# Untrenching Fundamental Rights

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*Synopsis*



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## Introduction

Marx's celebrated *XI Thesis on Feuerbach*[1] is singularly pertinent to the topic of fundamental rights. "The philosophers", we may say, "have only *interpreted* man's rights in several ways; the point, however, is to change them." This cannot be done by entrenching them in a charter of rights, but only by "untrenching" them from their ideological base. Social evils cannot be cured by a stroke of the legislative pen. To make the ink indelible does not change anything; on the contrary, it merely distracts the eye. No legal entrenchment of fundamental rights can entrench them in a society which does not practise what it preaches. There is no constitutional bridge which can span that chasm.

It is important to distinguish between two meanings of "ideology". According to the first, it denotes what Marxists have described as the "false consciousness" of the superstructure of a social system or theory. According to the second, it stands for the basic ideas which lie at the foundation of a way of life, without any judgment as to their objective

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[1] K. Marx, "Theses on Feuerbach" (1845) in *Karl Marx* [;] *Frederick Engels* [:] *Collected Works* (1976), vol. 5, 8, para. 11.

validity.[2] Although the idea of "false consciousness" suggests that we can find its true counterpart by penetrating the superstructure, we can say that something is false without claiming to know the true state of affairs if we believe that it is not what it is represented to be. We can speak of "false consciousness" to indicate that the superstructure of a social "false consciousness" to indicate that the superstructure of a social system or theory is out of line with the reality of its foundation. We can do this without explaining, with reference to some absolute standard of truth, what the true foundation of the society or theory is, and how it came about that the superstructure was distorted. I shall use "ideology" here in this sense.[3]

Judging by the media, there was for a long time no more controversial issue in Canada than the federal government's proposals to patriate the constitution and to entrench a charter of rights. This fact is itself more revealing than the heated debates which have raged over it. Was the issue really one that deserved so much media exposure, and so much venom and expense? Will the new constitution really turn Canada into something fundamentally different from what it was before? Are we going to pass from a "state of nature" into a state of grace where we will live like brothers and sisters practising the Golden Rule? Or are we not merely going to pass from one stage of jargon to another without changing the real rules of the game?

It is the jargon of the debate that should put us on our guard. A reform that is wrapped in familiar clichés is not likely to lead us into the promised land. The human rights record of the government that introduced the *Canadian Charter of Rights and Freedoms*[4] with such fanfare is hardly impressive. The Bible teaches us to judge a tree by its fruit, but the converse is also true. When we are promised certain fruit, we must look at the tree. Our political orchardists carefully rake the fallen fruit into the ground, and divert our attention to the blessings to come. The great political divisions of the past have produced few edible fruit. It is therefore a fairly safe bet that the new *Charter* will make little difference to the average Canadian. The lot of the majority is not going to be changed, for the *Charter* is not concerned with their bread and butter rights. In the great liberal tradition, economic rights do not generally

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[2] R. Samek, *The Meta Phenomenon* (1981), 146. See also R. Kinsey, *Marxism and the Law* (1978) 5 Brit. J. of L. and Soc. 202, and M. Tigar & M. Levy, *Law and the Rise of Capitalism* (1977).

[3] Samek, *Justice as Ideology: Another Look at Rawls* (1981) 59 Can. Bar Rev. 787, 787-8.

[4] *Canada Act, 1982,* Schedule B, *The Constitution Act, 1982,* Part 1, *The Canadian Charter of Rights and Freedoms.*

qualify for inclusion in a political charter lest they contaminate the purity of its doctrine with everyday problems.

My aim in this article is not to discredit the cause of human rights. On the contrary, I want to save it from being reduced to a formula. The effectiveness of any legal reform must be determined by its utility for bringing about social change. The merits of the *Charter,* if any, must be sought outside its purely legal effect, in the world of social reality. By the same token, the mere threat of legal sanction cannot provide a sufficient basis for social reform. It may give a helping hand when the time is ripe, but it cannot by itself bring about social change or protect it from a backlash.

## I. Anarchical Fallacies

The support that is buoying at the beginning of a movement can be cloying at its end. The embodiment in a sacred script of the dynamic values that promote the birth of a paradigm sets the stage for their decline. Once the document ceases to be a means and becomes an end, the impetus for change is lost. It was the force of the convictions behind the French *Declaration of the Rights of Man and of the Citizen* in 1789, not the document itself, that produced the progress achieved. Just as we must not judge its provisions cynically with the benefit of hindsight, so we must not put our faith in the magic of the text.

Nearly two hundred years have elapsed since this *Declaration* lifted the hearts of men, and in the interval a great deal has happened to lessen our expectations from its pronouncements. Even then, however, there were already many doubters whose scepticism was expressed in the following biting passage of Jeremy Bentham:

> *Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts. But this rhetorical nonsense ends in the old strain of mischievous nonsense: for immediately a list of these pretended natural rights is given, and those are so expressed as to present to view legal rights. And of these rights, whatever they are, there is not, it seems, any one of which any government *can* upon any occasion whatever, abrogate the smallest particle.[5]

So much for "terrorist" language. Bentham contrasts this with the language of reason and good sense according to which specific rights should be established, maintained and abrogated on the basis of what is advantageous to the society in question. In order to determine what would be advantageous, the circumstances of the proposals must be set out and the rights themselves must be specifically described:

> One thing, in the midst of all this confusion, is but too plain. They know not of what they are talking under the name of natural rights, and yet they would have them

[5]J. Bentham, "Anarchical Fallacies" in A. Meldon, *Human Rights* (1970), 32.

> imprescriptible — proof against all the power of the laws — pregnant with occasions summoning the members of the community to rise up in resistance against the laws. What, then, was their object in declaring the existence of imprescriptible rights, and without specifying a single one by any such mark as it could be known by? This and no other — to excite and keep up a spirit of resistance to all laws — a spirit of insurrection against all governments — against the government of their own nation — against the government they themselves were pretending to establish — even that, as soon as their own reign should be at an end. In us is the perfection of virtue and wisdom: in all mankind besides, the extremity of wickedness and folly. Our will shall consequently reign without control, and for ever: reign now we are living — reign after we are dead.[6]

Bentham rails not only against the utter vagueness of these so-called natural rights, but also against the conceit of those who seek to entrench them for all time, and he deplores their invitation to anarchy. The origin of government in a contract, he declares, is a pure fiction which is neither necessary nor useful. According to Bentham, all governments have been gradually established by habit after having been formed by force. Their origin is of no account. What matters is how conducive they are to the happiness of society. Contracts come from government, not government from contracts.

Bentham then turns his sarcasm on "these imprescriptible as well as natural rights" — liberty, property, security and resistance to oppression — which are enumerated in art. 2 of the *Declaration.* All these rights, he mocks, are "unbounded". To say that nature gave each man a right to everything is merely another way of saying that it has not given him anything, for what is every man's right is no man's right:

> Nature gave every man a right to everything before the existence of laws, and in default of laws. This nominal universality and real nonentity of right, set up provisionally by nature in default of laws, the French oracle lays hold of, and perpetuates it under the law and in spite of laws. These anarchical rights which nature had set out with, democratic art attempts to rivet down, and declares indefeasible.[7]

Bentham explicitly rejects the defence that these natural rights are limited by implication. Such an implication, he claims, would be inconsistent with their being imprescriptible, since indefeasibility excludes the interference of the law. Indeed, it is against the apprehended encroachments of legislators that liberty and property are intended to be made secure. Bentham attacks each of the alleged natural rights in turn.

(1) What these instructors as well as governors of mankind appear not to know, Bentham acidly observes, is that all rights are made at the expense of *liberty*:

> No right without a correspondent obligation. Liberty, as against the coercion of the law, may, it is true, be given by the simple removal of the obligation by which that

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[6] *Ibid.*, 32-3.
[7] *Ibid.*, 34-5.

