

BOOK REVIEWS

WESTERN TRIUMPHALISM: THE CRISIS OF HUMAN RIGHTS IN THE GLOBAL ERA

ANTHONY J LANGLOIS *THE POLITICS OF JUSTICE AND HUMAN RIGHTS: SOUTHEAST ASIA AND UNIVERSALIST THEORY* CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 2001 : 172 PAGES \$39.95

There is a metaphysical crisis in human rights. And just as this crisis is troubling those who write about legal institutions, it is posing a conundrum for those who write in pure philosophy, in comparative political and international studies, and in all the academic areas that deal with identity, values and human belief. Across these disciplinary fields, scholars are asking the same question: as between radically different forms of human existence, how are 'we' to decide whose values ought to trump others' values? Can human rights only be defended from within a set of foundational beliefs that are particular to Western ideological and cultural commitments? This question about the universality of human rights has given rise to a vigorous debate about cultural relativism. Law, as an institution that enforces core political and social values, cannot sidestep this debate. What are global institutions to do, and how is law to aid those institutions, when there is no global consensus about the values that ought shape political and social relations? Put differently, how can decisions about the content of human rights be made without committing cultural imperialism in the same (though possibly subtler) ways that 19th century colonists committed cultural imperialism?

In his book *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory*, Anthony J Langlois enters this debate. An Australian political scientist, Langlois uses the 'Asian values' debate of the 1990s to illustrate the cultural relativism dilemma: namely, that the creation and maintenance of the institutions of democracy do not necessarily deliver a culture of human rights within the 'local' traditions of that concept. More particularly, Langlois notes, since the Bangkok Declaration of 1993 the view has been expressed by representatives of the Singapore, Malaysian, Indonesian and Chinese governments that Asian cultures give human rights a different meaning than do those in the individualistic west. Asian values, they argue, place the group over the individual, place harmony and consensus over adversariness and debate, and deference to authority over individual self-expression and freedom. From this Asian values package a further argument is

then constructed that emphasises economic development and political stability (both domestic and regional) and that paints the western package of human rights as inimical to the Asian political and cultural sensibility.

Langlois notes that authoritarian Asian leaders and governments have used the language of human rights as rhetoric in defence of authoritarian practices. Asian leaders have defended illiberal practices on the grounds of their pursuit of economic development for the greater social good. Ironically, human rights transgressions are thus ostensibly committed in the name of human rights. From this debate, Langlois makes the point that there is no wide and deep international consensus on the meaning of human rights because there is no wide and deep international consensus on what values people adhere to. As the 'human' at the heart of human rights can no longer be thought of as the voting white man of the Enlightenment tradition, Langlois argues that '... the values imputed to human rights are not universally held'.¹ Rather, '... local religious and cultural beliefs ... constitute the values that people hold'.²

But for Langlois, tying 'human rights' to Western thought and language is not fatal to rights *per se*. He aims to rescue human rights in a two-step move that uses pragmatism as a corrective to the more abstract normative conundrum of human rights, and uses prudentialism as a corrective to the more concrete substantive content conundrum of human rights. In his first move, Langlois rejects the need for a unifying justificatory theory by using (University of Chicago law professor) Cass Sunstein's arguments for the virtues of 'incompletely theorised arguments'. This pragmatic step accepts the existence of human rights as a phenomenon of widespread-shared belief, even though it cannot be accepted that all who believe in human rights share the same normative basis for those human rights. In his second move, Langlois endorses (University of Westminster and New School political theorist) Chantal Mouffe's picture of society as a place for fruitful disagreements and productive agonistic dissensus. From Mouffe's model, Langlois frames a justification for human rights as a method of political contestation about the substantive content of those rights. Langlois makes a case for human rights as:

... a discourse in which persuasion, debate and conflict are permanent features, [where] there is always the opportunity for a given minority voice, decided against, to start a process of revision, redescription and redecision [so that justice is done ... by] developing, encouraging and conspiring towards the theory and practice of human rights which will ensure a virtuously political and discursive justice.³

For Langlois, the only universal amongst peoples is their capacity to think and to act as moral agents, meaning that '... it is false philosophical method that human

¹ Anthony J Langlois *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (2001) 5.

² Ibid.

