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# Cultural Diversity and Human Rights (F.R. Scott Lecture)

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F.R. Scott was a poet, an advocate and a scholar who cared passionately about human rights in Canada and around the world. Building from Scott's poem "On Kanbawza Road", the author extrapolates a vision of what Western actors must do to achieve a true dialogue on human rights that respects cultural diversity.

The shift in focus from the setting of recognized standards to the implementation of those norms has increased tensions in the area of international human rights. The attempts to define, categorize and group human rights have been less successful at achieving consensus than they have been at unearthing the Western philosophy at the core of the exercise. Revealing these Western sources has only exacerbated the existing clash-of-cultures debate. The author questions what is meant by culture within that debate. He argues that culture operates on the levels of form, structure and myth, but emphasizes the need to recognize the mythic level of human rights in the Western tradition. Two difficulties then arise. Is a society's culture defined solely at the structural level by the legally legitimate state, or do other entities matter as well? However it may be defined, is that culture then susceptible to change, or do its values ensure some form of purity? The author argues that the answers to both inquiries are not reached in as static a manner as clash-of-cultures proponents would seem to believe.

Using his interpretation of "On Kanbawza Road" as a guide, the author indicates that human-rights discussions must move beyond arguments over which philosophy underpins whose terminology. Common values within contrary terms and tenets must be recognized. All voices within a cultural group deserve to be heard. The Western listeners must be humble, approaching the encounter with neither an accusatory nor condescending predisposition.

F.R. Scott était un poète, un avocat et un professeur qui avait à cœur la protection des droits de la personne, tant au Canada que dans le reste du monde. À partir du poème «On Kabawza Road», de F.R. Scott, l'auteur propose un discours sur les droits de la personne qui respecte la diversité culturelle.

Le passage d'une ère de création de normes à une ère de mise en place de ces normes a accru la tension dans le domaine des droits de la personne. Plutôt que de créer un consensus, les diverses tentatives visant à définir, à catégoriser et à grouper les droits de la personne ont eu pour résultat de révéler l'eurocentrisme des valeurs véhiculées. La prise de conscience des racines occidentales des droits de la personne n'a fait qu'exacerber le débat entourant le choc des cultures.

L'auteur remet en question la définition de «culture» telle qu'employée dans ce débat. Il affirme que la culture opère au niveau de la forme, de la structure et du mythe, et il souligne l'importance du contenu mythique dans le discours sur les droits de la personne à l'intérieur de la tradition occidentale. Deux problèmes se posent alors. Tout d'abord, la culture doit-elle se définir uniquement au niveau structurel de l'État légitimement constitué, ou doit-on tenir compte d'autres entités à l'intérieur de l'État ? Par ailleurs, la culture est-elle susceptible de changer et d'évoluer, ou doit elle plutôt être perçue comme la réalisation concrète de valeurs pures ? La réponse à ces deux questions ne saurait être aussi statique que le laissent entendre les tenants du choc des cultures.

À partir de son interprétation du poème «On Kanbawza Road», l'auteur conclut qu'il est temps d'abandonner le débat sur les valeurs philosophiques véhiculées par la terminologie des droits de la personne. Il importe plutôt de rechercher les valeurs communes qui sont véhiculées par des terminologies et des doctrines contradictoires. Toutes les voix méritent d'être entendues. L'auditoire occidental se doit d'écouter avec humilité, sans accusation et sans condescendance.

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\* Dean, Faculty of Law, McGill University. This text is a revised version of the annual F.R. Scott Lecture, delivered on 8 May 1996 to the Friends of McGill Libraries. I would like to thank El-Obaid A. El-Obaid for his thoughtful comments upon an earlier version of this text.

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## Introduction

As he was considering whether or not to take up the Deanship of McGill's Faculty of Law, F.R. Scott is apocryphally reported to have delivered an Eleventh Commandment: "Thou shalt not commit deanery". I know exactly what he meant. F.R. Scott was a poet, an advocate and a scholar. He would never have wanted to see himself defined as an administrator.

The invitation to deliver this lecture has proven to be a gift of great value to me, for it has helped me to escape — if only briefly — from the confines of academic administration. I have had occasion to re-read the collected verse of Frank Scott, and can only reaffirm J. King Gordon's evaluation: "an emancipated spirit found expression in his poetry, in his fine sense of humour and in his enthusiasm."<sup>1</sup> I have also been forced to reflect upon my theme — cultural diversity and human rights — in the shadow of Scott's keen intellect. Finally, I have been called upon to visit and use a McGill library. Although I seem to spend much of my time soliciting donations for the library system, all too few occasions arise for me to explore its rich resources.

I have felt the personal imprint of F.R. Scott's legacy over the last few weeks. The poet, the advocate and the scholar — I have been privileged to engage with all three facets of Scott as I prepared this lecture. I also sense another connection, made palpable by my own Trinitarian definition of Scott's career. Although it is secularized in his poetry, I detect in Scott an imprint of the Anglican rectory: recall the famous "Creed" which includes the declaration that "The spirit of man is my God / The future of man is my heaven."<sup>2</sup> One of the many strains of Anglicanism emphasizes social justice and religious pluralism. Again in the words of J. King Gordon: "Scott had grown up in a home where the Christian imperative was expressed through a faith in the aspirations of men and women."<sup>3</sup> I share that imprint, and it draws me emotionally to Scott; those aspirations — for respect, for dignity — are the subject of my discussion.

