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Sociology 1993 27: 489
DOI: 10.1177/0038038593027003009

SOCIOLOGY Vol. 27 No. 3 August 1993
489–512

OUTLINE OF A THEORY OF HUMAN RIGHTS

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Abstract Although the study of citizenship has been an important development in contemporary sociology, the nature of rights has been largely ignored. The analysis of human rights presents a problem for sociology, in which cultural relativism and the fact-value distinction have largely destroyed the classical tradition of the natural-law basis for rights discourse. This critique of the idea of universal rights was prominent in the work of Marx, Durkheim and Weber. However, recent developments in the organisation of nation states, the globalisation of political issues, the transformation of family life, and changes in medical technology in relation to human reproduction have brought the question of human rights to the forefront of social and political debate. The paper argues that a sociology of rights is important, because there are obvious limitations to the idea of citizenship, which is based on membership of a nation state. Existing conceptualisations of citizenship require the supplement of rights theory. It is argued that sociology can ground the analysis of human rights in a concept of human frailty, especially the vulnerability of the body, in the idea of the precariousness of social institutions, and in a theory of moral sympathy. These three analytical supports – ontological frailty, social precariousness, and moral sympathy – are partly derived from the philosophical anthropology of Arnold Gehlen, from Ulrich Beck's concept of the risk society, and Max Scheler's phenomenology of sympathy. Emodied frailty is a human universal condition, which is compounded by the risky and precarious nature of social institutions. Human vulnerability can be contained or ameliorated by the institution of rights which protect human beings from this ontological uncertainty. From a sociological perspective, rights are social claims for institutionalised protection. However, it is because of collective sympathy for the plight of others that moral communities are created which support the institution of rights. This thesis not only offers a sociological version of traditional notions of natural or inalienable rights, but also attempts to provide a sociological alternative to enlightenment theories of social contract and individual rights.

Key words: human rights, citizenship, natural law, moral sympathy, human frailty, social precariousness.

Introduction

Although the idea of citizenship has received a lot of attention in recent sociological literature (Barbalet 1988; Jordan 1989; Roche 1987; Turner 1990), there has been no parallel discussion of the sociological importance of rights. As a general rule, sociology has neglected the empirical issue of human rights and has not developed any general theory of social rights as institutions. Sociology is typically sceptical, on historical and comparative grounds, about the possibi-

lity of the social existence of universalistic rights and obligations. By contrast, the concept of rights is often thought to be central to political theory. For example, Michael Freeden (1991:43) comments that 'The peculiar nature of the concept of rights, as a capsule surrounding other social and political concepts such as liberty, welfare, interest and self-determination, makes it quite impossible to disentangle the analysis of rights from the properties of those client-concepts'. One might add immediately, however, that while the concept of rights might be constitutive of the core of political discourse, rights are no less contested in politics than elsewhere (Dunn 1990:14–5).

Although the concept of rights is highly contested in law, philosophy and politics, the silence about rights in sociology is both interesting and important for at least two reasons. Contests over rights as claims or entitlements are a major feature of modern social life (such as social movements both for and against abortion and pornography). It would be difficult to understand either the domestic or the international contestation over the nature of social membership (for unborn children, refugees, migrant labour or the chronically sick) without some elementary notion of rights. Secondly, the institutionalisation of rights through the United Nations charter has to be regarded as a central aspect of the social process of globalisation (Robertson 1990:27). In fact 'International human rights is the world's first universal ideology' (Weissbrodt 1988:1). Here then is the problem. Human rights debates and legislation are major features of the socio-political processes and institutions of modern societies, but sociology apparently possesses no contemporary theory of rights.

This judgement might appear exaggerated, given the very obvious prominence of the law in the writings of major sociologists like Durkheim and Weber. Durkheim, for example, gave public lectures on law at Bordeaux between 1896 and 1900, in which he examined obligation, sanction and morality (Lukes 1973:256). However, Durkheim is probably a good illustration of my contention, since when he approached the question of law he did so from an entirely positivistic standpoint, which appears to rob the idea of 'rights' of an evaluative or normative content. In his *Professional Ethics and Civic Morals* (Durkheim 1992), Durkheim attempted to establish a science of moral facts, that is social phenomena which are external (to the individual), constraining (in terms of sanctions and obligations) and collective. Social facts are 'things' which are able to exert an external constraint on the behaviour of the individual. In Durkheim's positivistic epistemology, legal norms are an important illustration of social phenomena which exert external coercion over the individual.

Durkheim's treatment of the problem of law in relation to social solidarity was positivistic in the sense that he was not interested in, and actually ruled out, the possibility of a distinction between unjust and just laws, or unjust and just juridical sanctions. This distinction might appear to be of some interest to a sociologist since one might assume that social solidarity in Durkheim's terms would be better supported by a just legal system rather than an unjust system of sanctions and punishments. Durkheim was reluctant to entertain this line of

reasoning, because he wanted to show that sociology was independent of philosophy (Durkheim 1974). Questions about justice and fairness were viewed by Durkheim as normative and therefore primarily the province of philosophy; sociology was to deal with social facts in the framework of functional analysis rather than with their evaluation. Sociology was to observe social facts as things, not to philosophise over them.

Of course, in practice Durkheim's major sociological studies carried an implicit and often explicit pay-load of philosophical inquiry into the nature of religion, ethics, individual behaviour, legal theory, morality and so forth. As a result, Durkheim got into enormous conceptual difficulty over this issue. Because he was influenced by positivistic medicine as a model of science, Durkheim made a distinction between pathological and normal social conditions. Just as medicine attempted to understand abnormal functioning of the body within the scientific understanding of diseases, so sociology would be able to explain or understand the conditions which resulted from social pathology (Hirst 1975). Durkheim attempted unsuccessfully to provide various solutions to the problem through a scientific definition of social pathology. He proposed a nominal definition of the normal as that which conforms to conventional standards; alternatively, the normal is the average, or the normal conforms to the given *conscience collective*. Unfortunately, in both medicine and sociology, the definition of the normal involves an evaluation. While philosophers of medicine have attempted to offer neutral, descriptive criteria of 'disease', there is a strong argument to the effect that 'disease' is the product of a normative classificatory scheme.

