1

Introduction

This book grew out of my attraction to and discomfort with the idea of human rights. When I led an Amnesty International group as a law undergraduate twenty years ago, the concept of human rights already seemed to me *both* desirable (or even necessary) *and* flawed. Since then I have never been sure which of these two aspects take precedence. If I stress the defects of the concept I immediately want to recall that the concept is important and cannot be dismissed altogether. Conversely, I do not wish to signify my attachment to the concept without highlighting that it is far, very far, from being a panacea. This book represents my attempt to sort out my persistent ambivalence towards human rights. It does so by seeking to answer the following two questions: Can we believe in human rights? Should we believe in human rights? I shall give my personal answer to these questions. I shall also provide an intellectual map of the way I understand current scholarship approaches the concept of human rights.

Human rights as an article of faith

According to a standard definition, human rights are those rights one has by virtue of being human.[1] This definition suggests that human rights belong to every human being in every human society: all human beings have them, equally and in equal measure. Implied in one's humanity, human rights are generally presented as being inalienable and imprescriptible – they cannot be transferred, forfeited, or waived.[2] Many people, especially but not exclusively in the West, believe that human rights exist irrespective of social recognition, although they often acknowledge that the plurality of religious traditions and value systems from which they can be derived make their foundation controversial. For those who believe in human rights, the problem of their source is rarely considered an obstacle to asserting them. From their point of view, what is important is that human rights are evident.

This book starts from the observation that the political hegemony which human rights enjoy through being constantly invoked in contemporary discourse does not lend them, as such, ethical authority. We must differentiate between political dominance and ethical authority.[3] In particular, we should not exclude

the possibility that political utopias and/or forms of organization which are outside the human rights logic can be superior to it.[4] This is too easily forgotten in a world where human rights have become, in the words of Elie Wiesel, the secular religion of our time.[5]

Human rights is an article of faith.[6] The fundamental tenet of this credo is that human rights exist and are universal, inalienable and self-evident. I personally do not believe in this, for reasons expounded below. My personal answer to the question 'Can we believe in human rights?' is that it makes no rational sense to believe in human rights because, as far as I can see, reason disproves them.[7] Despite this, I hesitate to answer negatively the question of whether we should believe in human rights. Though an atheist, I may wish to appeal to the value of loving thy neighbour especially in front of a Christian. In the same way, I consider human rights to be the vehicle of useful values in our contemporary world. Though it does not appear to me intellectually tenable to 'believe' in human rights, I am ready to act as if I believed in them in a world where they have become part of the received wisdom – the more so since I almost believe in them, having been socialized in them and being persuaded by some of the values they seek to express. In short, I consider human rights as a potentially useful resource in my world. As far as I am concerned, using them strategically is not hypocritical, but a way to attain moral aims in the absence of a more persuasive language in which to articulate claims for emancipation. This position is not devoid of contradictions, but it is the best formulation of it I can achieve thus far.

The short-sightedness of the universal assertion

My main reason for objecting to the credo of the human rights orthodoxy has to do with their supposed universality – a characteristic so central to their definition, essence and *raison d'être* that it has practically become a trope in human rights discourse.[8] As an anthropologist, I do not see how one can say that human rights exist on a universal plane, nor do I see that human rights are such a good thing that it would be wonderful if they existed on a universal plane. Let me try to explain what I mean through an example.

How would Native Americans have reacted, had they been presented with the concept of human rights before they were colonized and, in many cases, virtually exterminated? Surely they would have objected to its strange, homocentric ethos.[9] They have indeed asked and continue to ask: what kind of existential dignity prevails when it applies only to human beings, moreover merely those who happen to be in the world of the living?[10] This example is pertinent because 'the Indians' have captivated the contemporary Western imagination for having developed a cosmology which is more respectful of land, water, animals, plants and, arguably, even human beings than Western society. The same conclusion could be drawn in respect of many other societies round the globe.[11]

The idea that human rights are universal flies in the face of societies which are based on social, political and ethical premises completely foreign to the liberal – and possibly market – logic of human rights. In other words, the concept of human rights rests on a peculiarly short-sighted view of humanity. It is sometimes suggested, including by anthropologists, that people who treat one another with respect and compassion actually respect human rights even though they do not use the term 'human rights'. This approach appears to me to suffer from 'occidentalism'.

