of *capacity* rights is demanded by '[t]he philosophical justification for ... human rights [which] ... is based on an identification of the needs and capacities common to all humans, whatever the differences between them.'⁸² Of course, there are intricacies and nuances in the interrelationship which permits disagreement and provides for distinctions to be made, but such editorial matters

69 See David Weissbrodt & Amy Bergquist, 'Extraordinary Rendition and the Humanitarian Law of War and Occupation' (2007) 47 *Virginia Journal of International Law* 295 at 336.

70 In the words of a recent Amnesty International report: 'The memorandum stated among other things that interrogators could cause a great deal of pain before crossing the threshold to torture, that there were a "significant range of acts" that might constitute cruel, inhuman or degrading treatment but would not rise to the level of torture and be prosecutable under the US torture statute, and that the President could override international or national prohibitions on torture': Amnesty International, *United States of America: Military Commissions Act of 2006 – Turning Bad Policy into Bad Law* (2006) at 5 <[http://web.amnesty.org/library/pdf/AMR511542006ENGLISH\\$File/AMR5115406.pdf](http://web.amnesty.org/library/pdf/AMR511542006ENGLISH$File/AMR5115406.pdf)> accessed 15 June 2007. That memorandum, in the words of the then White House Counsel Alberto Gonzales, 'represented the position of the executive branch at the time it was issued': response to oral and written questions put to Gonzales during the US Attorney-General nomination hearings before the Senate Judiciary Committee, January 2005. That memorandum was made public on 13 June 2004 by The Washington Post: see Dana Priest, 'Justice Dept Memo Says Torture "May Be Justified"' *The Washington Post* (13 June 2004) <<http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html>> accessed 15 June 2007.

71 Office of Legal Counsel, US Department of Justice, 'Re: Standards of Conduct for Interrogation under 18 USC §§ 2340-2340A' (Memorandum for Alberto R. Gonzales, Counsel to the President, 1 August 2002 at 1) <<http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>> accessed 15 June 2007.

72 See Brian Ross & Richard Esposito, 'CIA's Harsh Interrogation Techniques Described' *ABC News* (18 November 2005) <<http://abcnews.go.com/WNT/Investigation/story?id=1322866>> accessed 15 June 2007.

are quite different from efforts to marginalise human rights within the apparatus of democratic governance. One cannot have it both ways. Either democracies recognise human rights as integral parts to the whole (that is, their transcendental fundamentalist role), or they slough them off their body politic as dispensable additions and dismiss the notion of any such essentialism.

4. *Reactionary Fundamentalism*

Current travails aside, the historical success of human rights as a standard-bearing, mobilising force has nevertheless been remarkable. Since the reorienting of the geopolitical and ideological world order after the Second World War, and the somewhat guardedly hopeful recitations of the importance of human rights in Article 1(3) of the UN Charter and the UDHR, the prominence of the part played by human rights within the realms of domestic and international law and politics has grown exponentially. Indeed, as Conor Gearty puts it, so ‘epistemologically confident [and] ethically assured’ has the phrase ‘human rights’ become, that it now carries with it nothing less than a promise ‘to cut through the noise of assertion and counter-assertion, of cultural practices and relativist perspectives, and thereby to deliver truth’.⁸³ Given such a state of affairs, it comes as no surprise that human rights are invoked everyday in support of all manner of goals, practices, arguments and stances. But does the high rhetoric bear out in practice? Can it, or even should it?

This is the point at which I want to bring to bear consideration of the effects of reactionary fundamentalism. That is, I want to investigate what happens when human rights fundamentalism falls victim to its own success by going too far; when the human rights hype is believed too readily, completely and uncritically. When, in short, the fundamentalism in question becomes more reactionary than transcendental.

The above-established linkages between democracy and human rights serve as a good entry point to this endeavour. As stated, human rights can, and do, play a fundamental role in the prosecution of democratic governance. But it is only *a* role. Human rights are not synonymous with democracy. In addition to the broad representation of the selfish designs of citizens individually, their more collectivist concerns of social equity, distributive justice and communal security are also key features of good democratic governance. Or at least, they should be. The human

73 See *Critical Complaint Against United States Secretary of Defense Donald Rumsfeld, Former Director of Central Intelligence of the United States George Tenet, Former US Deputy Assistant Attorney General John Yoo and Assistant Attorney General for the Office of Legal Counsel (“OLC”) in the United States Department of Justice Jay S Bybee, Lieutenant General Ricardo Sanchez, and Other Members of the Government and Military of the United States for War Crimes and Torture Perpetrated Against Iraqi Detainees at Abu Ghraib, Iraq (2003/2004), and in Guantanamo Bay Naval Station* <<http://www.ccr-ny.org/v2/GermanCase2006/Docs/Table%20of%20Contents%20for%20German%20Complaint.pdf>> accessed 15 June 2007. For discussion, see also Scott Lyons, ‘German Criminal Complaint Against Donald Rumsfeld and Others’ *ASIL Insight* (14 December 2006) <<http://www.ccr-ny.org/v2/GermanCase2006/Docs/Table%20of%20Contents%20for%20German%20Complaint.pdf>> accessed 15 June 2007.

74 Comments of Mr Philip Ruddock on 1 October 2006, quoted in Wran, above n66 at 5.

rights concerns of personal liberty and respect for difference and individual integrity and dignity are not separate from these other goals, but their relationship to them is adjectival rather than directly and comprehensively prescriptive. That is to say, the upholding of basic rights can be used as one way to pursue these collective ends, but they cannot be seen as the only way, or — which amounts to the same thing — the only way that matters.