> coercion was applied — by the simple repeal of the coercing law. But as against the coercion applicable by individual to individual, no liberty can be given to one man but in proportion as it is taken from another. All coercive laws, therefore (that is, all laws but constitutional laws, and laws repealing or modifying coercive laws,) and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty. Not here and there a law only — not this or that possible law, but almost all laws, are therefore repugnant to these natural and imprescriptible rights: consequently null and void, calling for resistance and insurrection, and so on, as before.[8]

(2) Not only, Bentham states, do *property* rights restrict liberty; they are meaningless since they do not relate to any specific subjects. Unfortunately, what is every man's right is no man's right, and the effect of this part of the oracle would not be to establish property but to extinguish it. The result is either mischievous or nonsense.[9]

(3) Bentham observes that both liberty and property might have been included under *security*. What seems to be envisaged here is security for each man's person, such as loss of life and limb:

> All laws are null and void, then, which on any account or in any manner seek to expose the person of any man to any risk — which appoint capital or other corporal punishment — which expose a man to personal hazard in the service of the military power against foreign enemies, or in that of the judicial power against delinquents: — all laws which, to preserve the country from pestilence, authorize the immediate execution of a suspected person, in the event of his transgressing certain bounds.[10]

(4) What, Bentham asks, is oppression? Is it power misapplied to the prejudice of some individual? If that were so, the three preceding rights would seem to make this right redundant. Bentham concludes that its purpose is to prevent the infraction of an individual's rights; an actual right of *resistance to oppression* is conferred on him

> as often as anything happens to a man to inflame his passions, — this article, for fear his passions should not be sufficiently inflamed of themselves, sets itself to work to blow the flame, and urges him to resistance. Submit not to any decree or other act of power, of the justice of which you are not yourself perfectly convinced. If a constable call upon you to serve in the militia, shoot the constable and not the enemy; — if the commander of a press-gang trouble you, push him into the sea — if a bailiff, throw him out of the window. If a judge sentence you to be imprisoned or put to death, have a dagger ready, and take a stroke first at the judge.[11]

The draftsmen of the *Canadian Charter of Rights and Freedoms* could and should have learned a great deal from Bentham's criticisms. On the other hand, we must not take his strictures too literally, and bear in mind that he does not argue on firm ground. If natural rights are

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[8] *Ibid.*, 36.
[9] *Ibid.*, 37.
[10] *Ibid.*, 38.
[11] *Ibid.*, 39.

"nonsense on stilts", so is his calculus of pleasure and pain.[12] Bentham was terrified of anarchy, and this led him to have unbounded faith in government, though he did not very much like the government he saw. What he desired was not the shoddy system before his eyes, but a utilitarian government of the future. Bentham's object was to produce an ideal code of law that would satisfy his calculus. This was to be achieved by exposing existing mischiefs and removing them by legislation. Above all, Bentham was an arch-enemy of fictions and blamed the courts for having spawned them. He regarded the common law as the shadow of statute law and greatly its inferior. He called it an "assemblage of fictitious regulations feigned after the image of these real ones that compose the Statute Law".[13]

My reason for mentioning Bentham's theory of fictions is that it explains his hostility to natural rights, which he associated with natural law and the fictitious social contract. Bentham's real complaint was that fictions have been misused by the common law, and not that they refer to nonexistent entities. To dismiss all fictions as the creation of judicial fools and knaves is to undervalue the contributions of the judge, and to overvalue that of the legislator. There is no greater fiction than the pretence that all mischiefs can be cured by an act of parliament.[14] Similarly, Bentham's obsession with clarity backfired. So determined was he to purge the law of its fictions that he resorted to a Draconian cure. Clarity was to be achieved by coining a new vocabulary which was unintelligible to the common man whom his reforms were supposed to help. If Blackstone's concern with natural law marks him as medieval, Bentham's preoccupation with the formal aspects of law reform makes him seem naïve.[15]

To summarize, Bentham was right to use his scalpel on the language of the *Declaration of the Rights of Man,* but he was wrong in judging it as a legal document and finding it wanting on that ground. The *Declaration* was a political charter, an emotive rallying point for liberal change. Although it was not radical, as can be seen from its protection of property rights, it was perceived by many as such and marked a break with the past.

The same cannot be said of the *Canadian Charter of Rights and Freedoms.* Unlike the *Declaration of the Rights of Man,* the *Charter*

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[12]J. Bentham, *The Collected Works of Jeremy Bentham* [:] *An Introduction to the Principles of Morals and Legislation* (1970), 38-41.

[13]J. Bentham, *A Comment on the Commentaries and A Fragment on Government* (ed. J. Burn & H.L.A. Hart, 1977), 120.

[14]Samek, *Fictions and the Law* (1981) 31 U.T.L.J. 290, 293.

[15]*Ibid.,* 299.

does not *declare* existing rights; on the contrary, it is the chosen instrument of government to *guarantee* a selected bundle of rights to the people against its own encroachments. No genuine libertarian should be happy with this gift. A guarantee is too much like a conferral. If there is to be any guarantee, it should be by the peole to the government, and not the other way round. In contrast, the American *Bill of Rights*[16] is rooted in the fiery *Declaration of Independence* of 1776 which helped to spark the French *Declaration.* The preamble of the American *Declaration* asserts:

> 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. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

## II. Is Human Rights Legislation Effective?

In the Western democracies charters of rights abound, for cheap moralizing has become the order of the day. The Taoists recognized two and a half millenia ago that the cult of morality and law flourishes in times of immorality and crime.[17] Far from indicating a people's virtue, they cloak its absence. A society with an innate sense of human rights does not need to embody them in law.

Conversely, a people is not led into subjection by blind compliance with iniquitous laws. After World War II, Gustav Radbruch and other German jurists argued that positivism was largely responsible for the effectiveness of the Nazi laws.[18] If the German people had been less law-abiding, they claimed, and if it had been taught the natural law tradition of subjecting law to morality, it would have rebelled against Hitler's edicts. The facts tell a different story. It was not its respect for the law that led the German people by the nose, but its "moral" teachers who had prepared it for its destiny long before Hitler and the "shameful" peace of Versailles. The infamous laws of the Nazi regime merely followed suit.

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[16]U.S. Const. amend. I-X.

[17]See J. Needham, *Science and Civilization in China* (1956), vol. 2, 521-2.

[18]See G. Radbruch, *Rechtsphilosophie,* 4th ed. (1950), 335-7. For a discussion of Radbruch's reasons for abandoning legal positivism and an English translation of sections of Radbruch's post-war essays, see Fuller, *American Legal Philosophy at Mid-Century* (1954) 6 J. of Legal Ed. 457, 481-5. See also Hart, *Positivism and the Separation of Law and Morals* (1958) 71 Harv. L. Rev. 593, 617.

It was the aftermath of defeat that stilled the voices of hatred for awhile, not any laws which the "new" Germany put on its statute books. In the last decade, the same voices have become all too audible again, and they are by no means confined to the German fatherland. Even in Canada racism is alive and well, though we would never know it by looking at the letter of the law. The legal suppression of the social truth cannot stamp out the underlying disease; it will only drive it still further underground. Just as the German Jews were not saved from anti-semitism by Bismarck's charter of rights, so our minorities cannot be protected from the prejudices of the majority merely by the force of law.

Civil rights legalists will object that my own example speaks against me. The status of the Jews, they will contend, was raised immeasurably by outlawing discrimination against them. To argue thus is to put the cart before the horse. It was the wave of liberalism in the second half of the nineteenth century which ameliorated the social status of the Jews in many respects; the law merely ratified the prevailing liberal trend. Far from holding off the forces of anti-semitism, the apparent victory of the Jews spurred them on to greater slanders. That their victory proved all too Pyrrhic is a tragic historical fact.

Unfortunately, the illusionary nature of legal protection is still not understood. This is no accident. In limiting social change to legal change, the ideology tries to protect its flank, and in promoting the myth of the stability of law it seeks to perpetuate itself. As I have argued elsewhere, the stable state of the law is an illusion; it is formally true but substantially false.

> Law is only as stable as the soeiety which it serves. To the lawyer, the formal stability of law is a necessary, and usually a sufficient condition of the stability of society. That it is a myth to cloak its underlying instability is a thought that does not normally cross his mind; he has been taught that law is the cement of society. This dogma is enshrined in the prevailing ideology and is reinforced, whether or not he is conscious of it, by his self-interest. Being so conditioned, he cannot begin to grasp that fundamental social ills may not be amenable to legal cures and that social injustice springs from an underlying ideology that cannot be changed on its own terms. From this point of view, the stability of law may be an evil rather than a good, since it masks social instability and postpones the day of reckoning.[19]

The present conservative backlash further illustrates the instability of the law. It indicates that the law cannot protect people from the swings of ideologies. When the liberal tide runs high, their rights appear safe; when it ebbs, they are left high and dry. Then the fine slogans suddenly sound hollow, and the velvet gloves of the ideology are replaced by its

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[19]Samek, *Beyond the Stable State of the Law* (1976) 8 Ottawa L. Rev. 549, 558-9.

claws. As long as it harbours the tainted old genes, they will remanifest themselves. Their legal treatment is part of the disease, not the cure.