I use this word as a pendant to 'orientalism'. An example will illuminate my meaning. Upendra Baxi recently talked at a conference of a 'fatwa culture' which encompassed as much President George Bush's as Osama bin Laden's edicts on the so-called war on terror.[12] A member of the audience objected to this terminology, noting that such edicts were not fatwas in the traditional sense of the Islamic term and that Baxi's terminology had the effect of associating bad practice with Islam and/or the East. By contrast, talking of human rights to refer to the 'politics of dignity' puts the West on a pedestal by using the Western word to refer to a good practice or an ideal which can in fact be found across human societies. If we want to talk of the politics of dignity, let us call them that and stress that human rights is only one exemplar of such politics.

Tore Lindholm asserts that to talk of human rights before 1945 is anachronistic.[13] Even if this view be considered too extreme, it remains the case that most scholars locate the origin of the human rights discourse in the seventeenth or eighteenth century, with the French 'Declaration of the Rights of Man and the Citizen' a key moment. The point is that, whether their origin is counted in terms of decades or centuries, human rights are a latecomer in the history of humanity, however much they dominate contemporary political rhetoric. This is enough to make me think that the concept of human rights – when it is presented as a human constant – is not sound.[14] The proposition that human rights exist *irrespective* of social recognition (affecting *all* human beings in *all* human societies across time and space) does not make sense. It suggests that human rights are and have always been somewhere out there – but where? And why?

In my view, the concept of human rights conspicuously lacks 'universal universality' – at the very least their supposed universality does not exist across times and places. There is thus perhaps a sense in which the conclusion to the second question asked in this book is foregone: human rights are not universal, the concept is flawed, we should not believe in it, and that is the end of the matter. For Jack Donnelly among others, however, the 'universality of human rights is a moral claim about the proper way to organise social and political relations in the contemporary world, *not* an historical or anthropological fact'.[15] Rather than stopping the discussion at the fact that human rights is not an empirical constant in humanity, I am willing to examine whether the world *as you and I know it* may well demand something like a framework of human rights.

The shadow of the modern state falls heavily over contemporary society; therefore a counterpart to its power – and, incidentally, the power of any institution as strong as or even stronger than the modern state – is acutely needed. It is therefore interesting to ask whether the concept of human rights is valid as it were on its own ground, defined as the world affected by the modern state and all that comes in its train. This terrain is assuredly wide – it encompasses most if not all of the contemporary world – but it nonetheless ceases to embrace the whole of humanity across time. The question raised by this book can thus be rephrased as follows: in the limited arena of the contemporary world, which problems affect the concept of human rights? Are they such as to make it, even on its own historical terrain, invalid?

Practical and conceptual critiques of human rights

Scepticism regarding human rights has a long pedigree. Classical critiques of human rights thus provide an obvious starting point to contemplate the faults plaguing the concept. This book accordingly contains a series of five 'critical light' chapters which revisit, in turn, the realist, utilitarian, Marxist, particularist (a word I favour over the expression cultural relativist) and feminist critiques of human rights.

At the risk of caricature, the main thrust of each critique can be summarized as follow: realists (among whom I include Jeremy Bentham) intimate that human rights cannot be 'above' or 'beyond' the state but necessarily originate from and are enmeshed within the state; they reject the idea that human rights are natural, existing outside of social recognition. Utilitarians oppose the granting of individual rights regardless of the consequences for the common good; nor do they think it is possible for human rights to be absolute and/or inalienable. Marxists view rights as sustaining the bourgeois order and thus feeding oppression by privileging a particular class to the detriment of the oppressed majority. Particularists object to the idea that moral judgements can be made which hold true across cultures; they call for tolerance of practices which are not comprehensible within the dominant perspective and denounce what they see as the inherent imperialism of human rights which are not universal but the product of the society which has created them. Feminists, finally, attack human rights' pretence of equity and neutrality by observing that rights, which have generally been defined by men, largely bypass the interests and concerns of women; they dispute the idea that human rights are gender-neutral.

None of these critiques is more important than any other, nor does one logically precede another. I have chosen to arrange the five chapters historically, using the date of their 'foundation' text. The realist chapter (Chapter 3) comes first chronologically, with as its starting point the text Jeremy Bentham wrote in reaction to the 1789 French Declaration, where he argued: 'From *real* law come *real* rights; but from *imaginary* laws . . . come *imaginary* rights.' Bentham's

prominent place in the utilitarian movement naturally leads to the chapter on utilitarianism, though most of the debates reviewed in Chapter 4 are contemporaneous to us. The Marxist chapter follows: Karl Marx's most direct comment on the French Declaration was written in 1843, in his essay 'On the Jewish Question'. The American Anthropological Association's 'Statement on Human Rights', published a century later in 1947, is widely seen to epitomize the cultural relativist position on human rights and gives a point of departure to Chapter 6, on particularism. The feminist chapter rounds off the series: despite Olympe de Gouges's 'Declaration on the Rights of Woman' of 1790 and the writings of those such as Mary Wollstonecraft, a scholarly feminist critique of human rights has only started to provoke wide academic engagement over the last two or three decades.