Two important claims about the philosophy of social science are embedded in this introductory commentary. Firstly, a positivistic tradition in social science, which attempts to avoid any engagement with normative debate by aiming at a causal analysis or descriptive account of values, is unlikely to approach problems of justice within a framework of human rights discourse. Secondly, these positivistic solutions tend to be unstable (Parsons 1937) because in practice it is difficult to expunge normative evaluation systematically and radically. It can be shown that sociological explanations, for example of political behaviour, are incomplete without recognition of a normative account of laws, rights, entitlements, duties and other juridical institutions. Legal institutions are not 'things' in the same sense that tables and chairs are 'things' within a domestic environment, because the functions of laws in a society are in part dependent on whether they are just, that is whether their creation and imposition accords with such 'things' as the rule of law. The regularities of social life are not like the regularities of the natural world, because social rules and their enforcement depend on what social agents believe about these rules. As Alasdair MacIntyre (1971) has argued, this question – is it significant that a ruler should be just or merely appear to be just? – is an ancient one, deriving from philosophers like Thrasymachus, who claimed that he was merely describing rather than evaluating political life where questions of justice can play

no part. One problem for a value-free science of politics is that whoever claims that questions of justice cannot play a part in causal explanation has already committed a value-judgement.

Sceptical Sociology

The scepticism of sociology towards normative analysis of legal institutions is a legacy of the hostility of classical social theory. For example, Marx's analysis of the tradition of bourgeois individualism, specifically in the so-called 'Jewish Question', produced a conventional position in sociology which regards rights, especially individual rights, as partial, ineffective and superficial. Marx's negative view on bourgeois citizenship and the Declaration of the Rights of Man were developed around 1843–4 as a response to the ideas of Bruno Bauer on Jewish emancipation in Germany. Marx's basic criticism was that within political society people were seen as co-operative, while in their economic roles they were competitive, individualistic and egoistic. In short, the theory of rights expressed the division and alienation of human beings. Within Marx's account of capitalist civil society 'human rights' are merely a facade to hide or mask fundamental economic and social inequalities. This interpretation of liberal rights was an important aspect of his analysis of the Jewish situation in Europe. The political emancipation of the Jews was not an answer to their social separation; only a total transformation of the fundamental (economic) structure of capitalist society would pave the way to full liberation by re-uniting the political and the social nature of human beings. The same was true for the working class.

Marx's critique of rights has been influential, but it is a problematic influence. Firstly, there is no necessary reason why rights as such should be understood exclusively from an individualist perspective; there is a perfectly respectable communitarian tradition of rights, which has developed the idea of 'collective rights' (MacIntyre 1981; Sandel 1982). The problem with Marx's analysis is that he treated 'the consolidated property right' which protects 'unrestricted claims to divisible portions of social capital' (Ungar 1987:511) as the definitive model of rights as such. Marx was as a result unable to distinguish between two separate circumstances: 'is it the case that human rights merely served to disguise relations established in bourgeois society, or did they make possible, or even give rise to, demands and struggles which contributed to the rise of democracy?' (Lefort 1988:21). In any case, Marx's interpretation of the liberal tradition was in fact a caricature (Macedo 1991). For example, J.S. Mill's view of individualism was a critique of the narrow utilitarianism of Bentham and James Mill; J.S. Mill adhered to a developmental view of the individual which was far removed from the simplistic assumptions of Bentham's doctrine of pleasure (Abercrombie, Hill and Turner 1986:146; Holton and Turner 1989:14–17). Secondly, the erosion of human rights in east

European societies and the Soviet Union under the social and political domination of civil society by a monopolistic party system has made the legacy of Marx politically suspect. To take an example from Hungary, while under Stalinism the concept of 'bourgeois' (*polgar*) had negative overtones, dissident intellectuals eventually came to embrace the bourgeois values of intimacy, privacy and subjectivity in opposition to party values of the public and the social (Szelenyi 1988:52). Marx's own critique of bourgeois rights was bound up with the fact that in German the concepts of 'citizenship', 'citizen' and 'civil society' cannot be easily divorced from the concept of 'burghers' or 'bourgeois': *Burgerschaft, burgergesellschaft, burgerrecht* and so forth (Turner 1990).

While Marx was sceptical about rights as merely an ideological mask of individual property rights, sociology also inherited a tradition within the sociology of knowledge which has a relativistic reaction to normative claims (Meja and Stehr 1990). From the point of view of radical thinkers like Adorno and Horkheimer, Mannheim's sociology of knowledge had converted the critique of ideology into a description of belief systems. While Mannheim had in fact argued, in the context of the growing crisis of German culture, that a utopian mentality was actually necessary if human beings were ever to live optimistically with hope, his work was received as a value-neutral sociology of knowledge. That is, within Mannheim's sociology it would not be possible to distinguish between socialism and millenarianism: both were utopian belief systems of subordinate social groups (Turner 1991).

The consequences of Marxist criticism of bourgeois right and the sociology of knowledge have been to constrain the emergence of a sociology of human rights as universal aspects of social entitlement and membership. However, the crucial explanation of this lacuna in sociological theory is the influential sociology of law in the work of Weber. My criticisms of the Weberian legacy are based partly on the critical objections of Leo Strauss in his *Natural Right and History* (1950). Strauss claimed that the idea of natural rights had been attacked in social science, especially in Weber's philosophy of social science, in two contexts, namely conventionalism and the fact-value distinction. Strauss responded by attempting to demonstrate the logical difficulties with the idea that 'truth' is whatever people construe as 'truth', and by pointing out that virtually all of Weber's sociology depended on value judgements in the process of constructing causal arguments.

