



Andrew Clapham

HUMAN RIGHTS

A Very Short Introduction

OXFORD

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UNIVERSITY PRESS

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Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in

Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
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Published in the United States
by Oxford University Press Inc., New York

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Database right Oxford University Press (maker)

First published as a Very Short Introduction 2007

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British Library Cataloguing in Publication Data

Data available

Library of Congress Cataloging in Publication Data

Data available

ISBN 978-0-19-920552-3

1 3 5 7 9 10 8 6 4 2

Typeset by SPI Publisher Services, Pondicherry, India
Printed in Great Britain
by Ashford Colour Press Ltd., Gosport, Hampshire

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Preface

The aim of this book is to provide the reader with some entry points into the worlds of human rights thinking, activism, and law. This book concentrates on the power of ideas to mobilize people against injustice and indignities. Human rights do not really resolve the tension between competing interests and various visions of how the world should be; rather, human rights ideas provide the vocabulary for arguing about which interests should prevail and how best to achieve the ends we have chosen.

This short introduction actually looks at the content of a number of rights rather than simply telling the human rights story of revolutions, proclamations, and continuing struggles. Calling for a world based on respect for human rights is easy; adjusting current arrangements to achieve full respect for human rights is a never-ending process when we consider that there are human rights to life, equality, free speech, privacy, health, food, and housing. Human rights are about each of us living in dignity, and we are a long way from achieving that on a global scale. We shall see that the human rights project is not simply about implementing a set of obligations fixed in history; rather, the human rights movement is about people standing up to injustice and showing solidarity in the face of oppression.

In order to allow readers to discover for themselves some of the texts and organizations referred to in this introduction, we have provided a website with internet links at <http://hei.unige.ch/human-rights-vsi>. References marked with an asterisk* in this book can be found on the website.

Acknowledgements

I should like to thank all those at Oxford University Press who worked to bring this project to fruition. Special thanks go to Marsha Filion, who saw through the initial ideas and lent her support at an important stage. I must also thank James Thompson, Alyson Silverwood and Zoe Spilberg for their hard work in the production of the book. In addition, I very much appreciated the constructive comments and encouragement I received from Susan Marks and the anonymous reviewers. Their enthusiasm, dedication, and suggestions certainly shaped the final product for the better. Thanks also go to Louise Petre for designing an elegant companion website for the book.

Here at the Graduate Institute of International Studies in Geneva, I have been fortunate to have access to assistance from excellent graduate students, who have posed pertinent questions and provided marvellous editorial help. I should like particularly to thank Michelle Healy and Claire Mahon for their help on this project.

Lastly, let me express my gratitude to two people from my family: my mother, Margaret Clapham, who nourished the project and read the manuscript with a critical eye to keeping it jargon-free,

and my wife, Mona Rishmawi, who not only offered unwavering support, but also helped to shape the ideas and was happy to ‘think aloud’ with me on many occasions.

A.B.C.

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Chapter 1

Looking at rights

These days it is usually not long before a problem is expressed as a human rights issue. This book looks at where the concept of human rights came from and how the human rights movement has developed a set of obligations that apply worldwide. We will consider the trajectory of the idea of human rights and the role that human rights play (and might come to play) in our world.

One theme of this introductory book is that different people currently see human rights in different ways. For some, invoking human rights is a heartfelt, morally justified demand to rectify all sorts of injustice; for others, it is no more than a slogan to be treated with suspicion, or even hostility. Lawyers sometimes consider that human rights represent almost a term of art, referring to the details of accepted national and international human rights law. Yet the application of human rights law is almost always contested, with both parties to a dispute demanding that human rights law be applied in their favour. Human rights law is special as it often suggests that other law is inadequate or unjust. The language of human rights is deployed to criticize, defend, and reform all sorts of behaviour. Playing the 'human rights card' can be persuasive, sometimes even conclusive, in contemporary decision making; this is one aspect of what makes the moral force of human rights so attractive – they help

you to win arguments and, sometimes, to change the way things are done.

The concept of a ‘human rights culture’ also means different things to different people. To some, it means ensuring that everyone is treated with respect for their inherent dignity and human worth. To others, it means that judges, the police, and immigration officials are required to protect the interests of terrorists, criminals, and other undesirable elements at the expense of the security of the population. This tension recently came to a head in the United Kingdom with popular newspapers ridiculing the application of the new Human Rights Act (see Box 1). The tension is, in a way, inherent in the operation of human rights protections. Human rights come into play to stop governments and other actors from pursuing expedient policies at the expense of the well-being of certain individuals and the proper functioning of a democratic society under the rule of law. At times, human rights protections may seem to be anti-majoritarian; indeed, human rights may serve to protect people from the ‘tyranny’ of the majority. But, as we shall see, with the exception of the absolute ban on torture, human rights law does allow for security needs to be taken into consideration.

