

Review Essay - The Future of Human Rights? Theory and Practice in an International Context: Review of Upendra Baxi's *The Future of Human Rights*

Upendra Baxi, *THE FUTURE OF HUMAN RIGHTS*, Oxford University Press 2002, 210 pp, ISBN: 0195652894; \$ 29,95,--

*By Euan MacDonald**

A. Introduction

The phenomenon of human rights has, at least in the 50 or so years since its modern enunciation in the Universal Declaration, and in particular from the last decade of the 20th century onwards, been characterised by a curious dualism. On one hand, its ubiquity and rhetorical strength are staggering. The near universal acceptance by states of the International Bill of Rights,¹ for example, seems to signal some degree at least of meaningful and universal consensus on what are essentially issues of morality; an impression that is only reinforced by the fact that almost all recently adopted national constitutions contain some, usually strikingly similar, human rights provisions. The power and presence of the discourse is, however, also manifest at a more subtle level. Human rights seem to have become so central to our thought that we are struggling to find alternative vocabularies of moral or political critique. Any social movement that wishes to be taken at all seriously in the prevailing political climate will have to express its claims, and, indeed, frame its own self-understanding in terms of either one or more of those rights already widely accepted as “human,” or of an attempt to get a “new” right accepted into that general and privileged canon. Human rights, in this sense, are not understood as merely being the products of a certain political or legal framework. Rather, they have come

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¹ i.e. the Universal Declaration of Human Rights, and the 1966 Covenants on Civil and Political rights, on one hand, and Economic, Social and Cultural, on the other.

to be viewed as guides to the proper functioning and content of politics and law themselves.²

If, on the other hand, some notion of human rights is now widely accepted by most states in the world, even to the point of approaching their oft-proclaimed and celebrated “universality,” the same cannot be said about the attempts that have been made to provide some sort of sound theoretical basis to support the allegedly emerging consensus. Indeed, even if the political agreement on human rights goes no deeper than the most superficial level, it is nonetheless striking that such agreement was at all possible in the absence of any sound and widely accepted theoretical understanding of the concepts involved. (Although it may, of course, be suggested that superficial accord is easier to reach when the deeper, philosophical implications remain contested). The various failures to date of the theoretical endeavour have elicited an equally varied set of responses from theorists working in this field. Some have endeavoured to continue in pursuit of the elusive prize, whereas many others have simply come to the conclusion that human rights do not “exist,” from Bentham’s “nonsense on stilts” to McIntyre’s “witches and unicorns.” Others, however, have proposed other ways of approaching the problem, suggesting that the whole debate over the theoretical foundations and ontological status of human rights is misguided and futile, for example on the grounds that the “human rights phenomenon renders human rights foundationalism outmoded and irrelevant.”³ Whatever the chosen scholastic response, however, one thing seems clear: the gap between theory and practice in international human rights is an important issue, and one that threatens to undermine both sides if some sort of *rapprochement* is not achieved. From a theoretical standpoint, failure to engage seriously, successfully, and convincingly with a concept that is now of undoubted global importance may lead eventually to the marginalisation of philosophical concerns from ethical, political, and legal life; while, on the other hand, a skin-deep consensus on the existence and content of human rights, without a stronger body of theory to rely upon, loses much of its critical potential, and is thus far more susceptible to being appropriated by the powerful in order to sustain the global relations of domination prevailing today.

The attempt to affect such a *rapprochement* is one of the main themes of Upendra Baxi’s complex and wide-ranging book, *The Future of Human Rights*, the work that provides the focus for this essay. Although the book itself is some two years old at

² See, e.g. Ritter, “Human Rights”: Would You Recognize One if You Saw One? *A Philosophical Hearing of International Rights Talk*, 27 CA WESTERN INT’L L. J. 266 (1997).

³ Rabossi, *Human Rights, Rationality and Sentimentality*, in ON HUMAN RIGHTS (Shute & Hurley eds., 1993) available at <http://www.usm.maine.edu/~bcj/issues/three/rorty.html>.

this point, it is worthy of attention not merely because it has perhaps not received the critical attention that one would expect for such an author, but also because it deals directly with issues of great and enduring importance to human rights and international law more generally. My purpose here, is essentially twofold. First, I hope to give a brief critical overview and analysis of the book, although its aforementioned complexity means that this will be, of necessity, at best a cursory glance. Second, I will try to draw out some of the elements that I see as particularly relevant to the theme outlined above, and attempt, again briefly, to suggest some possible reconciliations or developments that may begin to provide an answer to some of the critique I outline in the first section of the paper and hopefully provide fruitful ground for further debate.