Human rights legislation shares the drawbacks of all legislation: it may change the law, but it can only do so on the law's own terms. Law has a way of slipping through the politicians' fingers and taking on a life of its own. This is so because it is part of an institutional system that survives all changes in its rules.[20]

We must not confuse legal change by legislation with genuine social change. The most serious drawback of legislation is that it is locked within the political and legal framework of the established system. Hence it cannot solve the crucial social problems which are neglected, or which are created by the system. The law reformer wrongly assumes that legislation is the universally appropriate method for curing any and every kind of social ill:

> Legislation is the *legal* method *par excellence* of law reform, that is, it generally relies on the standard procedures of sanctions through which the legal system enforces its norms. The soeial utility of this method is limited by the social disutility of its coercive nature. Not only does a system of sanctions lead to an infinite regress; external motivation conditioned by fear is always inferior to internal motivation which rests on the free choice of human beings.[21]

Previously, I tended to think of law and law reform as merely diversionary tactics through which the ideology helped to maintain itself. I failed to grasp then that they were all a consequence of the "meta phenomenon". This is how I defined it:

> The meta phenomenon is the human propensity to displace "primary" with "secondary" concerns, that is, concerns about ends with concerns about means. The latter come to be perceived as primary, and distort the former in their own image. The new primary concerns are in turn displaced by the new secondary concerns about the means to be adopted to achieve the new ends, leading to another shift in the focus of consciousness. The new secondary concerns come to be perceived as primary, and so on. The progression is not linear but global. If we think of the total number of primary concerns of a man, a society, an ideology, as a sort of gravitational field, it will be distorted continuously by the pull of a growing mass of secondary concerns. The result is an increasing loss of balance, a relentless slide to the peripheral.[22]

The lawyer tends to rely on legislation as the standard remedy for all the social evils he meets. Since he works in a legalistic system, he believes that it can be changed on its own terms. He fails to see that law is the chosen means of the system, and not an end in itself. To entrench a charter of rights in its superstructure does not change the foundation. I

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[20]Samek, *A Case for Social Law Reform* (1977) 55 Can. Bar Rev. 409, 416.
[21]*Ibid.*, 416-7.
[22]Samek, *supra*, note 3, 4.

have already suggested that the separation of political from economic rights in effect confirms the *status quo.* The myth of political equality merely helps to entrench existing economic inequalities, which is not to say that an egalitarian tyranny secures political rights.

## III. *The Canadian Charter of Rights and Freedoms*

The entrenchment of human rights in a legal charter suggests to the layman a guarantee of permanence, an absolute protection for all time. The truth, as every lawyer knows, is very different. "Entrenchment" is used in a relative sense. Since no rights can be exhaustively defined in a charter, their scope must ultimately depend on the perspective of those who are charged with interpreting its terms. It is only because we have adopted the legal point of view that we accept without question the crucial role given to the courts. Section 24 (1) of the *Canadian Charter of Rights and Freedoms* provides: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

An innocent Canadian might be forgiven for wanting to know precisely how he or she can benefit from the *Charter.* This is how a government spokesman might reply: "First of all, everyone is guaranteed four fundamental freedoms. They are contained in s. 2."

> 2. Everyone has the following fundamental freedoms:
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> a) freedom of conscience and religion;
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> b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
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> c) freedom of peaceful assembly; and
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> d) freedom of association.

At this our innocent citizen might well shake his head. "I don't know what you mean by 'freedom of conscience' ", he might say. "Am I now free to have a conscience as well as a religion even though I don't express them. That is very generous of the government. Then we have the strange mixture in (b). What a jumble! There is only one thing certain about it, that it will do me no good, no more than (c) and (d). I don't want to seem ungrateful, but I would be glad to do without these fine guarantees, if only you could find me a job or stop the landlord from raising the rent."

"Now listen to me", the spokesman might retort, "you have obviously not understood a word of what I have said. The *Charter* does not take anything away from you. Section 2 expressly preserves all existing rights and freedoms. So you can still look for a job, and you still have your remedies against the landlord. Indeed, you are guaranteed mobility under the *Charter.* Not only do you have the right to enter,

remain in and leave Canada; you can gain a livelihood in any province, subject to certain qualifications."

"This right", our innocent citizen might concede, "does at least seem to have come economic advantage and to mean more or less what it says. But what about the others; why do they all have different names?"

"Because they are different", the spokesman's deft answer would be. The fundamental freedoms are those in s. 2. The mobility rights are in s. 6. Then there are the democratic rights in ss. 3-5, the legal rights in ss. 7-14, and the equality rights in s. 15."

"What exactly are these democratic rights?"

"They give you the right to vote and be elected; and they provide that no House of Commons and no legislative assembly shall continue for longer than five years."

At this point our innocent citizen might show his mettle. "Not quite", he might interpose. "You have forgotten the little proviso in s. 4 (2): 'In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.' "

"That", the citizen might continue, "brings me to another point. You are no doubt familiar with the *War Measures Act*[23] which has been denounced as contrary to the fundamental notion of civil rights. Can you tell me if, notwithstanding the *Charter*, a similar Act could be passed in the future?"

"It probably could under s. 1 which provides: 'The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' However, this would be possible only in an emergency."

"But life is full of emergencies", our innocent citizen might rejoin not so innocently. "And if there were no emergencies, what would be the point in protecting rights which are by and large already enjoyed? Who would have predicted the 'emergency' in Québec? And what is the foreseeable emergency which has inspired the government to set up detention camps by Order-in-Council?"

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[23]R.S.C. 1970, c. W-2.

Our innocent citizen is quite right, of course; and it is no answer to plead the limited ambit of s. 1. In all probability it will have a wider range than meets the eye. The decision of the Supreme Court of Canada in *A.-G. Canada* v. *Lavell*[24] should be a warning to us. If someone had told the draftsmen of the *Canadian Bill of Rights*[25] that it might be subject to the law existing at the time when it was enacted, they would no doubt have dismissed such a construction. Yet this is a possible interpretation of the case.

There is a further difficulty. It is all very well to say that the *Charter* must normally take precedence over the law. Given its extreme open texture, the judges in construing its provisions will inevitably have to fall back on their own experience. To talk of a new kind of jurisprudence is to forget that it cannot be created out of thin air. The *Charter* will be placed within the established legal framework, not the other way round. The "due process" clause[26] in the American *Bill of Rights* shows how largely counter-productive the granting of fundamental *legal* rights can be. It illustrates well the operation of the meta phenomenon: the legal means come to displace the social end.

It simply will not do to leave everything to the good sense of the judges; it does them no service to cast them in the role of supermen. They are by their own standards the guardians of the law, not its master. Those who wish to place the responsibility of effectively applying the *Charter* on the judiciary are faced with the following *reductio ad absurdum*: if the rights in the *Charter* are entrenched, they are beyond the creative endeavours of judges; if, on the other hand, they are beyond them, they cannot be shown to be entrenched, since no one knows precisely what they are.

Another objection is that notwithstanding the myth of judicial independence, judges are appointed by governments. To argue that this will not affect their judgment is to give them a monopoly of trust. Parliament is also theoretically independent of government, and if we believe in the reality of the separation of powers there is no reason why we should not trust it to protect human rights against the executive. There is nothing more insidious than to undermine the mythology of the system. Once we doubt the independence of one branch of government, it will not be long before we lose faith in the others.

Largely at the behest of women's rights groups, the old phrase "equality before the law"[27] in the *Bill of Rights* was replaced in the *Charter* by "equality before and under the law":

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[24][1974] S.C.R. 1349.
[25]R.S.C. 1970, App. III.
[26]U.S. Const. amend. V and XIV.
[27]R.S.C. 1970, App. III, s. 1 (b).