F.R. Scott cared passionately about human rights. Aside from his famous engagements as a barrister before the courts of Quebec and the Supreme Court of Canada, when he "went to bat for the Lady Chatte"<sup>4</sup> and took on Maurice Duplessis,<sup>5</sup> Scott was also an unrepentant proselytizer. In 1959 he gave a series of four lectures on C.B.C. Radio entitled *The Canadian Constitution and Human Rights*. In these lectures he assessed the historical legacy of human rights in Canada, and proposed the creation of a charter of rights entrenched in the written constitution. Even in his poetry, Scott

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<sup>1</sup> J.K. Gordon, Address (F.R. Scott Memorial Service, McGill University, 18 February 1985), reported in Faculty of Law Newsletter (Faculty of Law, McGill University) May 1985 at 7.

<sup>2</sup> F.R. Scott, "Creed" in *The Collected Poems of F.R. Scott* (Toronto: McClelland & Stewart, 1981) [hereinafter *Collected Poems*] 89 at 89 (ll. 3-4).

<sup>3</sup> Gordon, *supra* note 1.

<sup>4</sup> F.R. Scott, "A Lass in Wonderland" in *Collected Poems, supra* note 2, 264 at 264 (l. 1). Scott defended D.H. Lawrence's *Lady Chatterley's Lover* against obscenity charges in *Brodie v. R.*, [1962] S.C.R. 681, 32 D.L.R. (2d) 507, rev'g [1961] B.R. 610, 36 C.R. 200 (Que. Q.B.).

<sup>5</sup> *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689, rev'g [1956] B.R. 447.

often adopted the tone of the optimistic advocate, albeit in the lyrical voice. I quote from "Spain 1937":<sup>6</sup>

In the spring of ideas they were, the rare spring  
That breaks historic winters. Street and field  
Stirring with hope and green with new endeavour,  
The cracking husks copious with sprouting seed.  
Here was destruction before flowering,  
Here freedom was cut in its first tendrils.

The issue is not ended with defeat.

Scott was also committed to the celebration of cultural diversity. I quote in its brief entirety "Bonne Entente":<sup>7</sup>

The advantages of living with two cultures  
Strike one at every turn,  
Especially when one finds a notice in an office building:  
"This elevator will not run on Ascension Day";  
Or reads in the *Montreal Star*:  
"Tomorrow being the Feast of the Immaculate Conception,  
There will be no collection of garbage in the city";  
Or sees on the restaurant menu the bilingual dish:

DEEP APPLE PIE  
TARTES AUX POMMES PROFONDES

Mais ces réflexions ne sont pas des révélations. Nous connaissons bien Scott le défenseur des droits de la personne et Scott l'observateur ironique des deux solitudes canadiennes (une idée qu'il n'a d'ailleurs jamais acceptée). Ce qui m'a le plus frappé en relisant son œuvre, c'est un thème qui rejoint mes propres préoccupations, à savoir les droits de la personne et la diversité culturelle dans une perspective globale. Nous considérons souvent Scott comme le symbole du patriotisme canadien, cependant son attachement à une certaine idée du Canada était fondé sur son dévouement profond pour l'amélioration de la condition humaine.

Permit me to quote at length what has become my favourite Scott poem — "On Kanbawza Road":<sup>8</sup>

In Southeast Asia  
the Buddhist New Year  
starts with a water festival  
lasting for days

Everything is put aside  
for this glorification  
of rebirth

<sup>6</sup> F.R. Scott, "Spain 1937" in *Collected Poems*, *supra* note 2, 96 at 96 (ll. 13-19).

<sup>7</sup> F.R. Scott, "Bonne Entente" in *Collected Poems*, *ibid.*, 256.

<sup>8</sup> F.R. Scott, "On Kanbawza Road" in *Collected Poems*, *ibid.*, 120.

Even the guerrillas  
who regularly cut the water-main  
into Rangoon  
promised no damage to the pipe-line  
during these celebrations

Only astrologers can tell  
the exact moment  
when the god descends  
and the year is born

A gun booms out their message

And walking by the Kanbawza Hotel  
on that bright morning  
under a torrid sun

I approached a gate on the roadway  
where stood a girl-child  
not three feet high  
holding a bowl of water  
with a spray  
of the sacred tha-bye tree

She too was celebrating  
she was waiting to sprinkle  
each passerby  
with the symbolic drops

But I I was a white man  
standing so far above her  
not easy to anoint

She moved toward me  
then drew back  
afraid

She understood the ritual  
taught in her family  
but never dreamed a foreign giant  
might need her blessing

Seeing her torn  
between faith and fear  
I sat down on my heels  
Burmese fashion  
levelling my eyes with her eyes

At once her fear vanished  
 she smiled at me  
 her little hands  
 dipped the sprig in the bowl  
 and touched me with the fertility of love

In our torn century, despairing of faith and filled with fear, how can we find ways to touch each other “with the fertility of love”? I believe that true dialogue across cultures on the fundamental questions of respect for persons and human dignity can provide us all with such moments of transcendence as experienced by F.R. Scott on Kanbawza Road.