David Kennedy's immanent critique of human rights warns against myopia or zealotry that forgets, ignores, or excludes other modes through which emancipation, peace and justice can be sought. This especially includes social welfare and redistributive economics, in respect of which he sees the West's marked preference for civil and political rights as entrenching the status quo rather than advancing the cause of the disadvantaged. Thus, he writes that 'existing distributions of wealth, status and power can seem more legitimate after rights have been legislated, formal participation in government achieved, and institutional remedies for violations provided'.⁸⁴

Feminist writers such as Hilary Charlesworth and Christine Chinkin⁸⁵ have extended this exclusionary theme through their critiques of the international human rights law's neglect of women's circumstance; that being one that encounters abuses in the private 'individual-to-individual' sphere where the writ of international law tends not to run because of its focus on public 'state-to-individual' rights. And although Karen Engle detects that some progress has been made as 'women's rights have become a part of the mainstream human rights and

75 See *Report of the Committee Against Torture*, UN GAOR, 53rd sess, Supp. No. 44, at 24 (Concluding Observations on the Report of Israel), UN Doc A/53/44 (1998). See also UN Human Rights Committee, *Report of the Special Rapporteur, Mr P Kooijmans: 'Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment'*, 42nd sess, at 29, UN Doc E/CN.4/1986/15 (1986), where the 'prolonged denial of rest [or] sleep' is listed as a 'method of physical torture'. In respect of the now sizeable body of jurisprudence on Article 3 of the *European Convention of Human Rights*, such an interrogation technique would be considered 'inhuman and degrading treatment' (though not 'torture') according to the reasoning of the seminal case of *Ireland v United Kingdom* (1978) 2 Eur Court HR (ser A) 25. However, more recently, the European Court of Human Rights has indicated a lowering of its threshold of tolerance for those 'not torture' arguments, observing in *Selmouni v France* (1999) VII Eur Court HR 411 at [101] that 'the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in [the] future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies'.

76 See Amnesty International, *Torture and Ill-Treatment: The Arguments* <<http://web.amnesty.org/pages/stoptorture-arguments-eng#question3>> accessed 15 June 2007; Amnesty International, *Is Sleep Deprivation a Form of Torture?* <http://www.amnesty.org.au/home/spotlights/is_sleep_deprivation_a_form_of_torture> accessed 15 June 2007.

77 Mary Crock, 'The Refugees Convention at 50: Mid-life Crisis or Terminal Inadequacy? An Australian Perspective' in Susan Kneebone (ed), *The Refugees Convention 50 Years On: Globalisation and International Law* (2003) at 47–89.

78 See Jane McAdam, 'Asylum Seekers: Australia and Europe – Worlds Apart' (2003) 28 *Alternative Law Journal* 193.

79 David Marr & Marian Wilkinson, *Dark Victory* (2003) at 176.

humanitarian law agenda',⁸⁶ there remain sizeable difficulties as identified by third world feminist critiques in trying to reconcile the necessary addition of economic and cultural factors to that of gender with the overall objectives of human rights protection and promotion.⁸⁷

Ignatieff stresses the importance — indeed necessity — of recognising the contestability of human rights such that it is more accurate to view them as the stuff of politics (albeit especially virtuous and powerful stuff) rather than as 'eternal verities'⁸⁸ or paragons that sit above and beyond politics. They can be used as instruments of dispute settlement, by creating a common framework and a set of reference points for those in conflict, but equally there is an imperialistic tendency towards 'nonnegotiable confrontation'⁸⁹ whenever 'political demands are turned into rights claims'.⁹⁰

The propensity for human rights to be over legalised has also been raised as a cause of concern. Such over legalisation has been the result of a combination of the preponderance of lawyers that colonise the ranks of relevant government departments, international human rights bodies, and activist organisations, as well as the apparatuses of enforcement (including and especially by the courts).⁹¹ And it is fuelled by the increasing tendency to see law as the only effective means to stiffen the resolve of, and respect for, human rights both domestically and internationally. Many rights sceptics from across the common law world such as Jim Allen, Tom Campbell, Marie-Benedicte Dembour, Keith Ewing, Mark Tushnet, and Jeremy Waldron are especially concerned about the constitutionalisation of human rights on account of the consequent enhancement

80 See the Australian Government's Discussion Paper, released September 2006: Australian Government, *Australian Citizenship: Much More than a Ceremony – Discussion Paper: Consideration of the Merits of Introducing a Formal Citizenship Test* (2006) <<http://www.minister.immi.gov.au/media/responses/citizenship-test/index.htm>> accessed 26 September 2007. For Prime Minister Howard's discussion of the matter see 2GB Radio, 'Interview with Alan Jones', *Radio 2GB Sydney*, 12 September 2006 <<http://www.pm.gov.au/media/Interview/2006/Interview2140.cfm>> accessed 15 June 2007; ABC Radio, 'Interview with Geoff Hutchinson', *ABC Radio Perth*, 13 September 2006 <<http://www.pm.gov.au/media/Interview/2006/Interview2140.cfm>> accessed 15 June 2007; ABC Radio, 'Interview with Jon Faine', *ABC Radio Melbourne*, 14 September 2006 <<http://www.pm.gov.au/media/Interview/2006/Interview2140.cfm>> accessed 15 June 2007; Radio 3AW, 'Interview with Neil Mitchell', *Radio 3AW Melbourne*, 15 September 2006 <<http://www.pm.gov.au/media/Interview/2006/Interview2140.cfm>> accessed 15 June 2007; Radio 2GB, 'Interview with Ray Hadley', *Radio 2GB Sydney*, 18 September 2006 <<http://www.pm.gov.au/media/Interview/2006/Interview2140.cfm>> accessed 15 June 2007. See also Andrew Robb, Former Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, 'Australia to Introduce Citizenship Test' (Press Release, 11 December 2006) <http://www.minister.immi.gov.au/assistant_minister/media/media-releases/2006/111206.htm> accessed 28 September 2007.

81 See, for example 'Emma Supports Aussie Values Declaration' *Sydney Morning Herald* (13 September 2006); Cath Hart & Dennis Shanahan, 'Rudd Alters Migrant Pitch to Outflank PM' *The Australian* (14 December 2006).