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or cthnic origin, colour, religion, sex, age or mental or physical disability.
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> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It appears that nothing is ruled out when it comes to political compromise. A clause here, a little word there — what does it matter if it helps the good cause? The political cause of affirmative action must not be sacrificed to that of equality. There are votes on both sides of the fence, and they must be garnered regardless of the consequences. The meaning of the language adopted is another matter. What on earth does "equal before and under the law" mean? On the face of it, it suggests that everyone must be treated in the same way — be it a corporation, a lunatic or an embryo. Of course, this is absurd. Presumably the phrase means that there must be no discrimination against any group on *a priori* grounds; it would have to be shown that all the members of that group are in fact not equally well qualified with respect to the matters in regard to which they are treated differently. But this still leaves us with a conventional standard of competence of some sort, for there is no objective way of assessing performance.

In a male-dominated society, the "objective" standard is naturally slanted by the male perspective. Indeed, this appears to be implicitly conceded by feminists' claims that women should be treated on the same footing as men. Obviously, females can only meet male standards at the risk of losing their own. Women *cannot* have the best of both worlds any more than other minority groups.

> [T]he very struggle of women for equality *in the system* undermines their genuine feminine stand. Since the system is male dominated, the means have come to overshadow the end. [The meta phenomenon]... is an expert at creating false dichotomies. Having divided women from men, it then encouraged them to enter the male rat-race. This cannot lead to a true liberation. The economic and sexual exploitation of women is merely an aspect of capitalism, and of the human condition in which it has its root. Both men and women must be liberated. The discontent of women is justified, but it is misdirected.[28]

Not only do ideological preconceptions affect the choice of "objective" criteria for judging job competence; they help to shape the kind of economic system we have and the opportunities available to the various social groups. The liberal myth of individual equality cloaks the very real inequalities between the component tiers of the established

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[28]Samek, *supra,* note 2, 243.

hierarchy. Similarly, the individualization of the social conflicts between them conceals the ideological bent in the "neutral" legal standards which are being applied to solve them.

Affirmative action programmes cannot change this state of affairs since they are harnessed to the system that caused the problems; they merely widen marginally the elite at the top by allowing more individuals from below to qualify on its terms. It is the visible female and black professionals that count, not the submerged mass of their brothers and sisters. The built-in inequalities of the system are suppressed by the appearance of equality in the superstructure.

Why, for instance, is the *Charter* silent about the economic inequalities that divide Canadian society? In these days of high unemployment, the fate of over a million dispossessed people apparently carries no weight on the scales of equality. They are placed in the cold storage of welfare under the equal protection of the law.

According to the liberal credo, social change can be produced through individual action by reforming the system from within. It does not allow for the fact that the concerns which are allowed to surface are distorted by its false consciousness. In focussing attention on the symptoms and suppressing the underlying disease, the system insulates itself against any criticism with which it cannot cope. The *Charter,* as I have argued, was not designed to change the *status quo*, but merely to give it greater appeal.

The political opportunism which marks it can be seen very clearly in s. 32 (2) which postpones the application of s. 15 for three years, and by the *non obstante* proviso in s. 33 which contains an "overrider clause":

> 33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> (4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

I have heard this provision praised by a politician for combining the best of two worlds, in other words, as a political compromise *par excellence.* The trouble with this kind of deal is that while the politicians are let off the hook, the citizen is given something with one hand which is taken away with the other. The professions of faith in the politicians'

attachment to human rights are not helped by relying on their fear of losing public support if they dared to override them. I think the interest of the public in the *Charter* has been grossly exaggerated. It is much more likely that politicians will submit to the pressures of their own electorate, and of the police and the military who are already campaigning to cut it down.

Even more blatantly political is the last minute decision to recognize in the *Charter* the *existing* rights of the aboriginal peoples in Canada:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Although the purpose of the *Charter* is allegedly to entrench the citizens' most basic rights, it has in effect entrenched a patchwork of legal puzzles which will provide grist to the lawyers' mill. The instability of the whole confection is apparent from the headings of the *Charter*. Why, for instance, are "fundamental freedoms" restricted to those set out in s. 2? Perhaps an even more puzzling question is why "legal rights" are restricted to ss. 7-14. Are the other rights not "legal" rights? Is the *Charter* merely declaratory except in regard to the special provisions relating to legal rights? Clearly, this is not so; but in that case why are not all the rights conferred "legal"?

The "legal" rights in the *Charter* are by no means more certain than the others. Consider s. 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." These legal rights are left dangling, so that they may be encroached upon in accordance with the vague principles of fundamental justice. Sections 8 and 9 have similar soft centres. Section 8 provides that everyone has the right to be secure against *unreasonable* search and seizure, and s. 9 asserts the right not to be *arbitrarily* detained or imprisoned.

Sections 10 and 11 guarantee certain rights on arrest or detention and in criminal proceedings. Section 12 provides that everyone has the right not to be subjected to any *cruel and unusual* treatment or punishment. Here one must wonder whether a cruel punishment may escape simply because it is usual. Capital punishment could easily be justified on that ground, and the prevailing conditions of imprisonment will obviously be regarded neither as cruel nor as unusual, and therefore legitimate.

The official language rights guaranteed in ss. 16-22 entrench an existing bureaucratic structure instead of encouraging bilingualism at the grassroot level. The minority language educational rights in s. 23 are

essentially designed to return Québec to the law as it stood before the passage of Bill 101, although the federal government has said that it is open to further bargaining on the matter. Far from accepting these overtures, the Québec assembly has thrown down the gauntlet to the federal government by passing a bill which goes beyond the *non obstante* provisions in s. 33. It purports to overrule the *Charter, inter alia,* by restoring Bill 101.[29]

While the official language provisions in the *Charter* are based on the rationale of the "two nations" doctrine and to this extent discriminate against other ethnic minorities, the politicians felt it necessary to make some gesture to the electorate. It is unlikely, however, that they will be satisfied with an interpretation clause that even in the context of the *Charter* remains extremely vague. Section 27 states: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

Every lawyer knows that a law is only as strong as its bite. My charge that the *Charter* is essentially backward and not forward-looking is borne out by the enforcement provision:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Subsection 2 sets the tone: the *status quo* is maintained by limiting the exclusion of evidence obtained in breach of the *Charter* to cases where to admit it would bring the administration of justice into disrepute. Once again we are dealing with a political compromise which does nothing for the reputation of our judicial process. Given this proviso, the citizen will scarcely be reassured by the promise of obtaining the remedies which a court of competent jurisdiction considers appropriate and just in the circumstances. It seems unlikely that judges will forget their legal upbringing and develop a broad and sophisticated range of new remedies to protect the rights and freedoms entrenched in the *Charter.* Short of effective enforcement, their entrenchment will be paper thin.

I want to forestall a criticism which may be made of my claim that the *Charter* does not change anything of substance. If that really were so, it may be said, then what is all the fuss about? Why would eight of the ten

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[29]*Charte de la langue française,* S.Q. 1977, c. 5.

provincial premiers have opposed the *Charter* so fiercely for so long?[30] This argument rests on two false premises. The first is that politicians only fight over important issues. I would contend that the opposite is true and that most disputes are trivial. My second point is bound up with the notion of false consciousness and the meta phenomenon. The federal and provincial governments were not arguing about the *Charter,* but about the balance of power within the system. The means of power had become the end.

The *Charter,* as I have emphasized, was introduced for political reasons, and therefore we must expect it to be full of political wind. Although it is supposed to breathe new life into the moribund *Bill of Rights,* the legal profession and the government bureaucracy will be its principal beneficiary. This is no phoenix rising from the ashes. How could it be when its wings were clipped from the start and it was entrusted into the same hands that emasculated its predecessor.

There is nothing inspiring about the outdated rhetoric of the *Charter.* Tacked on to the new constitution to give it a liberal "sex appeal", it can hardly be expected to rise above its origins. Its aim is to entrench the *status quo* by lending it a new legal look. Alas, its dress is as transparent as the emperor's new clothes. This is apparent from the very first section which confines its vaunted rights within such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The implication is that since we already live in such a society, the new rights are largely declaratory of the old.