In one way or another, each of these critiques points to a gap between the human rights ideal (the promise that every human being enjoys a number of fundamental rights) and the practice (a world where human rights violations abound and where many people are excluded from the enjoyment of human rights).[16] The gap could exist *either* because the practice has, so far, failed to live up to the theory, but without this affecting the validity of the concept of human rights, *or* because human rights cannot be what they are said to be, making the concept invalid. In other words, critiques of human rights can either require human rights to be true to their word or reject them as constructed on unsound premises. In the former case, the problems which are identified are conceived as demanding that a better human rights concept be found (possibly through theoretical input) or that a better practice be elaborated. Crucially, there is no suggestion that the concept is irretrievably defective: it is a matter of 'simply' closing the gap between what the concept promises and what it delivers. In the latter case, the critique points to a concept which is fundamentally flawed, thus advocating a solution which is altogether external to the human rights logic. In the former case, the belief is that human rights must *and* can be improved;[17] in the latter case, the concept of human rights is regarded as ultimately hopeless. These two positions could be called the practical and the conceptual critiques of human rights.

They cut across the classical critiques in that each of the latter comprises elements which in principle accept the concept of human rights but demand that it be better practised or conceptualized (or both) and elements which suggest that the problem of the gap between human rights theory and practice can only be solved by looking outside the human rights logic. Bentham famously described the rights of man as 'Nonsense upon stilts', suggesting his was a conceptual critique of rights; however, many utilitarians have defended theories of rights which correspond closely to modern notions of human rights, thus allowing for the development of a more practical critique of rights. Though this may come as a surprise to some readers, Marx was less scathing than Bentham in his critique of human rights. While he did not regard human rights as a panacea, Marx

nonetheless welcomed their introduction as a step towards communism and the emancipation of man. Moreover, a number of Marxist thinkers (including E. P. Thompson and Etienne Balibar) have wholeheartedly approved of the rule of law and the idea of rights. Cultural relativists seem intractably opposed to the idea of human rights; more sophisticated particularists, however, recognize the importance of the aspiration to a universalist position as expressed in the language of human rights even though they do not believe that pure 'universality' is attainable. Many, though not all, feminists work within a human rights agenda: they denounce a practice which is blind to its neglect of women but without objecting to the idea of a human rights agenda *per se*. In summary, each critique – which always encompasses various strands – has a variety of answers on the question of whether the gap between human rights theory and practice is due to a conceptual or a practical failure.

Liberal and non-liberal critiques of human rights

Liberalism and human rights are closely connected,[18] with the polysemic term 'liberalism' probably meaning, in this context, the political philosophy which holds that government should interfere as little as possible in the lives of its citizens.[19] From this perspective, a government is liberal when it strives to provide a forum in which citizens can pursue their own ends, in the absence of the establishment of any collective goal. This liberalism can therefore be characterized as 'procedural' (or 'thin')[20] rather than 'substantive' (or 'thick'). Particularly prominent in the Anglo-American world,[21] it puts great emphasis on the autonomy of the individual, and relies on the idea of giving the individual inalienable rights.[22] Given the intimate connection between this kind of liberalism and human rights, one might wish to ask: is a conceptual critique necessarily opposed to liberalism? Taking it the other way around, is it possible to oppose the *concept* (rather than the practice) of human rights from a liberal perspective?

Before answering these questions, it is worth identifying what the *conceptual* critique of human rights consists of. The critique encompasses at least the following three propositions: (1) the concept of human rights is wrongly presented as universal; (2) it pertains of a logic which focuses on the individual to the neglect of solidarity and other social values; (3) it derives from a reasoning which is far too abstract. The first point has already been touched on above when I noted that human rights lack 'universal universality': the claim that they would be relevant to all human beings across time and space is simply not credible in the light of societies which do not fall within the model of the modern state. The problem of a universal deficit is also noted by Marxists and feminists, though from a different angle. For Marxists, human rights lack universality because they primarily benefit the bourgeois; for feminists, because women are excluded from their definition and implementation. Interestingly the feminist critiques advocate solutions which fall either within or outside liberal parameters. To simplify, liberal

feminists believe that the problem of the exclusion of a women's agenda by human rights should be, and can be, solved by including women. Thus they seek a solution to the lack of universality *within* the liberal/human rights logic: the sole requirement – however difficult to implement in practice – is the inclusion of women. Some feminists, however, are not persuaded by this 'internal' solution. Radical feminists (who tend to be influenced by Marxism) argue that it is the liberal/human rights premise itself which needs revision. For good reasons, Marxists have the reputation of locating the solutions they advocate outside of liberalism. Nonetheless, valuable attempts to reconcile Marxism and liberalism make this proposition an unwarranted simplification.[23]