Before I really begin, there is one minor quibble that should be mentioned, which, although perhaps pedantic, is relevant to the subject matter of a book review although not the responsibility of the author himself. The work is littered throughout with misprints, misspellings or simple mis-citations that, although often relatively minor in themselves, nonetheless are an unnecessary irritant for the reader. Moreover, as this is a difficult, involved, and often densely-written book, the frequent occurrence of errors in the text do nothing to aid the process of comprehension. Perhaps the most striking example is Baxi's definition and discussion of Kymlicka's notion of "polytechnic" rights. It is only half-way down the next page that the terminology reverts to the (presumably correct) use of "polyethnic" rights. (108) While this says nothing about the substantive content of the book, it is, however, unfortunate that something so entirely avoidable creates such an unfavourable impression in the mind of the reader.

B. The Future of Human Rights.

Baxi begins his book with the following sentence: This book seeks to decipher the future of protean forms of social action assembled, by convention, under a portal named 'human rights'. It problematizes the very notion of 'human rights', the standard narratives of their origins, the ensemble of ideologies animating their modes of production, and the wayward circumstances of their enunciation.(v)

Given this, it is perhaps unsurprising that this book ranges widely over a large number of difficult and complex issues, pertaining to the practice, sociology, and theory of international human rights. The argumentative structure also follows this pattern, making it a difficult work to summarise in a few short pages. In what follows I will attempt to give a very brief critical overview and analysis of some of the main themes of the book, and the best way to do that is to follow, loosely, the thematic structure of the book itself, although I will provide more than merely a chapter-by-chapter synopsis.

In the first chapter, Baxi is at pains to illustrate the different ways in which human rights are used and understood throughout the world, and as such introduces a theme to which he will frequently return: that of the *radical contingency* of “human rights futures,” (3) or the idea that, as human “achievements,” these rights have no definite *telos* to which they are progressing, no inherent form or substance that is gradually being realised. Rather, he asserts that the futures of human rights are “open and diverse,” even to the extent that “in the eye of the future, that which we now term ‘human rights’ may live on only in the ruins of memory.” (3) In doing so, he invokes a whole range of concerns that are, for him, of direct relevance to any consideration of the future of human rights, such as the overproduction of human rights norms, the repressive as well as emancipatory potential of these norms, the “postmodernist suspicion” of meta-narratives, relativism, and the effects of the globalised market on the direction of human rights. It is, however, unclear at exactly what level he understands this contingency as operating. As I will argue below, in later chapters much of his argument leads to results that are perhaps confusing if we are to hold that this radical contingency operates all the way down to the ontological level.

A second theme of major importance to the work introduced in the first chapter is that of human suffering. For Baxi, “it is axiomatic that the historic mission of ‘contemporary’ human rights is to give voice to human suffering, to make it visible, and to ameliorate it.” (4) It is an explicit aim of the book not merely to speak to both theorists and activists, but also to reforge the link between the two and those actually suffering here-and-now from “the practices of the politics of cruelty.” Baxi takes great care to point out throughout the work that “*even* human rights regimes enact a hierarchy of pain and suffering.”⁴ (18) This fact, although inevitable, is something nonetheless to be aware and wary of. However, the irreducible core of this particular conception of human rights seems to rest in Baxi’s use of Arendt’s reworking of Kant’s notion of “radical evil,” here understood to mean those offences that human beings are able neither to punish nor forgive. The classic example would, of course, be the Holocaust. Crucial to Baxi’s idea, then, is that in these circumstances we find that we are able, indeed compelled, to depart from Humean philosophy, and derive “the *moral ought* from the *inhuman is*.” (19) It is, therefore, the existence of radical evil that forms the fundamental normative basis for the rest of Baxi’s work. “Put in another way, radical evil is the womb that nurtures the embryo of ‘contemporary’ human rights.” (19)

⁴ All italics in quotations are Baxi’s, unless otherwise stated.