Finally, it should be noticed that the *Charter* does not confer rights against private individuals:

> (32) (1) This Charter applies
> *(a)* to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> *(b)* to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

## IV. What are Fundamental Rights?

The prevalent notions of fundamental rights are derived from our libertarian ideology. This is borne out by their individualistic slant. Each person is treated as an atomic subject of rights which are guaranteed against an essentially hostile community. Yet, if society really were an aggregate of individuals, then *it* could not hold power over us. It is our

[30] W. Davis of Ontario and R. Hatfield of New Brunswick were the only two premiers who unconditionally supported the *Charter.*

way of looking at others that merges them with society and sets us apart. This perception of ourselves reflects our social consciousness, not our individual thoughts. As Marx said, it "is not the consciousness of men that determine their being, but, on the contrary, their social being determines their consciousness."[31]

Of course, if we accept Marx's statement at face value, his own doctrine immediately becomes suspect; in fact, it would no longer be "his own". The statement must be regarded as a useful corrective, not as a dogmatic truth. It must not be distorted from a means into an end. Neither "individual" nor "social consciousness" is an absolute term of reference. They are parts of an explanatory model which may be usefully combined, not alternatives between which we must choose.

We can express this insight in another way. Man is *in* the world, and the world is *in* him; hence, there can be no question of observing the world as if he were not part of it. He speaks *its* language whatever ideological position he may adopt. Although he can never tear himself out of the world, he can, once he becomes conscious of its limitations, stand apart to some extent from the false dichotomies which it imposes on us. Instead of taking sides in the game in which he too is involved, he can look at it with fresh eyes.

"What then *are* fundamental rights?", an impatient reader may ask. To formulate the issue in this way is to play into the hands of the meta phenomenon, to accept the relative means of language as an absolute end. What I have said in this regard about justice applies *mutatis mutandis* to fundamental rights. Any definition of justice, I said, will take us back to convention, and so will any analysis of the concept, or of the "language games"[32] that can be played with it. Justice, like truth, transcends convention, and therefore cannot be reduced to its terms. Language is conventional and consequently incapable of answering the questions which stretch it beyond itself. We must use it against the grain, so to speak, to free ourselves from its hidden values. Language can never work itself pure, but we can reverse its direction by stripping it down to its existential roots.[33]

Pascal's exposure of the confusion between justice, custom and law gives us a brilliant insight into the mystifying influence of ideologies.[34] Substituting ideology for custom and law, we can say that in disentangling

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[31]K. Marx, *A Contribution to the Critique of Political Economy* (trans. N.I. Stone, 1904), Preface, 11-2.

[32]L. Wittgenstein, *Philosophical Investigations*, 2d ed. (1958), s. 7.

[33]Samek, *supra*, note 3, 810.

[34]*Ibid.* See B. Pascal, *Pascal's Pensées* (trans. H. Stewart, 1950), 217 *et seq.*

justice from what passes for it in the false consciousness of a superstructure we set ourselves free to apply an open mind to the problems of the foundation. Furthermore, in recognizing the relativity of all ideologies, we avoid the trap of accepting the "justice" of a counter-ideology.

If we take an existential, as opposed to an ideological, approach to fundamental rights, they will appear in a very different light. We will see them as a way of responding to the human predicament, to the paradox of human existence in an inhuman world. Man is born in a state of nature without rights or obligations of any kind. It is our response to our condition which creates them both. Man denies his rightlessness by claiming certain fundamental rights and accepting their corresponding obligations.

This is basically the same approach which I have taken to the problem of justice.[35] Man's affirmation of justice can be explained as the "negation of a negation". Man, as a human being, denies the denial of his fundamental equality. If justice is to have any real meaning, it must seek to correct the existing imbalance; it must concern itself above all with the needs of the poor. No *theory* of justice will cure a single injustice in the world. Justice, like truth, must be part of a praxis, not merely subjects of speculation for philosophers. True justice knows no boundaries and ignores the false dichotomies of custom and law. There is no finer ethical maximum than: "From each according to his ability, to each according to his need."

What I have said about justice applies equally to fundamental rights. If fundamental rights are to have any real meaning, then they must above all protect the claims of the poor; for just as the poor are the greatest victims of inequality, so they suffer most from their rightlessness. It is idle and obscene to talk about fundamental rights unless we acknowledge the absolute priority of fundamental needs. Every human being has a body that requires sustenance. Indeed, in the great majority of cases, existence is largely a struggle for survival. Economic rights are not granted by generous governments to underdeveloped nations and starving nomads; they are the most basic of fundamental rights since they are a response to man's most fundamental needs.

John Rawls' theory of justice bears the tell-tale marks of the prevailing ideology.[36] In identifying justice primarily with the established political institutions, and allowing economic inequality on the fiction that it promotes the interests of the most disadvantaged, the stage is set for

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[35]*Ibid.*, 810-1.

[36]J. Rawls, *A Theory of Justice* (1971).

guaranteeing the *status quo.* The argument is that the existing system alone is capable of safeguarding the fundamental political and economic institutions on which we depend for our liberty and economic survival. While economic equality would be desirable as an ideal, it is ruled out by the hard facts of life. But for the present economic inequalities, we are told, there would be far less economic wealth to share, with the result that the worst off would be worse off still. Hence, to help them attain a greater measure of equality would be merely counter-productive.

The juxtaposition of political and economic equality is one of the most dangerous features of Rawls' theory of justice. The "special" conception of justice under which greater liberty must not be traded for more economic benefits does not hold for underdeveloped nations which are subject to the "general" conception which allows for such trade-offs. This not only enables us to accept repressive regimes in the third world on the spurious ground of economic necessity; it also poses a threat to our own societies. Rawls' qualification implies that liberty has a price.[37]

The prevailing notion of fundamental rights in the West is concerned with the political rights of citizens, without doubting the validity of the superstructure of which they form part. Instead of questioning whether this notion really is an effective means of protecting man's fundamental rights, our ideology treats it as an end in itself. It does not follow from this that nothing is to be gained by analyzing the notion of fundamental rights. Analysis is essential to lay bare the conceptual structure of the false consciousness in which an ideology entrenches itself. We cannot overthrow it as long as we see the world in its image, and accept its means of rationality as an end.

As the term itself indicates, fundamental rights should take us back to fundamentals, to the very bedrock of human existence. They are "natural" inasmuch as they are based on the nature of human beings in the world, and not on special rights conferred by a political or legal system. While the latter are contingent, the former are primordial. They are man's response to his condition, and that is why they should command respect.

Only in this sense are fundamental rights "individual". They are not rights obtained by individuals in virtue of certain contingent attributes or transactions. On the contrary, they are the substratum of rights of every human being after these have been discounted. An individual, we may say in the spirit of Zen, has fundamental rights only when he ceases to be one. In other words, John Smith does not have fundamental rights because he

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[37]Samek, *supra,* note 3, 800-1.

has a unique set of personal attributes; it is the human being hidden by John Smith who claims such rights.

Man responds to his predicament by claiming fundamental rights as a human being. This is the reason why he refuses to judge a person, or be judged by him, on the ground of contingent attributes such as race, colour, nationality or sex. For instance, John Smith can claim a fundamental right not to be discriminated against on the ground of his colour. He can assert that right not because he *is* black, but on the contrary because he is not. His colour is a means, not an end. It is the meta phenomenon which dehumanizes a human being into a black, a Jew, a female, a citizen, a lawyer and so on. The social roles ascribed to him swallow the man.

Since fundamental rights have their source in man's response to the human condition, they necessarily transcend all ideological values. Consequently, fundamental rights can never be exhaustively listed. There is a dynamism in the notion that is at odds with any static mould. We are not dealing here with a definable class of sacred rights, but with a dialectical process. Far from enclosing us, the notion of fundamental rights should have an opening, a liberating effect. It should help us to transcend the ideological horizon of the present and re-authenticate our values, instead of accepting it as the limit of truth.

But how, a sceptical reader may ask, can we determine which rights are fundamental and which are not? Well, of course, we cannot do that, or rather we should not want to do it. The question reflects the static bias of the ideology which demands that all solutions be "practical" in the sense of conforming forever to its standards. In fact, as we have seen, there is nothing practical about the *Charter.*

Take the rights of the handicapped, for instance. Are they fundamental or not? If we trace back their claims to fundamentals there can be no doubt they are well-founded, though not for the ideological reasons given. The handicapped are not entitled to any fundamental right as such; but they have *as human beings* the fundamental right not to be discriminated against on the ground of a physical or mental disability. In other words, they are protected against being treated as a special category of sub-humans because they are handicapped. Surely it is paradoxical that we first have to cripple them as persons in order to compensate them in small part for the damage we have done.

