Rights Babel:

Thoughts on the Approaching 50th Anniversary
of the Universal Declaration of Human Rights

by

DR. MARY ANN GLENDON

Learned Hand Professor of Law - Harvard University

Introduction

I'm honored and very grateful for the opportunity to discuss some of my current work on human rights under the auspices of the Furphy Lecture. As my research is still in an early phase, what I'm going to present this evening is sort of like a building under construction. Parts of it are fairly firmly in place, but others are still on the drafting board. This is the stage at which a writer can benefit most from the comments of others, so that is yet another reason why I appreciate the invitation to be here today.

I have long been interested in the way Americans think and speak about rights, but I crossed the disciplinary border of international human rights only recently--in connection with my representation of the Holy See at the United Nation's Beijing Conference on Women (1995). I'm not going to say much about that conference today, except as a source of examples to illustrate some of the difficulties inherent in the idea that certain goods or values are, or ought to be, called "universal rights." What stimulated my current research were two phenomena I noticed in Beijing that seemed to me to call for further investigation.

The first is the increasing intensity of assaults on what is in effect the "constitution" of the international human rights movement--the UN's 1948 *Universal Declaration of Human Rights*. As its 50th anniversary approaches, memories seem to be fading of why the nations of the world came together after World War II to agree that a small core of principles should be considered fundamental enough to constitute a minimum standard of human decency--and thus to be called universal.
The second phenomenon that piqued my interest is the way in which many parties to international discussions seem to assume that they are speaking a universal language of human rights, when in fact they mean very different things by words such as "rights" and "freedom." That confusion gives rise to my title, Rights Babel.

[There is a third set of issues that I won't be discussing today, because I'm just beginning to look into them. But I want to mention them because I'm always looking for leads and suggestions. They come under the heading of "rights doubletalk" and they involve such questions as: How does what we proclaim about rights at home in the U.S. match up with the way American organizations, public and private, behave as actors on the international stage? What differences, if any, are there between the rights we prescribe for others and the rights we favor for ourselves? And what about the role of large, government-like, private organizations in international affairs? My impression is that we Americans, rights-conscious as we are in some ways, know rather little about our own country's role in the international human rights arena. But that's a subject for another day.]

Being a teacher, I always like to begin a talk with a little outline--so you can see where I'm going, and how close I'm getting to the end! So my remarks today will be under four headings. First, the appearance of a new kind of attack on the Universal Declaration from an unexpected quarter; second, the turmoil created when different dialects of the language of human rights mingle in international debates; third, the way in which a new, simplistic kind of rights talk has permeated those debates; fourth, the appearance of a new, spirited defense of universal rights from an unexpected quarter. Finally, I'll conclude with a few words about the outlook for the brave but fragile experiment launched by the UN in 1948.

A New Type of Attack on the Universal Declaration

To my mind, the single most surprising development at the Beijing women's conference was one that went practically unnoticed in the United States. It was a challenge to key provisions of the 1948 Universal Declaration from a most unexpected source--the powerful 15-member European Union, negotiating as a bloc. The story, in brief, is this. The Beijing draft document left a record amount of language in brackets for final resolution at the conference itself, so there was an immense amount of work to be done in a mere two weeks. Accordingly, negotiating sessions were set up to run simultaneously in as many as eight different rooms from early morning until late at night.

Imagine my puzzlement, then, when in the first few days of the conference our Holy See negotiators began to report that talks were being stalled by the European Union. Stranger still, the European Union was dragging its feet on what should have been a non-issue: they were trying to keep out routine cross-references to relevant provisions of the Universal Declaration. The language they opposed was in five areas: the principle that human rights are grounded in human dignity; the principle that the family, as the fundamental social unit, is entitled to protection from society and the state; a standard guarantee of religious freedom; language on parental rights and responsibilities; and the statement that motherhood and childhood are entitled to special care and protection.

The fact that resistance to those particular items came from Europe was mind-boggling, because most of the European Union countries have similar language on all five points in their own constitutions. So I called on the heads of several European delegations--Spain, France, Italy--and
asked them why they were negotiating against their own constitutions as well as the UN's human rights corpus. Their responses, or I should say their unresponsiveness, reminded me of my days as a young lawyer in Chicago when the word sometimes went around the courthouse that "the fix was in." Not only did I get no answers, but the women with whom I spoke showed no discomfort with the contradictions I had pointed out.

So, at the end of the first week, with the conference half over, I sat down with Dr. Navarro-Valls, the head of the Vatican Press Office, and wrote a one-page press release to the major continental European newspapers. We quoted the disputed language and asked: Do these positions of your delegates really represent official government policy, or public sentiment, in your country? The next day, questions began to be raised in several European parliaments about what their delegations were doing in China. Within twenty-four hours after that, the European Union backed off and let in all the contested language. The remark of one European Union delegate about all this spoke volumes. She said to one of our negotiators, "Why did you have to bring all this out into the open?"