On closer inspection, much of the apparent British backlash against the ‘human rights culture’ in decision making turns out to be based on false information concerning the supposed effects of the new Human Rights Act. First, the judges cannot strike down laws as incompatible with human rights; Parliament retains complete sovereignty over which laws to pass or repeal. (This is not the case in other countries with an entrenched constitution, such as the United States or South Africa, where constitutional rights may rank supreme.) Second, the Government’s review of the implementation of the Human Rights Act has highlighted a series of ‘myths and misperceptions’ about the Act. Stories, such as the prisoner who claimed that denial of access to certain magazines amounted to inhuman and degrading treatment, have been retold

Box 1: Human rights in the UK press

The Sun (online): Oliver Harvey and Michael Lea,*
 ‘THOUSANDS of Sun readers have voted to scrap the
 Human Rights Act.’

Nearly 35,000 rang our You The Jury hotline within 24 hours to back our call for an end to the interests of killers, rapists and paedophiles coming ABOVE those of victims. The crazy legislation has led to many dangerous criminals being freed to re-offend. Others have used the barmy laws to gain perks and pay-outs.

The Sunday Telegraph: Give us back our rights

The Afghans who hijacked a civilian airliner are rewarded with a judgment that they are entitled to stay in Britain at the taxpayer’s expense. Foreign terrorists who reportedly plot the murder of hundreds of British civilians cannot be deported back to their countries of origin, nor may they be detained here. Murderers and rapists are entitled to have any decision to keep them in prison reviewed by a judicial hearing, at which they must be represented by a lawyer – and as a result, an intimidated Probation Service frees killers who go on to murder fresh victims. The British public is increasingly worried by judgments whose effect is to rank the ‘rights’ of criminals higher than those of law-abiding citizens. As a result, the whole notion of human rights is becoming discredited. Rather than basic protections against arbitrary power, ‘human rights’ are now seen as legal fictions that prevent the police, the intelligence services and other government agencies from doing what they believe needs to be done in order to safeguard the nation.

until they start to become synonymous with the very concept of respect for human rights. This prisoner’s claim concerning his

human right to magazines was never accepted by decision makers and was simply rejected by the courts. Stories that present the Human Rights Act as ‘a nutters’ charter’, ‘crazy legislation’, or ‘barmy laws’ on closer inspection turn out to be sensationalist. Attempts to paint human rights protection as madness remind us that the human rights project is often about securing rights for those who have been marginalized and made vulnerable. Those who conceived the idea of human rights centuries ago considered this was the outcome of rational thought, rather than neurosis, but they too were often seen as suffering from a delusion that such rights exist at all. We shall meet ‘Mad Tom’ Paine in a few pages. Let us now turn to consider the history of the concept of human rights.

We first need to understand that human rights are considered a special, narrow category of rights. William Edmundson’s introductory book on rights distinguishes human rights from other rights by suggesting that: ‘Human rights recognize



1. Headline from *The Sunday Telegraph*, 14 May 2006: branding the Human Rights Act ‘the refuge of terrorists and scoundrels’

extraordinarily special, basic interests, and this sets them apart from rights, even moral rights, generally.' Richard Falk suggests that human rights are a 'new type of rights' achieving prominence as a result of the adoption of the Universal Declaration of Human Rights by the United Nations in 1948. This point is worth remembering throughout the book: we are not talking about all the rights that human beings may have – we are considering a rather special category of rights.

Many who approach the subject of human rights turn to early religious and philosophical writings. In their vision of human rights, human beings are endowed, by reason of their humanity, with certain fundamental and inalienable rights. This conclusion has existed in various forms in various societies. The historic development of the concept of human rights is often associated with the evolution of Western philosophical and political principles, yet a different perspective could find reference to similar principles concerning mass education, self-fulfilment, respect for others, and the quest to contribute to others' well-being in Confucian, Hindu, or Buddhist traditions. Religious texts such as the Bible and the Koran can be read as creating not only duties but also rights. Recognition of the need to protect human freedom and human dignity is alluded to in some of the earliest codes, from Hammurabi's Code in ancient Babylon (around 1780 BCE), right through to the natural law traditions of the West, which built on the Greek Stoics and the Roman law notions of *jus gentium* (law for all peoples). Common to each of these codes is the recognition of certain universally valid principles and standards of behaviour. These behavioural standards arguably inspire human rights thinking, and may be seen as precursors to, or different expressions of, the idea of human rights – but the lineage is not as obvious as is sometimes suggested. Let us now look at some early historical invocations of the actual concept of *rights* (as opposed to decent behaviour) and the sceptical responses they evoked.