Scott himself has provided three clues as to how such transcendence can occur. First, we must place ourselves in direct contact with other cultural traditions. Contact does not presuppose comprehension; but a willingness to enter into situations where diverse perspectives and attitudes are voiced is a precondition to any ultimate shared understanding. Secondly, we must be willing to ask for the blessings of others, especially those less powerful than ourselves. In his encounter with the little girl on Kanbawza Road, Scott recognized both his physical power as a “giant” and his social power as a “foreign giant”. But he also knew that he *needed* the girl’s blessing, which would be a surprise to her. Thirdly, Scott tells us to sit down on our heels and level our eyes with people from other cultural traditions. Only then is any real communication possible.

Ces intuitions sont d’une importance capitale à notre époque. En effet, malgré la grande tradition du discours sur les droits de la personne issu des cendres de la Deuxième guerre mondiale, nous sommes menacés aujourd’hui par un contre-courant. Des clameurs insistantes s’élèvent contre les normes internationales des droits de la personne, à l’effet qu’il ne s’agit que d’un nouveau cheval de Troie qui permettrait à l’impérialisme occidental de refleurir. Loin de promouvoir la solidarité, ces normes camoufleraient une idéologie sectaire.

## I. The International Human-Rights System

I would like to offer a personal, perhaps idiosyncratic, reading of the contemporary international human-rights debate. I sense that a significant underlying reason for the emergence of a clash-of-cultures rhetoric in international human-rights discussion is the movement from so-called “standard setting” (the period from 1948 to the mid-1980s when governments tried to reach agreement upon explicit standards to which they would be willing to be bound) towards an implementation of norms. The new focus upon implementation of “universal” norms, as pursued by international non-governmental organizations and a number of Western governments since the mid-1980s, has heightened interregional tensions associated with human rights. This was inevitable: once one begins to stress implementation rather than articulation of norms, states — no matter what their cultural or ideological roots — will feel threatened. This is particularly true in the area of human rights, where the mechanisms for implementation remain largely political rather than legal. In turn, when rights are invoked in political discourse and given real bite, not only will implementation processes be

challenged, but greater scrutiny will be applied to the substantive content of the rights being called into play.

I want to emphasize the weak role of international legal mechanisms in the implementation of human-rights standards.<sup>9</sup> The International Court of Justice ("I.C.J.") has been almost wholly inactive in the area of human rights, as have most other adjudicative bodies, with the notable exceptions of the European Court of Human Rights and, to a lesser extent, the Inter-American Court of Human Rights.<sup>10</sup> The new tribunal empowered to hear cases involving war crimes and crimes against humanity in Rwanda and the former Yugoslavia has been hamstrung by an inability to pursue accused perpetrators and by a lack of political will on the part of states which trumpeted its creation. The various committees which sit under a diverse group of international covenants, such as the *International Covenant on Civil and Political Rights*,<sup>11</sup> the *International Covenant on Economic, Social and Cultural Rights*,<sup>12</sup> and the *Convention on the Elimination of All Forms of Discrimination against Women*,<sup>13</sup> are limited in power and in their permitted scope of inquiry. With the exception of the Human Rights Committee when sitting under the terms of the *Optional Protocol to the International Covenant on Civil and Political Rights*,<sup>14</sup> all of the committees are restricted to receiving and commenting upon state reports relating to the national implementation of the relevant convention. The reports of some states are cursory at best, wilfully misleading at worst. Even the Human Rights Committee, which has jurisdiction under the *Optional Protocol* to hear individual complaints, can only "forward its views", at the end of any particular case, to the state involved.<sup>15</sup> There is no mechanism for implementation of a committee decision, aside from the court of public opinion.

Therefore, implementation of human-rights norms by states is largely dependent upon overtly political action in bilateral diplomacy, or in multilateral fora such as the Human Rights Commission of the United Nations. Recently, the establishment of the office of U.N. High Commissioner for Human Rights has provided another focus of attention for human rights within the U.N. system. However, the high commissioner's

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<sup>9</sup> Within some domestic systems of law, international human-rights standards find solid support in national legislation and practice, which in turn leads to relatively effective implementation. But this implementation is haphazard and completely inconsistent between various states. It also remains largely outside the reach of any compulsory international scrutiny.

<sup>10</sup> The I.C.J. cannot in any way be blamed for this inactivity which is due to the limitations of its jurisdiction and the firm desire of most states to preclude the I.C.J. from hearing human-rights cases. On the jurisdiction of the I.C.J., see S. Rosenne, *The World Court: What It Is and How It Works*, 5th rev. ed. (Dordrecht: Martinus Nijhoff, 1995) at 81-110.

<sup>11</sup> 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171 [hereinafter I.C.C.P.R.].

<sup>12</sup> 19 December 1966, Can. T.S. 1976 No. 46, 993 U.N.T.S. 3.

<sup>13</sup> 1 March 1980, Can. T.S. 1982 No. 31, 1249 U.N.T.S. 13.

<sup>14</sup> 19 December 1966, Can. T.S. 1976 No. 47 (38-45), 999 U.N.T.S. 302 [hereinafter *Optional Protocol*].

