

A CONFUCIAN PERSPECTIVE ON HUMAN RIGHTS FOR CONTEMPORARY CHINA

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WHY CONFUCIANISM?

There are at least two main intellectual approaches to justifying universal human rights. The first, and more traditional, approach is to show that there are universal values and moral principles that can justify human rights to all reasonable persons.¹ The second approach tries to seek consensus on human rights from within cultural perspectives. It encourages different cultures to justify human rights in their own terms and perspectives, in the hope that an "overlapping consensus" on the norms of human rights may emerge from self-searching exercises as well as common dialogue. I shall call the first approach the "fundamentalist" approach and the second "ecumenical." The ecumenical approach has some advantages. If successful, it would ground human rights on less alien sources, and would make them more receptive to the cultures that originally lacked the idea of human rights. However, it is possible that this approach might create as much conflict as common ground for consensus: The deeper one digs into cultural perspectives, the more apparent might be the gap among them. In this chapter, I will test the feasibility of this approach by examining the case of Confucianism as a cultural perspective.

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1. A notable example is Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982).

To begin with, let me make two preliminary remarks. The first one is on the meaning and scope of Confucianism; the second, its contemporary significance. Like "liberalism," the word "Confucianism" can be used at several levels: philosophical thought, political ideology, actual state policies and practices, or way of life. In this chapter, I take it to mean a tradition of philosophical thought rather than a state ideology or actual political practices. Confucianism as a state ideology or practices was more a kind of product of time and historical circumstances, whereas Confucianism as a philosophical thought, founded by Confucius, has survived the test of time and remains today a lively source of ideas for Chinese. Moreover, separating the historical, institutional expression of a tradition of thought from its philosophical expression can create a space for people to critically evaluate, appropriate, and further develop that tradition of thought. Just as Marxists often turned to Marx's own words to denounce the political practices in communist states and develop new Marxian thinking on contemporary issues, we can likewise turn to the philosophical masters of Confucianism to do similar things. In discussing Confucianism as a tradition of philosophical thought, I shall further limit myself to the thoughts of early Confucianism, namely those of Confucius and Mencius. Despite the flourishing developments of Confucian thought in the later stages of the Chinese history, the thought of Confucius, represented by *The Analects* and further expounded by Mencius, has continued to serve as the paradigm and basis for further critical reflections. Because of this limited scope, the Confucian perspective on human rights that I reconstruct here is only one perspective in Confucianism. Confucianism is a long and complex tradition that certainly allows for more than one view of the subject.

But to what extent does Confucian thought constitute a lively cultural tradition in China today? To what extent can this philosophical thought be regarded as a cultural perspective, that is, a perspective that is generally endorsed by the Chinese and embodied in their way of life and practices? Confucianism was severely criticized and denounced in the 1960s and 1970s in Socialist China. Is there any hope that it will become an influential cultural perspective again? There are, I think, a few reasons for believing that Confucianism, perhaps in a modernized and reconstructed form, has the potential to become a main source for values and cultural regeneration, if not an influential cultural perspective as such. First, the ideology of Marxism has been discredited after the fall of the Soviet Union and the communist bloc in Eastern Europe. Today, although China remains officially committed to Marxism, it has become no more than lip service. China is in a moral and ideological crisis, and Confucianism as a cultural perspective seems most natural to fill the vacuum.

Second, with the end of the Cold War, nationalism has been on the rise. With Marxism being discredited in the international scene, China has seized nationalism as a strategy to reshape its image in the international scene and to rally for internal-political and moral cohesion. Recourse to cultural traditions is considered necessary to build up a national identity. In this regard, some high-level Chinese officials have openly acknowledged the need to learn from the past – the cultural and moral traditions of China.² In addition, recently there have also been some major academic conferences organized by semigovernmental bodies on the revival of Chinese traditional ethical thought, Confucianism in particular.³ Moreover, by the early 1990s a significant part of the Confucian ethic was already incorporated into the curriculum and the “behavior guidelines” for secondary and primary school students.⁴

This interest in Confucianism is not confined to a small group of politicians and academics in Beijing. At the provincial level, academics are even more enthusiastic than officials in promoting the study of Chinese history, traditional cultures, and philosophies. Numerous works have been published on traditional ethical thought. This phenomenon is present not only in a few provinces, but throughout the whole of China.

Finally, precisely because Confucianism is a potentially viable perspective but not yet a living tradition, and hence both its meaning and its concrete institutional content remain to be constructed, there is room for state officials to manipulate Confucianism for political purposes. Serious and open discussion on, for example, the relationship between Confucianism and human rights would help prevent politicians from hijacking Confucianism.

For these reasons, then, it is important to look at the relationship between Confucianism and human rights. Is Confucianism capable of embracing the modern idea of human rights, thus making it more familiar for Chinese culture? Or is Confucianism an obstacle for the promotion of human rights in China because its doctrines are inherently incompatible with the idea of human rights?

I attempt to answer these questions in the second and third sections. In the second section, “Four Alleged Confucian Reasons for Rejecting the Idea of

2. For example, Li Lanqing, vice premier and member of the Political Bureau in China, said that in developing Chinese ethics for the nation today, we ought to learn from the valuable ethical traditions developed in the last 5,000 years in China. Guojie Lou and Qizhi Zhang, eds., *Dongfang lunli daode yu qinshaonian jiaoyu* [Eastern Ethics and Education for the Youth] (Shanghai: Shanghai Education Publishers [in Chinese], 1994), pp. 1–2.
3. For example, an international conference on the theme of Eastern Ethical Traditions and Contemporary Youth Education, organized by some major educational bodies in China, was held in Beijing in 1993. Confucian ethics was the main focus in the conference.
4. For useful descriptions of this phenomenon, see the articles collected in Lou and Zhang, eds., *Dongfang lunli daode yu qinshaonian jiaoyu* [Eastern Ethics and Education for the Youth], pp. 324–31, 339–49, 347–58.

Human Rights,” I argue that the central doctrines of Confucianism, as represented by the thought of Confucius and Mencius, are compatible with the idea of human rights. In the third section, I argue that Confucianism may provide a justification for human rights, but this justification differs from the dominant strand in Western liberalism. One implication of this is that Confucianism would define the function and scope of some major human rights differently. In other words, although an overlapping consensus among the Confucian and other cultural perspectives might emerge through examination and dialogue on the existence of human rights, there will remain serious disputes over the justification and scope of those rights.⁵ In the final section, I draw together several points made in the earlier sections to form a Confucian perspective of human rights. I then illustrate its implications and significance with some concrete human rights issues. Let me emphasize, however, that in exploring the possibility of a Confucian perspective on human rights, I do not intend to claim that such a perspective is philosophically superior to other alternatives, such as liberalism.⁶ What I do wish to defend is a weaker claim – that such a Confucian perspective is philosophically plausible, and that because it is plausible, the Chinese may have a practical reason to prefer it to perspectives that are equally plausible but alien to their culture.

FOUR ALLEGED CONFUCIAN REASONS FOR REJECTING THE IDEA OF HUMAN RIGHTS

It has been a common view that Confucianism is incompatible with human rights. The view is not only that one cannot find the idea of human rights in Confucianism, but that any endorsement of the idea would go deeply against the Confucian view of human nature, ethics, and society. I concur with the first half of the statement, but I disagree with much of what has been said to support the second half. In this section, I argue that many key elements in Confucianism are indeed compatible with the idea of human rights. In arguing for this point, I shall cite and evaluate some common arguments to the effect that there are clear “Confucian” reasons for rejecting human rights. I have identified four of them and shall discuss these one by one.