³ Ibid 11.

rights have ever been seen as other than political ...⁴ The better alternative in a post-rationalist world where philosophical foundationalism is no longer viable, is:

...a rolling hegemony of different articulations of justice, of human rights values, which take their turn at being the common sense of a society; which are open to debate; which are contentious but are also just to the extent that they are revisable through the return of the political.⁵

Langlois' answer to the metaphysical crisis of human rights thus sidesteps the problems of universal normativity by emphasising the pragmatic value of human rights, arguing that it is only when '... human rights [are] centred around a particular non-universal tradition - Western liberalism ... - [that they] cannot be universal'.⁶

Langlois' book is a welcome addition to a growing field of literature that is occurring in disciplines outside mainstream Australian legal scholarship and that has direct relevance to the ways in which Australian law is both conceived of and taught. It is especially good for Australian lawyers to have Langlois' sophisticated linking of (US constitutional scholar) Cass Sunstein's work with the work of (UK-based political theorist) Chantal Mouffe. These two scholars are from either side of the rationalist (Sunstein) and post-rationalist (Mouffe) divide – Sunstein's work lies within the framework of analytical legal scholarship and Mouffe is influenced by, *inter alia*, the social theory of Jacques Derrida. In using scholarship from these two sources, Langlois' demonstrates fruitful and productive ways of working across intellectual lines that are too often counterpoised to one other. An immensely valuable aspect of Langlois' book is his re-packaging of the post-rational/postmodern message in language that will be more accessible to the average reader of orthodox legal and political theory. More specifically, he notes that western liberal political theory is temporally and spatially specific, and that self-evidence can only be assumed from within the western philosophical system. To date, the most concerted efforts to combine critical social and political theory with traditional analytical legal rationality have occurred within feminist legal scholarship,⁷ so it is particularly noteworthy that Langlois' work encompasses the broader field of human rights more generally. There is a real need for the mainstreaming of a more reflective analysis of human rights in Australian law schools, and Langlois provides a thoughtful and intellectually eclectic contribution to this need.

Langlois' argument progresses from case study (the Asian values debate); to Sunstein's theory about incompletely theorised arguments; to Mouffe's agonistic dissensus position, thus traversing three different disciplines and literatures. This is

⁴ Ibid 134.

⁵ Ibid 143.

⁶ Ibid 7.

⁷ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000).

both the strength and the weakness of the book: its strength because of the breadth of the argument, and yet its weakness because, of necessity, there are times when more questions are raised than are answered. More specifically, Langlois' book raises normative and structural questions that left me hoping he will write a sequel. Normatively, it strikes me that Sunstein's theory of incompletely theorised arguments still side steps in unsatisfactory ways the issue of the moral weight that ought to attach to radically different cultural practices. The conditions of globalisation have provided a new awareness of the extent of religious, cultural and social differences, both between sovereign states and within states. Whether it is the contestation around the death-by-stoning sentence of an adulteress under Shari'a law, or issues like the death penalty and abortion, there is an ineluctable moral component to the choice made by judges. Like Sunstein, Langlois leaves this issue un-addressed through his preference for a phenomenological account of human rights. Second, and more practically, Langlois' argument for Mouffe's schema of political dissensus and decision carries structural assumptions that are not only political, but also necessarily social and legal. Namely, it assumes that there is a model of democracy that has the practical capacity to peaceably 'hear' the many culturally-inflected disagreements that citizens have. Simply ensuring the preconditions for productive dissensus seems to make more urgent the need for a theory of democracy that elides with cultural difference itself.

MORE THEORY, NOT LESS

Is it possible to make a case for human rights without engaging in a metaphysical debate? It is a fact that human rights language is today used around the globe in aid of resistance to any number of oppressive governments and majorities.⁸ This means that the use of human rights language occurs not only in those western nations that framed the philosophy of human rights, but that human rights language has become the global *lingua franca* of request. In short, human rights are much more than a western export of oppression - as K. Anthony Appiah states, 'the spread of human rights culture and the growth of human rights NGOs all around the world does not amount to the diffusion of a metaphysics of Enlightenment liberalism. To the extent that it is right, we do not have to defend it against the charge of ethnocentrism.'⁹ Like Appiah, Langlois provides a secular justification for human rights, wishing to avoid the argument that the normative justification for human rights is ineluctably roped to the western human being. For Langlois, the justice in human rights derives not from the well-spring of the Enlightenment, but from the discursive process that forms and re-forms the substantive content of human rights. In other words, human rights ought not be deduced by reference to a common humanity and shared values, but only by peoples *in situ* arguing for and against the human rights that provide the best fit for their community.