The Rights of Man and their Discontents

The standard Western account of the tradition of human rights is somewhat problematic. Early legal developments in the area of human rights are said to have emerged from the *Magna Carta* of 1215, a contract between the English King John and the Barons who were dissatisfied with the taxes being levied by the monarch. But, although this agreement guaranteed rights for a *freeman* not to be ‘arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested... unless by lawful judgment of his peers and the law of the land’, this guarantee was simply a right to trial by jury granted exclusively to property-owning men. The rights contained in the *Magna Carta* were not human rights, but rather political settlements. Human rights belong to all human beings and therefore cannot be restricted to a select group of privileged men. From a contemporary perspective, the *Magna Carta* turns out to be a rather unfortunate example of a human rights declaration. Suffice it to cite one sentence, clause 54 of the *Magna Carta* reads: ‘No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband.’

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The *English Bill of Rights* of 1689 is similarly sometimes considered a stepping stone to today’s texts. Parliament declared that ‘no excessive fine be imposed; nor cruel and unusual punishment [be] inflicted’. It also stated, however, ‘That the subjects which are Protestants, may have arms for their defence suitable to their conditions, and as allowed by law.’ Like the *Magna Carta*, the *Bill of Rights* was in fact a political settlement; this time between a Parliament and the King (who had abused the rights of Protestants), in order to vindicate ‘ancient rights and liberties’.

At the same time, the work of a number of philosophers had a very concrete influence on the articulation of demands in the form of ‘natural rights’ or the ‘rights of man’. John Locke’s *Second Treatise*

of Government, published in 1690, considered men in a 'state of nature' where they enjoyed 'a state of liberty', yet it was not 'a state of licence'. Locke reasoned that everyone 'is bound to preserve himself' so when his own preservation is not threatened everyone should 'as much as he can... preserve the rest of mankind', and no one may 'take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another'. In this way, 'men may be restrained from invading others' rights and from doing hurt to one another'. For Locke, 'every man has a right to punish the offender and be executioner of the law of nature'. Locke saw that this 'strange doctrine' was unworkable but argued that men remain in this state of nature until they consent to become members of 'some politic society'. Locke saw civil government as the remedy for men acting as their own judges to enforce the law of nature. He considered that this social contract, freely entered into, entitled the government to enforce laws for as long as the government respected the trust placed in it. Should the people be subject to the exercise by the government of arbitrary or absolute power over their 'lives, liberties, and estates' then, according to Locke, governmental power would be forfeited and devolve back to the people.

The Social Contract of Jean-Jacques Rousseau developed the idea that an individual may have a private will (*volonté particulière*) and that his private interest (*intérêt particulier*) 'may dictate to him very differently from the common interest'. Rousseau considered that 'whoever refuses to obey the general will shall be compelled to it by the whole body: this in fact only forces him to be free'. For Rousseau: 'Man loses by the social contract his *natural* liberty, and an unlimited right to all which tempts him, and which he can obtain; in return he acquires *civil* liberty, and proprietorship of all he possess.' Published in 1762, *The Social Contract* was a precursor to the French Revolution of 1789 and the ideas it expressed have had considerable influence around the world as people have sought to articulate the rights of the governors and the governed.

Thomas Paine was a radical English writer who participated in the revolutionary changes affecting America. He emigrated to America in 1774, and in 1776 produced a widely read pamphlet called *Common Sense* which attacked the idea of rule by monarchy and called for republican government and equal rights among citizens. He also worked on the 1776 Constitution of Pennsylvania and for the subsequent abolition of slavery in that state. Paine's publication, entitled *Rights of Man*, appeared in 1791 as a defence of the French Revolution in response to Edmund Burke's *Reflections on the Revolution in France*. Paine was popular with the people (one estimate suggests that various versions of *Rights of Man* sold 250,000 copies in two years). He was unpopular with the government and was convicted in his absence of seditious libel at the Guildhall in London. The crowds flocked to support his defence counsel, protesting the trampling of the 'liberty of the press'. Paine had by then already escaped to France and was rewarded with election to the National Convention for his defence of the Revolution. He was, however, later imprisoned, having angered the Jacobins for opposing the execution of the King. He himself escaped the death penalty (according to some accounts, the chalk mark was put on the wrong side of the door) and later left for America, where he died unfêted in 1809. His writings still resonate, and one does not have to look far to find bumper stickers and badges with Paine's aphorism from his *Rights of Man*: 'my country is the world, and my religion is to do good'.