<sup>15</sup> See *ibid.*, art. 5(4).

power is highly circumscribed, and the first incumbent has taken a cautious approach to his job.<sup>16</sup>

La mise en application multilatérale de ces normes est instaurée de façon régionale par l'intermédiaire d'organismes tels que le Commonwealth, la Francophonie et l'Organisation pour l'unité africaine. La mise en application dans ces fora sera presque entièrement politique: les États seront soumis à un examen international et éventuellement condamnés. Dans certains cas extrêmes, des sanctions pourraient être imposées.

By far the most common form of implementation of human-rights standards by states remains traditional bilateral diplomacy. This can extend from oral condemnations through ambassadorial *démarches* to formal contacts with opposition and human-rights organizations. In extreme cases, linkages may be made with state policies relating to aid and trade. Such linkages, however, appear to have been lessening, rather than increasing, over the last few years. The current Canadian government has in most cases explicitly rejected the linkage of human rights with aid and trade initiatives.<sup>17</sup>

Diplomatic activity in support of human rights engages cultural diversity in both positive and negative ways. To the extent that diplomacy opens up multilateral or bilateral negotiations, cultural factors can be raised, assessed and debated. However, diplomacy is inevitably charged with the burden of broader interstate relations which can result in the mixing of agendas. In addition, negotiations are very much influenced by imbalances of power. Moreover, as quintessential interstate activities, negotiations will be affected by issues of regime legitimacy. Negotiators may reach accommodations which are not supported by the citizenry, or negotiations may fail when negotiators lack respect for the "opposing" regime.

This brief outline of the international human-rights system is intended merely to reiterate my central point that international human-rights law is weakly articulated in terms of implementation mechanisms. For that reason, political implementation is required and this inevitably sets up significant tensions between states. These tensions are inherent in the post-World War II structure of international relations. The *Charter of the United Nations* makes a number of references to the promotion of human rights as a goal of the organization and its members.<sup>18</sup> Yet simultaneously, article 2(7) of the *Charter* emphasizes the traditional principle of nonintervention in the internal affairs of states. The promotion of human rights inevitably results in intervention, broadly

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<sup>16</sup> High Commissioner José Ayala Lasso has kept a low profile since his appointment and has managed to avoid all public controversy, a singular achievement given the politicized nature of human-rights claims and debates.

<sup>17</sup> See e.g. the Canadian government's policy towards China. At the 1996 Liberal Party convention, Prime Minister Jean Chrétien responded to questioning concerning China in the following terms: "If you want us to be the only country in the world boycotting China, fine. But we will lose a lot of business, a lot of jobs" (quoted in R. Mickleburgh, "China Relentless in Pursuit of Critics" *The [Toronto] Globe and Mail* (28 October 1996) A1 at A11).

<sup>18</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, 59 Stat. 1031, 145 U.K.F.S. 805, preamble & arts. 1(3), 13(1)(b), 55(c) & 62(2).

conceived, thereby creating political tensions based upon traditional understandings of sovereignty. When implementation becomes the focus of international human-rights debates, tensions rise and resistance appears on the part of many states.<sup>19</sup>

## II. Definitional Issues

### A. Human Rights

The first question I want to pose is fundamental: what do we mean by “human rights”? In anthropological or sociological terms, human rights is really nothing more than a “symbol” of respect for persons.<sup>20</sup> As such, it is a cultural artifact with both positive and negative aspects. The positive aspects are obvious: human rights is a collective statement that individuals and social groups matter and that they cannot simply be treated as means to overriding ends. More negatively, one might argue that invoking rights implies that we are less interested in the welfare of a person from a caring perspective.<sup>21</sup> There may indeed be some lost social and moral value when an explicit declaration of respect is needed to replace innate patterns of social behaviour rooted in a culture that promotes respect for others.

But these observations are not particularly satisfying from a lawyer’s perspective. That is why F.R. Scott was so committed to an explicit and constitutionally entrenched charter or bill of rights within Canada. Lawyers constantly strive — rightly *and* wrongly — for more precise and more “legal” definitions of human rights. Rather than being mere descriptors of social behaviour, norms have legal significance when their substantive content is articulated and implemented through juridical processes that uphold the values of, *inter alia*, justice, equality, fairness and transparency. In principle, a right insulates its holder from mere utilitarian or instrumental claims or other claims based purely upon *social* good. Because the right is a form of insulation, it protects individuals and groups from majoritarianism.

None of this is to say, however, that rights are absolute. They are defeasible under certain circumstances by other rights and sometimes even by necessity and scarcity

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<sup>19</sup> Countries usually sign and ratify international human-rights instruments with weak enforcement mechanisms. For example, out of the 132 countries that have ratified the I.C.C.P.R. (*supra* note 11), only 42 have recognized the competence of the Human Rights Committee under article 41. Eighty-nine countries have ratified the *Optional Protocol*, *supra* note 14 (see United Nations, *Human Rights — International Instruments: Chart of Ratifications as at 30 June 1996* (New York, 1996) at 10-11 (UN Doc. ST/HR/4/Rev. 14, Sales No. E.87.XIV.2)).

<sup>20</sup> For a discussion of “respect for persons” as a generative logic for human-rights norms, see M. Somerville, “The Right to Health Care: A Human Rights Perspective” in J. Mann & C. Dupuy, eds., *SIDA, santé et droits de l’Homme/AIDS, Health and Human Rights* (Veyrier du Lac, Switz.: La Fondation Marcel Mérieux, 1993) 75.