⁸ K. Anthony Appiah, 'Grounding Human Rights' in Ignatieff, *Human Rights as Idolatry* (2001) 109.

⁹ Ibid.

Is Langlois here urging radical cultural relativism? Is he suggesting that every perspective is equally valid and that there is a moral equivalence between values? Lynda Bell, Andrew Nathan and Ilan Peleg have argued that there is a rigid dichotomy embedded in the 'Asian values' debate that too crudely outlines '... an arrogant universalism that [seems] to force its values on others, and amorally vacuous relativism that [seems] to flee from hard judgments and to justify non-democratic practices'.¹⁰ Furthermore, it is not entirely clear to me that even the post-rationalists would necessarily want the content of human rights to be stripped of everything but contingency. While Langlois wants to distance himself from the rationalist account of human rights, it is not clear that his identification of moral agency as the one shared characteristic of our common humanity gets him out from under the metaphysical thicket. It is not clear how Langlois' identification of moral agency is qualitatively different from (US law professor) Michael Perry's assertion that human rights are 'ineliminably religious', with a 'religious' worldview defined as one that is 'grounded or embedded in a vision of the finally or ultimately meaningful nature of the world and our place in it'.¹¹

An alternative approach to Langlois' might be to see that, just as one's culture can never fully capture all the beliefs and values that are held to be internal to that culture, so one's culture can never fully capture one's future commitments and attitudes. This is not so much an incompletely theorised philosophy of human values, but rather a dialogic understanding of cultural difference. In other words, if 'understanding people across the world is not categorically different from understanding people across the street',¹² then we don't really need Sunstein's non-theory theory. Rather, what we need are new ways of studying culture, so as to be able to better understand how differences among cultures affect the value judgments we make, and how different normative paradigms ought to affect the political decisions that flow from those judgments. Furthermore, if a cultural group has a value or practice that is irreducible and which has its own distinctive ethical valence, then it may simply be impossible to co-exist peaceably without acknowledging an intractable disagreement with another's cultural commitment. At some point, it seems to me, it is impossible to avoid a full frontal engagement with the differing moral schemas between different cultural systems. And with the United Nations articulating an international 'obligation to protect' nations that are at risk of civil violence as a precautionary measure against the sort of events that have occurred in Rwanda, Cambodia, Sierra Leone and Yugoslavia, the prospect of a reigning world morality backed up by at least peace-keeping, if not outright military force, seems more likely.¹³ Taken together, this all means that the need for a normative understanding of how legal judgment is to deal with cultural difference has become more urgent than ever before.

¹⁰ Lynda Bell, Andrew Nathan and Ilan Peleg, (eds), *Negotiating Culture and Human Rights* (2001) 4.

¹¹ Michael Perry, *The Idea of Human Rights* (1998) 15.

¹² Ibid 10.

¹³ Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Research Center (2001).

PRACTICAL DEMOCRACY

Perhaps even more problematic for the overall argument of international human rights under Langlois' political dissensus model is that his model depends upon a particular model of democracy. The notion of an active, though non-violent, dissensus presupposes a defined community with the structures, either formal or informal, to arbitrate between those interests. In other words, unless value-minorities have the structural capacity to register and argue their opposition to value-majorities, the Mouffe/Langlois dissensus model cannot work. This is where Langlois' normative and concrete arguments undergo a role-reversal. Similarly, the export of the procedural norms of western democracy will themselves be just as open to the charge of economic imperialism as the export of the substantive content of human rights – precisely the problem that Langlois is keen to avoid through locating the content of human rights as culturally determined. Furthermore, how can these norms be enforced when no transnational body, including the United Nations, enjoys forms of authority parallel to the domestic governments of the nation-state which is authorised to regulate relations between its citizens and to intervene when its citizens affect the rights of another? Langlois acknowledges the lack of international political structures for citizen involvement in liberal democracies that mirror national structures. How can we develop a set of global norms when the global community is not a macroscopic version of the state? It is here that some more territorial marking of philosophical ground may have helped. While Langlois does not cite Habermas' model of dialogic communication, and indeed seems apparently to reject it in favor of Mouffe's dissensus model, it is not clear on the face of Langlois' arguments that there is such a great *practical* difference between Mouffe and Habermas. In short, it is not clear that Mouffe's dissensus emphasis is not simply a focus on the stage prior to the consensus stage that Habermas emphasises. Mouffe sides with Derrida and Rorty in rejecting the link between universalism, rationality and modern democracy, but she, like Derrida and Rorty, is with Habermas in her commitment to the democratic project. While the difference is theoretical, the effects are practically the same.