2. Thomas Paine, celebrated on a US postage stamp. Issued in 1968, this stamp was part of the 'Prominent Americans Series'

Paine's writings were not clear on what are the actual *Rights of Man*. His rights theory builds on Locke and Rousseau, and concludes that a man deposits in the 'common stock of society' his natural right to act as his own judge to enforce the law of nature. Paine held that the 'power produced from the aggregate of natural rights... cannot be applied to invade the natural rights which are retained in the individual'. Reading Paine reveals what it is that makes human rights such an enduring concept. Paine is sentimental about other people's suffering:

When I contemplate the natural dignity of man; when I feel (for nature has not been kind enough to me to blunt my feelings) for the honour and happiness of its character, I become irritated at the attempt to govern mankind by force and fraud, as if they were all knaves and fools, and can scarcely avoid the disgust at those who are imposed upon.

Paine railed against Burke for failing to feel any compassion for those who had suffered in the Bastille prison and for being unaffected by the 'reality of distress'. We can see here, I would suggest, the real seeds of the human rights movement: a feeling of sympathy for the distress of others, coupled with a sense of injustice when governments resort to measures which invade the perceived natural rights of the individual.

Other philosophers have certainly contributed to our contemporary appreciation of the importance of respecting human dignity. Following the German philosopher Immanuel Kant, they have sought to derive the logic of human rights from absolute moral principles which can be generated from the following imperatives: first, that each of us has to act according to the principles that we wish other rational beings to act on; and second, that a person should never be treated as a means to an end, but rather as an end in themselves. In the words of the modern philosopher Alan Gerwith: 'agents and institutions are absolutely prohibited from degrading persons, treating them as

if they had no rights or dignity'. This is often the starting point for rights theories that emphasize the importance of individual autonomy and agency as primordial values to be protected.

The modern concept of human rights is thus traditionally easily traced to the ideas and texts adopted at the end of the 18th century. It is well known that the 1776 American Declaration of Independence stated: 'We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness.' The French *Declaration of the Rights of Man and of the Citizen* followed in 1789, and its familiar first two articles recognized and proclaimed that 'Men are born and remain free and equal in rights' and that 'The aim of every political association is the preservation of the natural and inalienable rights of man; these rights are liberty, property, security, and resistance to oppression.' These revolutionary Declarations represent attempts to enshrine human rights as guiding principles in the constitutions of new states or polities. Still, the rights they referred to were mostly relevant only to those states in relation to their citizens, and only specific groups could benefit from their protection. The Declarations were inspired by a liberal conception of society and a belief in natural law, human reason, and universal order. Rights were believed (by men) to be the exclusive property of those possessing the capacity to exercise rational choice (a group that excluded women). Attempts by Olympe de Gouge to promote (by appealing to Queen Marie Antoinette) a *Declaration of the Rights of Women* and a 'Social Contract Between Man and Woman', regulating property and inheritance rights, fell on deaf ears. In England, Mary Wollstonecraft's *Vindication of the Rights of Woman* appealed for a revision of the French Constitution to respect the rights of women, arguing that men could not decide for themselves what they judged would be best for women. The denial of women's rights condemned women to the sphere of their families and left them 'groping in the dark' (see Box 2).

Box 2: Mary Wollstonecraft's dedication to Monsieur Talleyrand-Périgord

Consider – I address you as a legislator – whether, when men contend for their freedom, and to be allowed to judge for themselves respecting their own happiness, it be not inconsistent and unjust to subjugate women, even though you firmly believe that you are acting in the manner best calculated to promote their happiness? Who made man the exclusive judge, if women partake with him, the gift of reason? In this style argue tyrants of every denomination, from the weak king to the weak father of a family; they are all eager to crush reason, yet always assert that they usurp its throne only to be useful. Do you not act a similar part when you *force* all women, by denying them civil and political rights, to remain immured in their families groping in the dark? For surely, sir, you will not assert that a duty can be binding which is not founded on reason?

Looking at rights

In the 19th century, natural rights, or the 'rights of man', became less relevant to political change, and thinkers such as Jeremy Bentham ridiculed the idea that 'All men are born free' as 'Absurd and miserable nonsense'. Bentham famously dismissed natural and imprescriptable rights as 'nonsense upon stilts', declaring that wanting something is not the same as having it. In Bentham's terms: 'hunger is not bread'. For Bentham, real rights were legal rights, and it was the role of law makers, and not natural rights advocates, to generate rights and determine their limits. Bentham considered that one was asking for trouble, inviting anarchy even, to suggest that government was constrained by natural rights.