The second problem with which all the critiques reviewed in this book take issue is the individualism inherent in human rights logic. To generalize (which I admit does not do justice to the sophistication and/or multiplicity of the arguments), some realists argue that for the state to ensure its own survival and to protect its own interests is to the benefit of its citizens; utilitarians call for political action to be governed by the principle of the happiness of the greatest number, which may or may not coincide with the protection of individual rights; Marxists ask man to behave as a member of humankind whose individual interest corresponds to the interest of the community; particularists call for the impact of and the reward of socialization to be recognized; feminists, especially those of a 'woman's voice' persuasion, demand that greater value be given to a more typically feminine ethic of care which stresses responsibilities towards others. Only the strand of liberalism which values individual autonomy above anything else does not regard individualism as a false aspiration.[24] To counteract the individualism inherent in human rights logic, realists and utilitarians tend to propose solutions congruent with liberalism – which is why utilitarianism is an acknowledged branch of liberalism in political theory. As noted in the previous paragraph, Marxists and feminists variously call for solutions within or outside liberalism.

All of the critiques are, finally, dissatisfied with the fact that the concept of human rights derives from an excessively abstract definition of man. Utilitarianism subscribes to the idea that the government's duty is to seek the common good – conceived of as a substantive project. In utilitarianism, rights are not Kantian categorical imperatives but, rather, tools to achieve a particular goal, under particular circumstances. The utilitarian perspective thus requires extensive contextualization. Realists, Marxists and feminists all examine (from different angles) whether human rights deliver their promises, and thus tend to assess their performance in practice, rather than to contemplate their theoretical basis. Particularists obviously do not believe, though for different reasons, that rights can be defined in the abstract. Again, it is possible for each of these critiques to seek contextualization within or outside liberalism.

It could be tempting to associate a conceptual critique of human rights with a perspective located outside liberalism, and a practical critique of human rights

with a perspective which would be liberal in its inspiration. This would suggest that one could neither defend the concept of human rights without being a liberal nor oppose it on liberal ground. Things are not that simple, however. To give one example, Costas Douzinas defends the concept of human rights from outside liberalism: for him, as for other protest scholars, the concept has been 'hijacked' by liberalism.[25] To give a second example, there are liberal utilitarians, including most famously Bentham, who oppose the concept of human rights.

Are those who find the concept of human rights altogether defective *against* human rights? It would be ridiculous to assume that they are in favour of their supposed binary opposite, namely, violations of human rights. This is because a world devoid of human rights does not necessarily mean a world full of injuries to human dignity.[26] On the contrary, what this type of critique may wish to suggest is that human rights are not the best way to try to implement the ideas of justice, equality and humanity which human rights supposedly stand for, and that better ways have to be found.[27] From some perspectives, the route towards emancipation does not take the form of human rights.[28]

Linking the classical critiques to the Strasbourg human rights case law

This book was planned around the assumption that the five classical critiques of human rights reviewed in it continue to tell us something important about human rights today so that their fundamental theoretical insights, whether they were formulated two hundred or twenty years ago, were bound to be reflected in human rights practice. I have decided to explore how these insights manifest themselves in the case law of the European Court of Human Rights (hereafter 'the Court'). The focus on the European Convention on Human Rights (hereafter 'the Convention') is arbitrary: I could have carried out the same exercise with respect to other human rights sites, for example the Inter-American system of human rights protection, the UN system or a host of non-judicial human rights struggles.

My concern is to effect a direct linkage between theory and practice so that the practice helps to explicate and refine the theory, while at the same time the theory generates more subtle readings of practice. Wishing to render theory and practice mutually responsive to each other, I have avoided the sequential examination of theory and its application, or practice; instead I move between theory and practice in each chapter through a succession of detours and bridges which lay out the premises and implications of both the theoretical arguments and case law.

I have allowed the argument to develop organically, without imposing an overly rigid structure. It is not my aim to test hypotheses in a traditionally 'scientific' manner and to present the reader with A to Z demonstrations which follow a positivist causal logic. Instead I seek to produce an 'essay' where, so to speak, I 'think aloud', provoking in turn my interlocutor to think. Louis Wolcher, struck by the unconventionality of my method, commented that

I was 'musing'. I took this as a compliment; the Muses, offspring of Zeus and Mnemosyne, are traditionally seen as inspiring creativity and learning. 'Musing' also embraces the idea of meditation, perhaps of wasting time but in order better to ponder and reflect.