82 Beetham, above n37 at 93.

83 Conor Gearty, *Can Human Rights Survive?* (2006) at 19.

84 David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004) at 11.

85 Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000).

of judicial impact and authority at the expense of powers of the Executive and Legislature; the manifest preference given to individual liberty rights (ie civil and political rights) over equity/capacity rights (economic and social rights); and the resultant entrenchment of existing social and political inequities between groups and classes, rather than their dismantlement. Among these sceptics, Jeremy Waldron's seminal philosophical work in the area is notable for its focus first on the logical disjuncture between the too ready assumption that if you support rights then you must support legally entrenched rights, and second, on the inherent political and philosophical problems of the latter:

To embody a right in an entrenched constitutional document is to adopt a certain attitude towards one's fellow citizens. That attitude is best summed up as a combination of self-assurance and mistrust: self-assurance in the proponent's conviction that what she is putting forward really *is* a matter of fundamental right and that she has captured it adequately in the particular formulation she is propounding; and mistrust, implicit in her view that any alternative conception that might be concocted by elected legislators next year or the year after is so likely to be wrong-headed or ill-motivated that *her own* formulation is to be elevated immediately beyond the reach of ordinary legislative revision.⁹²

Not only, he continues, does such presumptive mistrust sit awkwardly with the notion of mutual respect within human rights, it grotesquely skews power away from, and undermines the electoral mandate of, the present elected representatives. And it is not enough to counter with such concerns by saying that this arrangement will prevent or 'intimidate'⁹³ governments from doing things that harm us, for it is equally the case that it might prevent governments from doing things that help us.

African and Asian voices have also warned against the complacency of the human rights status quo. Makau Mutua, in an influential essay on the theory of human rights published in 1996,⁹⁴ protests against human rights' concentration on individualism as *blunting diversity and community*, especially (as he sees it), from his experiences inside and outside Africa.⁹⁵ And both Mutua and Yasuaki⁹⁶ share concerns that whilst one ought to accept that human rights are indeed universal, the version of universal human rights that has been promoted in modern times is more

86 Doris Buss & Ambreena Maji (eds), *International Law: Modern Feminist Approaches* (2005) at 49.

87 *Id* at 59–66.

88 Michael Ignatieff, 'Human Rights as Politics and Idolatry' in Amy Gutmann (ed), *Human Rights as Politics and Idolatry* (2001) at 20.

89 *Ibid*.

90 *Ibid*.

91 Philip Alston, 'Economic and Social Rights' in Louis Henkin & John Lawrence Hargrove (eds), *Human Rights: An Agenda for the Next Century* (1994) at 152–3.

92 Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18 at 27.

93 To use Philip Allotts's term: see Philip Allotts, *Eunomia: New Order for a New World* (1990) at 287.

94 Makau Mutua, 'The Ideology of Human Rights' (1996) 36 *Virginia Journal of International Law* 589.

95 *Id* at 592–3.

96 See Yasuaki, above n8 at 120.

peculiarly western in definition and application than truly global. They point to the widely held impression in the developing world that the human rights standards endorsed at the international level serve best the interests of the states and peoples of the West, more than the peoples of non-western (and especially non-western *developing*) states.

In fact, for anyone who cares to reflect at all seriously on the philosophical nature of human rights, and still more on their legal form, such a pluralist approach has to be seen as endemic rather than radical. As noted earlier, human rights are framed imprecisely, they sometimes conflict, and they have *within* them — that is, built into their DNA — essential conditions and various degrees of manoeuvrability in their implementation. Human rights theory and practice is as much about the legitimisation of limitations to rights as it is about the proclamation of the rights themselves. Human rights law is especially open in this regard, such that it is no exaggeration to say that the vast bulk of human rights jurisprudence, both national and international, revolves around the meaning of the exceptions to the rule, rather than on a statement of the rule itself. The legally permissible limitations and derogations to many human rights constitute a sort of ‘weak cultural relativism’, as Jack Donnelly puts it.⁹⁷ There will always be disagreement over what these let-outs mean in practice, as well as over whom, and by what process they are defined and invoked. But, no-one can seriously deny that they are necessary, not only to maintain the jurisprudential integrity of the whole body of human rights law through such devices as what the European Court of Human Rights call the doctrine of ‘margin of appreciation’,⁹⁸ but also as a matter of political viability of the universalised human rights project. The Nobel Laureate economist Amartya Sen’s recent interventions on human rights theory bears out these very points when he says that:

A theory of human rights can, therefore, allow considerable internal variations, without losing the commonality of the agreed principle of attaching substantial importance to human rights (and to corresponding freedoms and obligations) and of being committed to considering seriously how that importance should be appropriately reflected.⁹⁹

In terms of my thesis, the significance of stressing this particular point lies in the alarm it sounds against any fundamentalist temptation to argue that there is a precise and predictable human rights answer to any or many legal, social, political, or economic problems. Human rights may indeed provide persuasive reasons and reference points for the discussion and determination of such answers, but they do

97 Jack Donnelly, ‘Cultural Relativism and Universal Human Rights’ (1984) 6 *Human Rights Quarterly* 400 at 401.

98 Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2007) at 222–6.

99 Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy & Public Affairs* 315 at 323. He has pursued this line of reasoning further, by arguing against too legalistic a conception of human rights lest their more nuanced, social and political implications be lost; see below at n129.

so, as Jürgen Habermas says, in the context of facilitating dialogue rather than closing it down.¹⁰⁰

One may feel as certain as can be that no interpretation of human rights can ever accommodate (i) the monstrosly genocidal acts of Hitler, Stalin, Mao, Pol Pot, Idi Amin and the leaders of both sides in the Rwanda catastrophe; or (ii) the unbridled cruelty of pre-meditated, state-sanctioned torture; or (iii) the deliberate and conscious mass destruction of our global environment when there are viable options to do otherwise; or (iv) perhaps above all, our persistent, collective inability to address the plight of the estimated 1 billion people (1/5th of the world's population) who try to survive on less than \$1 a day, which, as the UN Development Programme states, is 'a level of poverty so abject that it threatens survival.'¹⁰¹

But what of other, less starkly offensive, more debatable human rights issues? For instance, the pervasive question of whether economic and social rights or goals ought to be given preference to civil and political rights? The undoubted economic and social benefits that have accrued from the tigerish economies of Vietnam and China are almost universally welcomed outside and (more importantly) inside both those countries, even if the benefits are unevenly spread. Are they sufficient, however, to offset the equally patent injustices meted out to civil society organisations and democracy parties and their members and followers in both countries? Naturally, the governments of both assert that they are, or that concerns are exaggerated.¹⁰² Many may disagree (at least in part), but whichever, can any of us be so utterly convinced that the economic advances in both states, and the rights enhancing consequences that have flowed therefrom, could have been achieved had the two Communist Parties relinquished their strangleholds on the organs of government and civil society in the early 1990s in much the same manner as did the Communist Party in the former USSR?