5. For an illuminating discussion on the possibility of an overlapping consensus of different traditions on human rights – despite disagreement on the justification and scope of those rights – see Charles Taylor’s contribution to this book (Chapter 5).
6. This position reflects the spirit of an ecumenical approach. In fact, I believe that the general nature of human rights allows a plurality of interpretations of the basis, scope, and ranking of rights. For detailed arguments on this point, see Joseph Chan, “The Asian Challenge to Universal Human Rights: A Philosophical Appraisal,” in James Tang, ed., *Human Rights and International Relations in the Asia Pacific* (London: Pinter, 1995); and Joseph Chan, “Hong Kong, Singapore, and ‘Asian Values’: An Alternative View,” *Journal of Democracy* vol. 8 (1997).

Contextual Individuals and Role-Based Ethics in Confucianism

Some scholars of Confucianism think that any assertion of human rights must presuppose that human beings are *asocial* beings and have rights independent of culture and society. They argue that this presupposition goes against the Confucian view that human beings must live in society to become really human and to lead flourishing lives. For example, Henry Rosemont, Jr., claims that because human beings have rights regardless of personal characteristics such as cultural background, they can live independently of culture, and this clearly goes against the Confucian view of humanity. In any case it is extremely difficult from a Confucian perspective to imagine these bearers of rights, because there are no culturally independent human beings.⁷ Similarly, R. P. Peerenboom writes that because human rights are rights to which humans are entitled *from birth*, human beings must be thought of as beings "*qua* members of a biological species" and not "*qua* social beings," a view deeply incompatible with the Confucian one.⁸ Roger Ames also argues that Confucianism cannot accept human rights because they protect human interests, which are "independent of and prior to society."⁹

The problem with these arguments lies in their understanding of human rights and their presuppositions. Human rights are rights that people have solely by virtue of being human, irrespective of sex, race, culture, religion, nationality, or social position. But this concept of human rights does not presuppose or imply that human beings can be thought of as having none of these attributes. What it asserts is rather a *normative* claim: one's sex, race, or culture is morally irrelevant insofar as one's entitlement to basic human rights is concerned. Similarly, the concept of human rights does not imply that humans are asocial beings with interests independent of and prior to society, quite the contrary. The international charters of human rights include rights that protect those interests of an individual that are social in nature: Freedom of expression protects an individual's interest in communicating with others, especially in the public sphere; freedom of religion protects one's interests in joining religious associations. These rights show precisely that the concept of human rights presupposes the fact that human beings are social and cultural animals. We must not confuse the basis of individual rights with the content of those rights. It is the *individual's* interest,

7. See Henry Rosemont, Jr., "Why Take Rights Seriously? A Confucian Critique," in Leroy Rouner, ed., *Human Rights and the World's Religions* (Notre Dame: University of Notre Dame Press, 1988), p. 167.

8. See R. P. Peerenboom, "What's Wrong with Chinese Rights? Toward a Theory of Rights with Chinese Characteristics," *Harvard Human Rights Journal* vol. 6 (1993), p. 40.

9. See Roger T. Ames, "Rites as Rights: The Confucian Alternative" in Rouner, ed., *Human Rights and the World's Religions*, p. 205.

not *society's* interest, that justifies a human right, although the content of the individual's interest may be *social*.¹⁰

Critics may argue that the concept of human rights does imply that people have rights irrespective of their social roles, and this goes against the notion of contextual individuals and the role-based ethics in Confucianism. For them, Confucianism subscribes to a view of morality which precludes the ascription of duties (or rights, if any) to human individuals as such. We may call this view a *pure role-based view of morality*. According to this view, moral duties or rights arise solely from social relationships, such as familial relationships, friendship, and political associations. For example, most of the Confucian teachings are about how we should behave in the five basic social relationships (*lun*): father-son, husband-wife, elder brother-younger brother, ruler-ruled, and friend-friend. Indeed, many scholars go so far as to claim that in the Confucian morality, the very identity of human persons is constituted by nothing but a web of social relationships.¹¹ In this vein, Rosemont writes,

For the early Confucians there can be no *me* in isolation, to be considered abstractly; I am the totality of roles I live in relation to specific others. I do not *play* or *perform* these roles; I *am* these roles. When they have all been specified I have been defined uniquely, fully, and altogether, with no remainder with which to piece together a free, autonomous self.¹²

This understanding of human personhood and morality is endorsed by a number of scholars and is used as a reason to reject human rights. By their interpretation, because (1) human persons consist of a web of roles in personal relationships, and (2) the duties or rights human persons owe to one another are exhausted by their role-based duties, there is no room for any duties or rights that belong to human persons *simpliciter*, independent of their roles.¹³

I agree that Confucianism does place great emphasis on particularistic social relationships, but it is a mistake to view Confucianism as a *pure* role-based or relation-based view of human person and morality. The Confucian view is that human persons are first and foremost moral agents capable of realizing *ren*, which means, among other things, a certain ability or disposition to care for and sympathize with others. Although the sites for the realization of

10. For more discussion on this point and on the relationship between individual rights and common goods, see Joseph Chan, "Raz on Liberal Rights and Common Goods," *Oxford Journal of Legal Studies* vol. 15 (1995).

11. See Peerenboom, "What's Wrong with Chinese Rights?" pp. 44-5; Lee Seung-hwan, "Was There a Concept of Rights in Confucian Virtue-Based Morality?" *Journal of Chinese Philosophy* vol. 19 (1992), p. 256; and Ames, "Rites as Rights: The Confucian Alternative," p. 208.

12. See Rosemont, "Why Take Rights Seriously? A Confucian Critique," p. 177.

13. For examples of this interpretation, see Peerenboom, "What's Wrong with Chinese Rights?" pp. 44-5; and Lee, "Was There a Concept of Rights in Confucian Virtue-Based Morality?" p. 256.

ren are commonly found in personal relationships such as those of father-son and husband-wife, there are nonrelational occasions when moral actions are also required by *ren*. That is to say, not all moral duties in Confucianism arise from social institutions or relationships. There are strong nonrelational elements in the Confucian morality. Consider a few examples:

1. A clear example of the expression of *ren* in a nonrelational or noninstitutional situation is Mencius's example of a child on the verge of falling into a well.¹⁴ For Mencius, a man with *ren* would be moved by compassion to save the child, not because he had personal acquaintance with the child's parents, nor because he wanted to win the praise of his fellow villagers or friends, but simply because of his concern for the suffering of a human person. Mencius's point is that no man is devoid of *ren* – which means, among other things, a sensitivity to the suffering of others. These "others" are not confined to those personally known. Rather they may include all people within the "Four Seas" – everywhere in the world.

