

Human Rights and the Challenge of Cosmopolitanism

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FOR SOME scholars the international human rights regime represents an achieved instance of cosmopolis. Would that it did. One of the leading proponents of this view, David Beetham (1998; see also, Marks, 2000: 106 ff.) acknowledges that problems remain, however, in the areas of implementation and enforcement. I agree, but in what follows I will argue that these problems have roots that reach deep into the innermost structures of the regime itself and therefore require attention before one can speak of human rights as a truly cosmopolitan artifact.

The western and, in many ways, specifically English origins of the civil and political components of human rights discourse are well-known, as indeed are the equally western origins of Marx's critique of them in the name of economic and social rights. The trouble is that, despite this knowledge, many participants in the human rights project fail to appreciate not only the continuing salience of these origins but, perhaps more importantly, the ways in which this salience has been reinvigorated by the continuous reinvention of these western traditions within the human rights regime as it has developed since the 1940s.

To my mind this failure has created at least two interlinked difficulties which currently threaten to derail the project. The first and more general difficulty arises because our knowledge of the specific social genealogy of rights discourse is too seldom used as a resource for interrogating the present international discourse. That is, we too seldom compare national rights discourses with the current international discourse with a view to understanding, as distinct from judging, the civilizationally asymmetrical power relations embedded in the international discourse because of the over-representation within it of ideas derived from western discourses. The difficulty this creates is that, while international human rights discourse is

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and indeed should be an instance of what Michel Foucault termed 'power/knowledge', it is a profoundly biased form of such knowledge that unreasonably narrows the options available to non-western nations and peoples as they pursue social development.

The second and more specific difficulty arises because, in forgetting the western origins of the discourse, we also forget its imbrication with specific social-structural and institutional forms and so risk neglecting its dependence on these forms for its enforcement. Thus a tendency arises to assume that once certain rights have been proclaimed, they will either be self-enforcing or automatically enforced by whatever sets of social relations and/or institutions already exist. The difficulty this creates is that we in the West are often too quick to condemn failing states when perhaps we should be criticizing ourselves for insisting on development strategies – export-led growth, for example – that undermine established sets of social relations without providing for the embedding of the new mechanisms for social defence associated with rights discourse.

These, then, are the difficulties I will be responding to in the account and discussion of the development of the international human rights regime that follows. In the remainder of the article I will deploy the family of concepts that Foucault created around the concept of discursive formation in order to show how the silence concerning social difference and the associated problem of enforceability were produced within international human rights discourse.¹ The way in which this family of concepts is used to make sense of the development of human rights discourse and diagnose its difficulties, both globally and locally, is as follows. First, any specification of the discursive formation is conceived of as a cross-section through the pertinent social and discursive conditions at a particular point in time.² Second, the interactions between the component elements of a discursive formation are understood not so much as a moving equilibrium but as a shifting agonism whose points of stress and strain, as well as modes of suture, are determined by its ever-changing rules of formation.

The Birth of International Human Rights Discourse

The most obvious point in time at which to cut, so to speak, the first cross-section is 1948, the date of the United Nations' Universal Declaration of Human Rights. In order to appreciate the particular significance of the fact that human rights first surfaced as an *object* of global interest within the United Nations (UN) system, the critical point one has to understand about the provenance of this organization, is that it was founded in 1945 as a successor to the defunct League of Nations by the powers, most importantly the United States and Britain, to whom the Germans and other Axis Powers surrendered. Likewise, the critical point one has to understand about the wider global context within which it developed is that, for most of its existence, the discourse was strongly marked by the rivalries, tensions and anxieties that were part of both the decolonization process and the Cold War (Cassese, 1990; Evans, 1996; Luard, 1982 and 1989). The founding text of the UN

was its Charter, which, despite the desires of some of its initial signatories, says very little about human rights except that they are important, to be promoted by the UN's Economic and Social Council (ECOSOC), and advanced by international cooperation.³ In 1946, ECOSOC established a Commission on Human Rights, most of whose members were diplomats and who therefore became the premier *authorities of delimitation* with respect to human rights, since it was they who drew up the Universal Declaration. Since the latter document became the definitive *grid of specification*, and in the light of subsequent tensions over its expansion and whether or not its component rights are related to one another in any sort of hierarchy, it is important to provide some analysis of its contents. Of the 24 specific rights listed (Articles 3–26), 18 may be defined as civil and political (see Articles 3–16 and 18–21), six of which concern rights in relation to legal authorities, while the remaining six may be defined as social and economic. In other words, this grid took as its object of application capitalist societies wherein private property was sacrosanct (Article 17), the rule of law securely established, the polity liberal-democratic, and there already existed a broad array of social services, voluntary associations and legal statuses – specifically, social security in all its forms (health, housing, unemployment and old-age insurance, income support, and special protection for mothers and children), education, labour administration, trade unions, and employment contracts.