Now you are probably wondering, as I did, what was the meaning of this strange behavior by the European Union, and why didn't any of the fifteen countries break ranks over this issue. Part of the answer, I believe, was specific to the Beijing conference. My guess is that the European Union governments, in selecting their delegates, were motivated by a combination of sexism and political expediency. They seem to have said to themselves, "It's only a women's conference, therefore not very important, so why not use the occasion to throw a crumb to the feminists in our ranks who are always pestering us? Instead of sending our usual teams of diplomats and legal experts, we'll give the ladies a field day."

That explanation may strike you as cynical, but it would account for a number of things: the delegates' lack of familiarity with basic concepts of domestic and international law; their readiness to throw key parts of the UN's human rights tradition on the junk pile; and their willingness to brush aside any principles that seemed to stand in the way of what they wanted. Freedom of religion didn't fit with their idea that religion is oppressive to women--so out with it. The duty to protect motherhood and family likewise didn't fit with their proposed paragraphs on marriage and family life as obstacles to women's advancement--so off with its head. Parental rights and responsibilities stood in the way of their proposed expansion of the reproductive freedom of young girls. And so on.

Now there is nothing new in the fact that international conferences attract special interest groups with a cafeteria approach to human rights. But it was disheartening to see all Europe represented by people who seemed to have forgotten why their forebears, still shaken from the horrors of World War II, tried to place a small core of freedoms beyond the politics of particular places and times.

Nor is there anything new, as such, about attacks on that small core of fundamental freedoms. Previously, however, such attacks have issued mainly from countries claiming that the so-called "universal" rights are not universal at all but just western ideas that the West is trying to impose on everyone else (i.e., cultural imperialism). What made the Beijing development surprising was that this attack came from the West itself, the part of the world that has long prided itself on being the cradle and custodian of a strong human rights tradition.
Now, moving to the second part of this talk, I would like to examine that confrontation between the West and its own offspring a little more closely. I am going to suggest that the stance of the European Union at Beijing was an early warning sign of the corruption of a rich, complex tradition of rights discourse by a simplistic patois—-a kind of pigeon libertarianism—-that is wholly inadequate to the task of cross-cultural communication in our tension-ridden, yet increasingly interdependent, world.

Rights Babel

Why should rights language matter? Because, for better or worse, cross-cultural discussion of how we humans are to live together on this planet is being conducted mainly in the language of rights, with the Universal Declaration as its most important reference point. That has led to a problem that would be amusing if it were not so serious: it is that with the nations of the world formally committed to the idea that certain basic rights are universal, many parties to cross-national debates are under the impression that they can communicate with one another in a universal language—a kind of "esperanto" of human rights.

But that notion is an illusion. The fact is that we seem to be in the presence of a phenomenon something like what language teachers call "false friends." All of us can remember when we began studying foreign languages how grateful we were for the existence of cognates. But no sooner does one discover those friendly words that mean the same thing in two languages, than one encounters the treacherous "faux amis"—words that sound the same, but have different meanings, sometimes to the great embarrassment of the speaker!

At the Beijing conference, linguistic misunderstandings abounded. Some were harmless and funny, like the instance of a group of Chinese women who clapped enthusiastically as marchers went by carrying signs that demanded "Equal rights for Lesbian women." Later, one of the bystanders who had been cheering asked a reporter, "Where, exactly, is Lesbia?"

A more serious misunderstanding, and what I want to focus on here, arises from the fact that words like "rights," "freedom," "equality," the "individual" are understood in very different ways in different cultures. Not only do key words have different meanings, but they carry different weights and values within different worlds of interpretation. [Those different values correspond to genuine cultural differences. To give one example, opinion polls consistently show that Americans and Britons place a much higher value on liberty than equality, while Germans, Italians and Spaniards place a slightly greater value on equality over liberty.]

In understanding this situation that I call "Rights Babel," the field of comparative law can be helpful to international law. International law, unfortunately, has traditionally been indifferent or hostile to national legal particularities. After thirty years of studying the constitutional law of various countries, however, I believe one can fairly say: (a) that the modern language of rights is western, at least in origin, and (b) that it has two main dialects which have evolved within the two main western legal traditions: the Anglo-American and the Romano-Germanic. I find it useful to call these somewhat different ways of thinking and speaking about rights libertarian and dignitarian. The libertarian dialect is strongest within the Anglo-American orbit, while the dignitarian mode is characteristic of post-World War II continental European constitutions—and of the UN's human rights documents.
The main points of contrast can be briefly summarized. Libertarian rights discourse is grounded in the notion that we have "certain inalienable rights" that government must respect; in fact it implicitly confers its highest priority on freedom from governmental constraints. In these systems, rights tend to be formulated without explicit mention of their limits, their relation to other rights, or to responsibilities. (Think of our Bill of Rights.) Freedom in such a context has a procedural framework, but lacks an explicit normative structure. (I emphasize "explicit" because much was left unsaid in the formative years of our tradition. Eighteenth century statesmen took many things for granted. That left libertarian freedoms vulnerable to deformation when what was left unsaid began to be forgotten--and when judges adopted a more adventurous conception of their role.) In libertarian systems today, constitutional interpretation tends to proceed right by right, with little attention to how the various rights fit together as part of a system of ordered liberty.