2. In another place, Mencius says that "a gentleman retains his heart by means of benevolence (*ren*) and the rites (*li*). The benevolent man loves others, and the courteous man respects others."¹⁵ Again, in the passage the "others" are unspecified. This same notion of loving others including all men can also be found in Book VII of *Mencius*, where Mencius says that "a benevolent man loves everyone, but he devotes himself to close association with good and wise men."¹⁶

Of course Mencius's notion of the potentially unlimited scope of benevolence was adopted from Confucius. Confucius says clearly that to be benevolent (*ren*) is to "love your fellow men."¹⁷ James Legge's translation better captures the meaning of the phrase, which is "to love *all men*."¹⁸ Confucius also teaches young men to learn to "love the multitude at large."¹⁹

3. There is another important moral teaching in Confucianism that is applicable not only to close personal relationships but to everyone: "Do not impose on others what you yourself do not desire."²⁰

It should now be clear that Confucianism does not hold a purely role-based view of morality. There are clearly nonrelational aspects in Confucian ethics. Of course, nothing said thus far shows that Confucianism recognizes

that human individuals have rights irrespective of their roles. Rather, it shows that the argument for the charge that Confucianism is unable to accommodate universal human rights is unsound, for it is based on a false premise, namely, that Confucianism subscribes to a purely role-based view of morality.

The Confucian Ideal of Community

It is commonly thought that the Confucian ideal of society is basically of the family writ large. As pointed out by many scholars, although three of the five basic human relationships belong to the family (father-son, husband-wife, and elder brother-younger brother), the other two (ruler-ruled and friend-friend), though not familial, are modeled after familial relationships.²¹ What characterizes the ideal family is mutual love and caring between members. A virtuous son would regard the well-being of his family members as part of his own well-being, and so would a virtuous father. In this ideal of the family, rights talk is inappropriate, for the reason that

Confucianism emphasizes that a genuine community is not composed of mutually disinterested egoistic individuals, but is composed of virtuous members thinking of shared goals and values over one's own. . . . In this ideal community, the highest moral virtue is *jen* [*ren*] (benevolence) when expressed in an active form; "overcoming one's selfishness" in a passive form.²²

Accordingly, any assertion of human rights would be premised on the view that human beings are egoistic, a tendency that should be protected rather than curbed. This view, it is argued, runs counter to the Confucian ideal of familial relationships. By extension, human rights would be incompatible with the larger society of which the family is the microcosm.

This argument is, however, based on an erroneous view of human rights. Human rights does not depend on the notion that human beings are egoistic, totally unconcerned with the well-being of others. Human rights protect legitimate interests of individuals. We must distinguish between "*self-interest*" and "*selfish interests*." For example, people have a self-interest in not being tortured or raped, but this interest is obviously not selfish. Unlike what Marx proclaims, human rights need not be the rights of "egoistic men." A person defending his right to not be tortured by others is surely not acting egoistically or selfishly.

For human rights to be asserted, then, only two claims need to be assumed:

(1) Every individual has certain legitimate self-interests that he or she ought

21. Lee, "Was There a Concept of Rights in Confucian Virtue-Based Morality?" p. 253.

22. Lee, "Was There a Concept of Rights in Confucian Virtue-Based Morality?" p. 252.

14. D. C. Lau, trans., *Mencius* (Harmondsworth: Penguin Books, 1970), book II, part A, chapter 6; referred to hereinafter as *Mencius* IIA:6. Unless otherwise stated, all translations of *The Analects* and *Mencius* are taken from D. C. Lau, trans., *Confucius: The Analects* (Harmondsworth: Penguin Books, 1979), and Lau, trans., *Mencius*, respectively.

15. *Mencius* IVB:28.

16. *Mencius* VIIA:46.

17. *The Analects* XII:22.

18. See James Legge, trans., "Confucian Analects," in Legge, *The Chinese Classics* vol. I (Hong Kong: Hong Kong University Press, 1960), p. 269 (italics in original).

19. *The Analects* I:6.

20. *The Analects* XII:2, XV:24.

to be allowed to protect, and (2) not all individuals are altruistic enough to sacrifice their own legitimate interests for the sake of others. The first claim makes human rights possible; the second gives them importance.²³ Clearly, these claims do not imply that human beings are egoistic or selfish.

However, one might still suspect that even these two weaker presuppositions of human rights are incongruous with the spirit of the Confucian community. For Confucians, people in close personal relationships should not even think of themselves as subjects possessing rights upon which they make claims against their partners. Rather they should think of themselves as participating in a relationship of reciprocal commitments, or of mutual caring and love. To introduce considerations of rights is inappropriate to this relationship, because this would motivate us to see other members' interests more as limitations on ours than as interests we wish to promote.²⁴

I am sympathetic to this view that rights do not play an important role in virtuous relationships. I agree that in a healthy, close relationship parties should best ignore rights and focus on mutual caring and love. But what if the relationship turns sour? Do we need rights to repair it? Probably not, since it would still be best to repair the relationship by refreshing the partners' commitment to the ideal of mutual caring, rather than by invoking rights.²⁵ If the relationship breaks down to a point of no return, would rights not be relevant and useful to protect the parties' interests? Consider the example of the breakdown of a marriage. If a husband's love for his wife has died and in many ways he has harmed her interests, it would be highly desirable and even necessary for the wife to have formal and legal rights (marriage rights as well as human rights) to fall back on in order to protect her interests.²⁶

Thus, there is reason to give rights a role even in familial relationships, and I think Confucianism would endorse rights in this sense. No ethics of benevolence and care would seek to diminish the needs of individuals. After all, when we care for a person, *what* are we supposed to care for if not that person's needs and interests? If an assertion of rights is sometimes necessary to protect important individual interests, then there is no reason why Confu-

23. It could perhaps be argued that rights may be necessary even in an altruistic society, because people may have morally divergent or even unacceptable views about what human interests consist of and how they should be promoted. Invasion of a person's legitimate interests can come from blind, obsessive love as well as selfish egoism.

24. See Hugh LaFollette, *Personal Relationships: Love, Identity and Morality* (Oxford: Blackwell, 1996), p. 146.

25. LaFollette, *Personal Relationships*, p. 146.

26. The notion of rights as a fallback apparatus is taken from Jeremy Waldron, "When Justice Replaces Affection: The Need for Rights," in Waldron, *Liberal Rights* (London: Cambridge University Press, 1993), p. 374.

ianism would prohibit it. If familial relationships require rights as a fallback position, all the more reason to support the greater community by maintaining an apparatus of rights. The Confucian community is not a community composed *entirely* of close personal relationships. The relationships between ruler and ruled and between strangers are not personal relationships, for example. In the workplace, the market, the government, the court, and other less personal social spheres, people do not interact according to the norms of close personal relationships. Rights talk need not be destructive of the relationships in these contexts. And ultimately, rights are important instruments for the vulnerable to protect themselves against exploitation and harm.