In *Economy and Society* (Weber 1978, Volume 2), Weber developed a number of important sociological arguments about the historical development of law. His guiding theme was the increasing rationality of law, which was manifest in the decline of religious justification of law, the increasing codification of the law, the professional training of lawyers, the elimination of ad hoc legal decision-making, the growth of the philosophy of law and so forth (Turner 1981). For Weber, the decline of the natural law tradition is an illustration of the secularisation of the normative foundations of the law. In *Economy and Society* in the chapter on 'The formal qualities of revolutionary law – natural

law', Weber set out a number of social developments which have in one way or another relativised the law. The growth of socialism has involved an emphasis on substantive natural law doctrines (especially on 'justice') in the ideology of the working class and among some intellectuals. However, it is difficult for these substantive concerns to have much impact because they are 'being disintegrated by the rapidly growing positivistic and relativistic–evolutionistic scepticism' of the intelligentsia (Weber 1978:874). The axioms of natural law have been discredited by the conflict between formal and substantive law, the relativisation of legal norms as a consequence of juridical rationalism, the decline of religious tradition and the spread of legal positivism. Weber thus rejected the idea that a universalistic and normative foundation for law (and hence for rights) is possible. The decline of the natural law has robbed the law of 'a metaphysical dignity' (Weber 1978:875). While this decline of dignity may have challenged the legitimacy of a particular rule, this secularisation has also effectively promoted the actual obedience to the power, now viewed solely from an instrumentalist standpoint, of the authorities who claim legitimacy at the moment. Among the practitioners of the law this attitude has been particularly pronounced (Weber 1978:875).

The conception of domination (*Herrschaft*) was central to Weber's sociology, and law was thus seen as a crucial feature of modern social relations of power. In fact Weber's entire sociology of domination was concerned with power, legitimacy and discipline. Weber identified various forms of power: economic, politico-military and symbolic. He analysed three types of legitimacy: traditional, charismatic and legal-rational. Why do social actors accept existing power relations? In premodern society, power tends to be legitimised by existing traditions and customs, or by the revolutionary authority of a charismatic leader such as a religious prophet. In modern societies, with the widespread effect of secularisation on socio-political attitudes, legal-rational authority is a far more common form of social legitimation. Rules are followed because they are thought to be properly constituted by some public body which has a mandate to operate in a certain way. We pay our taxes not because we believe that the taxation authorities have a divine authority, but because the tax regulations have been drawn up by an appropriate public authority, under the appropriate circumstances, by government offices which have the legal authority to extract taxes. These offices and officials have an authority which is grounded in the state and not in a supra-societal normative order. Secular legality is the ultimate basis of legitimacy.

It is not appropriate here to review Weber's political sociology (Mommsen 1984; Turner 1992b:217–41). However, one issue is particularly important in thinking about Weber in relation to the absence of a sociology of rights. Weber was deeply influenced by the philosophy of Nietzsche. As a result Weber saw modern society as an arena of violence in which organised social classes and status groups compete with each other for a monopoly of resources (economic, political, symbolic). Dominant social groups attempt to legitimise their mono-

polistic enjoyment of resources by an appeal to religion, tradition, ideology or whatever, but secularisation and rationalistic scepticism have meant that the dignity of traditional systems of belief, by which power can be legitimised, has been brought into question. 'Law' and 'rights' are part of this class struggle whereby classes appeal to substantive law to justify their claim to resources. As we have seen, Weber believed that this struggle over substantive law ('economic justice') conflicted with the growing formalism of modern law. Whereas the working class appealed to 'justice', the dominant classes manipulated law in the name of 'social order'. In Germany, this social conflict was reflected in two very different theories. Germanists saw the law as an essential feature of social solidarity, while the Romanists thought law was about authority and domination. Because of the impact of Nietzsche, Weber saw no simple solution whereby these conflicting views could ever be reconciled. The 'Death of God' – the collapse of any authoritative normative principle as a framework for traditional social life – led Weber to argue in his famous 'Science as a vocation' lecture that modern society is characterised by the endless conflict of polytheistic values. However, Weber did not ultimately deny that social actors are motivated by ideals; he specifically recognised the importance of both material and ideal interests. Although there is much dispute about his methodology, Weber adopted the position of value-freedom (*Wertfreiheit*). Value-judgement is not a component of the scientific evaluation of institutions and societies. Science tells people what they can do under given conditions, but it cannot tell them what they should do. Science tells people what is possible, not what is desirable.

From this perspective, we can see Weber's view of law and power-struggles as part of a German legal theory of the *Rechtsstaat* in which the state is legally acountable. In this respect, Weber's sociology of law had much in common with the doctrines of legal positivism which were developed by Hans Kelsen in his *Pure Theory of Law* (1969). Authority is seen in this theory as a top-down relationship. Rights inhere in the state rather than in the individual. Weber's views on limited democracy, the need for a strong state, and on the necessary relationship between economic growth and German imperialism were an aspect of this statist ideology. The implication of Weber's arguments are that, in the absence of a moral framework like natural law, might is right. Whoever happens de facto to be in power will enjoy de jure control. We might express this idea differently by saying that those (legal-rational) powers which happen to be in control of the legal apparatus and the bureaucratic machine will have legitimacy. In Weber's sociology of domination, this legitimacy does not come from below in terms of referenda or elections.

From Citizenship to Rights

We can now summarise the nature of sociology's scepticism towards human rights. Given the legacy of a relativistic sociology of knowledge, sociology finds

it difficult to accept the notion of human rights without also acknowledging a universalistic human ontology. While it rejects an ontological grounding for *human* rights, it may recognise 'rights' merely as claims for services or privileges by social groups involved in competitive struggles. These negative arguments about the role of relativism in sociology precluding the possibility of a theory of natural rights in modern social science were, as we have noted, opposed by writers like Strauss. Criticisms of value relativism have provided a background to recent attempts to revive the theory of rights in political philosophy by Luc Ferry (1990). Although Ferry's work is directly relevant to my argument, I attempt later to derive a notion of intersubjectivity as a foundation for a theory of rights not from Johann Fichte's *The Science of Rights* (1970) but from Durkheim via Arthur Schopenhauer and Max Scheler, because one can gain a stronger sense of the sociological roots of shared rights within a Durkheimian tradition.

Given this scepticism towards the idea of human and natural rights in classical sociology, a sociology of citizenship has functioned as a substitute for a sociology of rights. Sceptical sociologists have felt intellectually more comfortable with the idea of citizenship, because it does not appear to raise problems about universal ontology. Citizenship can be, in the tradition of T.H. Marshall (1950), defined in institutional terms as participation in the civic, political and welfare institutions of modern society. Unlike human rights, citizenship appears to be historically and culturally specific to western culture. It developed out of classical ideas about democratic participation in the polis; it flourished as a status entitlement within the autonomous cities of northern Italy; it was embraced by nineteenth-century liberalism and finally it has been developed in the late twentieth century as a critique of the consequences of monetaristic restructuring of the welfare system. From a sociological point of view, 'citizenship' is a middle-range theory of the evolution of the welfare system; it was a set of provisions to counter-act the negative consequences of class inequality in a capitalist system. Thus, a sociology of citizenship does not appear to involve one in any questions about ontology, morality or evaluation.