<sup>21</sup> S. Parker, “How Can ‘Rights-Talk’ Help Children? An Academic Perspective” in P. Alston & G. Brennan, eds., *The UN Children’s Convention and Australia* (Canberra: Human Rights and Equal Opportunity Commission, A.N.U. Centre for International and Public Law, Australian Council of Social Service, 1991) 16 at 18; see also C. Sheppard, “Caring in Human Relations and Legal Approaches to Equality” (1993) 2 N.J.C.L. 305.

arguments as long as democratically validated legal processes (which are open and transparent) are used to identify the reasonable limits upon the right. I underscore this point because it becomes important later: in any sophisticated Western philosophical tradition, rights are subject to processes of balancing, although there is no consensus upon the ideal balance to be achieved. This desire for balance is manifest in the principal international instruments, including the *Universal Declaration of Human Rights*<sup>22</sup> (drafted by another distinguished McGill colleague, Professor John Humphrey).<sup>23</sup>

N'oublions pas que l'origine de beaucoup de termes retenus dans les conventions internationales sur les droits de la personne remonte aux écrits du dix-huitième siècle en Europe et en Amérique, notamment à la déclaration des droits de l'homme et la déclaration d'indépendance des États-Unis. On peut également remonter jusqu'à Aristote et à la *Magna Carta* pour retracer les sources de cette tradition. Je tiens à souligner les origines terminologiques des droits de la personne par souci de clarté : l'expression des normes internationales est issue d'une longue tradition philosophique et politique occidentale.<sup>24</sup>

The contemporary terminology of human rights — even within the Western tradition — is ideologically loaded. For example, the eminent philosopher Isaiah Berlin emphasized the difference between so-called negative and positive rights.<sup>25</sup> Negative rights were said to be individual rights that inhibited state action: the individual had a right to be “let alone” by the state. On the other hand, positive rights were those rights that required active state intervention, such as the large body of economic, social and cultural rights. This characterization led some commentators and political figures to argue that only negative rights were real rights and that positive rights were nothing more than entitlements.<sup>26</sup>

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<sup>22</sup> GA Res. 217A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [hereinafter *Universal Declaration*]. The balancing required under the terms of the *Universal Declaration* is evident in article 29, paragraphs (1) and (2).

<sup>23</sup> Professor Humphrey outlined the history of the *Universal Declaration* in J. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, N.Y.: Transnational, 1984). The *McGill Law Journal* recently dedicated a special issue on international human-rights law to his memory (see (1996) 41 McGill L.J. 739-946).

<sup>24</sup> This is not to say that other cultures have remained aloof from human-rights debates nor that conceptual contributions have been the exclusive domain of Western thinkers. For a sophisticated reading of African human-rights evolution and contributions to the global debate, see E.A. El-Obaid & K. Appiagyei-Atua, “Human Rights in Africa — A New Perspective on Linking the Past to the Present” (1996) 41 McGill L.J. 819.

<sup>25</sup> See I. Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford on 31 October 1958* (Oxford: Clarendon Press, 1958); and for commentary on Berlin's contribution, see A. Ryan, ed., *The Idea of Freedom: Essays in Honour of Isaiah Berlin* (Oxford: Oxford University Press, 1979).

<sup>26</sup> This approach was particularly characteristic of the Reagan administration's engagement with international human rights. See e.g., J.J. Kirkpatrick, *The Reagan Phenomenon — and Other Speeches on Foreign Policy* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1983), *passim*.

Another term often used to describe a certain category of rights is "fundamental rights". The difficulty is what one chooses to include within the category. For most Western governments, fundamental rights have traditionally included only civil and political rights, most notably the freedoms of expression, association, assembly and religion. The use of the term "fundamental" can imply that there is a clear hierarchy of rights, with these being more important than others. But as soon as one attempts to establish such a hierarchy, one discovers how artificial the attempt really is. For that reason, many contemporary scholars would argue that all human rights are important and that they are mutually reinforcing.<sup>27</sup>

I want to discuss as well the approach based upon "generations" of rights, a term coined by Karel Vasak.<sup>28</sup> According to this terminology, the first generation of rights encompasses civil and political rights, including the "fundamental rights", the panoply of legal rights, democratic-participation rights, and a whole series of antidiscrimination rights based on defined categories such as sex, race and religion.<sup>29</sup> The second generation of rights includes all economic, social and cultural rights, such as the right to food, health, education, work and social security.<sup>30</sup> The implementation of these rights requires domestic and international action, and a reassessment of public-spending priorities. The third generation of rights would include the right to development, which is to be found in the *Universal Declaration of Human Rights* dating from 1948,<sup>31</sup> as well as the right to a healthy environment, the right to peace and the right to humanitarian assistance.<sup>32</sup> Here the focus is almost entirely upon international cooperation as a means to implementation of the rights. If a state is not in a position to fully implement the right to development, for example, then the people of that state should be entitled to assistance from other states in order to give effect to the right. It

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<sup>27</sup> See C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 *Osgoode Hall L.J.* 769; J. Humphrey, "International Bill of Rights: Scope and Implementation" (1976) 17 *Wm. & Mary L. Rev.* 527; and S. Toope, "The Convention on the Rights of the Child: Implications for Canada" in M. Freeman, ed., *Children's Rights: A Comparative Perspective* (Aldershot, U.K.: Dartmouth, 1996) 33 at 35-38.