It should go without saying that if we respond to the human condition in the name of fundamental rights, we must be prepared to shoulder the corresponding burdens; we cannot shift responsibility to the government by giving it a blank cheque without funds. Unlike a theory, a praxis does involve obligations. We can write *ad infinitum* about fundamental rights

without lifting a finger; but we cannot defend one of them without paying the price.

## V. Hart's Concept of Natural Rights

H.L.A. Hart advances the thesis that if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free:

> By saying that there is this right I mean that in the absence of certain special conditions which are consistent with the right being an equal right, any adult human being capable of choice (1) has the right to forbearance on the part of all others from the use of coercion or restraint against him save to hinder coercion or restraint and (2) is at liberty to do (*i.e.* is under no obligation to abstain from) any action which is not one coercing or restraining or designed to injure other persons.[38]

Hart gives two reasons for describing the equal right of all men to be free as a *natural* right, both of which, he says, were always emphasized by their classical champions. The first is that the right is one which all men have if they are capable of choice; they have it *qua* men and not only if they are members of some society or stand in some special relation to each other. The second reason is that a natural right is not created or conferred by men's voluntary actions as other moral rights are.

Hart points out that his thesis is more restricted than the traditional theories of natural rights, since it does not show that men have any absolute, indefeasible or imprescriptible rights, save the equal right of all to be free. Moreover, he admits that his thesis may appear to be unsatisfying in another respect: it merely asserts conditionally that if there are any moral rights then there must at least be this one natural right. He concedes that there may be moral codes which do not employ the notion of a right which would perhaps not be conditional in this way.

For Hart the natural right of all men to be free can be restricted by "special rights". These rights are limited to the parties to a special transaction or relationship. The most obvious case is that which arises from promises:

> By promising to do or not to do something, we voluntarily incur obligations and create or confer rights on those to whom we promise; we alter the existing moral independence of the parties' freedom of choice in relation to some action and create a new moral relationship between them, so that it becomes morally legitimate for the person to whom the promise is given to determine how the promisor shall act. The promisee has a temporary authority or sovereignty in relation to some specific matter over the other's will which we express by saying that the promisor is under an obligation to the promisee to do what he has promised.[39]

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[38]H.L.A. Hart, "Are There Any Natural Rights?" in Meldon, *supra,* note 5, 61.
[39]*Ibid.,* 68-9.

Another kind of transaction which confers rights, according to Hart, is one whereby a person consents or authorizes another to interfere in matters which he would otherwise be free to determine for himself. If I consent to your taking precautions for my health or happiness, then you have a right which others do not have, and I cannot complain of your interference if it is within the sphere of your authority. The typical characteristics of a right are present in this situation: the person authorized has the right to interfere not because of its intrinsic character but because *these* persons have stood in *this* relationship. No one else has any *right* to interfere.

Special rights are not necessarily created by the deliberate choice of the party on whom the obligation falls:

> A third very important source of special rights and obligations which we recognize in many spheres of life is what may be termed mutuality of restrictions, and I think political obligation is intelligible only if we see what precisely this is and how it differs from the other right-creating transactions (consent, promising) to which philosophers have assimilated it. In its bare schematic outline it is this: when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefitted by their submission. The rules may provide that officials should have authority to enforce obedience and make further rules, and this will create a structure of legal rights and duties, but the moral obligation to obey the rules in such circumstances is *due* to the co-operating members of the society, and they have the correlative moral right to obedience. In social situations of this sort (of which political society is the most complex example) the obligation to obey the rules is something distinct from whatever other moral reasons there may be for obedience in terms of good consequences (e.g. the prevention of suffering); the obligation is due to the co-operating members of the society as such and not because they are human beings on whom it would be wrong to inflict suffering.[40]

The fourth type of situation mentioned by Hart which may be thought of as creating rights and obligations exists where the parties have a special natural relationship, as in the case of parent and child.

Unlike special rights, general rights do not arise out of any special relationship or transaction. They are not rights, Hart emphasizes, which are peculiar to those who have them; all men capable of choice have them except insofar as they are cut down by special rights. To assert a general right, such as the right to say what one thinks, or to worship as one pleases, directly invokes the principle that all men equally have the right to be free; to assert a special right invokes it indirectly.

Although illuminating in many ways, Hart's analysis follows the *laissez-faire* approach of the prevailing ideology. The foundation of freedom is accepted without question, and on it an elaborate superstruc-

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[40] *Ibid.*, 70.

ture of special rights is built which ultimately rationalizes the enforcement machinery of the state. Man's original freedom is merely the starting point of his slavery, since he is deemed to have contracted it away. In consequence, the ideology is confirmed by what appears to be an impartial analysis.

Needless to say, I am not implying that Hart is guilty of bad faith. My point is that the concept of natural rights cannot be analyzed objectively by laying bare the underlying language game because (1) there is not merely one such game, (2) all such games carry false ideological weight, and (3) the choice of this method of analysis is already an ideologically slanted approach to the subject.

The victim of economic discrimination will be very sceptical of the value of his natural right to freedom, and he will be downright unbelieving when he is told that by accepting the benefits of life in a capitalist society he has accepted the *status quo.* Moreover, the whole thrust of the inquiry will seem to him to be misdirected. He will take the view that Hart's theory of special rights in fact gives moral authority to those who deny him his freedom.[41]

## VI. Self-regarding Acts and the Inner Sphere of Life

The distinction between self-regarding and other-regarding acts can be traced back to John Stuart Mill's famous principle of self-protection:

> The object of this Essay is to assert one very simple principle as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[42]

Mill is careful to say that this principle applies only to human beings in the maturity of their faculties. The idea of utility, and not that of abstract right, is the ultimate appeal on all ethical questions:

> But it must be utility in the largest sense grounded on the permanent interests of a man as a progressive being. Those interests, I contend, authorise the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people. If any one does an act hurtful to others, there is a prima facie case for punishing him by law, or, where legal penalties are not safely applicable, by general disapprobation.[43]

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[41]I have recently criticized Rawls' theory of justice on similar grounds. See *supra,* note 3, 802.

[42]J.S. Mill, "On Liberty" in *Three Essays* (1975), 14-5.

[43]*Ibid.,* 16.

The first question raised by Mill's principle of self-protection concerns the nature of its object: is it merely to protect the liberty of each individual so that each can be given the maximum amount of liberty consonant with that of everybody else, or is the protection of liberty a means and not an end? In some passages Mill seems to suggest that liberty is the highest good, but in others the key element appears to be "social harm". This is not limited either to illegitimate interference with the liberty of individuals or to physical harm to persons and property; it includes certain types of moral harm and certain public violations of good manners. Focussing on this element, the prevention of social harm is the higher good to which liberty must be sacrificed.

Mill gives us only one general principle for circumscribing the area of social harm, and that is the negative principle that an individual's own good, whether physical or moral, is not a sufficient warrant for interfering with his liberty. Although this principle leads to a distinction between self-regarding and other-regarding acts, Mill's principle of self-protection cannot be reduced to a statement of this distinction. For one thing, as we have seen, it consists of composite elements; for another, I have claimed that Mill put forward the distinction as a guiding principle, and not as a self-sufficient automatic test. This is borne out by his admission that "no man is an island".

> The distinction between self-regarding and other-regarding acts is, I suggest, a *normative* and not a factual distinction. The question is where we *ought* to draw the distinction, not where it *is,* and how we answer it will depend not only on our values, but also on the purpose for which the question is asked. Thus, all other things being equal, we will be more reluctant to classify an act as other-regarding for the purpose of imposing a *legal* sanction than for the purpose of imposing a moral sanction. The values which inspired Mill were liberal and utilitarian, and it is on these values that he drew, and on which we must draw, to flesh out the dry bones of the distinction between self-regarding and other-regarding acts.[44]

W.E. Conklin rejects Mill's principle of social harm and argues in favour of protecting the liberty of each individual against interference by others:

> The key criterion to decide whether society may intervene with an individual's conduct, therefore, is not that the conduct sets off deep-felt feelings of "intolerance, indignation or disgust", as Lord Devlin would have it... . Nor is it that the conduct causes harm upon others, as John Stuart Mill sometimes would have it. Rather, the test is whether the exercise of the person's choice in pursuing the conduct is necessary for a "self-creative enterprise" and, if so, whether that conduct interferes with the capacity of other members of society to exercise choice.[45]

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[44]Samek, *The Enforcement of Morals: A Basic Re-examination in its Historical Setting* (1971) 49 Can. Bar Rev. 188, 195.