There can be no doubt that Beijing and Hanoi were intently watching Moscow at that time, drawing their own lessons and conclusions accordingly. Some may bridle at the bland justifications that China gives, in its annual White Papers on Human Rights, for its continuing preference for the economy and community rights first; civil and political rights later (though, it has to be said that today's blandness is infinitely less jarring than the brutal messages contained in the White Papers of the early 1990s).¹⁰³ But, at the very least, it points to the viability of the

100 See Thomas Diez & Jill Steans, 'A Useful Dialogue? Habermas and International Relations' (2005) 31 *Review of International Studies* 127 at 133, noting in particular the perceived intimacy of the relationship between Habermas's theory of communicative action and the promotion of human rights ideals and standards.

101 United Nations Development Programme, *Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (2005) at Chapter 1.

102 For Vietnam, see Ministry of Foreign Affairs of Vietnam, *Achievements in Protecting and Promoting Human Rights in Vietnam* (2005) at 4 <<https://www.mofa.gov.vn/nr040807104143/nr040807105001/ns050818155432>> accessed 27 September 2007. For China, see Information Office, State Council of the People's Republic of China, *China's Progress in Human Rights in 2004 (2005)* (2005) <http://english.gov.cn/official/2005-07/28/content_18115.htm> accessed 27 September 2007.

argument that in certain circumstances and at certain times, a two-speed approach to human rights *implementation* may not only be possible, but necessary. I stress here ‘implementation’ because I believe that such latitude cannot be allowed to go so far as to fracture the skeleton of principle that (in the words of the UN’s Vienna Declaration) ‘all human rights are universal, indivisible and interdependent and interrelated’.¹⁰⁴ But up to that point at least, there is room for debate and legitimate disagreement.¹⁰⁵

Similar lineball arguments can and are being raised in respect of a multitude of other interpretations and applications of human rights which must be accepted as mitigating against any absolutist claims made by reactionary fundamentalist advocates. For example:

- Whether, how and to what extent should states be agreeing to have corporations held liable (under international as well as national laws) for human rights abuses perpetrated by them, or by the states or agencies with which they have an intimate commercial relationship (a joint venture, for instance)?¹⁰⁶
- When rich western countries impose human rights conditions on the poor countries that they are providing aid to (either through bi-lateral agreements or multilateral regimes such as the World Bank, the Asian Development Bank, or even the World Trade Organisation),¹⁰⁷ is this imperialism by ideological stealth? Or is it the expression of legitimate concerns for the rights of the poor pursued by appropriately semi-coercive means?¹⁰⁸

And, of especial topical prominence:

103 And capitalists as well as communists have run this line. In the words of Isaiah Berlin, ‘[i]t is true that to offer political rights, or safeguards against intervention by the State to men who are half-naked, illiterate, underfed, and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, any increase in their freedom’: see Isaiah Berlin, ‘Two Concepts of Liberty’ in *Four Essays on Liberty* (1969).

104 *Vienna Declaration and Programme of Action*, above n41 at para 5.

105 For a sophisticated jurisprudential account of the scope and limitations of such an approach, see Teraya Koji, ‘Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights’ 12 (2001) *European Journal of International Law* 917.

106 See David Kinley & Junko Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 *Virginia Journal of International Law* 931 at 970, 980–981. See also International Commission of Jurists, *ICJ Expert Legal Panel on Corporate Complicity in International Crimes* (2006) <http://www.icj.org/news.php3?id_article=3961&lang=en> accessed 15 June 2007.

107 Through World Trade Organisation-enabled, so-called General System of Preferences regimes: see Lorand Bartels, ‘The Appellate Body Report in European Communities: Conditions For the Granting of Tariff Preferences to Developing Countries and its Implications for Conditionality in GSP Programmes’ in Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi (eds), *Human Rights and International Trade* (2005) at 463–87.

108 See Mac Darrow & Amparo Tomas, ‘Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation’ (2005) 27 *Human Rights Quarterly* 471.

- How and when can militarily powerful states appeal to reasons of preventing humanitarian outrages and promoting human rights when using military force to breach another country's sovereign borders?

In recent times, we have had a number of conflicting examples that do little to establish any definitive basis for when such humanitarian intervention is justified and when it is not. Thus, for example, the bulk of international opinion appears to be saying 'probably yes' to NATO's intervention in Kosovo in 1999; 'probably no' to the US-lead invasion of Iraq in 2003; 'should have' in respect of Rwanda in 1994; and 'should do more' in respect of the current situation in Darfur!¹⁰⁹

Indeed, the conviction that respect for human rights operates as a legitimating necessity for states constitutes the central tenet of so-called 'cosmopolitan' thought in both international relations and international law. Thus, respect, protection and promotion of certain human rights (essentially civil and political rights) are seen as pre-requisites to states both joining and remaining members of the 'sovereignty club'¹¹⁰ (that is, a club whose bestowal of the undoubted powers and privileges of state sovereignty is conditional on the fulfilment of certain expectations and responsibilities). One such act of 'responsible sovereignty'¹¹¹ is the state's upholding of human rights within its own boundaries, which for many cosmopolitans means by way of democratic government. Egregious breaches of human rights by, or through, state authorities will thereby provide grounds for legitimising intervention to stem the abuse by political, economic or even military means, or even provide grounds for expulsion from international forums.¹¹² But this facially attractive approach still leaves unanswered the vital questions of: Which human rights? Which permissible limitations? How democratic is democratic enough? And who is the final arbiter on all these points?