<sup>28</sup> See K. Vasak, "Les différentes catégories des Droits de l'Homme" in A. Lapeyre, F. de Tinguy & K. Vasak, eds., *Les Dimensions Universelles des Droits de l'Homme*, vol. 1 (Bruxelles: Bruyant, 1990) 297; see also K. Vasak, "For the Third Generation of Human Rights: The Rights of Solidarity" (Inaugural Lecture to the Tenth Study Session of the International Institute of Human Rights, Strasbourg, 2-27 July 1979) [unpublished], cited in P. Alston, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?" (1982) 29 *Netherl. Int'l L. Rev.* 307 at 307 n.

<sup>29</sup> See Vasak, "Les différentes catégories des Droits de l'Homme", *ibid.* at 302.

<sup>30</sup> See *ibid.*

<sup>31</sup> See *Universal Declaration*, *supra* note 22; K. Vasak, "Pour une Troisième Génération des Droits de l'Homme" in C. Swinarski, ed., *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (The Hague: Martinus Nijhoff, 1984) 837. See also *Declaration on the Right to Development*, GA Res. 41/128, UN GAOR, 41st Sess., Supp. No. 53, UN Doc. A/41/53 (1986) 186.

<sup>32</sup> See Vasak, "Les différentes catégories des Droits de l'Homme", *supra* note 28 at 303. Keba Mbaye also included the right to peace, the right to a clean environment and the right to development within the third generation of rights (see K. Mbaye, *Les droits de l'homme en Afrique* (Paris: A. Pedone, 1992) at 184-211).

will be obvious that such a right is likely to cause consternation in the halls of power of many Western democracies. The right to development is very expensive to implement.

In short, the evolution of human-rights discourse over the last forty years has been marked by an ever increasing list of rights and various attempts at categorization. The effort to define hierarchies of rights has been unsuccessful, but has itself fed ideological confrontation.

### **B. Culture**

A second fundamental definitional question is what we mean by "cultural values", the values which are said to be in conflict when we discuss human rights in an international setting. If the notion of rights is a difficult concept, culture is even more complex and multifaceted. Roy Preiswerk has defined culture as "a totality of values, institutions and forms of behaviour transmitted within a society ... [which] covers *Weltanschauung* [world view], ideologies and cognitive behaviour."<sup>33</sup> A more succinct definition is offered by Clifford Geertz, who characterized culture as "an historically transmitted pattern of meanings embodied in symbols".<sup>34</sup>

One helpful symbol of culture is the tree.<sup>35</sup> At the top of the tree, we see its ultimate flourishing: branches and leaves. In the leaves and branches we see the form of the culture, including patterns of behaviour, custom, language, arts and history. Just below we see the most impressive element of the tree: its trunk. In the trunk we see the structure of the culture, involving family arrangements, social organization and practices in economics, politics, health care, education and law. Underground, of course, are the nourishing roots, the system that allows the tree to flourish. In the roots, we see the mythic level of culture: world view, attitudes towards time and space, epistemology, values and cosmology. Of course, the depth of the roots, the sturdiness of the trunk and the shape and texture of the leaves — the evolution of a culture — will depend upon climate and other environmental conditions.

In some senses, the idea of human rights operates at all three levels of culture; it expresses itself in form, structure and myth. But what I want to emphasize is that the Western view of human rights is rooted in myth, in the generative sense of that word. Western versions of human rights are largely anthropocentric and they focus upon autonomy of the individual, treating people as ends in themselves. Of course, this mythology is then expressed in structural legal terms, but human rights is not essentially a legal concept. Rather, important expressions of the concept have precise legal meanings when filtered through a value-laden legal system that shapes and constrains definition, norm identification and processes of implementation.

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<sup>33</sup> R. Preiswerk, "The Place of Inter Cultural Relations in the Study of International Relations" (1978) 32 *Y.B. of World Aff.* 251 at 251.

<sup>34</sup> C. Geertz, *Interpretation of Culture* (New York: Basic Books, 1973) at 89.

<sup>35</sup> I am indebted to Kalpana Das and Robert Vachon of the Montreal Intercultural Institute for this evocative organic metaphor.

If this approach to culture has any utility, it highlights two important difficulties. First, we must ask who participates in the construction of "culture"? Do we look solely at the state as the definer of culture? To dominant elites? Or do we look as well at "traditional" groups within societies? From a legal perspective, the central issue here is one of legitimacy, the legitimacy of the state government which seeks to define a "national" culture.

A second issue is whether cultures can change. The organic symbol of the tree suggests that cultures are dynamic, that they are influenced by other cultures, and that they interpenetrate.<sup>36</sup> In other words, cultures can change through both internal and external forces. This is true for both Western and non-Western cultures. Canada has been reshaped through immigration and political attachments to multiculturalism, just as African and Asian cultures have been reshaped through colonialism and the dominance of the Western media.<sup>37</sup> Cultural "purity" is a nonsense, but it seems to be a convincing nonsense for nationalists around the globe, and in our own backyard.