In line with the way in which human rights became objects of concern, the most important *credential* for speaking authoritatively about them was identical with the *institutional site* from whence any such speech could emanate, namely representing a 'good' state in the sense of one that possessed the characteristics just listed (cf. Marks, 2000). From the beginning the UN was divided between 'good' and 'bad' states in that a small number of states, including the Soviet Union and four of its allies, plus South Africa and Saudi Arabia, had abstained when the Universal Declaration was put to the vote. They did so because they felt that it laid too much stress on the civil and political side. However, reflecting this division and their diplomatic backgrounds, rather than take up any *mode of interrogation* the Commission's experts took up a position best described as 'see no evil, hear only a little about any evil, and definitely do not speak of any evil'. That is, between 1946 and 1967, and because it claimed to have no such power, the sole body then charged with the task of interrogating states concerning their human records refused to investigate any complaints, agreed only to receive very general descriptions of alleged violations for research purposes and concerned itself with preparing legislation.

Like their specific content, the fact that rights rather than, say, principles were what the Universal Declaration specified, also reflected the social characteristics of the original signatories although not without tensions. The principal tension was between the proponents of civil and political rights, led by the United States, and those of social and economic rights, led by the Soviet Union, with the Western European and Latin

American states in the middle. The result was that the coexisting *conceptual* and *methodological* resources upon which the discourse of human rights could draw were divided between those of the law and those of political theory, those of the common and civil law traditions and those of, on the one hand, the great western declarations of rights – the Bill of Rights of England’s Glorious Revolution, the American Declaration of Independence and Bill of Rights, the French Declaration of the Rights of Man and of the Citizen – and, on the other, the critique of these declarations prefigured and contained in Karl Marx’s *Communist Manifesto* and *Critique of the Gotha Programme* respectively. Predictably, given the expertise of the Commission and the impossibility of it doing anything else, the procedure that it initially adopted as its *mode of intervention* into this new and, from the beginning, very complexly structured field was rewriting. That is, reflecting the divisions between the two traditions and trying as far as possible to neglect that fact that one of them had the support of some ‘bad’ states, the Commission spent the six years from 1946 to 1954 working on what became the two principal Covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Again reflecting the diversity of the UN’s membership, the *strategic* resources upon which the discourse could draw to define the direction of its development were divided between the same two traditions as in the case of conceptual resources: a liberal tradition that assumed that citizens were best left to look after themselves and a socialist one that assumed that they needed or deserved state support. At this point, and despite the exclusion of the right to private property from both declarations, the systematization or integration of these two *thematic authorities* was considered to be impossible so the Commission declared them indivisible and therefore equivalent. However, there was a clear difference between the two strategies as regards their political-economic *functionality* from the point of view of the majority of ‘good’ states: the liberal tradition assumed the legitimacy of capitalist economic relations while the socialist tradition was, at the very least, sceptical.

In sum, when one considers this first cross-section through the discursive formation which represented the conditions of possibility of the discourse of human rights at its moment of inception, one can see that it was marked by a significant conceptual division which reflected social-structural differences. However, because of wider asymmetries of wealth and local ones of voting power, not only were the social differences regarded as impertinent, but also the conceptual division took on a moral dimension that significantly reduced the likelihood that the emergent discourse would have a significant social and economic dimension. Nevertheless, the exclusion of private property, the judgemental reticence and drafting activities of the Commission, plus its promulgation of the doctrine of ‘indivisibility’, meant that the possibility of the discourse gaining such a dimension was not altogether closed off.

Making Human Rights Enforceable

Because the present argument focuses on the questions of enforcement and enforceability, the most appropriate point in time at which to cut a second cross-section through the discursive formation is 1971, since by that time the UN had become much more interested in such issues. In 1971 the UN was a very different body to what it had been at its inception. In addition to the original 58 members, the ongoing process of de-colonization had produced many new members. Moreover, because of the loss of its empire, Britain was no longer the power that it had been, and because of its unpopular involvement in Vietnam, the United States no longer held the moral high ground, particularly in the eyes of the state-socialist and postcolonial states. Additionally, the economic and political challenges of the 1960s had reinforced the commitment of many Western European states to corporatist social policies that emphasized social and economic entitlements, even as their social-democratic parties retreated from any commitment to socialism as even their ultimate goal. Finally, not only were the former Axis Powers, Japan and West Germany, now members of the UN, but both were clearly on their way to becoming major economic powers. In sum, thanks to these developments, their own very erratic reform efforts, and their on/off alliance with China, the Soviet Union and its Eastern European allies were no longer either so socially distinctive, so friendless, or so easily anathematized.