The point of this exposé of the indeterminacy of human rights, and especially human rights law, is not at all to undermine the concept, but rather the opposite. It is to warn against the damage that may be done to the notion of human rights if, by way of reactionary fundamentalist thinking, the rights are elevated to the level of religious scripture and as a result stand plainly in opposition to their application in practice. The legal, philosophical and political foundations of the human rights promoting sides to each of the debatable issues just discussed can veer towards an essentially reactionary standpoint. There is the ever present temptation to justify

109 See generally Nsongurua Udombana, 'When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan' (2005) 27 *Human Rights Quarterly* 1149.

110 See Patrick Hayden, *Cosmopolitan Global Politics (Ethics and Global Politics)* (2005) at 67.

111 A notion developed by Richard Falk: see Richard Falk, 'Sovereignty and Human Dignity: The Search for Reconciliation' in Francis Deng & Terrence Lyons (eds), *Africa Reckoning: A Quest for Good Governance* (1998) at 14.

112 By way, for example, of military humanitarian intervention: see Udombana above n109 and accompanying text; or such as the World Bank's withdrawal of support to Myanmar and the International Labour Office's repeated concerns over whether or not to exclude Myanmar from its organisation: see International Labour Office, *Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29): Discussion Paper* (2005) <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb294/pdf/gb-6-2.pdf>> accessed 15 June 2007.

any proselytising designs by relying on the apparent unimpeachability of human rights, which like any claims of ‘a cause that is above justifying itself’, invites an inevitable and debilitating backlash.¹¹³ Principled, highly persuasive and essentially ‘good’ as we might all think human rights to be, they cannot — must not — be put beyond any question, query or examination, even if such exposure is uncomfortable and challenging. To do otherwise, by seeking to protect the concept of human rights as if it were a fragile child,¹¹⁴ is to kill (or a least maim) them with kindness.

5. *A Reconciliation of Fundamentalisms?*

Having articulated the nature, form and scope of both transcendental fundamentalism and reactionary fundamentalism, and sketched out the dimensions of the difficulties for human rights theory and practice posed by each, I want to bring things to a head by considering briefly how we might reconcile the best of each, and minimise (or discard) the worst of each. Put simply, we should be trying to bolster the appreciation and application of the transcendental fundamentalism of human rights in the minds, words and actions of our leaders, whilst taking care not to overstate the case such that we excite the counter-productive sensibilities of reactionary fundamentalism. Our perch on the horns of this particular dilemma is well captured by Martin Loughlin who observes that while on the one hand ‘[i]nstitutionalised rights protection might help vulnerable minorities ... against high-handed executive action,’ and that ‘[r]ights discourse is also likely to lead to an emergence of a more rationalized form of political and policy decision-making ...’,¹¹⁵ on the other,

... aspects of rights discourse undermine this notion of politics ... lead[ing] to the growth of single-issue agendas, a more adversarial form of politics, and a degree of political fragmentation which makes it more difficult to build coalitions around some conception of the public good.¹¹⁶

For me, at least, I see the disregard for the transcendental fundamentalism of human rights — both wilful and unwitting — as a greater problem than that of the consequences of reactionary fundamentalism which, though very real, are in fact to some extent overblown by those who challenge the transcendental fundamentalism of human rights in the first place. The sophistry of creating straw man targets is readily apparent in many such critics. There is something almost hysterical, for instance, in assertions that if the elites had their way regarding immigration in Australia, entry would be ‘substantially under the control of

113 Thomas Brudholm, ‘Conviction and Critique: Addressing the Sceptic’ in Kirsten Hastrup (ed), *Human Rights on Common Grounds: The Quest for Universality* (2001) at 36, paraphrasing George Ulrich, ‘Universal Human Rights: An Unfinished Project’ at 204 in the same book.

114 Borrowing David Kennedy’s metaphor: see David Kennedy, ‘The International Human Rights Movement: Part of the Problem?’ (2002) 15 *Harvard Human Rights Journal* 101.

115 Tom Campbell, Keith Ewing & Adam Tomkins (eds), *Sceptical Essays on Human Rights* (2001) at 57.

116 *Id* at 58.

criminal people-smugglers' and that but for the fact that that the MV Tampa was Norwegian, Prime Minister Howard 'could well have received the Nobel Prize' (as argued by Professor David Flint).¹¹⁷ And equally, Janet Albrechtsen's bilious rant against lawyers and judges who dare to raise human rights objections to the scope and substance of the Commonwealth's counter-terrorism legislation, as 'a lawyer class adored by terrorists for making their job of jihad that much easier'.¹¹⁸

More trenchant critiques can also slip into empty, straw man arguments. For example, Mirko Bagaric and Penny Dimopoulos argue that the ineffectiveness of international human rights standards (the 'nonconsequentialism' of rights) stems directly from the unfulfilled claims made of rights that they reflect 'truth'.¹¹⁹ Yet, while many (if not most) advocates of human rights invest much in their normative force, not even Kant claimed that they reflect absolute, exact and unshakeable 'truth' — except in the most general sense (as, for example, in the propositions that no one human life is more important than another and freedom should be available to all). Not least this is because the detailed expression of human rights in law and their application in practice is, as I argue above, necessarily open-ended and consequentialist. Also, in this vein, Greg Rose and Diana Nestorovska have advanced the remarkable contention that human rights standards are 'of uncertain applicability in the counter-terrorism context, as fundamental questions arise as to their own universality, immutability, interpretation and application',¹²⁰ as if the presence of such questions necessarily neuters the authority or relevance of human rights in any context, counter-terrorist or otherwise. Extrapolating such naïve absolutism would render nugatory not only the particular lineage of rights jurisprudence, but also the whole canon of modern philosophical inquiry from Socrates onwards. The posing of questions is precisely what separates the process of rational inquiry and standard setting (of any form) from pre-ordination, and it is what gives the standards set whatever level of (less than total) fortitude they possess.

The framework and object of the enterprise of human rights — especially as established at international law — demands respect, engagement and a good faith intent to abide by those obligations that one freely enters into.¹²¹ Over the past decade or so, there has developed within successive Australian governments a 'politics of denial' (as Penny Martin and I have called it).¹²² This can be judged,

117 Professor David Flint, 'Cover Story: The Twilight of the Elites' *News Weekly* (31 May 2003), extracted from David Flint, *The Twilight of the Elites* (2003).