### III. Clash of Cultures?

This brings me to the so-called "clash of cultures" and its import for contemporary human-rights claims. In June of 1995, the Voice of Vietnam broadcast excerpts from an article in the army newspaper entitled "Human Rights: A Precious Tree and a Soil to Grow It In" in which the following comments were made: "The ways in which the human rights offensive of the Western countries has been intensified have caused many people to worry that this issue could be the greatest source of ideological and cultural conflict in decades to come ..."<sup>38</sup> This article is typical of the rhetoric that has emerged over the last few years concerning a supposed clash of cultures between "The West" and "The East" (or between "The North" and "The South"). One of the most articulate proponents of the clash is Kishore Mahbubani, the permanent secretary of the Ministry of Foreign Affairs of Singapore. In a series of articles published in leading journals he has documented the collapse of the West, both in terms of its economy and its social structures. He has linked this collapse to Western decadence, which in turn he relates to an overemphasis upon human rights, an exaltation of the individual at the expense of society.<sup>39</sup>

Il me semble que ce conflit a été excessivement dramatisé et manipulé politiquement dans le but de protéger certains États, et surtout les élites de ces États, d'un examen international rigoureux. La description même de ce pseudo-conflit est peu

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<sup>36</sup> See A. MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, Ind.: University of Notre Dame Press, 1988) at 12; A. An-Na'im, "Conclusion" in A. An-Na'im, ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 427 at 432.

<sup>37</sup> See E. Said, *Culture and Imperialism* (New York: Alfred A. Knopf, 1993) at 37-39, 291-303.

<sup>38</sup> Voice of Vietnam radio broadcast, 5 June 1995, rebroadcast on the internet, Southeast Asia Discussion List (seasia-1@msu.edu) 14 June 1995.

<sup>39</sup> See e.g. K. Mahbubani, "The Dangers of Decadence: What the Rest Can Teach the West" (1993) 72:4 Foreign Aff. 10; K. Mahbubani, "The United States: 'Go East, Young Man'" (1994) 17:2 Wash. Q. 5; K. Mahbubani, "The West and the Rest" [1992] Nat'l Interest (Summer) 3.

nuancée, en ce qu'elle se base sur un portrait caricatural des valeurs occidentales et non-occidentales. Permettez-moi de vous citer quelques exemples.

As concerns the caricatured portrayal of Western values, it is important to note that contrary to the evaluations offered by some interested observers, Western values are not unremittingly individualist. Indeed, there are significant strains of Western philosophy in which deep concern is expressed about the proper relationship between individuals and society. I am alluding, of course, to European and Canadian social democracy and to the profound communitarianism of such influential thinkers as Charles Taylor and Alasdair MacIntyre.<sup>40</sup> Furthermore, in all Western societies limitations on individual rights can be and are justified. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* contains an express limitation clause,<sup>41</sup> as does the *Canadian Charter of Rights and Freedoms*,<sup>42</sup> to offer but two examples.

One must also be careful not to treat as exactly commensurate "Western values" and American constitutional law, a mistake that is often made by cultural critics of the West. In many respects, U.S. domestic law is not an adequate exemplar for international human-rights standards. In the area of freedom of expression, for example, the failure to impose significant limits within the United States upon violent pornography and hate propaganda is not mirrored in all other Western societies. Nor is it accurate to view the human-rights movement as dominated by the United States. Civil liberties and human rights have grown in importance within the Latin American region since the demise of various dictatorships. South Africa has adopted a leading role in the promotion of civil and political rights, most recently in its advocacy of strong actions against the Nigerian dictatorship. The most forceful intrusion upon traditional notions of state sovereignty is found in the *European Convention*,<sup>43</sup> not in an American text.

Finally, when portraying Western values, it is important not to trivialize the notion of human rights. It is not fair or accurate to blame Western "decadence" solely on a fetish for rights. For example, violent pornography is not treated as a right in most Western societies, even though it is widely available in some. In any event, violent pornography is also produced, distributed and consumed extensively in the non-Western world.

As concerns non-Western (usually described as Asian or African) values, one should note that they are not unremittingly communal or social in orientation. In societies as disparate as Singapore, Nigeria and Malaysia, individual achievement, both

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<sup>40</sup> See A. MacIntyre, *supra* note 36; C. Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989).

<sup>41</sup> See *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur. T.S. 5, 213 U.N.T.S. 221, art. 15 [hereinafter *European Convention*].

<sup>42</sup> See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 1.

<sup>43</sup> See *e.g.* Sections III and IV of the *European Convention*, *supra* note 41, which establish the jurisdiction of both the European Commission of Human Rights and the European Court of Human Rights.

academic and financial, is widely appreciated. The notion of entrepreneurship is expressly upheld as an important social value, even though entrepreneurs are classic individualists. An astute Singaporean observer has noted that liberal and universalist philosophical strands can be found "in the vast body of Asian culture and within classical Confucian thought."<sup>44</sup>

One must also be careful not to adopt a superficial assumption that particular values are shared by all Asians or Africans. During the nineteenth and early twentieth centuries, Western scholars of Asia often succumbed to "orientalism", the attempt to draw a homogenous, and typically negative, picture of the world to the east of Europe.<sup>45</sup> It strikes me that some advocates of Asian or African values are now participating in the same counterintuitive exercise, but seeking to put a uniformly positive gloss on "indigenous" cultural artifacts.<sup>46</sup> For example, the use of corporal punishment in Singapore is justified as an example of social discipline rooted in the Asian values of deference to authority and a desire for social stability and cohesion. Yet this practice is not matched by any similar state-sanctioned punishments in India or Japan. Indeed, it could be argued that corporal punishment is itself a Western imposition, a "value" inherited from the British.<sup>47</sup> It is ironic to attack Western values using "Asian" examples actually drawn from Western cultural practices. No culture is pristine and monolithic, and it behooves us all to admit the interplay of values and practices that has shaped and continues to shape the overlapping cultures of the contemporary world.