As this rather different *institutional setting* had developed, new *authorities of delimitation* had gained a greater say and, as a consequence social, economic and cultural rights secured their place within the *grid* that specified the nature of human rights as an object of discourse. Thus the two Covenants were not only completed but in 1966, admittedly after a long delay, submitted for approval by the General Assembly and subsequent ratification by member states. They entered into force once the requisite number of ratifications had been obtained, which was in 1976. In Steiner and Alston's (1996: 126) useful summary, the rights contained within the ICCPR are:

- (a) protection of the individual's physical integrity, as in provisions on torture, arbitrary arrest, arbitrary deprivation of life;
- (b) procedural fairness when government deprives an individual of liberty, as in provisions on arrest, trial procedure and conditions of imprisonment;
- (c) equal protection norms defined in religious, gender and other terms;
- (d) freedoms of belief, speech and association, such as provisions on the practice of religion, press freedom, and the right to hold assembly and form associations; and
- (e) the right to political participation.

Likewise, the central provisions of the ICESCR may be briefly summarized as:

- (a) the rights to work, just and favourable conditions at work, and the right to form and join trade unions;
- (b) the rights to social security, family and mother/child support, and protection in childhood;
- (c) the rights to an adequate standard of living, physical and mental health, and education;
- (d) the rights to cultural participation, knowledge and copyright;
- (e) equal protection norms defined in religious, gender, racial and other terms.

Moreover, the *credentials* for speaking authoritatively about them became more inclusive as the definition of a 'good' state was simultaneously broadened. Thus the notion of the 'indivisibility' of the two sets of rights gained more substance, not only because their more detailed specification made it easier to see that they at least overlapped, but also because a practical rather than principled rationale was agreed for their continuing separation. This was provided in the official annotations to the draft texts of the two covenants:

Those in favour of drafting two separate covenants argued that civil and political rights were enforceable, or *justiciable*, or of an 'absolute' character, while economic, social and cultural rights were not or might not be; that the former were immediately applicable, while the latter were to be progressively implemented; and that, generally speaking, the former were rights of the individual 'against' the state . . . while the latter were rights which the state would have to take positive action to promote. . . . The question of drafting one or two covenants was intimately related to the question of implementation. . . . Since the rights could be divided into two broad categories, which should be subject to different procedures of implementation, it would be both logical and convenient to formulate two separate covenants. (quoted in Steiner and Alston, 1996: 261, emphasis added)

This move in the direction of consensus was accompanied by a similarly explainable move in the direction of more active *modes of interrogation* of the membership's behaviour as regards the human rights of their citizens – the UN now listened far more attentively, and it began to question and look. This process had begun in 1959 when ECOSOC (Resolution 28) repeated its invitation to the citizens of member states to communicate any complaints to the Secretary General. In 1967 ECOSOC (Resolution 1235) had sanctioned a decision by the Human Rights Commission to engage in an annual public debate on any gross violations known to it and also, if necessary, to engage in thorough studies of them with a view to making recommendations both to the state concerned and, again if necessary, to one or other of the UN organs for further action.

Three years later, in 1970, ECOSOC (Resolution 1503) had further authorized its Sub-Commission on the Prevention of Discrimination and Protection of Minorities to consider these complaints, and any governmental responses already received, under conditions of confidentiality and with a

view to ascertaining whether or not they revealed ‘a consistent pattern of gross and reliably attested violations of human rights . . . within [its] terms of reference’ (quoted in Steiner and Alston, 1996: 376). In cases where the Sub-Commission feels there is cause for concern it is empowered to refer them to the Commission on Human Rights for detailed study with a view to the Commission making recommendations to other UN organs, again under conditions of confidentiality, unless its decision is to transfer the issue to the public 1235 procedure.

Finally, a state’s ratification of either or both of the general covenants means that, according to international law and as the signatories of treaties rather than simply the supporters of a declaration of principles, even though such support is required as a condition of membership, they incur binding legal obligations in respect of the content of the covenants. The first of these obligations is the periodic filing of reports on implementation with the Human Rights Committee created by the ICCPR – a committee whose members were initially and remain largely lawyers – and, instructively, the far more tardily formed Committee on Economic, Social and Cultural Rights (Alston, 1992a). These reports are then considered by the relevant committee, which returns them with its own comments, criticisms and requests for further information or supplementary reports, in the hope of stimulating improved performance. Signatories to the First Optional Protocol to the ICCPR, which allows their citizens to make direct complaints to the Committee, also incur the obligation to at least receive the Committee’s ‘views’ of the complaint. All of these requirements and procedures also apply with respect to signatories to the Convention on the Elimination of Racial Discrimination (CERD), which was approved by the General Assembly in 1965 and entered into force in 1969.