The second chapter begins with the argument against the claim that human rights originated with the European Enlightenment, or that they are in any way “the gift of the West to the rest.” Baxi is very eloquent in his denial of this proposition, and comes up with a number of powerful arguments as to why it should be rejected. It is central to his notion of what the futures of human rights should look like that cultural diversity should play a leading role, and not be limited to the enlightenment guarantee of bourgeois rights, of the type that made “the power of a few the destiny of millions of people.” (25) All of Baxi’s reasons for rejecting the Eurocentric argument, however, concern the potential for the problematic effects such a discourse might have; a bar to inter-cultural dialogue, for example, or a shield for Third World dictators to hide behind. No real attempt is made, with the exception of some sensational and, I think, in most cases unwarranted, references to “epistemic racism” or “wicked sociology,” to engage with that large body of work from a plethora of respected scholars that *does* find the origins of contemporary human rights discourse in Western culture. This point, however, is of no real importance to the present paper, and it can certainly be agreed that Baxi raises some vitally important concerns regarding the adverse effects to which uncritically accepting or overstating the allegedly Western origins of human rights may give rise.

The main theme introduced by chapter two, however, is the distinction between “modern” and “contemporary” notions of human rights. Essentially, the former seems to signify the paradigm of human rights (historically, the “rights of man”) introduced by the revolutionary declarations of the 18th century. For Baxi, this paradigm is characterised by the civil rights, particularly to property, and the abstract individuation that necessitated the question, “Who is human?” It was, argues Baxi, the response to this question (rational and autonomous men) that allowed for the continuation and expansion of such practices as colonisation and slavery, and that allowed “social Darwinism” to be the defining rule of intercultural relations. “Contemporary” human rights, on the other hand, emerged with the new paradigm introduced by the Universal Declaration and developed through resistance to the Cold War “practices of cruelty.” It is characterised by an “exuberant” production of human rights standards, and is not, unlike the modern conception, limited to a basic and exclusionary set of rights. (29-32) It finds its basis in the various and continuously innovating forms of human suffering, not in “any predetermined conception of what constitutes a human ‘essence’.” (79)

The last important distinction introduced in this chapter is that between politics *of* human rights and politics *for* human rights. Put simply, the former is the use of the discourse of human rights for the pursuit of power. It refers to its strategic/political deployment. Politics *for* human rights, on the other hand seeks to make “the state more ethical, governance progressively just, and power increasingly accountable.” (41; emphasis omitted) The tenability of this distinction is something I will return to

later. For the moment it suffices to note that it is central to Baxi's attempt to reconnect human rights theory and practice. As he himself notes, "much of the argumentative platform collapses if this distinction is rendered insensible." (vi)

The next two chapters are largely concerned with setting the scene within which Baxi sees "contemporary" human rights as functioning. In the interests of space, I will not go into them in any detail here, save to note that both chapters attempt to cover a vast number of different issues in a relatively short space, resulting in the fact that often they read like an extended research proposal, with each section lasting only a few paragraphs, including numerous calls and suggestions for further study. Chapter 5 deals with the issue of local identity in a globalised world, a particularly thorny topic in terms of the universalising impulse of human rights discourse. Again here, however, Baxi is content to identify problems and raise questions rather than make any concerted effort to furnish a solution save to reassert his attractive proposal that human rights authorship should be understood as occurring not at the global level, but rather in the heat of local struggles and resistance movements. Up until this point, most of the book is decidedly polemical in style. Propositions are, for the most part, asserted rather than argued or defended. However, in the Chapter entitled "What is Living and Dead in Relativism?", Baxi engages in more detail with certain philosophers. Of these, I would like to briefly mention his treatment of two: Hegel and Rorty.

Baxi refers to the work of Hegel in the context of the "universality" of human rights (something that, incidentally, he feels is radically new to "contemporary" approaches, despite the fact it was often proclaimed when the "modern" approach was dominant). He underlines the importance of this theoretical endeavour, particularly in terms of this essay, when he notes that the notion of the 'universality' of 'human rights' raises heavy and complex questions that may seem distant from the real world of human rights praxis. However, these erupt constantly in that 'real' world where the lack of approaches to a response complicates the enterprise of protecting and promoting human rights. (93)

Baxi then goes on to suggest that the notion of "universality" as it applies to human rights is best understood in terms of the Hegelian dialectical method, in particular the synthesis of *abstract universality* and *abstract particularity* in bringing about *concrete universality*. For Baxi, human rights enunciations addressed to "all people" display the objective moment of abstract universality, which was then particularised by the series of norms dealing with, for example, women's rights as human rights, rights of children, or those of indigenous peoples. The achievement of concrete universality happens, to use Baxi's terms, "where rights come home, as it were, in the lived and embodied circumstance of being human in time and place under the mark of finitude of individual existence." (94)