The contemporary scholar Amartya Sen has recalled Bentham's influence, and highlighted a 'legitimacy critique' whereby some see human rights as 'pre-legal moral claims' that 'can hardly be seen as giving justiciable rights in courts and other institutions

of enforcement'. Sen cautions against confusing human rights with 'legislated legal rights'. He also points to a further reaction to human rights discourse: it has been claimed by some that human rights are alien to some cultures which may prefer to prioritize other principles, such as respect for authority. Sen calls this the 'cultural critique'. This last criticism is a common preoccupation of commentators whenever the topic of human rights is raised. Indeed, *The Very Short Introduction to Empire* suggests that, for some observers, the International Criminal Tribunal for the former Yugoslavia (well known for the aborted trial of Slobodan Milošević) is an imperialist creation, and that for 'such critics, the whole idea of "universal" human rights is actually a gigantic fraud, where Western imperialist or ex-colonial powers try to pass off their own, very specific and localized, idea of what "rights" should be as universal, trampling roughly over everyone else's beliefs and traditions'.

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Karl Marx responded to the proclamation of rights in the Constitutions of Pennsylvania and New Hampshire and in the French Declaration by deriding the idea that rights could be useful in creating a new political community. For Marx, these rights stressed the individual's egoistic preoccupations, rather than providing human emancipation from religion, property, and law. Marx had a vision of a future community in which all needs would be satisfied, and in which there would be no conflicts of interests and, therefore, no role for rights or their enforcement. Marx also highlighted the puzzle that if rights can be limited for the public good then the proclamation that the aim of political life is the protection of rights becomes convoluted (see Box 3). We return to the issue of how to balance individual interests with the public good when we consider in Chapter 5 how modern human rights law allows for some limitations that are 'necessary in a democratic society'.

Is the story of human rights then simply a dispute between those who believe and those who doubt? Do different people, depending on their situations, perceive rights as either helpful for their struggle or as bourgeois obstacles to revolutionary change? Are

Box 3: Karl Marx, On the Jewish Question

It is puzzling enough that a people which is just beginning to liberate itself, to tear down all the barriers between its various sections, and to establish a political community, that such a people solemnly proclaims (Declaration of 1791) the rights of egoistic man separated from his fellow men and from the community, and that indeed it repeats this proclamation at a moment when only the most heroic devotion can save the nation, and is therefore imperatively called for, at a moment when the sacrifice of all the interests of civil society must be the order of the day, and egoism must be punished as a crime. (Declaration of the Rights of Man, etc., of 1793.) This fact becomes still more puzzling when we see that the political emancipators go so far as to reduce citizenship, and the *political community*, to a mere *means* for maintaining these so-called rights of man, that therefore the *citoyen* is declared to be the servant of egoistic *homme*, that the sphere in which man acts as a communal being is degraded to a level below the sphere in which he acts as a partial being, and that, finally, it is not man as *citoyen*, but man as *bourgeois* who is considered to be the *essential* and *true* man.

rights enthusiasts and their critics in perpetual antagonism? Modern rights theorists have sought to justify the existence and importance of rights by reference to some overriding value, such as freedom, autonomy, or equality. Such philosophical excursions are helpful because they tell us *why* we might want to protect human rights. We can see that rights can be instrumental to build a society that allows people the freedom to develop as autonomous individuals, while allowing participation based on equality in the community's decision-making process. In other words, we can start to admit that political arrangements are useful for protecting human rights, not because every community must be about protecting God-given rights, but rather because human rights

seem to prove a useful way to protect other values, such as dignity and participatory democracy.

Some philosophers have suggested that we abandon the quest for a convincing theory of why we have human rights. For Richard Rorty, it is a fact that: ‘the emergence of the human rights culture seems to owe nothing to increased moral knowledge, and everything to hearing sad and sentimental stories’, and that we should put foundationalist moral theories concerned with human rights behind us so that we can better ‘concentrate our energies on manipulating sentiments, on sentimental education’.

Lively discussion continues about the utility of human rights for progressive change. Many question whether adopting a rights strategy might not result in entrenching existing property interests. Feminists continue to highlight the failure of human rights to address structural inequality between the sexes, issues of private violence against women, and the need for greater inclusion of women in decision making. Even reorienting human rights to address these issues could be considered simply a measure to reinforce stereotypes of women as victims of violence and in need of protection. At another level, as references to human rights feature increasingly in the discourse of Western leaders, some fear that human rights are becoming instrumentalized, deployed as excuses for intervention by powerful countries in the political, economic, and cultural life of weaker countries from the South. This level of criticism does not seek to deny that human rights exist. Indeed, human rights are under attack today, not because of doubts about their existence, but rather due to their omnipresence. Let us leave moral philosophy for now and see what insights we can glean from the way human rights have sometimes been portrayed in 20th-century literature.