Concerning the *conceptual* dimension of the discursive formation around 1971, here too things were rather different as compared to around 1946. Because of the partial equalization of the balance of power between the proponents of the civil/political and the social/economic approaches, and in particular because of the role of legal discourse in reducing the conceptual antagonism between these approaches, as well as the legal expertise established in the Human Rights Committee, legal concepts and ways of thinking gradually displaced political ones in the UN’s handling of human rights issues (Rancharan, 1997). This is particularly clear in the way that the Committee made and was allowed to make international law through its General Comments, which address not simply procedural issues associated with the improvement of the quality of the reports they receive, but also bear on issues of interpretation with respect to the meanings of articles and the criteria for proper implementation. Also, the investigations and reports or ‘views’ under Resolutions 1235 and 1503, as well as the responses to individual complaints allowed by the First Optional Protocol, took on an increasingly judicial cast. The net result was that much of the activity undertaken during the 1970s may be summarized as the transcribing of politically inspired texts into legal language. Thus, and at least in relation

to the older covenants, legal modes of reasoning and principles became the chief *strategic* resource defining the future direction of the human rights project. As a result, not only were Liberalism and Socialism displaced as such resources, but also the issues of their relationships to human rights were shelved. This, like the earlier exclusion of the right to private property from the Covenants, latterly proved to be politically functional as the *détente* between the superpowers developed.

In sum, when one considers this second cross-section, one can see that the conceptual division that was such a marked feature of the first one had been transmuted into a legally expressed set of differences of purpose and modes of implementation. In this way, then, the initial reticence of the Commission paid off in terms of allowing a consensus to emerge and active enforcement to begin. However, this also meant that the social-structural differences implied by divergent political ideologies tended to disappear from human rights discourse as in any way pertinent to the issue of enforcement. Moreover, the fact that they disappeared in a largely capitalist world, whether measured numerically or in terms of the distribution of economic resources, and that the medium through which they disappeared was that of liberal western law, meant that social and economic rights were about to encounter a new challenge to their status within the pantheon of rights, namely that summarized by the term ‘justiciability’; that is, the requirement that, for a right to be properly so called, judicial remedies must be available where violations occur. The nature of this challenge, and as it happens a neat exemplification of how this discussion remains bedevilled by a confusion of economic or labour rights, in particular, with substantial material benefits, is very clearly indicated in the following quotation from a globally influential source:

Describing paid holidays as a basic human right (as the Universal Declaration does in Article 24) just seems wrong headed. . . . Claims for economic goods are not justiciable. A court of law, even in a poor country, can determine when civil and political rights are being violated by the government, but it cannot, by a mere legal judgement, summon the resources to meet social and economic goals. (*The Economist*, 5 December 1998: 9)

The Legalization of the Discourse of Human Rights

Once again reflecting the present argument’s focus on questions of enforcement and enforceability, 1990 would seem the most appropriate point at which to cut the third and final cross-section through the discursive formation, since by then the present array of institutions and processes was in place. However, the human rights project was also by this time in a state of some crisis. The weakening and eventual collapse of the Soviet Union had allowed tensions that had been suppressed by the *realpolitik* of the Cold War to come to the surface in the form of a strong reassertion by some states of the pertinence of, and the challenges posed by, social-structural differences. The source of this crisis was the tension created by the simultaneous

occurrence of three developments that affected the play of forces within the *institutional site* represented by the UN system: the increased influence of largely western-based NGOs and INGOs (non-governmental organizations, international non-governmental organizations) committed to enlarging and deepening the ambit of human rights discourse; the rise of neo-liberalism in the United States and Britain in particular; and the increased cultural assertiveness of many Asian states, as some insisted on their Islamic culture, others drew confidence from their economic achievements, and China became more engaged in global and UN politics (Bauer and Bell, 1999; Davis, 1995; Tang, 1995; Woodiwiss, 1998).

The NGOs and INGOs were successful in that the 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) became effective in 1981, the 1984 Convention against Torture (CAT) in 1985, and the 1989 Convention on the Rights of the Child (CRC) in 1990. However, the effect of this new legislation was somewhat reduced by simultaneously developing resistances on two fronts. The first was that represented by some western nations' rejection of any pressure on them to enhance social and economic rights; not only did the Reagan and Bush administrations continue to refuse to contemplate the ratification of the ICESCR, but they also suspended the ratification of the ICCPR that the Carter administration had initiated. The second was that represented by some Asian states' equally strong rejection of any insistence on the enhancement of civil and political rights. In the first case, the economic success of an unshackled capitalism and the political victory of liberal democracy over socialism justified the resistance. In the second, untrammelled liberal democracy was seen as an obstacle to the achievement of the same economic success and therefore to the advancement of social and economic rights, while certain aspects of the project to enhance women's rights, in particular, were regarded as culturally imperialistic. The second form of resistance was most powerfully expressed in the 1993 Bangkok Government Declaration, which preceded the UN's Second World Conference on Human Rights held later the same year in Vienna. In sum, the geopolitics of the 1980s produced two new claimants to positions amongst the *authorities of delimitation*, the NGO movement and certain Asian governments, but without any accompanying challenges to either the basic *grid of specification* concerning the object of human rights discourse or the methodologies of human rights work at the UN level.