[45]W. Conklin, *In Defence of Fundamental Rights* (1978), 205.

In a recent article, R.N. McLaughlin contrasts Conklin's view of self-regarding acts with Mill's.[46] Conklin, he says, draws our attention to the many places in his essay *On Liberty* where Mill defends self-regarding acts because they advance the social good. For Conklin they express development of the "inner sphere of life" and therefore are valuable in themselves. Moreover, while Mill held that it was for society to decide whether an act was self-regarding or not, Conklin believes that to allow it to do so would invite the tyranny of the majority which Mill so much dreaded. McLaughlin says:

> Part of the criticism of Mill seems misdirected. It is society — in the form of the authorized agencies which create and enforce the rules — and not the interested party, which must decide what is and is not lawful under any system. It is hardly fair to criticize Mill's system in particular for possessing this feature. Mill may err in saying that no self-regarding actions ought to be restrained or that actions become other-regarding when they affect the interests of others or transgress duties owed to others. He cannot be blamed if the representatives of society draw the line between privileged and restrainable actions in the wrong place.[47]

The fact that society must bear responsibility for deciding whether an action is lawful or not, McLaughlin claims, is illustrated by Conklin himself in his discussion of slavery. Suppose that one person wishes to become a slave and another wants to become his owner. On Conklin's own account, we are here justified in denying the prospective slave's self-creative choice. Conklin permits us, as representatives of society, to say that the choice is apparent only, and not a development of the inner sphere.

It is true that Conklin ascribes to Mill the view that self-regarding acts should be protected on utilitarian grounds, and that whether an act is self-regarding or other-regarding is a matter for society to decide. Conklin makes it clear, however, that Mill's account is by no means consistent and that it reveals a tension between the demands of society and individual liberty. Mill certainly would not have permitted a majority decision on whether a given act is self-regarding or other-regarding. As I have indicated, he put forward the distinction as a guiding principle, though sometimes he treated it as a question of fact. In either event, the decision would have to be justified in line with the considerations put forward by Mill, and not by counting heads. Conversely, Conklin's view is not that each individual should be able to decide whether an act is self-regarding or other-regarding. Just as for Mill, the decision must be made rationally in accordance with the proposed criteria. Conklin would have no difficulty in disposing of the example of the slave on the ground that it is inconsistent with self-respect.[48]

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[46]McLaughlin, *Fundamental Rights* (1979) 27 Chitty's L.J. 291.
[47]*Ibid.*, 293.
[48]See *infra*, Part VII.

Unfortunately, Conklin's account is obscured by his notion of the "inner sphere of life" which he superimposes on Mill's concept of self-regarding acts. McLaughlin seems to think that Conklin restricts fundamental rights to matters in that sphere, but this, as I shall attempt to show, is not the case. Like Mill's concept, Conklin's notion merely provides us with a guiding principle for circumscribing the area of permissible interference with a person's liberty; it neither justifies interference in all other cases, nor does it define the whole range of fundamental rights.

Another source of confusion must be mentioned at this point. Conklin recognizes that liberty is not a homogeneous concept. Even Mill did not always use it in the same sense. According to Isaiah Berlin, there are two concepts of liberty which are telescoped in Mill's account:

> One is that all coercion is, in so far as it frustrates human desires, bad as such, although it may have to be applied to prevent other, greater evils; while non-interference, which is the opposite of coercion, is good as such, although it is not the only good. This is the "negative" conception of liberty in its classical form. The other is that men should seek to *discover* the truth, or to develop a certain type of character of which Mill approved. Fearless, original, imaginative, independent, non-conforming to the point of eccentricity and so on and that truth can be found and such character can be bred, only in conditions of freedom. Both these are liberal views, but they are not identical, and the connection between them is, at best, empirical.[49]

Berlin prefers the "ideal" of negative liberty to that of positive liberty:

> Pluralism, with the measure of "negative" liberty that it entails, seems to me a truer and more humane ideal than the goals of those who seek in the great disciplined, authoritarian structures the ideal of "positive" self mastery by classes, or peoples, or the whole of mankind. It is truer because it does, at least, recognize the fact that human goals are many, not all of them comensurable, and in perpetual rivalry with one another.[50]

This is also Conklin's choice. His approach to fundamental rights in terms of man's "open-ended potentiality" is inconsistent with a positive conception of liberty based on a fixed set of values.

## VII. Conklin's Theory of Fundamental Rights

Conklin acknowledges his debt to Rawls' principle of self-respect, but he goes beyond it in formulating his theory of fundamental rights. Rawls, Conklin says, places self-respect along with rights and liberties, powers and opportunities, and income and wealth as the chief primary goods in society. He distinguishes two aspects: first, the sense of a person's own

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[49]I. Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (1969), 128.
[50]*Ibid.*, 171.

value and the conviction that his plan of life is worth carrying out, and secondly, confidence in his own ability to carry it out. Self-respect for Rawls is a primary social good because without it nothing seems worth doing. Accordingly, liberty is fundamental because it provides the most effective social basis for self-respect. The source of self-esteem in a just society is not a person's income share, but the publicly affirmed equal distribution of fundamental rights and liberties. Everybody has basically the same status.

Why, Conklin asks, does liberty fulfil the need for self-respect whereas wealth does not? Rawls, he states, explains that if material wealth were the basis of self-respect, not everyone could possess the highest status. Each man's gain would be another's loss; self-respect could not be distributed equally. But why would the parties not agree to equal wealth? Because, Rawls believes, this would be irrational in view of the possibility of bettering everyone's circumstances by accepting certain inequalities. "Rawls' compromise solution is 'to support the primary good of self-respect as far as possible' by assigning equal basic liberties and giving them priority over the relative shares of material means."[51]

Rawls, Conklin points out, applies his self-respect argument for basic liberties to the right of equal participation in government. The latter principle requires that each person should have one vote and that all citizens should have equal access to public office. Equal political rights enhance the self-esteem and the sense of political competence of the average citizen. They also lead to the development of the citizens' intellectual and moral faculties. Men and women acquire an affirmative sense of political duty and obligation because they must explain and justify their views by appealing to common principles:

> Rawls' notion of self-respect may finally suggest a principled criterion for which we have been searching to explain why fundamental rights are fundamental. The traditional juristic arguments failed to support consistently the existence of fundamental rights. We also found wanting the various brands of utilitarianism. Even John Stuart Mill's arguments for the protections of "self-regarding" conduct suffered from serious conceptual difficulties. Rawls's political theory of liberty also possesses shortcomings, not least of which is the self-contained nature of the most extensive system of basic liberties. Hidden within the interstices of Rawls' complex exposition, on the other hand, we have found an argument which, at face value, appears to support the existence of fundamental rights in a consistent manner.[52]

Conklin distinguishes between three conceptions of the "self" which can be found in Mill. According to the first, the self is an actuality with subjective desires and impulses. According to the second, it is defined in

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[51] *Supra,* note 45, 181.
[52] *Ibid.,* 182-3.

objective terms of higher goodness. This true self tends to be identified with the social whole of which the individual is merely a part; he is merged in a race, class, state or religion:

> There is, however, a third conception of the "self". As Mill suggested in his analogy of a tree, the self is a potentiality, always in the process of becoming. The self is one's *daimon,* "the ideal possibility which each individual bears within him and which it is his destiny progressively to actualise". Unlike the first conception, the self is not conceived by reference to one's impulses or desires: he [sic] is continually growing. Unlike the second conception, the self cannot be imposed nor be discovered by some great leader because the self is *always* in the process of becoming. The "monstrous impersonation" about which Berlin was concerned is conceptually impossible with this third notion of the self because our fallibility prevents us from ever knowing its nature. The meaning of the self is, of necessity, open-ended. Any one person's conception is of equal weight and equal respect relative to another's. Consequently, the basis of freedom in this third conception cannot logically lead to tyranny.[53]

In order to understand the meaning of respect for a person as a person rather than as a thing, Conklin claims, we must distinguish between "appraisal" and "recognition" respect. There are several implications of appraisal respect, Conklin says, which run counter to the third conception of the self, and the existence of fundamental rights. In the first place, not everyone in society is worthy of appraisal respect. When we consider men and women in their roles we find a great deal of inequality between them. Secondly, appraisal is relative to a society's values and preference at a given time. Hence, if the existence of fundamental rights were to turn on appraisal respect, it would leave us with no principled criteria to determine the nature of fundamental rights:

> Recognition respect requires that we shed the conspicuous labels of social, political and professional status. It insists that, underlying the unequal human abilities and underlying our grading of those capacities, there is a common humanness enveloping each person. That common humanness is found in one's potentiality, in the unchartered individuality which is always in the process of becoming.[54]

The notion of the person as a personality, Conklin claims, provides more force to Mill's theme of the need to protect self-regarding conduct. Mill's point was that only when a person is left to think and choose on his own will he develop. To conform to custom merely *as a custom* does not educate or develop him in any of the qualities which are the distinctive endowment of a human being. The individual must be allowed to exercise his own judgment because choice is the indispensable condition for the making of a person. This requires a disposition to perceive another person's self-regarding conduct from his own point of view.