Nonetheless, a Confucian perspective might not want to give human rights a role greater than that of a fallback apparatus. Rights constitute neither human virtues nor virtuous relationships. This point has important implications for a current, popular trend of rights talk in some Western countries such as the United States. There has been a strong tendency for some Western liberals to adopt an inflated view of rights, and this tendency ought to be resisted. Some liberals argue that even the most valuable forms of mutual caring and love can flourish only in a relationship based on rights.²⁷ Simon Caney argues that "benevolence as a virtue is more desirable if based on knowledge of one's rights and entitlements. It has a greater degree of intentionality."²⁸ The claim is contestable, however. It amounts to saying that the life of Mother Theresa would not be as desirable had she no knowledge of rights – a counterintuitive claim. John Tomasi gives the following example to support Caney's general point:

Imagine a marriage relation in which one spouse is utterly deferential to the other. Consider a "deferential wife" whose most every act toward her husband would be perceived by others as being beyond her reasonable duty, as being – apparently, at least – supererogatory (we could as easily imagine a "husband"). However uncomfortable, she nonetheless always wears clothes she knows he prefers; however much they annoy her, she always invites guests he enjoys; however ill suited for her schedule, she always rises and retires when he does. . . . It seems clear that the deferential wife . . . does not act in a way properly called virtuous. . . . She does not recognize that she is most often in a good position to act otherwise; she has forgotten – and likely would prefer not to be reminded – that she even has rights.²⁹

27. Simon Caney, "Sandel's Critique of the Primacy of Justice: A Liberal Rejoinder," *British Journal of Political Science* vol. 21 (1991), p. 517; John Tomasi, "Individual Rights and Community Virtues" *Ethics* vol. 101 (1991), pp. 532–3; and Joel Feinberg, *Freedom and Fulfillment* (Princeton, NJ: Princeton University Press, 1992), p. 238.

28. See Caney, "Sandel's Critique of the Primacy of Justice," p. 517.

29. See Tomasi, "Individual Rights and Community Virtues," p. 533.

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One may agree with Tomasi that, in the example, ~~the wife is deficient, lacking self-respect or self-worth.~~ The basis of self-respect, however, need not lie in the fact that she has rights (although she does), but in the belief that she is worthy of care and concern and that her well-being matters. So she has a legitimate basis to complain about her husband, but the basis need not be that the husband ignores her *rights*. A more appropriate basis is the very ideal of mutual caring and love – that the husband is not caring toward her and is not recognizing her needs and aspirations.³⁰ The wife need not think in terms of rights to assess the relationship. In fact, once she thinks in these terms, she starts distancing herself from the persons on whom she may press her claims. What she ought to do in the first place, in the Confucian view, is rather to reaffirm and remind her husband of the ideal of mutual love and caring.

Hierarchy and Paternalism in Confucianism

For some scholars, the Confucian conception of personal relationships advocates hierarchy and submission. Individuals in the five basic relationships are unequal. "The power to enjoy one's personal and public interests was limited and graded in accordance with his/her social status and relational standing."³¹ Consider the example of the duties of children in a father-son relationship. According to some interpretations, the Confucian view of *xiao* (filial piety) preaches submission of children (young or adult) to their parents (the father in particular). A son is expected to follow every instruction of his father, however unreasonable it may be. According to this interpretation, a Confucian view of human relationships would reject human rights even if they are intended as a protective apparatus for family members.

There might be a certain element of truth in this interpretation of Confucianism. But first, it is essential to separate early Confucianism from the later developments of Confucianism on this issue. Most if not all of the teachings on absolute obedience or hierarchy in familial relationships date from the later developments during and after the (Han dynasty) – for example, the teaching of *san gang*, which preaches the absolute authority of the husband over his wife and children and the absolute authority of the ruler over the

30. Some might say that the husband violates the norm of reciprocity, which is one form of fairness. But reciprocity, as I understand it, is a minimum notion embedded in many kinds of ethics. One can say that the ideal of mutual caring and love, and Confucius's notion of *shu* – not to impose on others what we ourselves do not desire, and to establish and enlarge others insofar as one seeks to establish and enlarge oneself – embodies some notion of reciprocity. In any case, reciprocity as a form of "fairness" is still very different from the notion of a right.

31. See Lee, "Was There a Concept of Rights in Confucian Virtue-Based Morality?" p. 251.

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ruled. Further, as will be explained later, Confucius's own teaching might appear to imply children's submission to their parents. But even according to Confucius thought, there is reason to reject this kind of teaching. The reason lies in the perspective of *ren* in understanding basic human relationships and their associated virtues. Let us take filial piety as an example. For Confucius, *ren* is the basis of all human virtues. The family is the most natural and important site for the exercise of *ren*. How does *ren* bear on the understanding of filial piety? Several points are in order.

First, *ren* means, among other things, to love people.³² It requires us to show concern and respect to people. To treat our parents with *ren*, we should not only provide them with food but also treat them with concern and respect. "[E]ven hounds and horses are, in some way, provided with food. If a man shows no reverence [to his parents], where is the difference?"³³ Second, a filial son with *ren* would be concerned with his father's *ren* as well. He would want his father to act according to *ren*. Thus he would not want to obey the unreasonable or immoral instructions of his father, for so doing would reinforce his father's indulgence in vices. Filial piety should not be stressed at the expense of *ren*. Third, *ren* also requires that the parents love their children, to promote their well-being (*ci*, paternal love). *Ren* also implies the principle of reciprocity: We should not impose on others that which we do not desire.³⁴ If this reciprocity could be applied to a relationship with different roles, then we could say that a virtuous father should not impose on his son what he would not desire if he were in his son's position.

We can now see how Confucius's teaching of filial piety can be criticized from his own perspective of *ren*. According to one interpretation, Confucius says that a son should be obedient to his parents even if his parents are doing wrong and do not pay heed to the son's advice.

The Master said, "In serving your father and mother you ought to dissuade them from doing wrong in the gentlest way. If you see your advice being ignored, you should not become disobedient but remain reverent. You should not complain even if in so doing you wear yourself out."³⁵

The first part of the passage shows that in Confucius's view, children should care about the moral character of their parents. Thus the perspective of *ren* is implicit in this passage. But the second part of the passage does not seem to take the perspective far enough. It makes the mistake of placing reverence above *ren* – asking the son to let or even help his parents act against *ren*.

However, there is a more charitable interpretation of the passage. By this

32. *The Analects* XII:22.

34. *The Analects* VX:24.

33. *The Analects* II:7.

35. *The Analects* IV:18.

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interpretation, the key phrase "not disobedient" is not the only possible translation of the Chinese *bu wei*. James Legge notes that *bu wei* may mean "not abandoning his [the son's] purpose of remonstrance," rather than "not daring to go against the mind of his parents."³⁶ If this interpretation is accepted, then the passage does not support the claim that Confucius advocates absolute obedience. Rather, it supports the *ren* perspective of filial piety.

To conclude the argument thus far, if one subscribes to a *ren*-based view of filial piety, one should rule out absolute obedience as a norm of filial piety.³⁷ This point holds for other familial relationships. Whatever the specific norms of these relationships, they should be grounded in and constrained by principles of *ren*. In short, *ren* requires mutual love and excludes self-centered or selfish domination of one party over another.

However, critics may still find that this argument thus far does not fully answer the objections. Although one may agree that familial relationships should be grounded in and constrained by *ren*, there are specific norms of these relationships that may be congruent with *ren* but nonetheless violate certain human rights. Take the example of arranged marriage. This practice, widely observed in traditional China, does not seem to violate *ren* but is certainly incompatible with the human right to freely choose a partner in marriage.