This, however, is as much of an exposition of Hegel's theory as Baxi gives in support of his argument. This is not the place (and nor am I the person) to go into any detail on the intricacies of and difficulties with the Hegelian method. However, it is legitimate to ask whether such a cursory and unsophisticated rendering of what is a deeply complex and contested theory is sufficient to do the theoretical work that Baxi asks of it. The reader is asked to accept simply that this happens, and that it is important to the notion of universality of human rights, without much more than a passing reference to "difficulties" with the relation between the three stages.⁵ Furthermore, Hegel's method is part of an integrated philosophical structure. To this extent, it is doubtful whether he is the type of theorist with whom one can adopt an *à la carte* approach. In addition, for Hegel, it is the synthesis, the concrete universality, that presupposes the objective moments of abstract universality and particularity necessary for its own progressive realisation. Thus, the perfect reconciliation of form and content, of universality and particularity, is *already implicit* in the moment of abstract universality, in much the same way as a tree trunk and branches are implicit in a seed.⁶

It is, therefore, at least arguable that the Hegelian dialectical method does not leave much room for radically contingent futures of the type postulated by Baxi. Baxi's endorsement of this method, therefore, leaves us uncertain as to his own position on questions of metaphysics; an impression that is only compounded by other aspects of the book. Indeed, it is often difficult to shake off the impression that Baxi arrives at the human rights discussion table with a very definite idea of the "correct" response to the ethical issues implicated in human rights disputes. Even in the most general terms, the good faith/bad faith divide implicit in his insistence upon distinguishing between politics *for* and *of* human rights would seem to require *some* degree of moral certainty. If, however, Baxi appears at times to reject metaphysics in favour of radical contingency, and thus eschew one potential basis for justifying the ethical positions he adopts, his more forceful rejection of the pragmatic approach to human rights foundationalism serves only to confuse the reader as to the philosophical basis for his normative prescriptions – surely an important issue to resolve in any attempt to reconcile human rights theory and practice.

⁵ The three stages being abstract universality, abstract particularity and concrete universality. For one critique of the whole notion of "objective moments" that interact to produce the perfect synthesis of the Idea that presupposes them, see generally Marx, *From the Critique of Hegel's Philosophy of Right (1843)*, in MARX: EARLY POLITICAL WRITINGS (1994).

⁶ See Knox, *Foreword to HEGEL, PHILOSOPHY OF RIGHT* at ix (1952).

Baxi's treatment of the work of Richard Rorty seems to me to be as cursory as, if less deferential than, his approach to Hegel. After a brief overview of postmodern anti-foundationalism, and the highlighting of several aspects thereof that do raise genuine concerns for the project of protecting human rights, Rorty is held up as "exemplifying the hazard of postmodern philosophical anthropology." (99) The passage he quotes is one in which Rorty suggests that the fundamental category of "human being," as sufficient for membership in a moral community, is still relatively unknown outside of those people directly affected by the European enlightenment. Although Baxi makes a fair point in noting that no one in the Third World escaped the "dark side" of the enlightenment, through colonisation or economic globalisation, the remainder of his critique of Rorty misses its mark. For, situated in the wider context of his essay, "Human Rights, Rationality and Sentimentality,"⁷ it is clear that Rorty is not making "a large-scale generalization about being 'good' and 'bad' human beings" as Baxi suggests. (100) Rather, he is making the point that the category of "people like us" (i.e. "true humans", worthy of human rights) is still not anything like as wide as "we" would want it to be (a charge that he levels against Westerners elsewhere in the piece).⁸ Taking this into account, Baxi's already odd conclusion on Rorty becomes all the more startling: "It... needs at least to be said that if such interludes at philosophical anthropology are all we have by way of antifoundationalism, the case for foundational theorizing is adequately reinforced!" (100)

Baxi's disagreement with Rorty is a topic to which I will return in the second section of this paper. However, the above quotation also illustrates another confusing aspect of Baxi's general theoretical approach. On questions of foundationalism or essentialism, he seems to refuse to take any stance at all. For example, as noted above, he argues that contemporary human rights are non-essentialist, in that they are not based on an "essential" notion of humanity. However, in his response to the antifoundationalist critique, he argues that "not all antifoundationalist critiques realize that the subaltern struggles remain inconceivable, or at any rate unintelligible, outside frameworks that invoke a universal conception about the concept of being 'human'." (99)

Here, as in other places in the book, Baxi seems to be coming close to endorsing an *efficacy* rather than an *epistemological* approach to human rights theory⁹ – the type of

⁷ Rabossi, *supra* note 3.