The recognition of the open potentiality of persons, Conklin states, supports the inviolability of the inner sphere of life. In contrast to

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[53] *Ibid.,* 195.
[54] *Ibid.,* 199.

utilitarianism, it assumes that one's duties towards others emanate from within the individual rather than from society. The principle of respect for persons necessitates an immanent rather than an imposed freedom.[55] Similarly, it protects self-regarding conduct because of the intrinsic worth of the individual, and not because of its instrumental value for the greater welfare of society.[56] Finally, it does not allow society to decide what is and what is not self-regarding conduct.[57]

Having shown why neither the state nor society ought to penetrate the inner sphere of life, Conklin concludes, we can legitimately describe the rights which entrench the boundaries of that sphere as fundamental. The rights are fundamental in the sense that they are "essential", "basic", "underlying", "primary", "formative". Being rooted in respect for persons, they "extend beyond the mere protection of the inner sphere of life."[58] They are tied to the recognition of the person as a human being whose own point of view is worthy of consideration:

> The individual's obligations are of two kinds: an attitude of non-interference in the activities and thoughts of others, and a duty of personal respect towards others.... The two obligations explain why one's own good, "whether physical or moral", is not a sufficient warrant for society to punish a motorcyclist who does not wear a helmet or to create a crime for anyone who attempts suicide. The two obligations explain why slavery is inconsistent with the protection of "self-regarding conduct". At long last we have elaborated a philosophic perspective which can consistently support the existence of fundamental rights in general and the absolute inviolability of the inner sphere of life in particular.[59]

Conklin is adamant that the state does not give us fundamental rights. Its officials, including judges, merely metaphorically acknowledge their existence because we already possess them as members of the human species. Similarly, the state's officials cannot take them away on the pretext that they must be earned. They are the rights "of man", "of the person", not "of the citizen". They are held independently of statute, judicial decision, custom, constitution and also of a person's utility to society:

> Thus, we cannot determine whether a right is fundamental by looking backward to the principles embedded in legal tradition as Chief Justice Coke would have us do. Nor is it satisfactory for us to investigate the contemporary values of society. Nor, indeed, does a written constitution resolve our problem. Rather, in order to determine if a right is fundamental, a judge, legislator, bureaucrat or citizen must be prepared to examine normative political philosophy. My own study indicates that such an inquiry should ask whether any particular right is bound up with "the recognition" of a

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[55] *Ibid.*, 204.
[56] *Ibid.*, 149.
[57] *Ibid.*, 153.
[58] *Ibid.*, 210.
[59] *Ibid.*, 211.

> "person". Those fundamental rights which are indispensably entangled with "the recognition" of a "person" are "minimum floors" which *must* be fulfilled if we are to claim in all honesty and consistency that our society is founded upon the existence of fundamental rights.[60]

According to Conklin, recognition respect for persons would appear to require at least three avenues of constitutional inquiry. First, the proscribing of discrimination on grounds of race, sex, national origin and colour. Secondly, the prohibiting of interference with a person's life, his inner sphere of life, his thoughts and feelings, the modes of his own expression and due process.[61] Thirdly, the recognition of the equal worth of fundamental rights which necessitates examining the socio-economic considerations surrounding their effective exercise.[62]

The first avenue, Conklin points out, does not preclude the possibility of a tyrannical government taking away rights which belong to the second. Conklin comes out strongly against capital punishment because it takes away the paramount fundamental right to life. He includes in the second avenue the fundamental freedoms of political participation, speech, religion, due process and assembly. These freedoms, he insists, are fundamental because they recognize, protect and develop an individual's open-ended potentiality:

> Language rights do not flow from the principle of "respect for persons" with the same facility as do the rights to life, thought, political participation, speech, assembly, religion and due process. Language rights are not owed to each person as a member of the human species. But their importance to the principle of "respect for persons" arises from the fact that, in the Canadian circumstances, language rights are essential conditions for the effective exercise of those fundamental rights which are integrally entangled with "respect for persons".[63]

I have set out Conklin's theory of fundamental rights in detail because it seems to make some important points. Conklin refuses to accept a handout of such rights from any state or its officials, for he realizes that to do so is in effect to surrender them. He who gives can also take away. Once we are prepared to accept our rights from the state, we place ourselves in its hands. This is the most fundamental objection to any constitutional charter of legal rights. In reducing our fundamental rights to legal entitlements, we exchange our birthright for a mess of potage.

To acknowledge, directly or indirectly, their derivation from God is little better. To trace them back through the state to God is in effect to strengthen the hand of the government. We must not resurrect the divine

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[60] *Ibid.*, 219.
[61] *Ibid.*, 219-20.
[62] *Ibid.*, 220.
[63] *Ibid.*, 225.

rights of kings by identifying them with the prevailing state ideology. Moreover, any tribute to God in a charter will discredit its provisions to non-believers who, in actual fact, comprise the majority of our population. Mere lip-service to a religion should not be good enough. The last minute reference to the supremacy of God in the *Charter* for blatant political reasons will put off any genuinely religious person.

Once fundamental rights are identified with a certain ideological package, the dynamics of the original notion is lost. This is apparent from Conklin's treatment of the subject. His starting point is the open-ended potential of all human beings, which can only be restricted to give each person an equal opportunity of realizing it. Formulated in this way, the recognition respect for persons is not frozen in a particular mould. It is due to them as persons, and has its root in their very being, not in a set of ideological beliefs.

Unfortunately, Conklin feels obliged to "fill up" man's open-ended potential with the prevailing ideological mix. After all the straining against the leash, we end up with pretty much the liberal position, though we must give Conklin credit for stretching it as far as it will go and for buttressing political with economic rights. To profit from the notion of man's open-ended potential we must trace it back to his condition in the world. His real potential lies in his capacity to respond to it and in doing so find the way to release from the human predicament. Man's quest for justice and his assertion of fundamental rights are merely different aspects of the same response.

## Conclusion

I have suggested that we should view the notion of fundamental rights as a dynamic response to man's condition in the world, and not as a bundle of claims with a static ideological content. The adequacy of the latter must be measured with reference to the former, and not the other way round. The standard is normative — not factual — and permanent, but the modalities of its application vary in space and time. The notion of fundamental rights is a means, not an end; it is relative, not absolute. Hence, it cannot be preserved forever in a constitutional heaven. It must, as Marx did with Hegel's "Idea", be brought down to earth and tested in praxis.[64]

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[64]K. Marx, *Capital* [:] *A Critique of Political Economy* (ed. E. Unterman, 1906), 197-8.

The notion of fundamental rights is not primarily legal. It requires a much deeper and broader perspective than the law can afford. By taking us back to the bedrock of human existence, it gives us the vision and purpose to reorganize our lives around that central fact. It does not follow from this that the law has no part to play in protecting fundamental rights. Whether or not it can make a contribution, and in what manner it can best do so, will depend on the circumstances of the case. The question must always be whether the proposed legal move is more likely to strengthen the cause of fundamental rights or the prevailing ideology. I have suggested that if we ask this question in regard to the *Charter,* the answer will not be in doubt.