118 Janet Albrechtsen, 'Jihadists owe Kirby a Thank You' *The Australian* (8 August 2007).

119 Mirko Bagaric & Penny Dimopoulos, 'International Human Rights Law: All Show, No Go' (2005) 4 *Journal of Human Rights* 3 at 10–20. They go on, tremendously, to proclaim that thereby, in their view, 'there is not any role in moral discourse for rights claims', and ultimately conclude with the philosophically remarkable, and certainly politically naïve statement (even if well-meant), that 'we should abandon existing international human rights principles and devise new methods for increasing the level of worldwide human flourishing': Bagaric & Dimopoulos, at 12, 20.

120 Greg Rose & Diana Nestorovska, 'Australian Counter-Terrorism Offences: Necessity and Clarity in Federal Criminal Law Reforms' (2007) 31 *Criminal Law Journal* 20 at 20–1.

121 That is, the international law principle of *pacta sunt servanda*.

for instance, by the extraordinary reactions of all governments — Federal and State, Labour and Coalition — to the High Court’s decision in *Minister for Immigration and Ethnic Affairs v Teoh*¹²³ (‘*Teoh*’) in 1995¹²⁴ that said simply that there ought to be an expectation in *domestic* law that governments might at least heed, if not be bound by, the obligations that they have signed up to under *international* law. As a matter of rationality let alone law, how can one not agree with Chief Justice Mason and Justice Deane’s declaration that ‘ratification by Australia of an international convention is not to be dismissed as merely a platitudinous or ineffectual act’.¹²⁵ In any event, let it be said that trying to explain the rationale of the various anti-*Teoh* legislative initiatives that sought to rebut such a presumption¹²⁶ to exchange students from Civil Code jurisdictions studying in Australian law schools is a chastening experience. The politics of denial is also evident in some of the decidedly petulant and self-righteous statements of the current Howard government regarding the actions and activities of the various human rights organs of the UN that dare to question Australia’s compliance with its international human rights obligations.¹²⁷

If, in pursuit of our reconciliation goal we are to advance the cause of human rights by extolling its transcendent qualities and curbing its more reactionary inclinations, then I believe that there are two essential and interrelated aspects of the global human rights project that we — as citizens and non-citizens, activists, educators and scholars, leaders and lawyers, and above all as human beings — must grasp immediately, and act on increasingly.

The first of these is the importance of community human rights education in general, and the promotion of an empathetic understanding of human rights in particular.¹²⁸ We all have a responsibility in this regard: ‘public discussion is centrally important both for the recognition of human rights, and for their

122 Kinley & Martin, above n47.

123 (1995) 183 CLR 273 (‘*Teoh*’).

124 See Wendy Lacey, ‘In the Wake of *Teoh*: Finding an Appropriate Government Response’ (2001) 29 *Federal Law Review* 219.

125 *Teoh* (1995) 183 CLR 273 at 291 (Mason CJ & Deane J).

126 Lacey, above n124.

127 See Kinley & Martin, above n47; Hilary Charlesworth, Madelaine Chiam, Devika Hovell & George Williams, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *Sydney Law Review* 423. Consider also, most recently, Australia’s reluctance to accept the definition of ‘self-determination’ in the *United Nations Declaration on the Rights of Indigenous Peoples*, which has led to the Australian Federal Government refusing to support that Declaration: see Human Rights & Equal Opportunity Commission, ‘Social Justice Commissioner Praises United Nations Human Rights Council for Adopting the Declaration on the Rights of Indigenous Peoples’ (Press Release, 30 June 2006) <http://www.humanrights.gov.au/about/media/media_releases/2006/47_06.htm> accessed 27 September 2007. For criticism of the Government’s lack of support for the Declaration see Senator Chris Evans & Peter Garrett MP, ‘Moral Leadership Needed on Indigenous UN Declaration’ (Press Release, 12 October 2006) <<http://www.petergarrett.com.au/c.asp?id=233>> accessed 27 September 2007; *United Nations Declaration on the Rights of Indigenous Peoples*, UN GAOR, 61st sess, UN Doc A/61/L.67 (2007).

128 Christopher Weeramantry, *Justice Without Frontiers: Furthering Human Rights* (1997) at 3–6; and see David Williamson’s comments below, n131.

realization and advancement', as Sen argues.¹²⁹ The point has also been expressly recognised in the particular context of Victoria's *Charter of Human Rights and Responsibilities Act 2006*, when the Victorian Attorney-General, Rod Hulls, remarked upon introducing the legislation into Parliament, that it 'recognises ... the importance of community education about human rights'.¹³⁰ Human Rights Commissions can and should also be seen as elemental in this respect,¹³¹ but some are clearly more committed and successful than others in their educative role.¹³² All that said, there are surely special responsibilities that fall on educators who work in universities, as well as on those who pass through their corridors and lecture halls. As public academics, we certainly should (and in my view, certainly do), engage in what the Prime Minister has rightly suggested should be 'a diverse and lively environment',¹³³ rather than the 'soft-left dominance' (whatever that means)¹³⁴ that he believes is the reality in Australian universities today.¹³⁵ The fact that the Howard Government has itself exhibited such intolerance of dissension, and has in fact been impressively successful in 'silencing dissent' in the realm of political discourse over the last decade,¹³⁶ is pointedly ironic.¹³⁷

I want to be clear that human rights education is not alone sufficient, or even primary, in any efforts to address human rights problems; but it must have a role to play, and (more often than not) a significant role. Engagement, empathy, vigilance, reasoned argument, openness and self-reflection¹³⁸ are the talismanic characteristics that we need to adopt in such education, whether we are pointing the finger at foreign country abusers of human rights,¹³⁹ discussing how to improve our own governments' records of, and approach towards, human rights,

129 Amartya Sen, 'Human Rights and the Limits of the Law' 27 (2005–6) *Cardozo Law Review* 2913 at 2927.

130 Victoria, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4 May 2006 (Attorney-General Mr Rod Hulls) at 1294.

131 Brice Dickson, 'The Contribution of Human Rights Commissions to the Protection of Human Rights' (2003) *Public Law* 272 at 283–4, stressing that human rights commissions can 'popularize' concept of human rights, and that part of their job is 'to educate and inform the public at all levels (from primary school upwards) about what is or is not accepted internationally as a human rights standard'.