Kundera on human rights

The language of international human rights has become associated with all sorts of claims and disputes. Almost everyone

now emphasizes their point of view in terms of an assertion or denial of rights. Indeed, for some in the West, it seems we have already entered an era when rights talk is becoming banal. Let us illustrate this with an excerpt from Milan Kundera's story 'The gesture of protest against a violation of human rights'. The story centres on Brigitte, who, following an argument with her German teacher (over the absence of logic in German grammar), drives through Paris to buy a bottle of wine from Fauchon.

She wanted to park but found it impossible: rows of cars parked bumper to bumper lined the pavements for a radius of half a mile; after circling round and round for fifteen minutes, she was overcome with indignant astonishment at the total lack of space; she drove the car onto the pavement, got out and set out for the store.

As she approached the store she noticed something strange. Fauchon is a very expensive store, but on this occasion it was overrun by about 100 unemployed people all 'poorly dressed'. In Kundera's words:

It was a strange protest: the unemployed did not come to break anything or to threaten anyone or to shout slogans; they just wanted to embarrass the rich, and by their mere presence to spoil their appetite for wine and caviar.

Brigitte succeeded in getting her bottle of wine and returned to her car to find two policemen asking her to pay a parking fine. Brigitte started to abuse the policemen and when they pointed to the fact that the car was illegally parked and blocking the pavement, Brigitte pointed to all the rows of cars parked one behind the other:

'Can you tell me where I was supposed to park? If people are permitted to buy cars, they should also be guaranteed a place to put them, right? You must be logical!' she shouted at them.

Kundera tells the story to focus on the following detail:

at the moment when she was shouting at the policemen, Brigitte recalled the unemployed demonstrators in Fauchon's and felt a strong sense of sympathy for them: she felt united with them in a common fight. That gave her courage and she raised her voice; the policeman (hesitant, just like the women in fur coats under the gaze of the unemployed) kept repeating in an unconvincing and foolish manner words such as forbidden, prohibited, discipline, order, and in the end let her off without a fine.

Kundera tells us that during the dispute Brigitte kept rapidly shaking her head from left to right and at the same time lifting her shoulders and eyebrows. She again shakes her head from left to right when she tells the story to her father. Kundera writes:

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We have encountered this movement before: it expresses indignant astonishment at the fact that someone wants to deny us our most self-evident rights. Let us therefore call this *the gesture of protest against a violation of human rights*.

For Kundera, it is the contradiction between the French revolutionary proclamations of rights and the existence of concentration camps in Russia that triggered the relatively recent Western enthusiasm for human rights:

The concept of human rights goes back some two hundred years, but it reached its greatest glory in the second half of the 1970s. Alexander Solzhenitsyn had just been exiled from his country and his striking figure, adorned with beard and handcuffs, hypnotized Western intellectuals sick with a longing for the great destiny which had been denied them. It was only thanks to him that they started to believe, after a fifty-year delay, that in communist Russia there were concentration camps; even progressive people were now ready to admit that imprisoning someone for his opinions was not just. And they found an excellent justification for their new attitude:

Russian communists violated human rights, in spite of the fact that these rights had been gloriously proclaimed by the French Revolution itself!

And so, thanks to Solzhenitsyn, human rights once again found their place in the vocabulary of our times. I don't know a single politician who doesn't mention 10 times a day 'the fight for human rights' or 'violations of human rights'. But because people in the West are not threatened by concentration camps and are free to say and write what they want, the more the fight for human rights gains in popularity the more it loses any concrete content, becoming a kind of universal stance of everyone towards everything, a kind of energy that turns all human desires into rights. The world has become man's right and everything in it has become a right: the desire for love the right to love, the desire for rest the right to rest, the desire for friendship the right to friendship, the desire to exceed the speed limit the right to exceed the speed limit, the desire for happiness the right to happiness, the desire to publish a book the right to publish a book, the desire to shout in the street in the middle of the night the right to shout in the street. The unemployed have the right to occupy an expensive food store, the women in fur coats have the right to buy caviar, Brigitte has the right to park on the pavement and everybody, the unemployed, the women in fur coats as well as Brigitte, belongs to the same army of fighters for human rights.

Looking at rights

Kundera's essay makes a few points about the changing world of human rights. First, for some people today, human rights are obvious, self-evident, and simply logical. There is often no challenge regarding the source of these rights or even the theoretical foundations of a rights claim. The foundations of the rights regime seem to us so solid that the act of invoking rights in itself seems to make you right.

Second, human rights are claims that automatically occur to one once one feels hard done by. A sense of injustice can breed

a feeling that one has been denied one's rights. Appeals to rights as derived through irrefutable logic and entitlement are today somehow more immediately convincing than concepts such as 'social contract', 'the law of nature', or 'right reason'. Brigitte convinces the police through an appeal to a logical entitlement to a *right* to park on the pavement. An appeal for generosity, forgiveness, humanity, or charity would have involved a different gesture.