Some of the Asian or African values that are upheld as admirable are frankly irrelevant to a discussion of human rights. There is simply no point of disagreement as between the West and the East on the theoretical importance of the family or of hard work. The fact that these values may not universally be acted upon is not related primarily to the socially weakening effects of human rights, but to the frailty of the human will.

Finally, and perhaps most controversially, proponents of Asian or African values often seem to have trouble distinguishing between social or community values and rules that are simply imposed by an authoritarian nation state. It is odd that in a purported attempt to support indigenous Asian or African values, state power should be promoted, as the state itself is in large measure a Western imposition. In the name of the collectivity, states can actually stifle the traditional community. It seems to me that true communitarianism implies consensus that should not require authoritarian state

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<sup>44</sup> S. Tay, "Human Rights, Culture and the Singapore Example" (1996) 41 McGill L.J. 743 at 758.

<sup>45</sup> See E. Said, *Orientalism* (New York: Vintage Books, 1978).

<sup>46</sup> Edward Said, *ibid.* at 325, writes, "the modern Orient ... participates in its own Orientalizing."

<sup>47</sup> See Tay, *supra* note 44 at 765. Tay also emphasizes, appropriately in my view, that given the increasing interplay amongst cultures, "indigenous" traditions are often *mélanges* of cultural strands from diverse traditions, and that tradition itself may often be "invented", serving as a solace to populations coping with the stress of deep social change (*ibid.* at 762-63, 768-71). See also R. Falk, "Cultural Foundations for the International Protection of Human Rights" in An-Na'im, ed., *supra* note 36, 44 at 46. On the social invention of tradition, see E. Hobsbawm & T. Ranger, eds., *The Invention of Tradition* (Cambridge, U.K.: Cambridge University Press, 1983).

control, such as administrative detention, widespread censorship and limitations upon the emergence of civil society.

## Conclusion

And so I return to the work of F.R. Scott for guidance. How might we move beyond the clash of cultures, to find “the fertility of love” experienced on Kanbawza Road? First, we require some honesty and humility on both “sides” of the argument. We need to sit on our heels and level our eyes.

I believe that it is helpful to admit frankly that the language of rights is Western in its philosophical roots. But I would then ask what underlies this language. It seems to me that the goal of human freedom and the desire to promote physical, intellectual and spiritual development are values shared by Asian and African peoples and governments, as well as by Western peoples and governments. Furthermore, given the predominance of the interstate system, we are simply “stuck” with a Western language of human rights; it is the language that has inspired all the relevant international instruments.

Bien que le langage des droits de la personne soit d'origine occidentale, il est possible d'établir certaines analogies culturelles. N'est-il pas possible d'envisager une terminologie indigène, soit africaine ou asiatique, pour exprimer le respect des individus et des groupes?

If we are to succeed in bridging the so-called clash of cultures, it will also be important to listen to diverse voices within Asian, African and Western societies. We need to put ourselves in positions where the plurality of perspectives can be heard. No society has a completely homogenous philosophical tradition. Moreover, governmental legitimacy is a relevant issue to raise in some cases. For example, should one really listen to the current government of Nigeria as it seeks to define and limit a monolithic Nigerian culture? Many groups within societies may challenge the governmental assertion of cultural specificity. These groups deserve attention.<sup>48</sup>

Finally, Western proponents of human-rights values must exercise some modesty. Raimundo Panikkar wisely cautions human-rights advocates not to evaluate uncritically “one cultural construct with the categories of another.”<sup>49</sup> Human rights is a complex idea with differing emphases even as between various Western societies.<sup>50</sup> Only with appropriate humility and self-doubt can true dialogue be encouraged.

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<sup>48</sup> For a subtle discussion of alliances of equality between internal and external cultural critics, see K. Savell, “Wrestling With Contradictions: Human Rights and Traditional Practices Affecting Women” (1996) 41 McGill L.J. 781.

<sup>49</sup> R. Panikkar, “Is the Notion of Human Rights A Western Concept?” (1982) 120 Diogenes 75 at 88.

<sup>50</sup> The example of capital punishment, varyingly rejected or embraced across Western societies, comes to mind.

She moved toward me  
then drew back  
afraid

She understood the ritual  
taught in her family  
but never dreamed a foreign giant  
might need her blessing

Seeing her torn  
between faith and fear  
I sat down on my heels  
Burmese fashion  
levelling my eyes with her eyes

At once her fear vanished  
she smiled at me  
her little hands  
dipped the sprig in the bowl  
and touched me with the fertility of love

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