132 See C Raj Kumar, 'National Human Rights Institutions and Economic, Social and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights' (2006) 28 *Human Rights Quarterly* 755 at 767–71.

133 Howard, above n61; and as have many before him similarly advocated, from Adam Smith, through Hegel, to Allan Bloom: see Allan Bloom, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students* (1987) at 259.

134 Though undefined by Prime Minister John Howard, David Williamson defines it in contradistinction to the right's 'carrot-and-stick version of humanity', that is, 'the soft left finds the right's view of human nature too bleak', believing rather 'that self-interest is balanced by the human capacity for empathy, and that it is right and proper that governments protect the vulnerable': see David Williamson, 'Latte Man Fights for his Survival' *Sydney Morning Herald* (9 December 2006).

135 Howard, above n61. The concerns of the Minister for Education, Julie Bishop, seem to be more with hard left take-overs in light of her concern that public school curricula in Australia reflect a Maoist agenda: see ABC Television, 'Curriculum Conformity', *Stateline*, 6 October 2006 <<http://www.abc.net.au/stateline/act/content/2006/s1758494.htm>> accessed 15 June 2007.

or the growing industry of bringing human rights concerns to the attention of non-state actors, such as the World Bank, International Monetary Fund, WTO and transnational corporations, and calling for their greater recognition of the attendant responsibilities.¹⁴⁰ Ultimately, this is an endeavour to understand more fully, and apply more effectively, the principle of human rights accountability (who is accountable, for what, to whom) which, as Philip Alston criticises, is presently invoked ‘with almost reckless abandon’.¹⁴¹

Whatever the public forum, I sincerely believe that human rights inquiry is relevant in proportions large and small. This is a lesson I have learnt well. The day after I first set foot in this country in June 1989 (as a green Cambridge doctoral student, and still reeling from the obscene splendour of the newly completed Parliament House in Canberra: that is, compared to the shabby, cramped Gothic pile of the British Houses of Parliament in which I had been spending so much of my time), I was invited to sit in on a Senate Scrutiny of Bills Committee meeting as the Committee was relevant to my research. It was the day after the brutality in Tiananmen Square. I was introduced to the Committee by the Chair as I sat meekly and jet-lagged in the corner, whereupon one member of the Committee turned to me and spat out how affronted she was that I should be here in Australia researching human rights, given the recent events in Beijing. I was struck dumb. To his eternal credit, however, the Chair — Senator Barney Cooney — responded on my behalf, invoking Thomas Jefferson’s immortal words that ‘the price of liberty is eternal vigilance’. And that, in his opinion, included the Parliament of Australia.

The questioning, querying, critiquing and even criticising of human rights are central to my quest to reconcile the two fundamentalisms, in that such attitudes of inquiry are essential to maintaining the robustness of human rights, and to the ongoing process of renewing our understanding and application of their objectives. In this respect, I agree with Tom Campbell who argues forcefully about the importance of stoking the fires of intellectual debate around rights when he states that ‘in conducting a critical examination of rights we are putting ourselves in a better position to make up our minds about the most important moral and political issues of our time’.¹⁴²

136 Helen Ester, ‘The Media’ in Clive Hamilton & Sarah Maddison (eds), *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* (2007) at 101–23.

137 See David Marr, ‘His Master’s Voice: The Corruption of Public Debate Under Howard’ (2007) *Quarterly Essay* 26 at 29–33. On the specific matter of marginalisation of civil society see Eric Sidoti, ‘Australian Democracy: Challenging the Rise of Contemporary Authoritarianism’ (Paper based on speech to Catholics in Coalition for Peace and Justice Seminar, 17 August 2003) at 15–9 <<http://www.hrc.org.au/CCJP.htm>> accessed 15 June 2007.

138 See, in this regard, Fleur Johns’ remarks on the current paucity of critical reflection on ‘the effects of rights-based modes of legal thinking in Australian settings’, above n44 at 306.

139 See David Kinley & Trevor Wilson, ‘Engaging a Pariah: Human Rights Training in Burma/Myanmar’ (2007) 29 *Human Rights Quarterly* 368.

140 Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006).

141 Philip Alston, ‘Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New UN Human Rights Council’ (2005–2006) 15 *Journal of Transnational Law & Policy* 49 at 50.

The second feature of human rights requiring attention concerns the difficult but important question of the utility and effectiveness of promoting human rights, whether by education or other means. The matter is *important* because without knowing how effective, ineffective or even retrograde our human rights policies and actions are in terms of protecting people's rights and dignity, we simply cannot adequately defend our present actions or mount any rational case for doing something different in the future. It is *difficult* because measurement of such matters as the effectiveness of programs of human rights protection and promotion is fraught with profound conceptual and empirical problems. To assess whether and what beneficial impacts accrue from human rights training workshops for judges, bureaucrats or police, or to measure what impact a Bill of Rights or a state's signing of an international human rights agreement has had on the every-day existence of that state's citizens, are notoriously difficult questions to answer with any degree of precision. So too are such frequently raised questions as how to measure the consequences of donor agencies, gender awareness, indigenous, HIV/AIDS and child protection programs on the welfare and rights enjoyment of the people they are designed for. The bottom line is beyond certain crude quantitative or simplistically qualitative tools; meaningful 'Key Performance Indicators' for human rights advancement just do not exist.

In part, this circumstance is due to the sheer scale of the exercise in respect of which measurement is sought, and in part it is due to the fact that there really is some truth in what human rights activists on the ground say: namely, that changes — good and bad — are not easily gauged in any way other than impressionistically, and, even then, they are only measurable across, rather than within generations. Moreover, the sorts of empirically verifiable measurements taken — numbers of trainees, hours of technical assistance provided, or schools or medical centres built — are of little use in gauging the overall impact on a community's actual enjoyment of human rights.