However, I want to argue that to read 'citizenship' in this way is a mistake. The debate about citizenship in sociology has been covertly normative. In the work of Marshall, the concept was developed to answer a problem in liberalism. In capitalism, liberal values were successful in emphasising freedoms and individualism, but there was no easy liberal answer to critics who pointed out that the classic freedoms (of speech, association, religion and so forth) were ineffective tokens for the majority of the population who lived in poverty. In part, the institutions of citizenship, especially in the British case, functioned to ameliorate the condition of the working class without transforming the entire property system. While 'citizenship' functions as a description of certain institutions, it covertly carries the implication that they *ought* to exist in the interests of social harmony. The Marshallian view of the evolution of citizenship, embracing the majority of the population in a supportive system of social

security, is an evolutionary account of progress. In this respect, there is a connection between the overtly normative character of the discourse of rights and the covertly normative account of citizenship as progress. Thus, any attempt (Harrison 1991) to argue that citizenship is not an evaluative concept is certainly mistaken.

There are, however, three analytical problems with the concept of citizenship which are specifically important for this discussion of rights. The first is a comparative problem; the second is historical; and the third is juridical. It is not clear whether the concept of citizenship is useful in comparative research. The concept emerged in relation to a specific type of urban development, namely the autonomous city-state. Furthermore, the concept privileges certain public values, while criticising particularistic and private commitments. A good citizen acts in the public interest, not with reference to tribal needs, or even family loyalties. Thus, the western conception of 'corruption' has to be seen in the light of this view of the 'public' which is part of the tradition of citizenship. A good citizen acts in the public good by managing public assets in a fashion which is disinterested and accountable, even when his or her actions might be against the interest of the tribe, the family or the locality. It appears doubtful therefore that 'citizenship' could apply easily to societies which have had very different urban histories, or which have very different notions of 'the public'. For example, there are significant problems in attempting to apply citizenship concepts to Japan, especially in the area of law labour and industrial relations (Woodiwiss 1992).

The second problem is that 'citizenship', like many core concepts in sociology and political science implicitly view the 'nation-state' as the natural boundary of 'society'. The very word 'citizen' is a combination of *cite* (city) and *sein* (to be). A citizen was originally a member of a city-state. As the concept developed after the French Revolution, it came to mean an active participant in a republic, that is a nation-state built around some dominant ideology, typically nationalism. Citizenship was a form of secular solidarity which within the context of nationalism was replacing religious solidarity and religious symbolism.

However, as European societies expanded through the eighteenth and nineteenth centuries, many aboriginal communities in the 'white-settler societies' of Australia, New Zealand, Africa and Canada lost their customary access to the land and were either destroyed by military action or exterminated by disease. They were not citizens of the new societies, but their own tribal structure had often broken down. They were denizens rather than citizens, but to extend citizenship rights to them may be simply a form of internal colonialism. With the growing interconnectedness of the world economy and with the spread of cultural globalism, it is no longer clear that the nation-state will survive in its traditional form under these pressures of globalisation. The nation-state is not necessarily the most suitable political framework for housing citizenship rights. In Europe, citizens increasingly appeal to supra-national entities (the European

court or the European parliament for example) to satisfy or achieve their (national) citizenship rights. It is clear that there will be increasingly strong regional, subnational and national pressure groups who look to Brussels not national governments to achieve their rights. Furthermore as a result of both nineteenth-century colonialism and twentieth-century globalisation, the world refugee problem and aboriginal rights questions cannot be easily approached within the framework of (nation-state) citizenship concepts.

In addition to these historical and comparative problems with citizenship, there is a juridical objection that, while citizenship in sociological theory might appear to fill the gap of a theory of rights, citizenship is merely a bundle of rights. In Marshall's terms, it is a set of civic, political and social rights. Civil rights concern the liberties of the individual; the political component is the right to participate in the political decision-making process; and social rights refer ultimately to participation in civilised life. Thus, while sociologists writing about citizenship may be inclined to think of citizenship as a social institution, Marshallian citizenship is an ensemble of rights, which constitute the privileges of social membership. From a legal point of view, one can argue that the Marshall tradition is unsatisfactory because citizenship is an arbitrary or contingent set of rights. Marshall himself wrote about (English) citizenship as a contingent outcome of certain historical transformations of status (Turner 1986). Also citizenship is a mixture of (bourgeois) individual rights and (democratic) collective rights. This instability of the contingent mixture of rights may partly account for the contradictory interpretations which are typically placed on citizenship. The question is: why this particular ensemble of rights? One traditional objection to Marshall has been that his view of citizenship neglects economic rights. As a result, 'citizenship' has not been developed as a concept in social science with much regard to its logical coherence.

In summary, by contrast with the discourse of citizenship, 'human rights' appears to be more universal (because they are articulated by many nations through the United Nations charters), more contemporary (because they are not tied to the nation-state) and more progressive (because they are not related to the management of people by a state). If sociology is the study of the transformation of *gemeinschaft* (organic and particularistic values and institutions) into *gesellschaft* (associations which are more universalistic in their definition of social membership) as a consequence of modernization, we can conceptualise human-rights solidarity as a historical stage beyond citizenship-solidarity. Whereas citizenship as a doctrine has been a progressive feature of western societies in terms of universalistic values behind the welfare state, human-right concepts can be seen as a progressive paradigm which is relevant to a world system. At least in the short-term, some combination of human rights and citizenship institutions appears to be essential for developing policies towards such conflict areas as Northern Ireland, Lebanon and Yugoslavia, and towards such marginalised groups as aboriginals, stateless persons such as Kurds or sufferers from AIDS. The point about the concept of *human* rights is

that they are extra-governmental and have been traditionally used to counteract the repressive capacity of states. By contrast, citizenship has been more frequently associated with state-building and state-legitimacy (Bendix 1964; Mann 1987). Human rights abuses in East Timor as a consequence of the imposition of Indonesian state citizenship through population transfers and organised violence would be an illustration of this argument.