How should we respond to this objection? Although *ren* does set some theoretical limits to filial piety, whether its many specific norms are required by *ren* would depend on cultural norms and social contexts. Confucius holds that to be filial is to comply with rites (*li*) in serving one's parents when they are alive and in burying them when they die.³⁸ Confucius lived in a feudal society in which many norms or *li* placed great demands and limitations on children. For example, according to *li*, a filial son is required to follow his father's footsteps and life ambitions for three years after his father's death.³⁹ But we need to bear in mind that for Confucius, *li* should come after *ren*.⁴⁰ Confucius displays a humanistic attitude toward *li*: "What can a man do with the rites who is not benevolent [*ren*]? What can a man do with music who is not benevolent?"⁴¹ Certain rites may be required by *ren* in certain social or economic situations, but they should be changed when the situation changes in such a way that they no longer help or express *ren*. Confucius also says that a virtuous person, in applying principles, should be able to weigh

36. Legge, trans., "Confucian Analects," pp. 170-1.

37. Notice that the point is not meant to support general equality in the family. From the Confucian perspective, some inequalities in the family may be appropriate. For example, the elderly should be treated with reverence or more respect. They may have greater decision-making power on certain common affairs in the family.

38. *The Analects* II:5.

40. *The Analects* III:8.

39. *The Analects* I:11, IV:20.

41. *The Analects* III:3.

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the exigencies of the times and circumstances.⁴² This line of thought could be used to analyze the case of arranged marriage in modern society. Rather than pursuing further this particular case, I want to examine the general theoretical question behind the criticism.

The theoretical issue seems to be that although *ren* may rule out selfish domination, it may not rule out paternalism – coercion aimed at improving the well-being of the coerced. A theory with strong paternalistic elements would find it difficult to accept some of the basic liberties that human rights protect. Theoretically, a strong emphasis on care and concern might lead to paternalism. Indeed Confucianism is often criticized as being too paternalistic and not giving enough recognition to individual autonomy. In reply to this objection, I want to make two points. First, as a matter of history, paternalism was widely practiced in ancient China as in other parts of the world in ancient times. But as a matter of theory, to my knowledge I do not find, in *The Analects* at least, any endorsement of any recommendation or principle equivalent to paternalism, except in the controversial passage about filial piety discussed earlier. It is very important to distinguish a theory that has a high propensity to lead to paternalism from a theory that affirms paternalism as a comprehensive policy or principle. Endorsement of human rights contradicts a theory of the latter kind – you cannot inject human rights into that theory without abandoning its paternalistic principles – but I believe Confucianism is closer to the first type and no "surgery" is needed for Confucianism to incorporate human rights. It might be true that Confucianism has a high propensity to lead to paternalism because of its ethic of care and emphasis on the moral life and because of its relatively weak emphasis on individual liberty. But if this is true, it demonstrates that Confucianism has an *internal need* for human rights – if human rights were incorporated, it would be less likely for Confucianism to slide into paternalism. Such incorporation need not involve uprooting or taking away any central value or principle in Confucianism.

What I have said may still not be sufficiently sympathetic to Confucianism, and this is my second point. Confucius not only does not affirm the use of force to promote people's virtues or well-being, he explicitly discourages it. In many kinds of relationships, such as ruler-ruled, father-son, friend-friend, and even the relationship between culturally superior and inferior groups, Confucius does not recommend the use of force in changing or transforming people's lives or in preventing morally bad people from corrupting others. Instead he persistently asks those in a superior position – the ruler, the father,

42. *The Analects* IX:30.

the culturally superior group – to behave themselves and to set a moral example for others:

Chi Kang Tzu asked, "How can one inculcate in the common people the virtue of reverence, of doing their best and of enthusiasm?" The Master said, "Rule over them with dignity and they will be reverent; treat them with kindness and they will do their best; raise the good and instruct those who are backward and they will be imbued with enthusiasm."⁴³

Confucius gives similar advice to rulers who want to rule over the "barbarians," people living far away from the central regions of China and having a low level of cultural and moral achievement: you should cultivate your own moral quality in order to attract people to settle in your territory, and once they have come you should make them content⁴⁴ More will be said on the aversion to coercion in Confucianism in the next section. Suffice it to say that while there may be elitism in Confucianism, there is no recommendation for paternalism.

The Nonlitigious Nature of Confucian Society

The fourth "Confucian" reason for rejecting human rights is that the appeal to rights would turn social relationships from harmonious to conflictual or litigious. The Confucian ideal of social harmony emphasizes the virtues of concession and yielding rather than competition and self-assertion. "Anyone who is overly contentious, self-assertive, quarrelsome or litigious is considered contemptible. A virtuous Confucian man is one preoccupied himself with self-overcoming and yielding, not one with claiming and asserting what he is entitled to."⁴⁵

I agree that Confucianism would, if possible, prefer to avoid the use of litigation or rights instruments. Confucius says: "In hearing litigation, I am no different from any other man. But if you insist on a difference, it is, perhaps, that I try to get the parties not to resort to litigation in the first place."⁴⁶

The recourse to rights and litigation often implies that *li* or virtuous relationships have already broken down. Thus, in the case of conflict, we should first try to compromise in a way still faithful to the ideal of mutual caring and love. But in this passage Confucius does not say that litigation should be avoided absolutely or at all costs. As argued earlier, when people no longer act according to virtues or *li* – when they harm others, for example, there is a need for us to fall back on rights to protect our legitimate interests. More

43. *The Analects*, II:20; also III:3, 26; XII:19, 23; XIII:4; XV:14.

44. *The Analects* XVI:1.

45. See Lee, "Was There a Concept of Rights in Confucian Virtue-Based Morality?" p. 255.

46. *The Analects* XII:13.

important, and Confucius does *not* say that we should always yield to others at all times, even when we are unjustly harmed. There is a passage that may correct this popular misunderstanding of Confucius:

Someone said, "What do you say concerning the principle that injury should be recompensed with kindness?" The Master said, "With what then will you recompense kindness? Recompense injury with justice [*chih*, or straightness], and recompense kindness with kindness."⁴⁷

When we are wronged, injured, or harmed by others, Confucius says that it would be appropriate to react by recourse to fairness or justice. The preference for mediation, reconciliation, and compromise implies neither that human beings do not have rights nor that they should never use them to protect themselves when harmed. This said, the Confucian preference for non-legal methods of conflict resolution is worth mentioning in the contemporary discourse of human rights. As Peerenboom writes,

Although far from perfect, traditional methods [of conflict resolution] such as mediation offer many advantages. Both parties save face, fully participate in the proceeding, and shape the ultimate solution. The process, usually faster and cheaper than more formal methods, allows for a more particularized justice and for the restoration of social harmony, with both sides feeling they have received their due.⁴⁸

In fact, for our purposes the concern for nonlitigation can be understood as an objection not to human rights as such but to the abuse of rights. But in order not to abuse rights, we need a theory of virtues to guide right holders in the exercise of their rights. Confucianism, being a rich theory of virtues, precisely complements a theory of human rights in this regard.⁴⁹

THE GROUNDS AND CONTENT OF HUMAN RIGHTS – A CONFUCIAN PERSPECTIVE

Thus far I have argued that Confucianism as represented by Confucius and Mencius need not reject the idea of human rights. But would Confucianism endorse the specific rights commonly found in contemporary human rights charters? How would it understand the scope and limits of these rights? In

47. *The Analects* XIV:36, from Legge, trans., "Confucian Analects."

48. See Peerenboom, "What's Wrong with Chinese Rights?" p. 55.

49. Space does not permit me to elaborate on this point. For more discussion, see Jeremy Waldron, *Non-sense Upon Stilts* (London: Methuen and Co., 1987), p. 194; Michael J. Meyer, "When Not to Claim Your Rights: The Abuse and the Virtuous Use of Rights," *The Journal of Political Philosophy* vol. 5 (1997), pp. 149–62; and especially Lee Seung-hwan, "Liberal Rights or/and Confucian Virtues?" *Philosophy East and West* vol. 46 (1996), pp. 367–79. Regrettably, the last article, which gives a very interesting analysis of the relationship between Confucian virtues and liberal rights, came to my attention only after this chapter was essentially completed.