In terms of the pertinent 'enunciative modalities', the *credentials* and *institutional locations* required for authoritative speech became still more inclusive as those of the wider but predominantly western legal and NGO communities were recognized. However, those of the 'Asian values' constituency were refused. In the words of the implicitly dismissive Vienna Declaration of 1993:

. . . [a]ll human rights are universal, indivisible and independent and inter-related. . . . While the significance of national and regional particularities and

various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms. (quoted in Steiner and Alston, 1996: 235)

In the meantime, the *interrogation* of the human rights records of the signatories to the growing number of covenants, which of course did not include the United States and China, had become still more detailed and insistent, consequent not only on the steadily improving legal rigour of the procedures involved but also on the increased access granted to NGOs – in 1994, 900 NGOs had official consultative status with the UN, while 1500 were represented at the Vienna Conference. Thus, not only did the Committees set up under the various conventions become more demanding and critical with respect to the content of the reports that had to be filed with them, but the number of complaints they received grew exponentially:

... until the mid-1980s the UN received, on average, 25,000 complaints per year. Recently this number has ballooned to around 300,000, but many of these complaints are identical as a result of letter-writing campaigns by groups with a large and active membership. (Steiner and Alston, 1996: 380)

Moreover, not only has the appointment of rapporteurs empowered to make site visits been added to the range of methods of fact-finding available to the committees, but also 'thematic mechanisms' have been instituted by the Commission, which provide for the continuing monitoring of areas of concern by either working groups or special rapporteurs. In 1995, 13 such mechanisms were in operation. They were concerned with: disappearances, arbitrary detention, extra-judicial executions, freedom of expression, racial discrimination, torture, religious intolerance, use of mercenaries, commercial sexual abuse of children, internally displaced persons, judicial independence, violence against women, and the effects of toxic and dangerous products on human rights.

With respect to the *conceptual* dimension of the discursive formation circa 1990, and although political concepts informed some of the campaigns for the new covenants, legal discourse became ever more entrenched as the source of concepts to think through difficulties as well as more generally 'handle' human rights issues. Furthermore, the various committees become ever more confidently judicial in their reasoning and the tone of their comments and 'views' (McGoldrick, 1991). Thus even the once formidable barrier to their jurisdiction represented by national sovereignty seems to have been largely overcome, legally at least, as Louis Sohn (1994) and Steiner and Alston (1996: 369–72) have shown in their accounts of the UN's relations with the previous regimes in South Africa and Poland respectively (see also Mills, 1998). This development has been buttressed by the emergence of regional human rights jurisdictions in the forms of the European Court of Human Rights and the Inter-American Court for Human Rights.

Less positively, it is also illustrated by the rather imperious way in which the doctrine of ‘indivisibility’ was used to dismiss the ‘Asian values’ argument in the extract from the Vienna Declaration quoted above. Thus legal and political discourses coexist under the terms established by the hegemony of the former with the result that the proponents of politically inspired arguments can now only hope to make a difference if they use legal terms or, minimally, do not challenge legal norms or procedures – legal casuistics (in the positive sense of the term), then, are now virtually the only possible way of working within the conceptual field of human rights.

In these ways, then, legal reason has become firmly established as the principal *strategic* resource defining the future of human rights not just as regards the development of the extant covenants and conventions but also as regards any possible new treaties in that all now will have to pass the current exclusionary variant of the ‘justiciability’ test. The *functionality* of all this for the geopolitical position of the United States was graphically borne out by the role of human rights discourse, in the form of the 1975 Helsinki Accords, during the latter days of the Soviet Empire:

Whatever contribution the process ultimately made to the demise of Communism, it clearly played an important role, especially in the second half of the 1980s and the early 1990s, in legitimating human rights discourse within Eastern Europe, providing a focus for non-governmental activities at both the domestic and international levels . . . (Steiner and Alston, 1996: 578)