The selection of a judicial institution as the practical focus of my reflection results in a book which contains far more law than non-lawyers are used to, though less law than lawyers may have wished. I briefly introduce the Convention in Chapter 2 so that the reader can see how the cases I discuss fit within the law of the Convention. Without claiming to offer systematic treatment of the rights guaranteed by the Convention,[29] I have sought to provide an account of how the Convention operates, the rights it covers, the recurrent principles in the Court's legal reasoning and key cases. My primary aim is nonetheless to explore the intricacies of judicial argument in order to expose the reasoning or the processes which reflect traces of the classical critiques of human rights.

The chapters develop the following and somewhat predictable arguments: first, state interests play a major role in the development of human rights law, though the Court can also come down hard on the state; second, the Court endlessly engages in trade-offs and compromise, gauging the potential consequences of its position even while creating the impression that human rights prevail over all other considerations; third, a privileged applicant has far greater chances to be heard by the Court than an underprivileged one, though even the latter can be heard; fourth, the prima facie objective of establishing common standards while acknowledging the need to respect social diversity, means that the Court cannot but pursue a controversial path; fifth, the Convention system remains biased towards men in many respects even if it is, on the face of it, gender-neutral and equally open to women.

The case law I cite *illustrates* these points. In each instance, other cases could have been used to support my argument. Indeed, my view is that the tensions I explore manifest themselves repeatedly in the case law, though in differing forms. Readers acquainted with the Strasbourg system will no doubt think of their own examples as they read my analyses. At times they may wonder why I am not referring to a case or a series of cases which, in their view, demonstrate even better the saliency of the issue under discussion. Given that the book does not aim at comprehensiveness, a selection was necessary. I do not even list further cases in footnotes, as these lists themselves become arbitrary and potentially never-ending.

Separate (generally dissenting, but sometimes concurring) opinions, as they are called, are of special interest to me. In a separate opinion, the judge is free to express himself or herself outside the constraints of a collegiate text. The assumptions underlying his or her logic are more likely to surface, because the coherence of his/her reasoning need not be lost in the process of accommodating the various perspectives of the individual judges who constitute a bench. This book thus makes far greater use of separate opinions than is generally the case in legal commentaries.

A kaleidoscopic reading of the Convention

Given that the cases I discuss in the book are merely illustrative, there is a strong element of fortuity in the way the five 'critical light' chapters are assembled. The image of the kaleidoscope comes to mind in that it points to an infinite number of combinations of either theoretical or empirical elements, or both. In each chapter it is as if I had collected pieces of case law, shaken them, and observed the resulting combination – if not exactly symmetry – in the mirror (or light) of a particular theory. I could have repeated the exercise over and over again, *ad infinitum*, either with the same or with slightly different material (case law) or mirrors (critiques).[30] Each time the result would have been different but, I would argue, no less compelling.

The image of the kaleidoscope draws attention to the way our senses construct patterns which do not 'really' exist except through the artifice of reflection (theory). It could be said that I offer a kaleidoscopic reading of the Convention, i.e. one generating arrangements which are, if not aesthetically pleasing, at least deceptively attractive in their simplicity and (imposed) regularity. A friend who read Chapter 3 was not deceived. She remarked, disapprovingly, that it was as though I were using Bentham as a *tuyau* (trick) to allow me to discuss *my* points and to say what *I* felt about the Convention. I have two responses to the objection: first, there is a sense in which one can read whatever one wishes into the Convention (even if the post-modern ring of this observation may not convince everyone); second my analysis, however much it may be a trick, helps to explore a legitimate discomfort towards what could be labelled the human rights credo and, beyond this, to identify various visions as to what human rights are.

Not one, but several concepts of human rights

I do not immediately address the crucial question: what are human rights? Readers could have expected me to start the book with it, on the ground that it is surely appropriate to delineate a concept before examining the critiques to which it has been subjected. The delay, however, is deliberate. As I have said, I do not believe that human rights exist outside of social recognition; to me, human rights exist only to the extent that they are talked about.[31] It is therefore logically impossible for me to discuss either the real or idealized nature of human rights; the only thing I can do is to investigate the way people use the concept of human rights - what it means to them. This is not a philosophical but an empirical investigation (which I have personally chosen to approach through the examination of European Convention cases).

I thought it would nonetheless be interesting to try to identify and systematize the essential features of the human rights concept by reading closely what scholars said about it. In the course of this exercise I came to the conclusion that there is not one single concept of human rights, but several: human rights are conceived