⁸ *Id.*

⁹ See, e.g., p. 87, where, in responding to postmodern critiques, Baxi notes: "No matter how flawed the Parisian and neo-Parisian cognitive fashions, human rights discourse furnishes potential for struggle which postmodernist discourse on the politics of identity as yet does *not*. These cognitive fashion pa-

approach explicitly embraced by Rorty.¹⁰ However, as noted above, at other times he seems to prefer to distance himself from pragmatism, and endorse some form of metaphysical approach, as can be seen from his use of the Hegelian methodology. It is arguable, however, that this ambivalence poses more of a threat to Baxi's theorising than he acknowledges. For if, as he seems to suggest at some points, he is drawn towards foundationalism in rights theory, then he has the unenviable task of attempting to elucidate exactly what principles this entails, and the objective normative basis on which it relies. If, on the other hand, he refutes essentialism in the final instance, he then has to provide arguments to substantiate and flesh out his general claims concerning what is to count as suffering, etc. Again, this problem is brought sharply into focus by his insistence on a distinction between the politics *of* and the politics *for* human rights. For his assertions in this field often seem to go far beyond what could be reasonably deduced from his notion of radical evil, even if one accepted it as an unproblematic normative foundation.

For all of the above reasons, the theoretical portion of Baxi's work is not convincing. Even if, however, this is the case the last two chapters, in which he performs a sociological analysis of current human rights practices in the international sphere, are the most powerfully argued, interesting, and innovative sections of the whole book. In chapter eight, Baxi discusses the emergence of what he perceives to be "human rights markets," brought about by the need for different activists and groups to compete for scarce resources. Although he recognises that the use of terms such as human rights investors, producers and consumers may cause a considerable degree of discomfort amongst activists, Baxi views this process as to some degree inevitable given the realities of global society, the lack of funding and the widespread desensitisation resulting from the ambivalent effects of the global media. In a subtle and nuanced analysis, he suggests that the best way to approach this new phenomenon is with caution, contestation, but not "lamenting the global fact of the very existence of human rights markets." The result is an extremely thought provoking passage of work that more than amply demonstrates the aptness and usefulness of the market metaphor in these circumstances.

Similarly, in the last chapter, Baxi postulates the emergence of "an alternative paradigm of human rights" challenging that set up by the Universal Declaration in 1945. Here, Baxi traces the emergent "human rights" claims of the institutions of global capital, from the WTO and IMF to multinational corporations, and illustrates the ways in which they "'justify' corporate well being and dignity even when it entails

rades may not be allowed to drain emergent solidarities in struggle unless the postmodernist anti-essentialist critique demonstrates that *human rights are a mistake*."

¹⁰ Rorty, *supra* note 3, at 118.

gross and flagrant violation of human rights of actually existing human beings and communities.” (132) Furthermore, he argues that the emergent paradigm of trade-related market-friendly human rights is working to put an end to “human rights oriented, redistributionist governance practices” in ways that foreclose the possibility of progressive realisation of economic, social and cultural rights, and is engendering the re-interpretation of actually existing rights, such as the right to development or the right to food, in ways that reflect the new market ethos (139). The role of the state is increasingly to appear attractive to the institutions of global capital, to the extent that, in many cases, it is actually directly accountable to these institutions rather than the citizens who elected it, and who still have to bear the brunt of its decisions. Thus, Baxi convincingly and eloquently shows that “the power of the human rights discourse has already been critically appropriated by global capital,” (147) and alerts us to the myriad ways in which this process is continuing.

C. Post-Essentialism and International Human Rights.

In what is left of this essay, I want to begin by returning to the suggestion that many of the theoretical difficulties with Baxi’s work could be resolved, or at least recast, if he began to view Rorty as an ally rather than an enemy, and then move on to a brief consideration of what some of the implications of this might be for human rights and international law more generally. That Rorty and Baxi could be allies is not as far-fetched as one may believe after reading Baxi’s critique in the work under review here. They seem (at times at least) to share very many of the same philosophical presuppositions. As I noted above, Baxi at times comes close to endorsing Rorty’s avowedly efficacy-based approach to the theory of human rights. Further examples of potential overlap are not difficult to find.