These are the factors which ultimately unhinge the various charges and counter-charges that are currently doing the rounds of the human rights academe, in both political science and law. Oona Hathaway's study¹⁴³ of the coincidences of the uptake by states of human rights treaties and their levels of human rights protection, purports to show that the correlation is, if anything, negative. Her methodology and analysis, however, is founded on so many complex variables and externalities that it is simply impossible to draw any such definitive conclusions. Equally, on the other side of the debate, the human rights socialisation theories of Thomas Risse and Kathryn Sikkink,¹⁴⁴ and more recently of Ryan Goodman and Derek Jinks,¹⁴⁵ which argue that the adoption and use of human rights discourse inevitably leads to absorption of its principles and practices, while long on hunch and hope (and I confess to having subscribed to both when working on human

142 Tom Campbell, *Rights: A Critical Introduction* (2006) at xix.

143 Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935.

144 Thomas Risse, Stephen Ropp & Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (1999) at 1–38.

rights projects in South-East Asia), are short on verifiable indicators of direct cause and effect. Even the more practically oriented approaches to the issue are limited to the measurement of levels of the recognition of, or respect for, human rights,¹⁴⁶ or (more often) of their violation.¹⁴⁷ Fundamentally, the presuppositions and conclusions of these commentators simply do not address any demand for evidence of a clear (or even a fairly clear) link between intention and outcome, usually (it has to be said) because they do not seek to do so — which is at least an implicit acknowledgement of the complexity of such an equation.

The human rights ‘measurement deficit’ is also due in part to the human rights movement’s resistance to any suggestion that measurement is needed and/or feasible. Some preliminary research on this particular phenomenon by the Carr Centre for Human Rights Policy at Harvard University’s John F. Kennedy School of Government, acknowledges that much of the human rights community’s criticism of the application of impact assessment tools to its activities is justified as missing ‘the essence of’ its work.¹⁴⁸ That said, the donor-generated demands of accountability argue for the adoption of ‘a position in which organizations develop a combination of quantitative and qualitative impact metrics’.¹⁴⁹

As difficult as that task might be, it is necessary. A more open and engaged perspective on effectiveness measurement will yield a clearer appreciation of who is, and who is not, responsible for the protection of human rights in any specific instance; and that is becoming a matter of greater and greater importance as the number and variety of possible candidates increase, across more traditional private, public, international and domestic boundaries. Certainly, *whatever* the developments in this field, the interpretation, application and enforcement of international human rights laws will never be perfect.

The late Jeane Kirkpatrick, when she was the US Ambassador to the UN under the Reagan Administration, is said to have once referred to the UDHR as ‘a letter

145 Ryan Goodman & Derek Jinks, ‘How to Influence States: Socialization and International Human Rights Law’ (2005) 54 *Duke Law Journal* 621. Goodman and Jinks’ subsequent piece, ‘International Law and State Socialization: Conceptual, Empirical, and Normative Challenges’ (2005) 54 *Duke Law Journal* 983, does not yield robust indicators of human rights *cause and effect*, but rather, mere indicators of (or rather, arguments for) possible *effects*, which may or may not be coincidental with the human rights design. This is not to rubbish Goodman and Jinks, but rather to say that they – as with all others who have tackled this extraordinarily difficult problem – have yet to get near to solving it. Indeed, in their own words the authors admit the limited nature of their enterprise, which is to ‘refine our conceptual model, scrutinize its normative assumptions, and begin to chart future lines of empirical research’: Ryan Goodman & Derek Jinks, ‘International Law and State Socialization: Conceptual, Empirical, and Normative Challenges’ (2005) 54 *Duke Law Journal* 983 at 997.

146 See, for example Marie Green, ‘What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement’ (2001) 23 *Human Rights Quarterly* 1062 at 1078–9.

147 See, for example Todd Landman, ‘Measuring Human Rights: Principle, Practice and Policy’ (2004) 26 *Human Rights Quarterly* 906 especially at 908–24.

148 The Carr Centre for Human Rights Policy, *Measurement and Human Rights: Tracking Progress, Assessing Impact* (2005) at 15, 22.

149 Fernande Raine, ‘The Measurement Challenge in Human Rights’ (2006) 3 *Sur International Journal on Human Rights* 1 at 8.

to Santa Claus'.¹⁵⁰ We might rightly respond that at least certain of its provisions have transcended their wish-list format and gained considerable concreteness. But it cannot be denied that we need to devise better ways of understanding and assessing to what extent this is so, and what caused it to be so.

6. Conclusion

Ultimately, there is a duty upon all of us, individually and collectively, to ensure that we care enough for the normative message of human rights; to ensure that we act accordingly; and, crucially, that we ensure that our leaders do too. The tools of human rights education and impact measurement will assist us in this task, not least by helping to avoid the pitfalls of under-cooking transcendental fundamentalism and over-cooking by way of reactionary fundamentalism.

It is with this message that I would like to finish. And to do so with a few lines borrowed from Constantine Cavafy — a truly multicultural poet who was Greek born, English schooled and Egyptian domiciled:

With no consideration, no pity, no shame,
they have built walls around me, thick and high.
And now I sit here feeling hopeless.
I can't think of anything else: this fate gnaws my mind —
because I had so much to do outside.
When they were building the walls, how could I not have noticed!
But I never heard the builders, not a sound.
Imperceptibly they closed me off from the outside world.¹⁵¹

For me, these words warn us of the dire consequences that follow not only any imprisonment of the idea of human rights *by design*, or any imprisonment of the idea through lack of candour, but also when imprisonment is aided and abetted by *indifference*. Human rights education and learning — formal and informal, national and international — has a vital and continuing role to play in breaking down existing walls that close off human rights and preventing others from being built. A Chair in Human Rights Law must play a part in that enterprise.

150 In specific reference to developmental, social and economic human rights provisions, the attribution often made appears to originate from Jeane Kirkpatrick: see Jeane Kirkpatrick, 'Establishing a Viable Human Rights Policy' (1981) 143 *World Affairs* 323 at 331–2.

151 Constantine P Cavafy, 'Walls' in George Savidis (ed), *Collected Poems* (Edmund Keely & Philip Sherrard trans, 1992 ed) at 3.