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this section I will show in what ways Confucianism's answers to these questions differ from some typical liberal ones. (Whether the former answers are better than the latter is a different question.)

✓ *Freedom to Choose the Good*

Would Confucianism endorse modern human rights, such as the right not to be tortured, the right to fair trial, freedom of expression, freedom of religion, freedom of association, and so on? It is understandable why Confucianism would not reject the right not to be tortured and the right to fair trial. As explained earlier, the Confucian perspective would take rights as a fallback auxiliary apparatus that serves to protect basic human interests in case virtues do not obtain or human relationships clearly break down. A man with *ren* would be sensitive to the sufferings of others.

How about those traditional civil liberties that liberals cherish? The Confucian perspective on this question is somewhat more complicated.⁵⁰ I want to argue for three points: (1) The Confucian perspective would endorse basic civil liberties or rights such as freedom of expression and religion, (2) but its understanding of the scope of these liberties would be different from some Western, rights-based perspectives, and (3) the two perspectives differ on the justification of civil liberties. To illustrate these points, consider the right to freedom of expression as an example.

Neither Confucius nor Mencius explicitly (or even implicitly) advocated freedom of expression or any equivalent state policy. However, a Confucian perspective would have a reason, albeit an instrumental one, to endorse freedom of expression. Both Confucius and Mencius hold that social and political discussion and criticism are necessary to prevent culture and politics from degenerating. For example, Confucius justifies political speech in terms of its contribution to healthy politics:

✓ If what [a ruler] says is not good and no one goes against him, then is this not almost a case of a saying leading the state to ruin?⁵¹

✓ Mencius also finds that ministers have the duty to criticize the ruler for wrongdoing:

If the prince made serious mistakes, they [ministers] would remonstrate with him.⁵²

50. In this chapter I do not discuss whether a Confucian perspective would endorse political rights: the right to vote in a free election, political equality, or democracy in general. A serious discussion of this issue requires a separate study.

51. *The Analects* XIII:15; see also XIV:7; XVI:1.

52. *Mencius* VB:9.

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One might think that, in these passages, Confucius and Mencius ask only those holding public office (ministers) to perform the task of admonishing the ruler, and so freedom of expression should be confined to them alone, but this is not true. Neither Confucius nor Mencius were state officials, but they were active in speaking publicly to criticize current politics and schools of thought. Mencius was once asked why he was fond of disputation. He replied that he was not but had no alternative, because the schools of Yang and Mo had a perverse effect on people's minds, morality, and politics. He also said that Confucius himself composed the *Spring and Autumn Annals* in order to counsel the sovereign and people of his time.⁵³

If the way of Yang and Mo does not subside and the way of Confucius is not proclaimed, the people will be deceived by heresies and the path of morality [benevolence and righteousness] will be blocked. . . . What arises in mind will interfere with policy, and what shows itself in policy will interfere with practice. . . . I am not fond of disputation. I have no alternative. *Whoever can, with words, combat Yang and Mo is a true disciple of the sages.*⁵⁴

In the last sentence, Mencius even invites people to publicly challenge the thoughts of Yang and Mo.

This does not prove that Confucius and Mencius valued free speech as such, nor is this my intention. What it shows, rather, is that both of them saw the importance of speech in politics and culture. Now if, as an empirical claim, it is true that freedom of speech in the long run helps society to correct wrong ethical beliefs and to prevent rulers from indulging in wrongdoing, then a Confucian perspective would endorse freedom of political speech. In short, if freedom of expression is generally conducive to the flourishing of these practices and hence to the pursuit of *ren*, there is no reason why the Confucian perspective would reject it outright.

Let me add two brief remarks on the nature of this justification of freedom of expression. First, this justification is only indirectly individualistic. The ultimate goal in the Confucian perspective is the attainment of *ren* for each and every individual rather than the glorification of the state or the ruler. In this sense, the justification of freedom of expression is individual oriented. But the immediate justification is its contribution to social, cultural, and political activities, the flourishing of which helps promote *ren*. In this immediate sense, the justification appeals to the social good rather than the individual good.

Second, the justification is a perfectionist one, in the sense that it takes an ethical good to be the goal promoted by the state. Freedom of expression is

53. *Mencius* IIB:9.

54. *Mencius* IIB:9 (italics added).

then justified on the ground that it serves, in the long run, to promote that goal. In terms of its structure, this justification is similar to the perfectionist-instrumental justifications of freedom of expression in Western political philosophy.⁵⁵ The Confucian justification differs primarily in its specification of the ethical goal – *ren* in this case. But this perfectionist-instrumental justification differs from the rights-based justification proposed by some liberal philosophers. This can be seen from the way these two types of justification differ on the question of “tolerating the bad.”

Tolerating the Bad

Although the Confucian perspective does offer some justification for civil liberties or rights, some might criticize this justification as being moralistic and thus seriously limited. According to the Confucian perspective, the criticism goes, we have rights only insofar as we use them to promote the ethical life or *ren*. The Confucian perspective would find it hard to recognize the rights of people who would use them to promote the bad instead of the good. Thus we should not have the right to publish pornography or to express views or lifestyles that are considered morally corrupt or debased, even if they do not harm others. As a well-known Chinese scholar, Hsieh Yu-Wei, wrote on Confucian ethics in 1960s, we have freedom to choose the good or to develop our humanity or one's true self, but this freedom is not extended to choosing the bad: “On condition that we choose within the limits of goodness, we can choose freely. Outside the limits of goodness, one should not be free. . . . Whatever freedom you want, you should not violate this ethical principle of freedom to choose the good.”⁵⁶

Many human rights scholars in the West would find this view unacceptable. They think that individuals have the right to express their thoughts whatever the content, as long as the expression does not harm others. For example, Thomas Nagel writes,

My objection to the censorship of pornography . . . is [that the danger is] quite out of proportion to the actual harm done by such prohibitions. . . . I am aware that life without pornography is perfectly livable. . . . But that is just the point. It is not the consequences, but the idea that state power *may* be legitimately used in

55. See, for example, John Stuart Mill's *On Liberty*, which has a strong perfectionist justification of freedom of expression (though it has some other justifications as well), and T. H. Green's moral and political philosophy. For contemporary perfectionist-instrumental justifications, see Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), chapter 10; and Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1993), chapter 7.

56. See Hsieh Yu-wei, “The Status of the Individual in Chinese Ethics,” in Charles A. Moore, ed., *The Chinese Mind* (Honolulu: University of Hawaii Press, 1967), p. 313.

such ways that seems grossly wrong. . . . They simply have no right to control people in that way.⁵⁷

Nagel bases his claim on the notion of the moral status of individuals: Each is equal as a moral being and should enjoy substantial personal independence, immune from coercion by the will of others.⁵⁸ Joel Feinberg, another liberal philosopher defending the right to produce pornography, bases his claim on the idea that individuals are sovereign in their personal affairs. The notion of “sovereign individuals” is suggested by “the language of international law in which autonomous nation-states are said to have the sovereign right of self-determination.”⁵⁹ Just as a sovereign state rules over its territory, onto which no other state can trespass, a sovereign individual rules his or her own life and actions (so long as the actions do not harm others). Notice that, for Feinberg, personal sovereignty, like state sovereignty, is “an all or nothing concept; one is entitled to absolute control of whatever is within one's domain however trivial it may be.”⁶⁰ This right to personal sovereignty thus forbids external intervention that is *not* based on other-regarding reasons such as the prevention of harm or offense to others.