Finally, one way round the traditional problem of (anthropological) relativism would be to argue that, precisely because we live in a world which is integrated (but not wholly unified) by various globalisation processes (in terms of tourism, consumerism, communications, law, time, economic integration, military surveillance, and common ecological crises), the historical divisions between national communities has been partly eroded by multiculturalism. It would be a mistake to exaggerate this process, because global tendencies will be resisted by strong movements to express local differences, but it is difficult to see how any 'local' difficulty (such as the Gulf War) could be resolved without global remedies. Thus, consciousness of the possibility of 'one world' (however diversified and antagonistic) might create the sociological conditions in which the conventional sense of anthropological relativism might decline, thereby removing the scepticism about a common ontology as a basis for *human* rights in the absence of a common law tradition.

Human Frailty and the Precariousness of Institutions

Human rights as a sociological concept have been defended as an important supplement to the existing idea of institutional citizenship, partly on the grounds that in a global political system 'rights' could function as more realistic and more progressive than the traditional and national concept of citizenship. Of course, 'human rights' as a concept has been challenged. It is seen by many to be biased and western; it provides western powers with an opportunity to intervene in the Third World under the auspices of the United Nations. The human rights movement has been criticised in particular for adopting western individualism as the underpinning for the modern exercise of rights (Holleman 1987). For those who follow or have been influenced by C. B. Macpherson (Kontos 1979), human rights are still too closely connected with justifications of the market and possessive individualism. For many critics of the concept of rights, the contemporary status of human rights, especially when it is institutionally and globally attached to the United Nations Universal Declaration on Human Rights and the European Convention on Human Rights, is in no significant way different from its seventeenth-century intellectual forebears. The concept of rights is thus still criticised on the grounds that there is no ontological foundations for claims about universality, that it is an individualistic concept of western (liberal) philosophy, and that it is covertly but inevitably tied to the idea of (private) property.

It is not possible to defend the concept of rights from all of these various charges. The specific aim of this conclusion is to claim that the universality of the concept of rights can be defended through a sociology of the body. If it is possible to identify such a foundation, then this sociology of the body could function discursively as a substitute for the ancient notion of natural law. This argument recognises that natural law theory in its pristine form cannot be easily resurrected, but a claim about the universality of rights which is based on some theory of human nature requires a substitute for the certainties of natural law. To be precise, the argument is that, from sociological presuppositions about the frailty of the body and the precarious or risky character of social institutions, it is possible to offer a sociologically plausible account of human rights as a supplement to citizenship or as an institution which goes beyond citizenship because human rights are not necessarily tied to the nation-state.

Sociology has been critical of the idea of human rights on at least two grounds. First, it is critical of the idea of the 'human' or 'humanity' as a universal category, because it has adopted a social constructionist view of the body (as a socially produced rather than natural phenomenon) and a relativistic view of culture (in which different cultures would produce different forms of reason and reasonableness). 'Human' is not a category which can be applied cross-culturally, because the divide between human and not-human is socially and historically variable. Secondly, 'rights', especially in the utilitarian tradition, have been regarded as a product of an individualistic, possessive and egoistic society, and as an inevitable adjunct to and legitimation of inequalities in capitalist society. By combining these two traditional criticisms, we can see why the concept of 'human rights' has not been widely accepted within sociological theory. The same type of argument would apply to related concepts such as 'social rights', 'women's rights', 'aboriginal rights' or 'animal rights'.

The argument here is that it is possible to underpin the idea of 'human rights' by asserting a common humanity across cultures via an appeal to a particular tradition in philosophical anthropology, which is associated with the work of Arnold Gehlen and Helmut Plessner (Honneth and Joas 1988), and by challenging the epistemological validity of social constructionism (Turner 1992a:99–121). In the current theoretical climate, it is also probably unfashionable to adhere to debates about ontology and philosophical anthropology. There is obviously a strong movement towards a deconstruction of natural rights discourse (Douzinas and Warrington 1991:74–91), although Jacques Derrida (1987) has taken a strong position towards law and rights, especially in the case of South Africa. In this article, it is not possible to present an argument about the ontological underpinnings of human rights in detail, although a fuller justification of these assumptions has been presented elsewhere (Berger 1969; Berger and Kellner 1965; Ainlay 1986; Turner 1984; Turner 1992a:1–28). Briefly, Gehlen's philosophical anthropology was based on Nietzsche's notion that human beings are 'not fully complete animals' (*noch nicht festgestelltes Tier*). This notion has a number of dimensions. First, human beings are

'prematurely' brought into the world, as an accident of their evolution towards an upright posture, and therefore they are socially dependent on society and culture for a long period during maturation. In fact, human beings do not have a species-specific environment for which they are instinctively equipped. Secondly, they are therefore characterised by their 'world-openness' (*Weltoffenheit*), because they do not have a stable instinctive baggage; they experience a deprivation or lack of instincts (*Instinktarmut*), for which social institutions provide a substitute apparatus. Finally, Gehlen had a historical view of these developments in which, in modern society, human 'character' has been replaced by a fluid 'personality' which corresponds to an equally uncertain, deinstitutionalised social reality. Modern life is thus precarious and Gehlen drew extremely conservative conclusions from this ontological picture; human beings require a more secure political and social environment to provide some discipline, if social stability is to be maintained (Gehlen 1988).

Gehlen's philosophical anthropology has had a significant, if somewhat disguised impact on modern social theory, especially on the sociology of knowledge (Berger and Luckmann 1966). In this presentation, I want to argue that the central aspect of the legacy of Gehlen resides in two related ideas. First, human beings are ontologically frail, and secondly that social arrangements, or social institutions, are precarious. These two notions can be given a specific operational content as follows. Human beings are frail, because their lives are finite, because they typically exist under conditions of scarcity, disease and danger, and because they are constrained by physical processes of ageing and decay. Against this characterisation of human ontology, it can be argued that this condition of frailty is historically and culturally variable and that therefore it cannot function theoretically as a substitute for natural law. Notions like 'scarcity' and 'need' are notoriously ideological in that they can only assume some meaning within a specific economic discourse. In particular, modern western societies are societies of abundance (Xenos 1989).