Conclusion: The Need for a More Cosmopolitan Human Rights Regime

In conclusion, all this is as it should be except, as I will argue below, that justiciability should also be a requirement with respect to rights under the ICESCR rather than a mode of diminishing them. The law and its enforcing institutions are undoubtedly the best means we have yet developed for endeavouring to ensure that we are protected from state and, indeed, mutual oppression when this is necessary. Moreover, now that at last the United States has ratified at least the ICCPR, and China has signed the ICESCR and promised to sign the ICCPR, the human rights regime has a truly global reach. However, at least one major problem remains to be properly addressed in the area of enforcement and that is the broader and sociological question of enforceability. This arises because the discourse of human rights still takes as its object of application at the national level the same kind of social structure that it did in the 1940s; namely capitalist societies where individualism is a significant component of the value system, the rule of law is securely established, the polity is liberal-democratic and there are a broad array of social services, voluntary associations, and widely recognized legal statuses. Indeed, the taken-for-granted character of this specification of the national object of application has been still further enhanced by developments both within the discourse of human rights and amongst its conditions of existence. The principal instance of the

first is the well-established view that not only social and economic rights but also some civil and political ones too, notably those pertaining to access to the legal system, are programmatic rather than absolute or 'justiciable' in character; that is, the obligations that States Parties incur with respect to economic and social rights are more to make progress in achieving certain goals of a largely institutional character rather than to provide for enforcement. The development with respect to conditions of existence was, of course, the demise of socialism in Russia and Eastern Europe.

There is an irony inherent in the distinction between justiciable civil/political and programmatic economic/social rights. And it is that, although it was intended to help those in need, it in fact discriminates against them. Thus it was introduced, in what one must assume was good faith, so as not to impose too great an economic burden on developing societies and because economic/social rights are, for some reason, thought to be more expensive to implement than civil and political ones, which only require imposing buildings, well-found offices and princely salaries for politicians and legal personnel for their implementation. Such reasoning is, however, profoundly mistaken since – as Tom Marshall (1949) made clear so long ago and indeed the Economic, Social and Cultural Rights Committee has more recently attested in one of its 'general comments' (Alston, 1992a: 495) – the discourse of what Marshall termed social citizenship rights is concerned with procedurally establishing equality of status with regard to certain minimum material conditions rather than the equalization of material conditions that many of the proponents of the narrow reading of justiciability seem to fear. Moreover, the ICESCR (Article 2) only requires States Parties to deploy 'the maximum *available* resources' (emphasis added). Thus to say that even such a minimal and cheaply deliverable entitlements as many labour rights and a right to 'adequate housing', for example, are not justiciable cannot mean that they could not, in principle, be pursued through the courts, since all such a possibility would require would be appropriately drafted legislation, for which many models exist in the statute books and administrative regulations of the more developed societies. Rather, what it does mean is that there is no UN requirement for the existence of such legislation. One result is that any response to need is therefore left to the discretion of governments and their calculations of political advantage without any danger that a court might make an order that, for example, ultimately required them to forego some of their expensive, state-provided cars in favour of sheets of corrugated-iron roofing to be distributed amongst those in need. Another result is that, since Article 1 of the ICESCR defines resources to include those made available 'through international assistance and co-operation, especially economic and technical', there is also no possibility that the richer countries could be held to account with respect to the level of assistance they provide.

Tragically, the distinction therefore catches many millions of people in the less developed countries in a vicious double bind. This double bind arises for the following reasons. First, because of the artificial narrowing of

what is considered to be justiciable, many are currently deprived of legal remedies with respect to violations of certain civil and political as well as economic, social and cultural rights. Second, the coverage of human rights discourse is now so broad and its requirements so institutionally specific – in many ways rightly so – and, less justifiably, western-inspired, that it reaches deep into the inner recesses of social structures where the social routines pertaining to human rights are not simply interconnected with many others but depend upon them for their functioning. Thus, because of the discourse's implicit evolutionism, the only way in which, to use Jeffrey Harrod's (1987) term, the 'unprotected' will gain full access to their rights is when the societies in which they live reach western levels of development. However, it cannot be assumed, as the concept of programmatic rights implicitly suggests, that in time and as they develop all of them will or should converge on the kind of 'modern' society that the specification of the object of application instances (Woodiwiss, 1997). This is for two main reasons: first, the operation of the global economic system is as likely to prevent development in some societies as it is to encourage it; second, the enviroing routines are often culturally specific, very different from those associated with the supposed 'modern' archetype, and presumably protected by both the right to self-determination as developed in the UN's 1970 Declaration on Friendly Relations and, by implication at least, the much more recent acknowledgement of indigenous rights.

In sum, the double-bind that many people in less developed societies find themselves in thanks to the narrow construction of justiciability is as follows: first, they are currently denied rights that according to international law are theirs; second, they will only be able to enjoy them in the future if they sacrifice much that they value in their cultures and the quality of their social relations. However, if they make such sacrifices it may well be that their lives will become less secure thanks to the breaking of many of the social ties upon which they currently depend to protect themselves from the arbitrariness of the powerful and the vagaries of fate (on the general point see Taylor, 1999, and for a discussion of some attempts to re-invent 'traditional' protections under such headings as 'restorative justice', see Broadhurst, 1999).