Third, a shared sense of grievance provides powerful succour for those claiming their 'rights'. When those of us who feel aggrieved stand together in protest we find strength through solidarity. The law itself may be the target of the protest. Outrage at law can somehow delegitimize such laws even in the eyes of law enforcers. Obedience to the law is a habit often related to the law's reasonableness. Invoking our human rights has become a way to challenge laws that we feel are unjust (even when the law has been adopted according to the correct procedures). In fact, human rights law has now developed so that, in almost all states, national law can be challenged for its lack of conformity with human rights. As laws are repealed and struck down, there is a valid perception that the legitimacy, or even legality, of all law has to be judged against human rights law. The hierarchy between human (or constitutional) rights law and normal national law is now mirrored at the international level in the hierarchy between general international law and certain 'superior' international law prohibitions (known as 'peremptory' or '*jus cogens*' norms). Human rights operate from a higher plane and are used to criticize normal laws.

Fourth, appealing to rights and ensuring respect for rights is a way of, not only achieving a fixed goal, but changing the system we live in. Human rights are important as instruments for change in the world. Human rights have moved on from the idea of citizens' individual entitlements in a national revolutionary proclamation (such as the French Declaration of 1789 or the

political settlements contained in the *Magna Carta* of 1215). Today, not only are human rights claims instrumental in changing national law, but human rights principles have also become relevant to designing international development assistance projects, evaluating lending conditions and project designs of the international financial institutions, facilitating transitions from communist to market economies, rebuilding war-torn societies, and combating poverty.

Fifth, for some there is an historical association between human rights and Western preoccupations, and it has therefore been tempting to dismiss those who raise the issue of human rights as divorced from the actual deprivations they are talking about. The example of a rich girl complaining about lack of parking space is of course deliberately absurd and ironic. But Kundera's story illustrates how human rights outrage can quickly be made to seem ridiculous, even hypocritical, as certain Western governments selectively sanction and support human rights violations. It would, however, be a mistake to overemphasize the association of human rights with Western hypocrisy. In fact, the modern human rights movement and the complex normative international framework have grown out of a number of transnational and widespread movements. Human rights were invoked and claimed in the contexts of anti-colonialism, anti-imperialism, anti-slavery, anti-apartheid, anti-racism, and feminist and indigenous struggles everywhere. Western governments may recently have dominated the discourse at the highest international levels, but the chanting on the ground did not necessarily take its cue from them, nor did it sing to the West's tune.

Sixth, the sense of solidarity amongst those who believe they are the victims of a human rights violation can transcend class, gender, and other distinctions. This sense of connectedness is critical to understanding the changing world of human rights. Part of the justification for the primacy of certain human rights norms in public international law is that certain acts offend the

conscience of humanity. It is the sense of common humanity and shared suffering that keeps the world of human rights moving and explains the *gesture of protest against a violation of human rights*.

Lastly, through the eyes of Kundera and Brigitte we observe several different logics of human rights depending on culture, time, place, and knowledge. This is a European story. There are African, Asian, or American stories which would be very different. But we suggest that Kundera helps us here because he identifies this special contemporary gesture as an internal human feeling which drives the discourse. The vocabulary of human rights is not a simple revelation of a deep universal structure which we all innately understand. Nor is it a language to be learned as an adult. It is the story of struggles concerning injustice, inhumanity, and better government. And at the same time, the world of human rights provides the tools for states to pursue foreign policy goals. Unless we understand some of the driving forces behind human rights we risk missing the currents which will determine its future direction. Kundera's scepticism may jar – but it also strikes a chord. The contradiction between our commitment to the 'obvious' moral logic of human rights, and our cynicism towards certain rights claims has to be addressed head-on if we want to understand the world of human rights today.

Limits to rights reasoning

Having considered what makes human rights language resonate, let us now examine further aspects of the backlash against rights. We saw earlier how the popular media in Britain were blaming human rights for prioritizing criminals' rights over the rights of the law-abiding citizen to be safe and free from crime. In the United States, emphasis on rights is sometimes seen as undermining participatory politics. Mary Anne Glendon's book *Rights Talk: The Impoverishment of Political Discourse* asks a series of questions about whether the elevation of rights has been

at the expense of citizens taking responsibility for a vital political life.

The prevailing consensus about the goodness of rights widespread, though it may be, is thin and brittle. In truth, there is very little argument regarding *which* needs, goods, interests, or values should be characterized as ‘rights,’ or concerning what should be done when, as is usually the case, various rights are in tension or collision with one another. Occasions for conflict among rights multiply as catalogs of rights grow longer. If some rights are more important than others, and if a rather small group of rights is of especially high importance, then an ever expanding list of rights may well trivialize this essential core without materially advancing the proliferating causes that have been reconceptualized as involving rights.