Ultimately, if human rights are only a political tool, the use of which depends upon the existence of western-like democratic social and institutional structures, then surely that also means that the 'universality' of human rights remains under question. Ignatieff has suggested that international human rights norms will only have legitimacy if they are the product of 'a commitment to respect the reasoned commitments of others and to submit disputes to adjudications',¹⁴ an approach which resembles (US political theory professors) Amy Gutman and Denis Thompson's argument that the moral authority of collective decisions depends upon the moral quality of the process by which those decisions are made.¹⁵ Langlois in this book does not fully articulate the links between his human-rights-as-political-dissensus model, and the relative moral weight of each temporary, contingent

¹⁴ Ignatieff, above n 8, 84.

¹⁵ Amy Gutman and Denis Thompson *Democracy and Disagreement* (1998) 4.

moment in the human rights argument. Does this mean that the legitimacy of human rights can only ever be established by what (US law professor) Diane Orentlicher calls ‘a show of hands’?¹⁶ The project of democracy is crucial to Langlois’ argument, because without equality of opportunity to express one’s perspective, the project becomes one of the tyrannies of numbers. This could be a starting point for Langlois’ sequel on the model of democracy that would articulate the human rights effects of cultural difference as political dissensus.

After reading this book, I wondered what sort of human rights Langlois’ active dissensus might produce. It seems questionable, for instance, that it would necessarily produce changes in the institutional or legal regulation of torture. The failure of the Pinochet extradition to Spain to stand trial emphasised that there are tremendous differences of tradition amongst countries.¹⁷ What is the *international* procedural analogue of Mouffe’s state-contained dissensus? Perhaps the only practical difference is that whereas we can envisage Mouffe’s citizens talking loudly and gesticulating as they emphasise differences with their fellow citizens, Habermas’ citizens seem to speak in quieter tones as they gather around the village pump. But how is deep legitimacy for international consensus on international human rights norms to be built across intellectual and cultural lines that are vastly dissimilar? The issue is one of sharp practical importance, because the ever-expanding use of human rights language by all sorts of individuals, groups and states around the world has notched up expectations that social conditions will inevitably improve once human rights language has been invoked. How do we avoid re-creating ‘a pessimism generated by disappointment’ when human rights practice means vastly different things in different countries?¹⁸

Part of the answer must surely lie in not backing away from judging legal principles by their performance under moral criticism, and not by the mere fact of either consensus or dissensus. Some Muslim women lay claim to a right to undergo female circumcision as the portal to cultural identity that ought not be painted by western liberals as mutilation carried out upon victim girl-children. Serbs and Croats each lay claim to the right to religious freedom that the other group, each says, tramples its own. And the former Yugoslavian leader Slobodan Milosevic claims before the International Criminal Tribunal for (the former) Yugoslavia that it was NATO, not he, that committed atrocities upon civilians. At some point, there is the need to declare a value preference for the particular model of human rights that one supports; and whether (or not) that model respects bodily integrity against oppression from the state, the family, or the social group. At some point, there is a need to declare a preference for a state that works to implement this vision.

Langlois’ well-researched and carefully argued book makes a crucial point: that accelerating since the end of the Cold War, human rights present deep challenges to legal and political institutions. The conditions of globalisation have illustrated the

¹⁶ Ignatieff, above n 8, 147.

¹⁷ Diane F. Orentlicher ‘Relativism and Religion’ in Ignatieff, above n 8, 150-1.

¹⁸ Tony Evans, *The Politics of Human Rights: A Global Perspective* (2001) 117.

palette of political ideologies from which moral, political, social and religious choices may be made. We are daily confronted with this human rights and justice conundrum. Technology and the media bring us new illustrations of the apparent incommensurability of the world's many cultures and values. Langlois' book shows that law, international relations, and human rights, are a bricolage of complex arguments that defy neat disciplinary boundaries. But whether moral values best issue from the crucible of political argumentation as Langlois argues, or are best articulated by judges from legal and legislative precedent, they retain their quality of being a choice – a *moral* choice, of our values about human behavior. With great care and cultural sensitivity, let us make value choices, frame our arguments for these choices, and then pursue them through all the humane means of persuasion we have available to us.

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* My thanks go to Bernadette Myler and Ben Neaderland for research assistance.