Take for example Baxi’s insistence on the radical contingency of human rights futures, and on the constant innovation of “practices of the politics of cruelty,” and compare the following quote from Rorty, in responding to the idea that moral inquiry should have an objective “terminus”: “those who, like myself, find themselves accused of post-modern frivolity do not think that there is such a terminus. We think that inquiry is just another name for problem-solving, and we cannot imagine inquiry into how human beings should live, into what we should make of ourselves, ever coming to an end.”¹¹

Or consider Baxi’s understanding that “‘human rights’ logics or paralogics are all about how one may or ought to construct ‘techniques of persuasion (as) a means of

¹¹ Rorty, *The Decline of Redemptive Truth and the Rise of a Literary Culture*, 1 at <http://www.stanford.edu/~rrorty/decline.htm>.

creating awareness',"¹² (15) and compare again Rorty's exhortation to "sentimental story-telling" and the importance of education as crucial to the spread of the human rights culture.¹³ As a final comment in this regard, it is worth mentioning that Baxi's suggestion (114) that Rorty remains complacently content with the current state and status of human rights in the US seems, in the light of subsequent works, a little unfair.¹⁴

But how can Rorty's particular brand of post-essentialism help to resolve some of the theoretical problems with Baxi's book that I outlined above? Relatedly, yet perhaps more importantly, how can it help us to begin to effect a *rapprochement* between human rights theory and practice in a way that is helpful to both? It is important to state at the outset here that I am not suggesting that Rorty's work should be taken as some sort of universal panacea. It brings with it its own peculiar set of problems, some of which may appear just as insoluble as the ones that it hopes to avoid. I do, however, feel that a careful yet generous reading of Rorty's work may open up fruitful ground for dialogue between human rights theorists and activists in a way that neither rights-dogmatism nor rights-denial can hope to achieve.

First, Rorty's view that we should "no longer be tempted to practice either epistemology or ontology"¹⁵ paves the way for the acceptance of what he refers to as "the rise of the literary culture."¹⁶ What distinguishes this new, literary culture from the older, religious and philosophical, cultures is that there is no attempt to get in touch with something "hard," something "non-human" upon which we can base our moral reflections, so that we can finally rid ourselves "of the hope that there may be something to which human beings are responsible other than their fellow hu-

¹² Quoting ECO, APOCALYPSES POSTPONED 104 (1995).

¹³ See generally Rorty, *supra* note 3.

¹⁴ It is certainly true that, upon a superficial reading of many of his works, Rorty's tone may often lead one to the belief that he thinks the US has got it pretty much right in terms of human rights. This, however, should be seen in context. Often, his main target is the critical left in America, with whom he shares much in the way of philosophical assumptions, but who, he believes, are too slow to recognise some of the advantages and benefits of Western societies in general: see, e.g., Rorty, *The Unpatriotic Academy*, in RORTY, PHILOSOPHY AND SOCIAL HOPE 252 (1999); However, in many other writings, he makes it clear that his philosophy of social hope is far from exhausted by the US model: see, e.g., Rorty, *Failed Prophecies, Glorious Hopes*, in RORTY, PHILOSOPHY AND SOCIAL HOPE 201 (1999); Rorty, *supra* note 3.

¹⁵ Rorty, *A Pragmatist View of Contemporary Analytic Philosophy*, 1 at <http://www.stanford.edu/~rrorty/pragmatistview.htm>.

¹⁶ See generally, Rorty, *supra* note 3.

mans.”¹⁷ Of course, in this sense, Rorty is dealing with philosophy *qua* metaphysics. Although this is undoubtedly an excessively restrictive definition, in that not all philosophers have postulated or argued for the existence of “truth” in the way suggested, it is useful to limit it in this manner in order to better understand the radical shift in our approach to thinking in general that Rorty is proposing. This, however, is not to suggest that works of “religion” or “philosophy” are outdated and thus to be summarily ignored. Rather, it is to insist that the truth-claims that they made be laid to one side, in order that the books may be read as works of literature in their own right. Therefore, it is in terms of Rorty’s “literary culture” that we can begin to make sense of Baxi’s insistence both on the “non-essentialist” nature of contemporary human rights, and on the continuing importance of the self-understanding of those involved in human rights struggles as protecting something *essentially* human. For it is in this sense that human rights can finally be sensibly understood as *fully* human, both in terms of subjecthood and authorship.