But perhaps the problem Glendon wants to address is more closely connected, not so much to the need to protect the value of core rights against devaluation, but to the way that rights are perceived by some as absolutes. The penchant for seeing rights as winning ploys for arguments about freedom is nicely illustrated by Glendon:

Looking at rights

The exaggerated absoluteness of our American rights rhetoric is closely bound up with its other distinctive traits – a near silence concerning responsibility, and a tendency to envision the rights-bearer as a lone autonomous individual. Thus, for example, those who contest the legitimacy of mandatory automobile seat-belt or motor-cycle helmet laws frequently say: ‘It’s my body and I have the right to do as I please with it.’ In this shibboleth, the old horse of property is harnessed to the service of unlimited liberty. The implication is that no one else is affected by my exercise of the individual rights in question. This way of thinking and speaking ignores the fact that it is a rare driver, passenger, or biker who does not have a child, or a spouse, or a parent. It glosses over the likelihood that if the rights-bearer comes to grief, the cost of

his medical treatment, or rehabilitation, or long-term care will be spread among many others. The independent individualist, helmetless and free on the open road, becomes the most dependent of individuals in the spinal injury ward. In the face of such facts, why does our rhetoric of rights so often shut out relationship and responsibility, along with reality?

This is a reminder of the fact that not everyone agrees that emphasizing individual rights as a way to organize society is the best way to ensure a fair distribution of opportunities, wealth, and development. Some would prefer to emphasize the need to create a sense of responsibility and community among individuals. Others, as we started to see with Marx, believe that focusing on rights dissuades us from radical changes to the *status quo*, redistributive policies, and collective arrangements for the general good (and especially for the least well off) (see Box 4).

Human Rights

But we have slipped back into talking about ‘rights’ rather than the specific category ‘human rights’. This is a recurring challenge in an introduction to human rights: the origins of contemporary human rights lie in the natural, constitutional, and political rights discourses that emerged in the Enlightenment and found their way into the constitutions of the 18th and 19th centuries. Let us therefore try to disentangle modern human rights from all this ‘rights talk’.

Box 4: ‘An Essay on Rights’ by Mark Tushnet

People need food and shelter right now, and demanding that those needs be satisfied – whether or not satisfying them can today persuasively be characterized as enforcing a right – strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced.

Chapter 2

The historical development of international human rights

When governments, activists, or United Nations documents refer to ‘human rights’ today they are almost certainly referring to the human rights recognized in international and national law rather than rights in a moral or philosophical sense. Of course, philosophical debate will continue to illuminate (or sometimes obscure) the reasons *why* we think human rights are important and *how* to best develop them. But for the moment, the *content* of human rights is usually understood by reference to the legal catalogue of human rights we find developed through international texts. This legal approach responds to demands for the concrete protection of inherent natural rights, and goes some way to meeting the criticism that we are simply talking about desires and selfishness. The shift to positive law also fixes these rights in an agreed written form. Hersch Lauterpacht’s influential book *An International Bill of the Rights of Man*, published in 1945, drew on a range of natural rights thinking and constitutionally protected rights to argue for a written Bill of Rights to be protected through the UN.

The key text for us today is the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948 (see Annex). But the enumeration of human rights was not simply frozen by proclamation in 1948. Since that time dozens of treaties (agreements that create binding legal obligations for states)

and intergovernmental Declarations have supplemented this proclamation of rights. In 1984, at the height of this flurry of writing up rights, Philip Alston suggested that new international human rights be subjected, like wine, to a ‘quality control’ by the UN General Assembly. The relevant UN resolution, adopted in 1986, suggested that international human rights instruments should:

- (a) Be consistent with the existing body of international human rights law;
- (b) Be of fundamental character and derive from the inherent dignity and worth of the human person;
- (c) Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
- (d) Provide where appropriate, realistic and effective implementation machinery, including reporting systems;
- (e) Attract broad international support.

Some may feel that some texts have failed this test, but, overall, the UN’s core human rights instruments satisfy these criteria. Let us look in more detail at the development of this human rights catalogue.

The historical development of the international protection of human rights deserves our attention as it tells us much about how and why states use human rights in international relations. The human rights story in the 20th century has multiple layers. At one level, human rights were invoked as a rationale for fighting the world wars. In 1915, in the context of World War I, Sir Francis Younghusband set up an organization called the Fight for Right movement; one of its declared aims was ‘To impress upon the country that we are fighting for something more than our own defence, that we are fighting the battle of all Humanity and to preserve Human Rights for generations to come.’ At another, rather more academic level, the Chilean legal scholar Alejandro Alvarez, the Secretary General of the American Institute of