The core of this counter-argument would be that technological development and social modernisation have changed the circumstances of human ontology. Now the paradox of this argument might be that technological and institutional modernisation have made modern society, in some respects, more rather than less precarious, and that human life is endangered by pollution, environmental disaster, a scarcity of resources and chronic diseases of civilisation (cancers, strokes and heart failure). In part, it is the very success of industrial modernisation (or in cultural terms of instrumental rationality) that has made the planet ecologically unsafe, at least in the absence of adequate institutions of global government. In any case, human life is still finite, and the mass of the world's population lives under circumstances of scarcity. The institutions which are meant to protect human beings from their own frailty now appear as part of the problem, not the solution.

There is therefore a dynamic and dialectical relationship between our ontological frailty and our social precariousness. The institutions which are

designed to protect human beings – the state, the law, and the church in particular – are often precisely those institutions which threaten human life by the fact that they enjoy a monopoly of power. The state is that institution which enjoys a monopoly of violence in a given territory, while the church is an institution which exercises a spiritual violence through its symbolic force (Turner 1992b). Various social utopian dreams have always anticipated the erosion of the state as a necessary precondition of human happiness and security. It is here that we can see the limitations of the idea of citizenship and welfare (Goodin 1988) as a social shield to protect human beings from their frailties when they are exposed to sickness, unemployment and early retirement. Citizenship is often not an adequate mechanism for protecting individuals against a repressive or authoritarian state. Human rights, insofar as they are extra-political or supra-societal rights which have their legitimacy beyond the state, are crucial in protecting individuals against state violence, or at least in providing the normative grounds on which individuals could be protected against state violence.

We can perhaps at this point begin to define social precariousness. The basic idea here is that social institutions are in the long run often inadequate to human purposes. First, there is the perennial argument in sociology that, primarily as a consequence of bureaucratisation, human institutions change over time in such a manner that they eventually deny or negate their original design. For example, the routinisation of charisma is precisely such a fateful theory; the inevitable transition of sects to churches, or the incipient denominalisation of religious practices are processes which express a similar view. In political sociology, the iron law of oligarchy as a theory of mass politics embraced a fundamental pessimism about the possibility of democracy. Secondly, there is the idea that form destroys or contradicts content. In Georg Simmel's sociology (Levine 1971), there was a 'tragedy of culture' in which the creative aspects of the life-world are destroyed by institutionalisation. We can treat this tragic view as a version of Weber's institutionalisation of charisma, which also expresses the idea that over time institutions can no longer adapt to the conditions from which they originally sprang. This tragic view may well prove to be a persistent feature of western social thought in which social institutions stand in a fateful relationship to human purposes because they contradict their origins (Turner 1981). Secondly, institutions, if they are to be effective in achieving public ends, have to be powerfully equipped and constituted. In Althusserian terms, the repressive and ideological apparatus of the state (Althusser 1971), such as the police, the army, the Church and the professions, requires legal and ideological guarantees, which means that standards of democratic participation are subordinated to the requirements of strong government. The bureaucratisation of political power in the interests of predictability and continuity often operates against the interests of individuals or marginal groups. Strong institutions require powerful custodians, but who will exercise custody over these custodians? Thirdly, institutional arrangements

are uncertain and insecure because they are also resources (or control access to resources), and as a result they are an arena for competitive struggle between powerful social groups. This competitive struggle for scarce resources necessarily results in corruption and the abuse of public office, or in the existence at various levels of 'legitimate' monopolies of privileges, status honours and symbolic capital. In short, social systems are subject to the contradictory problems of resolving the requirements of normative integration and allocation of resources under conditions of scarcity (Parsons 1991:115). Because there is no stable optimal solution to these contradictory requirements, social life is precarious. Human beings as social agents are always exposed to contingencies, uncertainties and risks, and the measures which are taken to regulate these risks create further dilemmas of power.

We can see various features of this dynamic, which we can suitably call the paradox of precariousness, in seventeenth-century versions of social contract theory. In many respects, the account I have given of human frailty and social precariousness is a version of Hobbesian responses to the state of nature in terms of the creation of political order through a contract. Hobbes saw human life in a state of nature as nasty, brutish and short. Human beings are rational, but it is difficult for rational humans to live amicably in a pre-social state, because competition drives them against each other. They create an authority to whom they surrender part of their freedom in order to establish the conditions of social peace. This vision provided the classical foundations of contractarianism. The idea of human frailty, which I have derived from Gehlen, departs from the contractarian view in that Hobbesian Man is aggressive and rational rather than frail and dependent. Human beings, in my argument, are ontologically members of a community of suffering from which they cannot escape (Hand 1989:39). The Lockean view might be somewhat different in that Locke's state existed to protect human beings in order for them to continue to enjoy their property rights. The assumptions which one can take from Gehlen propose that human beings require institution-building because they are 'unfinished' and 'world-open' not because they are cunning and aggressive. Thus, the argument about frailty also departs from those social philosophies which would derive (natural) rights from human dignity, as in Ernst Bloch's *Natural Law and Human Dignity* (1986). Frailty and precariousness sketch out a model of the indignity of human life, of its essential alienation.

However, the problems in Hobbes's theory of the state fit the precariousness proposition very well. Hobbes's social contract theory was secular and individualistic. The state exists, not because God has imposed it or sanctified it, but because rational beings require its protection. It was for that reason that writers like Sir Robert Filmer opposed the idea in his defence of royal patriarchal authority in his *Patriarcha* which was written in 1640 and published in 1680 (Schochet 1975; Turner 1984:138–41). Filmer's patriarchal theory claimed that the power of the king, just as the power of fathers over their households, derived from God; it was a natural form of power not a social one. The problem

with Hobbes's theory is that it can be used to justify any type of power (patriarchal, monarchic, ecclesiastical and so forth) provided that power is contractual and effective. Critics of Hobbes feared that a contractarian ideology could be used to justify an authoritarian system such as the last days of the Cromwellian regime when Cromwell was contemplating his own appointment to kingship. The Hobbesian state is, in this perspective on the unreliability of institutions, quintessentially precarious. In the long-term, it can evolve in an authoritarian direction which will come to destroy or oppress the very citizens who, by mutual contract, put it in place. If the frailty of human beings can be summed up in the Hobbesian phrase of 'nasty, brutish and short', the precariousness of institutions might be captured in the ironic lines of Robbie Burns's poem 'To a mouse' in which the precariousness of nature and social life is expressed in the observation that 'The best laid schemes o' mice an' men, / Gang aft a-gley, / An' lea'e us nought but grief an' pain, / For promis'd joy'. Social life is characterised by its risk, by the instability of social relations, and hence by the precarious nature of trust. A risk society is one that produces 'bads' rather than 'goods' (Beck 1992).