Second, acceptance of Rorty’s “literary culture” necessarily implies the kind of radical contingency of futures that Baxi insists upon, in a way that avoids the theoretical problems that the latter’s reliance on a Hegelian dialectic may give rise to. If scholars in the “literary culture” no longer search for something non-human (or for something eternally and universally human), then they seem unlikely to reach any other conclusion about the future than to celebrate its diversity and contingency, both themes that chime with those of Baxi’s book. As Rorty notes:

For members of the literary culture, redemption is to be achieved by getting in touch with the present limits of the human imagination. That is why a literary culture is always in search of novelty, always hoping to spot what Shelley called “the shadows that futurity casts upon the present”, rather than trying to escape from the temporal to the eternal.¹⁸

Third, and on a more general level, Rorty’s pragmatism may help to open up new grounds for constructive dialogue between theorists and activists by somewhat closing the gap between the philosophical problems involved, and the self-understanding of the activist in the project in which he or she is implicated. If practitioners of human rights have been alienated by the level of abstraction at which theoretical debates were conducted, if they felt that such an approach was a luxury that had little to say to the immediate difficulties of here-and-now struggles against violations of human rights, then they may find something new and encouraging in Rorty’s work besides the blunt and essentially unargued assertion that they are doing the “right thing,” namely that the philosophical problems that remain *are*

¹⁷ Rorty, *supra* n. 3.

¹⁸ *Id.*, at 6.

more immediate, more relevant to the everyday business of promoting international human rights than they had previously imagined. The most pressing problems that remain to be answered in Rorty's framework do not concern ontology or epistemology, if rights are "real", or if we can actually know about them. Rather, we are faced with the increasingly urgent question "How do we justify normative action from within a post-essentialist framework?" Many would, of course, suggest that, in so doing, Rorty is no longer engaging in anything that can sensibly be called philosophical thinking. This however only holds true to the extent that we insist that inherent in all philosophical endeavour is the belief in something non-human, something eternal and objective, in terms of which our actions *can* be properly judged. This position, however, seems to have a rapidly dwindling number of adherents, particularly within academia.

There are, of course, numerous problems that bear directly on the practice of human rights to which Rorty's position, in and of itself, can offer no response. Perhaps the most pressing of these is, "How can we give depth, and thus real critical potential, to human rights discourse if our support thereof is reducible to a bland statement of preference?" This, of course, is to all intents and purposes the same question as the one posed in the last paragraph. This is a difficulty to which Rorty certainly has no definitive answer, leaving many of his critics unsatisfied. Although, as noted above, Baxi is equally incapable of explaining the normative origins and strengths that he clearly brings to his work in any theoretically satisfying manner. Rorty, however, does propose an interesting avenue for thought when he suggests that "the further maturation of mankind will be achieved through what Kant called 'the aesthetic' rather than through what he called 'the ethical.'"¹⁹ Doubtless, shifting the justification for normative action from rational to aesthetic premises (although, depending on definitions, the two need not be mutually exclusive) would have far-reaching consequences and raise interesting new difficulties both for the theory and practice of international human rights. Any examination of these consequences is, however, outside the scope of the present paper.

But what of international law more generally? What is then the crucial challenge as seen from the "critical" standpoint? It is, in my view, the question of how to frame and justify a normative standpoint, and the imposition of that standpoint on those who disagree with it, while at the same time *accepting that there can be no external nor universal internal standard by which such norms and their imposition can be justified*. Although the focus of critical scholars has undoubtedly been placed on the latter part of this sentence, there are few, if any, who expose and critique the necessarily and inevitably political nature of current international law in order to replace it

¹⁹ *Id.* at 12.

with their own, "correct" blueprint for the future. The rejection of the existence of such a blueprint, of the possibility of universal and objective "correctness," is an undercurrent that runs through much, if not all, of the work in this field. Acknowledging this is to recognise what Carty has referred to as one aspect of the "decadence" of international law.²⁰

It is, however, perhaps this realisation that has left those approaching international law from a "critical" standpoint most open to attack from those within the mainstream. Perhaps understandably given the affirmation of the irreducible subjectivity of values, most if not all of the "critical" thinkers have put forward little if anything in the way of constructive ideas for reform that are both well theorised and practically realisable (in terms of their own philosophical premises). The oft-levelled criticism, then, is that of legal nihilism; happy to criticise, but devoid of any substantive suggestions that are not immediately susceptible to their own critique.²¹ And it does seem that some of the central figures of this group have been unable to formulate answers that would satisfy themselves. This is apparent in Kennedy's persistent calls for "disciplinary renewal"²² coupled with his somewhat vague assertions that the way forward lies in such areas as critical race theory and feminism,²³ or in Koskenniemi's striking but as yet under-theorised "return to formalism," evident in more recent articles, not to mention his latest book.²⁴

But this does not mean that we are condemned to the tragic and ultimately futile (tragic because ultimately futile) defence of a crumbling 'fortress.'²⁵ One answer lies not in rejuvenating the search for knowledge of the non-relational, but rather in

²⁰ Carty, *Theory of/or Theory instead of/ International Law*, 8 EUR. J. OF INT'L L. 181, 195 (1997).