This is one type of liberal justification of civil rights (which is, arguably, also a politically influential vision of public morality in the United States).⁶¹ Civil rights are not only instrumentally useful, they express the very idea of the moral status of individuals understood in terms of personal independence or individual sovereignty. The scope of civil rights should be very wide, and the only reason for limiting them should be the prevention of harm to others. By this liberal perspective, Confucianism does not take individual rights seriously enough. “To admit the right of the community to restrict the expression of convictions or attitudes on the basis of their content alone is to rob everyone of authority over his own mental life. It makes us all, equally, less free.”⁶²

Here lies the main difference between the Confucian perspective and this brand of liberal one. The liberal ideal of individual sovereignty or independence seems entirely foreign to Confucianism. Does this therefore indicate that the Confucian perspective is deficient? In my opinion, it is essential to

57. See Thomas Nagel, “Personal Rights and Public Space,” *Philosophy and Public Affairs* vol. 24 (1995), pp. 95–9.

58. Nagel, “Personal Rights and Public Space,” p. 94.

59. See Joel Feinberg, *Harm to Self* (Oxford: Oxford University Press, 1986), p. 47.

60. Feinberg, *Harm to Self*, p. 55.

61. For a detailed account of how this brand of liberalism developed in the United States, see Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996).

62. See Nagel, “Personal Rights and Public Space,” p. 99.

distinguish two views: (1) in general, debased acts (which are harmless to others) should not be prohibited by law, and (2) individuals have the moral right to say or do debased things (if they are harmless to others).⁶³ The liberal, individualist perspective of the kind just discussed justifies (1) by means of (2), whereas the Confucian perspective might be inclined to accept (1), though not (2).

The Confucian perspective would not adopt the strong view of individual moral rights as expressed in (2). As said earlier, this strong view is based on the notion of individual sovereignty or independence. Confucians would find it hard to accept this notion. They might accept the notion of moral autonomy, which means that individuals should be autonomous in moral deliberation and in making moral choices.⁶⁴ However, moral autonomy is valuable because it is a constitutive part of the moral life. The moral or ethical life is valuable in itself; moral autonomy, being a constitutive part of the moral life, is also valuable. For the Confucians, then, individual sovereignty would be of no value if it is used in the pursuit of the bad rather than the good.⁶⁵ Individuals have civil rights or liberties not because they are grounded in personal sovereignty but because (1) they have important interests in developing their humanity or *ren* in all of its personal, social, cultural, and political dimensions, and (2) these interests can best be served by protecting civil rights or liberties. These rights are not to be intended as an excuse or protection for moral decay. Individuals do not have the basic moral right to moral wrongdoing (in the self-regarding sense).

Some might think that the view that individuals have no basic moral right to moral wrongdoing may easily justify legal suppression of civil liberties, especially when people misuse their liberties to pursue the bad. However, Confucians do not favor the use of legal coercion to foster virtues or prevent people from indulging in the bad or debased. Confucius reckons that legal punishment cannot change one's heart or soul; only rites can. "Guide them by edicts, keep them in line with punishments, and the common people will stay out of trouble but will have no sense of shame. Guide them by virtue, keep them in line with the rites, and they will, besides having a sense of shame, reform themselves."⁶⁶

One cannot be compelled by force to be virtuous. To live a genuinely virtuous life, the agent must see the point of that life – he or she must endorse the virtues and be motivated to live by virtues and to enjoy that life. "One who is

63. For a similar distinction, see George, *Making Men Moral*, chapter 4.

64. See also Benjamin Schwartz's discussion of moral autonomy in Confucius's thought, *The World of Thought in Ancient China* (Cambridge, MA: Harvard University Press, 1985), p. 113.

65. This view is not uniquely Confucian. It is shared by Raz, *The Morality of Freedom*, pp. 378–90, and George, *Making Men Moral*, chapters 4 and 5.

66. *The Analects* II:3.

not benevolent cannot remain long in strained circumstances, nor can he remain long in easy circumstances. *The benevolent man is attracted to benevolence because he feels at home in it.*⁶⁷ The cultivation of virtue is done through education and practice in rites – it is rites, not physical force, that make people feel at home with virtue. This point bears on personal freedom as absence of coercion. To act virtuously, we must act for the right reason. Avoidance of punishment is not a reason for virtuous action. The law is thus not a good instrument of moral edification. Anyone recognizing this point would want to limit the scope of criminal law. Neither should punishment be used to prevent the bad from influencing the good, for Confucius thinks that the best method is still moral edification by example, and he urges the rulers to set a good example.

Lord Ji Kang asked Confucius about government, saying: "Suppose I were to kill the bad to help the good: how about that?" Confucius replied: "You are here to govern; what need is there to kill? If you desire what is good, the people will be good. The moral power of the gentleman is wind, the moral power of the common man is grass. Under the wind, the grass must bend."⁶⁸

Confucius puts demanding standards of moral behavior on the rulers and gentlemen, not the common people. This is consistent with the general spirit of tolerance in Confucianism – "to set strict standards for oneself, and make allowances for others."⁶⁹ Confucian tolerance is not grounded in liberal values like personal independence or sovereignty or any notion of a moral right to wrongdoing. It is based on sympathy, on the view that coercion is ineffective in promoting *ren*, and on a particular approach to moral edification.

CONTEMPORARY RELEVANCE OF THE CONFUCIAN PERSPECTIVE OF HUMAN RIGHTS

The main elements of the Confucian perspective of human rights can be summarized as follows:

1. There are human rights that protect important interests in *ren* or humanity.
2. Such protection should be seen as a fallback apparatus: Rights are important when virtues fail to obtain or personal relationships break down.
3. Human rights should not be inflated, that is, they should not be considered constitutive of valuable personal relationships or necessary for

67. *The Analects* IV:2 (italics added).

68. *The Analects* XII:19, from Simon Leys, trans., *The Analects of Confucius* (New York: W. W. Norton and Company, 1997).

69. *The Analects* XV:15.

the display of virtue and they should not be intended to offer protection for debased acts as well as good ones.

4. Rights instruments should be the last means to resolve conflicts.

With regard to the significance of a Confucian perspective for contemporary human rights issues, one must take into consideration a range of normative, practical, and historical factors before one can judge. I hope to show, albeit briefly, that this perspective does clarify some genuine concerns. I shall consider two issues related to the jurisprudence of human rights, namely, the constitutional protection of freedom of expression and the rights of the elderly.