Discussion

The argument is that we can, in the absence of natural law, avoid sociological relativism through a re-interpretation of philosophical anthropology to assert an ontology of rights in the claim that human frailty is a universal feature of human existence. This position can be seen as a variation on Barrington Moore's thesis in his *Reflections on the Causes of Human Misery* (1970:1–2) that, while human happiness is notable for its cultural diversity, misery is characterised by its unity. In this discussion, one major objection to this position has been considered, namely that technological improvements in the human condition might radically change the fragility and frailty of human life. There are two counter arguments. First, it seems inconceivable that social conditions could sufficiently improve globally to believe that the mass of humanity could escape from pain, disease and death. Secondly, changes which ameliorate human frailty may typically increase precariousness. To take one example, the spread of AIDS in the 1980s exposed the fallacy of assuming that medical technology had overcome such global epidemics. To control the spread of AIDS, it may be necessary, according to some political elites, to adopt draconian public-health measures – quarantine, mass testing, compulsory vaccination, registration of victims, deportation and so forth – which would undermine civil liberties (Sontag 1988). Making our health less fragile could mean making our social environment more precarious. In terms of the sociology of the body, we could consider modern society as a social system which is developing into the 'somatic society' (Turner 1992a:13). The body is no longer the productive agency of economic accumulation; on the contrary, it constantly

appears as a limit which must be transcended or replaced by medical and industrial technology, by body substitutes, computers, and cyborgs, or overcome by new regimes of management, surveillance and training. Modern armies require drug therapy and drug enhancement if they are to function effectively. The limitations of the human body must be constantly transcended by medical technology if economic and military goals are to be achieved under rational conditions, but this management of the body is a critical aspect of the infringement of rights. The possibility that the state might claim ownership of frozen fertile embryos from couples who are now dead is one striking illustration of the complexity of medical intervention to overcome the existing limitations of the reproduction of bodies.

We can consider some additional criticisms of this outline of a theory of rights. First, since animals, especially those which share common characteristics with humans, namely mammals, are also frail for the same reasons that humans are frail, can one separate out animal from human rights? Animals age, suffer and die in much the same way that humans do; therefore, animal rights cannot be in fundamental terms separated or distinguished from human rights. This issue arises partly because I am attempting to outline a minimal, thin theory of human rights, that is a theory which appeals to a minimal criterion of commonality (frailty), and which is thin because it avoids rich theories of human culture, symbolic communication or reason. Therefore, the argument about human frailty must have implications for the debate about the division between nature and society, animals and humans. The idea of animal rights is clearly controversial (Tester 1991), but the idea of *human* frailty would not automatically imply the importance of animal rights. The quest for a mechanism to explain or to justify human rights sociologically suggests that animals must be protected, because a threat to the existence of animals is indirectly but ultimately a threat to the continuity and survival of the human species. Protecting animals may ultimately contribute to the protection of human beings, because animals and humans are both exposed to pollution, environmental contamination, global warming and industrial waste. Rather than engage in a debate about whether *animal* rights are possible (Regan 1983), I have adopted a utilitarian position: improving animal happiness may contribute to the total sum of human happiness; biological diversity is in the interests of human existence.

The second objection might suggest that, while all human beings are frail, some are more frail than others. My argument rather than providing a defence of universal human rights could justify the principle of the survival of the fittest. In a society where many social groups (the elderly, the sick and children) are frail, it is in the interests of the survival of the strong (or the less frail) to maximise their advantages (by genocide, for example). How can the frailty argument get round the problem of human nastiness? As we have seen, the Hobbesian solution (and generally all solutions which depend on some appeal to human rationality) is to suggest that rational actors will have an interest in

security. The problems with this Hobbesian solution for sociology are well known (Parson 1937). Furthermore, I have rejected the rich/patriarchal image of *homo economicus* as a rational, achievement-oriented, inner-directed agent in favour of an account of human nature which gives priority to what we might call the theodicy problem, namely to human suffering, misery and frailty. A rationally organised society in which a culture of individual civility and education was long-established might produce, not harmony and security, but a bureaucratic holocaust (Bauman 1989). In sociological terms, the moral imperative of Kantian philosophy is too individualistic and rationalistic, because it neglects the emotive (sympathetic) element of social dependency and obligation.

These propositions about collective sympathy are seen as a necessary component of the sociological answer to the question: why should any frail agent be other-regarding? How can one deduce a theory of human rights rather than the survival of the fittest from the theodicy problem? Ultimately my argument has to assume that sympathy is also a consequence of, or a supplement to, human frailty. Human beings will want their rights to be recognised because they see in the plight of others their own (possible) misery. The strong may have a rational evaluation of the benefits of altruistic behaviour, but the collective imperative for other-regarding actions must have a compassionate component in order to have any force. The strong can empathise with the weak, because their own ontological condition prepares them for old age and death. There may be a rational component to these anticipations of future dependency, but the limitations of utilitarianism is to imagine that all altruistic acts are in fact egotistical and individualistic. More importantly, sympathy is crucial in deciding to whom our moral concern might be directed (Fisher 1987).