How, then, might the victims of this double-bind be released? As I will argue at length elsewhere (Woodiwiss, forthcoming), two steps seem to me to be essential. The first is to extend the procedures for intervention in human rights discourse to include the admittedly very difficult area of socio-legal translation so that at least some civil and political rights may be translated into economic and social terms. Contrary to what many sociologists have argued in the past (Abel, 1982; Santos, 1995, for example), I hasten to add, the main purpose of such activity is not to find surrogates for legal institutions, although there are circumstances in which such surrogates have an important role to play. Rather, it is to make legal discourse itself both more effective and less culturally intrusive and destructive by translating socially impertinent legal statuses and entitlements into pertinent ones. In

this regard, the recent development and deployment by the European Court of Human Rights of the doctrines known as the ‘margin of appreciation’ (States Parties should have some discretion as to how they fulfil their obligations) and the ‘effectiveness principle’ (States Parties should ensure that their citizens may practically exercise their rights) seem most encouraging. This is because these doctrines both allow the blurring of the distinction between civil and political rights on the one hand and economic and social rights on the other, and suggest that such exchanges could be seen as acceptable when judged against the principles of international human rights law. Moreover, they have already been used in labour law cases (Merrills, 1988: chs 5, 6 and pp. 222–3). The second step is to challenge, through support for the addition of a ‘social clause’ to the protocols of the World Trade Organization, the common view that economic, social and cultural rights are not justiciable at the international level, since it is this doctrine that allows the decision as to their justiciability to be left to the discretion of governments.

My suggestion, then, is that in these ways, amongst many others no doubt, international human rights discourse might yet be made to be more truly multilingual, and so overcome its constructed silence with respect to social difference and finally become an achieved instance of cosmopolis.

Notes

1. The questions that Foucault addresses with this family of concepts are: (1) How do discourses develop? (2) How do they come to be taken as comprising authoritative and therefore to some degree socially determinant statements about the nature of the world?

His answer to these questions is that discourses develop and gain their determinative power as a consequence of the largely unwillful interaction between four elements: ‘objects’ (the things they are about), ‘modes of enunciation’ (the ways these things are spoken of), ‘concepts’ (the intellectual constructs that are used to speak about them) and ‘strategies’ (the ways in which these constructs are combined or thematized). What determines the nature and power effects of the interactions between these elements are their respective rules or, better, the social entities and processes that continuously determine their formation and re-formation.

In the case of objects these entities and processes, partially translated from Foucault’s rather fearsome terminology, comprise: (1) the institutional sites wherein the ‘objects’ of interest are problematized and so become socially visible – for example the Catholic confessional in the case of psychiatry, the marketplace in the case of economics, and the ‘court’ in the case of law; (2) the appearance or presence of ‘authorities of delimitation’ – experts and latterly professionals of all kinds – who possess the power to decide what is or is not an instance of the object of interest; and (3) the production or presence of a ‘grid of specification’ produced by these experts which delimits the object of interest and distinguishes it from other objects – examples include general concepts such as the ‘body’, the ‘economy’, the ‘polity’, ‘society’, the ‘law’ and ‘human rights’.

Concerning ‘enunciative modalities’ or ways of making statements, the entities and processes are: (1) the credentials of the qualified speakers; (2) the institutional

sites from whence they speak; and (3) the modes of ‘interrogation’ they engage in (listening, questioning or looking, for example).

With respect to ‘concepts’, the entities and processes are: (1) their order and forms of succession or emergence and development; (2) their fields and forms of coexistence or the general methodologies that are used to determine their legitimacy as instances of knowledge; and (3) the ‘procedures for intervention’ or the ways of working within the conceptual field as exemplified by ‘rewriting’, ‘transcribing’ and ‘translating’.

Finally, the entities and processes with regard to ‘strategies’ are: (1) the identities, similarities, differences and combinations of such strategies; (2) the identification of thematic authorities, whether these are located within the field of discourse involved or external to it and are therefore authorities by analogy; and (3) the identification of ‘the *function* that the discourse under study must carry out *in a field of non-discursive practices*’ (Foucault, 1972: 68, emphasis in original) such as the economic and political realms, and ‘*possible positions of desire in relation to discourse*’ (1972: 68, emphasis in original).

What, in sum, Foucault has provided us with, is a means for thinking about and tracking the highly complex concatenations of diverse willed and unwilled developments that produce such ‘total social facts’ as international human rights discourse.