Jurisprudence of Human Rights: The Case of Freedom of Expression

From a Confucian perspective, human rights do not include the right to say or do immoral things. This view has important implications for the jurisprudence of human rights. Modern bills or charters of rights include the right to free expression, but what forms of speech or expression should be protected by this right? From a liberal, individualist view, many forms of speech should be stringently protected (except those that cause clear and distinct harm to others such as libel). In the case of the United States, freedom of expression receives almost absolute protection in the Constitution. However, Confucians would be reluctant to place certain forms of expression under such protection (obscene or pornographic magazines, for example) because human rights are not properly used to protect people's prurient or debased interests. This has some significant implications. First, judicial review could not be used to strike down laws censoring pornography, although they could be changed by the legislature itself. Second, in assessing the reasonableness of a censorship law, public interest in pornographic expression would carry far less weight than the interest in political, academic, or artistic expression. Of course, whether pornography should be banned is another question. As I argued in the last section, Confucians are generally reluctant to use legal punishment for the purpose of moral edification. They aim at transforming peoples' desires rather than suppressing them.⁷⁰

Consider also the case of expression of ideas encouraging racial hatred and discrimination in violation of the rights of others. Such expression should not be protected by the right to free expression guaranteed by human rights charters. Objections to banning these forms of expression argue that it is difficult to differentiate genuine hate speech from less overt discriminatory expression, but if this kind of speech were not banned, it would not be because people have the moral right to express ideas advocating racial hatred.

70. This might perhaps partly explain why pornography was tolerated in ancient China.

The Rights of the Elderly

Several Asian countries, including China and Taiwan, have legislation to the effect that parents who are unable to support themselves have the right to be supported by their children who have come of age. In the case of China, this right is guaranteed by Article 49 of the Chinese Constitution. Recently Singapore followed the example of China and Taiwan. Although most Western human rights laws protect the rights of children under the care of parents or adult guardians, no reciprocal rights are granted to parents. It seems that the idea of a parental right is a distinctively Chinese phenomenon. Would the Confucian perspective outlined here endorse this idea of parental right?

This sort of legislation would strike many Western people as unheard of. First, unlike in Chinese culture, I find no clear, widely shared understanding in the West that children have a moral duty to support their parents. The second reason is that most parents in Western economically advanced countries have pensions to support themselves after retirement. There is no need for parents to rely upon their children for support. Neither of these conditions exists in China or Taiwan. In Chinese culture, filial piety, which includes the moral duty to support parents, is still widely shared. Moreover, in the past Chinese parents who were not well-off selflessly spent all their energy and earnings to help their children receive the best education and training; in retirement, they needed and expected support from their children.

What should the solution to this problem be for Chinese societies? A legal parental right to receive support from children or a state/personal pension scheme? What would the Confucian perspective indicate? The Confucian perspective would say that we should first try a more indirect means to both support retired parents and enhance filial piety. For example, it would support the idea of giving a tax exemption to children who live with or support their parents. This has been practiced in Hong Kong for a long time, and it has been well received by the community. (Recently, people supporting their siblings and grandparents can also get a tax deduction.) Moreover, it would support the idea of enlarging the definition of family to include the parents. At present Hong Kong follows the Western idea of the nuclear family, which includes the married couple and their children. Thus the fringe benefits that an employee receives do not cover his or her parents. For example, medical benefits and housing allocations do not allow for the fact that the employee may have to live with and support his or her parents.⁷¹ These policies should be changed.

71. See also Daniel A. Bell, "The East Asian Challenge to Human Rights: Reflections on an East West Dialogue," *Human Rights Quarterly* vol. 18 (1996), pp. 665-6.

CONCLUSION

If these proposed policies work, and if filial piety is strong in a country, then there is no general need to resort to law to force children to support their parents. However, what are we to do with those exceptional cases where children do not have a strong sense of filial obligation? Or what if the culture of filial piety declines? Should we resort to the legal parental right as a fallback apparatus to protect the parents? The answer depends on how we conceive of the goals of legal parental right. Let us first consider the marriage case. Recall our previous argument that if a marriage turns sour, it is best to repair it by renewing the partners' commitment to mutual caring and love, rather than by asserting their rights. But if the relationship comes to a point of complete breakdown, then it would not be inappropriate for one party to resort to rights to protect her interests.

Similar points can be made in the elderly rights case. If the aim of an elderly right is to sustain or even repair a parent-child relationship based on filial piety, then rights would not be appropriate. The use of a legal instrument would fail to promote filial piety as a virtue, for it fosters a false motivation for children – supporting their parents out of fear of punishment. But if the aim is not to sustain a parent-child relationship, but to protect the parents' interests when the relationship breaks down, then the use of a legal parental right to protect the parents may not be inappropriate. Consider a 1993 case in China, described by Li Chenyang:

In Shandong Province a ninety-year-old woman sued her two sons for failing in their filial duty. The woman's husband died young and left her with two sons, one and three years old, respectively. Through countless hardships she brought them both up. Now she had become old and could not work. Neither of her two sons wanted to take care of her. The court intervened in her favor, and the sons agreed to take full responsibility for her living and medical expenses.⁷²

Confucians believe that grown children have a moral duty to support their aged parents. In a divorce situation, one party – usually the wife – has the right to financial support by another party who was unfaithful to her. Confucians would consider it equally legitimate for helpless aged parents to resort to a rights instrument to demand financial support from their uncaring grown children. Of course, not all parents would sue their uncaring children. Some might find this a very shameful and painful thing to do. But in situations like the one described in the example, resorting to a legal right seems a necessary means to protect one's interests as a person and one's due as a parent.

72. See Li Chenyang, "Shifting Perspectives: Filial Morality Revisited," *Philosophy East and West* vol. 47 (1997), p. 218. Li's article stated that this case was reported in the August 25, 1995 issue of *People's Daily*.

In this chapter I have argued that Confucianism, as represented by the thoughts of Confucius and Mencius, is compatible with the idea of human rights. The central elements in Confucianism – the emphasis on role-based ethics, the Confucian ideal of community, the respect for seniority and the elderly, and the preference for harmony rather than litigation – are all compatible with the idea of human rights. Moreover, the Confucian philosophy of *ren* would endorse human rights as an instrument to protect humanity and important human interests, although such an instrument should be seen as primarily a fallback apparatus. On the Confucian view, we should strive to resolve conflicts first by means of education, mediation, and compromise in order to preserve the spirit of mutual caring and trust, but this should not mislead us to believing that the instrument of human rights is unimportant. Both human rights and virtues are important in the reconstructed Confucian ethics, and they require each other. Virtues may fail at times, and so they are precarious in protecting human interests. On the other hand, virtues are needed to guide the conduct of the right-holders in the exercise of their rights. Virtues help prevent people from misusing their rights.

I have also argued that Confucianism would justify civil liberties – freedom of expression, for example – on instrumental rather than intrinsic grounds. Whereas Western liberals justify freedom of speech on the ground of personal autonomy, Confucians would see this as a means for society to correct wrong ethical beliefs, to ensure that rulers would not indulge in wrongdoing, and to promote valuable arts and cultures in the long run. Confucians would not recognize that individuals have the moral right to debased speech, although Confucianism would not advocate the use of legal punishment to ban it.

What does this examination of Confucianism and human rights reveal about the possibility of an overlapping consensus on human rights? Insofar as Confucianism and Western liberalism are concerned, I think both traditions may converge upon a certain list of human rights, which includes at least some personal rights such as the right against torture and some basic civil liberties such as the freedom of expression, but this consensus does not reach to the level of justification and scope. Of course, both perspectives can be revised and further developed, so a greater degree of consensus might be achieved. The awareness that there are interesting perspectives on human rights other than one's own precisely provides a strong impetus for mutual dialogue and self-progress.