²¹ See generally, Scobbie, *Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism*, 61 BRITISH YBK OF INT'L L. 339 (1990).

²² See, e.g., Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 NYU. J. OF INT'L L. AND POL. (2000)

²³ Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. OF INT'L L. 9, 34 (1999).

²⁴ See, e.g., Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 17 (Byers ed., 2000); KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* (2001). For a review of the latter in terms of a return to formalism, see Cryer, *Déjà Vu in International Law*, 65 MOD. L. REV. 931, 941 (2000).

²⁵ For an intriguing attempt to overcome the nihilist/ wilful ignorance dichotomy, see Korhonen, *New International Law: Silence, Defence or Deliverance?*, 7 EUR. J. OF INT'L L. 1, 28 (1996); By 'Fortress' Korhonen refers to a situation in which the flaws are explicitly recognised and in which international law continues as "relatively satisfactory," with nothing better at hand. There is no space here to examine her solution, based on a reading of Plato's cave metaphor, except to say that for this author it fails to meet the standards of its own critique.

recasting the terms in which we view Korhonen's fortress. Clearly, the role of international lawyers in persisting with a legal system that they know must always fall short of an absolute objective ontology is only tragic *if we are looking for something more*; the impossibility of universal objectivity only appears as an "imperfection" from the standpoint of one who sees a "metaphysical crutch"²⁶ as an indispensable precondition of valid and effective law. If, however, we abandon this not only as unattainable *but also as undesirable*, we can begin to sketch a redefinition of the current state of affairs that may provide fruitful new insights into what we can do with law in the future. That is, instead of blindly practicing a wilful ignorance to the shortcomings of the current conception of international law, or hopelessly and tragically working on in the face of them, we might begin to think of ourselves as the *creators* and not merely the subjects of law. Far from merely being an exercise in making virtue out of vice, I think and hope that such a redescription of international law in general could provide grounds for new insights into what international law might become in the future. Certainly, it would help us throw off some of the reified, even fetishised dogmas of doctrine.²⁷ Perhaps an element of tragedy would still remain, but it would be the tragedy of the Existentialists, of the human assumption of responsibility for the choices they make and the norms they generate, and not the tragedy of the disappointed metaphysician, seeing imperfection everywhere on the grounds of inescapably impossible standards. Perhaps the best, and most hopeful, summary of this position that I have found is in the following quote from Rorty:

"nowadays, to say that we are clever animals is not to say something philosophical and pessimistic but something political and hopeful, namely: If we can work together, we can make ourselves into whatever we are clever and courageous enough to imagine ourselves becoming."²⁸

All of the above considerations illustrate that these are complex issues, in need of complex answers. And, fittingly, the work under review here, *The Future of Human Rights*, is a complex book, which defies simple synopsis either of its aims or its content. It has much to recommend it, in particular the sociological analysis of the effects of marketisation and globalisation on the international practice of human rights. The book, however, fails in any attempt to bring together the worlds of human rights theory and practice, simply because its theoretical side is, in the final instance, unconvincing. As I have tried to suggest in the second section of this es-

²⁶ I have taken this phrase from Rorty, *supra* note 3.

²⁷ On this, see generally, Boyle, *Ideals and Things: International Legal Scholarship and the Prison-House of Language*, 26 HARV. INT'L L. J. 327, 359 (1985).

²⁸ Rorty, *supra* n. 3.

say, some at least of these difficulties could be overcome if Baxi were to more openly embrace a post-essentialist framework, a framework to which he often comes close to endorsing within the context of his book. Under these circumstances, the attempt to close the gap between the ivory tower and the real world may well appear, to some at least, as more convincing. It is, of course, not the argument of this paper that such a move renders human rights theory and practice unproblematic. On the contrary, many seemingly intractable differences are, if anything, brought more sharply into focus. However, such a move, from the rational/foundationalist to the aesthetic/post-foundationalist does seem to me to be perhaps the most promising way to attempt to pursue the problem that forms one of the central themes of the laudable, yet ultimately unsatisfactory, book under review here. For although Baxi is certainly correct when he notes that "the book in your hands undoubtedly raises more questions than it answers," many may feel that, on a theoretical level at least, it begs even more than it raises.