2. This said, no such cross-section can be a clean cut, so to speak. This is because some of the elements of a discursive formation consist of diachronic or change-making processes that have their effects over a number of years. I have dealt with this problem by discussing such processes in relation to what appeared to me to be the most appropriate point in time, whether their principal effects precede or succeed it.

3. My aim in this article is to make a series of analytical points. Thus I make no claims to empirical novelty. Indeed virtually all of the factual material is derived from a small number of texts, namely the histories by Cassese (1990), Evans (1996), Luard (1982 and 1989), Tolley (1987) and Vincent (1986), the comprehensive volume of text and materials by Steiner and Alston (1996), and texts on enforcement by Alston (1992b) and Flood (1998). Readers desiring further information, discussion and suggestions for further reading concerning many of the points or arguments made in this chapter, or indeed the many that have been neglected, should easily be able to find what they are looking for by consulting these excellent resources.

References

- Abel, R.L. (ed.) (1982) *The Politics of Informal Justice*. New York: Academic Press.
- Alston, P. (1992a) ‘The Committee on Economic, Social and Cultural Rights’, in P. Alston (ed.) *The United Nations and Human Rights: A Critical Appraisal*. Oxford: Oxford University Press.
- Alston, P. (ed.) (1992b) *The United Nations and Human Rights: A Critical Appraisal*. Oxford: Oxford University Press.
- Bauer, J. and D. Bell (eds) (1999) *The East Asian Challenge for Human Rights*. Cambridge: Cambridge University Press.
- Beetham, D. (1998) ‘Human Rights as a Model for Cosmopolitan Democracy’, in D. Archibugi, D. Held and M. Kohler (eds) *Re-imagining Political Community: Studies in Cosmopolitan Democracy*. Cambridge: Polity Press.

- Broadhurst, R. (1999) 'Crime and Indigenous Justice', Special issue of *Australia and New Zealand Journal of Criminology* 36(1).
- Cassese, A. (1990) *Human Rights in a Changing World*. Oxford: Polity.
- Davis, M.C. (ed.) (1995) *Human Rights and Chinese Values*. New York: Oxford University Press.
- Evans, T. (1996) *US Hegemony and the Project of Universal Human Rights*. Basingstoke: Macmillan.
- Flood, P.J. (1998) *The Effectiveness of UN Human Rights Institutions*. Westport, CT: Praeger.
- Harrod, J. (1987) *Power, Production and the Unprotected Workers*. New York: Columbia University Press.
- Luard, E. (1982 and 1989) *A History of the United Nations*, 2 vols. Basingstoke: Macmillan.
- McGoldrick, D. (1991) *The Human Rights Committee*. Oxford: Oxford University Press.
- Mann, M. (1993) 'Nation States in Europe and other Continents: Diversifying, Developing, not Dying', *Daedalus* winter: 115–40.
- Marks, S. (2000) *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology*. Oxford: Oxford University Press.
- Marshall, T.H. (1949) 'Citizenship and Social Class', in B. Turner and P. Hamilton (eds) *Citizenship: Critical Concepts*. London: Routledge.
- Merrills, J. (1988) *The Development of International Law by the European Court of Human Rights*. Manchester: Manchester University Press.
- Mills, K. (1998) *Human Rights in the Emerging Global Order*. Basingstoke: Macmillan.
- Rancharan, B.G. (1997) *The Principle of Legality in International Human Rights Institutions*. The Hague: Martinus Nijhoff.
- Santos, B. de Sousa (1995) *Toward a New Common-Sense: Law, Politics and Science in a Paradigmatic Transition*. New York: Routledge.
- Sohn, L. (1994) *Rights in Conflict: The United Nations and South Africa*. New York: Transnational Publishers.
- Steiner, H. and P. Alston (eds) (1996) *International Human Rights in Context: Law, Politics, Morals*. Oxford: Oxford University Press.
- Tang, J. (ed.) (1995) *Human Rights and International Relations in the Asia-Pacific Region*. London: Pinter.
- Taylor, C. (1999) 'Conditions of an Unforced Consensus on Human Rights', in Bauer and Bell (1999).
- Tolley, H. (1987) *The United Nations Commission on Human Rights*. Boulder, CO: Westview Press.
- Turner, B. and Hamilton, P. (eds) (1994) *Citizenship: Critical Concepts*. London: Routledge.
- Vincent, J. (1986) *Human Rights and International Relations*. Cambridge: Cambridge University Press.
- Woodiwiss, A. (1997) 'Against Modernity: A Dissident Rant', *Economy and Society* 26(1): 1–21.

Woodiwiss, A. (1998) *Globalisation, Human Rights and Labour Law in Pacific Asia*. Cambridge: Cambridge University Press.

Woodiwiss, A. (forthcoming) 'Making Human Rights Work: A Sociological Approach', mimeo, Department of Sociology, City University – London.

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