The notion of sympathy is not exclusively or even primarily a psychological concept; it has on various occasions played an important part in sociology and it is valuable at this juncture in indicating that the idea of frailty requires the support of a theory of sympathy to underpin the sociological nature of this argument about the connection between frailty and human rights. An adequate justification for the importance of sympathy in a theory of morals lies beyond the scope of this paper; it is, for example, an important part of modern theories of rights which derive their arguments from the idea of self-legislation and intersubjectivity in Fichte (Neuhouser 1990). The idea of sympathy was important in the development of a phenomenology of social relations in Max Scheler's sociology of knowledge (Scheler 1980). Although Scheler's sociology has been criticised (Frisby 1983), Scheler's attempt to find an alternative to sociological relativism is directly relevant to my argument. Furthermore, Scheler's phenomenology of sympathy and emotions (Scheler 1954) provides an account of intersubjectivity, which is valuable in developing an understanding of 'we-feeling'. It is now clear that similar issues lay behind Durkheim's development of a science of morals. Stjepan Mestrovic (1991) has shown how Durkheim adopted Schopenhauer's critique of Kant's theory of duty to argue

that, without some notion of collective compassion, moral injunctions would be worthless. We are collectively committed to duties and obligations, not merely out of some rational appraisal of obligation, but because of collective sentiments (compassion) about the moral force of rules. In my argument, it is from a collectively held recognition of individual frailty that rights as a system of mutual protection gain their emotive force.

The third objection, which would come from a feminist critique of the private/public division, raises questions about the application of rights, primarily to women, in a society, which is organised along patriachal principles. These criticisms could be regarded as a specific aspect of the general criticism of (individual) contractarianism by feminist political theory. A full answer to the wide range of feminist criticism of rights theory cannot be considered here (Dietz 1992). However, a defence of the frailty-theory of human rights would entail the following considerations. First, feminist criticism of the liberal theory of rights has many of the strengths and weaknesses of the Marxist tradition. Rights mask underlying structural inequalities by an appeal to the sovereignty of the individual. However, it is wrong to dismiss all versions of rights theory on the grounds that one version is found wanting. Secondly, feminist criticism is often in fact a criticism of theories of citizenship rather than human rights; it concentrates on the patriarchal aspect of the private/public dichotomy in the citizenship tradition which is not necessarily present in all theories of human rights. Thirdly, while the function of rights in particular circumstances could be criticised, one still needs a general theory of the democratic process, of which rights would be an essential component. Finally, a critical analysis of feminist metanarratives (Fraser and Nicholson 1988:382) suggests that the category of 'woman' itself obscures fundamental differences between women (black women, old women, disabled women and so forth). Here again, while there are differences of circumstance, all women (like all men) are frail, and they are all exposed, in different degrees, to social precariousness.

Finally, one could consider powerful politico-legal objections to this theory. For example, the theory outlined here is essentially a theory of rights as claims for immunity and protection, but there are other types of rights. For example, some rights are privileges or entitlements. The classical liberal rights of personal freedom might not appear to be protective human rights, because they are by their critics associated with the functioning of the market. However, my argument is that the core of rights is the idea of a protective arrangement which, among other things, allows individuals or groups to seek redress for wrongs and to make claims for security. Even the Lockean right to property might be regarded, in this light, as a mechanism whereby parents might seek to protect their own children against the vicissitudes of social life. A further objection is that an elaborate theory (rather than an outline of a theory of rights) would have to consider circumstances where human rights may be in fundamental contradiction. For example, there are obvious problems with freedom of expression in Article 19 and so-called 'hate speech'; there are equally obvious conflicts

around abortion and the rights of unborn children. However, these conflicts are endemic to legal relations rather than simply to rights provisions, because they reflect fundamental social conflicts of entitlement and protection. A more profound issue concerns the institutionalisation of a global source of legitimate power which would be capable of enforcing human rights, especially against the interests of national governments. The paradox here is that any global government or legal body with the capacity to enforce human rights, for example in protecting human beings from industrial pollution, would also have the power to curtail or expunge rights. This paradox appears to be inherent in the whole problem of social precariousness which I have attempted to describe in this article.

Conclusion: The Frailty Theory of Rights

This argument about the neglect of the problem of human rights has been presented at a highly abstract level. It has not addressed the question of the historical origin of rights, the political role of rights in modern democracies, or the social conditions for human rights legislation. These questions have been considered frequently in political history and political philosophy. For example, a general account is to be found in Strauss's classical *Natural Right and History*, to which I have already referred. My purpose in this account has been somewhat different. The thesis about human frailty, social precariousness and collective sympathy can be regarded as a ground-clearing exercise; it represents an attempt to provide a general sociological orientation towards human rights as a response to the traditional problems of conventionalism and the fact-value dichotomy. Through an appeal to a modified version of Gehlen's philosophical anthropology I have attempted to provide a minimalist understanding of human attributes in order to circumnavigate the traditional problem of cultural relativism. However, in order to avoid both a static view of the need for human rights as a system of protective claims and a purely meta-theoretical analysis of social relations, the argument has considered the historical implications of technological change for human existence and the increasingly risky nature of social life with globalisation: there is a dynamic relationship between human vulnerability and the precarious character of social institutions.

In more specific terms, it is claimed that sociology needs to develop a theory of rights as a supplement to a theory of citizenship. While the concept of citizenship has functioned analytically as a substitute for a theory of rights, the analysis of rights is important because citizenship is closely tied to the historical fortunes of the nation-state. In a world which is subject to strong forces of globalisation, the struggle over rights has become an increasingly important feature of the global political order. However, within the nation-state itself, there are constant political processes which erode the rights of citizens, and, as

a consequence, appeals to courts outside the state are important for the protection of individuals and groups against enhanced state power. To take one example, it is widely believed that with the growth of prime ministerial power in Britain, there is a pressing need to protect and enhance human rights, for example by a Bill of Rights (Ewing and Gearty 1990). The improvement of citizenship may not be the most appropriate response to state power or state terror. If the sovereignty of the nation-state is eroded by the growth of supranational legal and political institutions, then the debate about rights might begin to replace the debate about citizenship in both academic and political life. This article attempts to prepare the ground for a genuinely sociological account of human rights, which will counteract the largely negative view of rights which we have inherited from the classics within mainstream sociology.

Acknowledgements

This paper was originally developed for a workshop on human rights in the Human Rights Centre, University of Essex. I am particularly grateful to Kevin Boyle, Michael Freeman, and Onora O'Neill for their comments on an earlier draft. The paper was also given as a seminar at Birkbeck College, London, where Paul Hirst and colleagues provided generous criticism. I would also like to thank Joe Foweraker, Michael Harloe, Karen Lane, Gordon Marshall, Ray Pahl, Robert Stones and Ian Taylor for advice on earlier versions of this analysis of the relationship between citizenship and human rights. However, I am finally responsible for the contents of the article.

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