In dignitarian systems, by contrast, rights tend to be formulated so as to make clear their limits, and their relation to one another, as well as to the responsibilities that belong to citizens and the state. Charters in this tradition, such as the *Universal Declaration*, typically ground human freedom in innate human dignity, as well as in inalienable rights. [Thus, for example, the Preamble of the *Universal Declaration* says that: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."] Another feature of dignitarian documents that would strike you if you compared them with our own Constitution is their inclusion of social and economic rights along with familiar civil and political liberties.

[Underlying these different dialects of rights talk are somewhat different notions about the person who is endowed with rights and freedoms. The libertarian rights-bearer is imagined as more independent, autonomous, and self-determining. The dignitarian tradition also stresses the unique worth of every human being, but recognizes that we are constituted in important ways by and through our relations with others, and that each of us develops our potential within a social network of obligations and dependencies.]

Underlying these differences are the somewhat divergent paths taken at history's first great "rights moment" when the American revolution proceeded under the flag of life, liberty and the pursuit of happiness, while the French flew the banner of liberty, equality, and fraternity. The Anglo-American tradition has a more minimalist attitude toward government, while the Romano-Germanic tradition has carried forward more of the feudal notion that a sovereign is obliged to be protective of the people. And bound up with those different histories are two somewhat different traditions of political philosophy, Locke and Hobbes having made a more definitive break with classical and biblical thought than either Rousseau or Kant.

In sum, then, the libertarian and dignitarian traditions represent two different cultural expressions of "the universal human longing for freedom," and two different ways of pondering the perennial problem of freedom and order. Each in its own way points toward a coherent vision of the good society; and each in its own way is subject to deformation.

In our present age of rapid circulation of information and ideas, it was inevitable that these two great streams of ideas and ideals would flow together. International human rights is the field on which they have met, mingled, and begun to enter into new combinations. And that brings me to the third section of my talk.
Here, I'd like to draw attention to some disturbing patterns that are forming as rights dialects mingle in international settings. Three trends are of special concern: (1) the mounting attacks on the *Universal Declaration* that I have already mentioned; (2) the constant efforts to expand the list of rights deemed "universal"--to the point where comparison with the Tower of Babel seems appropriate; and (3) the colonization of the dignitarian vision of rights by a debased version (indeed a caricature) of the libertarian approach.

The problems arising from the proliferation of rights are fairly well known. For one thing, the more rights you add to the list, the more collisions will occur among them, threatening the whole enterprise with incoherence. For another, you risk trivializing the core freedoms that are essential to any system of ordered liberty. And finally, many new rights are so vague that they become empty boxes to be filled by judges--inflicting considerable damage on ordinary processes of democratic decision-making.

What I wish to focus on here is the less widely recognized phenomenon of the debasement of the UN's dignitarian rights language. Philosopher Alasdair MacIntyre has painted a gloomy picture of what can happen when two well-established traditions of moral discourse become entangled. He claims that each tradition loses its own internal compass, and breaks into fragments which cannot be usefully combined with parts of the other tradition, because they are so deeply inconsistent with one another. That sets the stage for manipulation and other mischief.

In the context of international human rights, MacIntyre's thesis has explanatory power--up to a point. Both the libertarian and dignitarian approaches to rights do lose coherence the further they are removed from their habitual social and political contexts. And because debates about rights typically focus on one right at a time, both traditions do tend to become dis-aggregated. In that process, fragments of each approach can take on a life of their own. Unfortunately, but not surprisingly, the rights ideas that travel the fastest in our world of rapid communications are those that are easiest to sloganize. Like the shards of the hobgoblin's magic mirror in Hans Christian Andersen's story *The Snow Queen*, fragments of libertarian rights have flown around the world with amazing rapidity. And like the bits of that broken mirror, they distort whatever they penetrate.

Simplified, uprooted, libertarian ideas have deeply invaded international human rights discourse. They are, one might say, built to travel, tailor-made for the sound bite. The idea of unrestricted freedom, so perilously close to license, seems to have a special appeal to men and women "on the way up"--the mobile, modernizing, elites who predominate in the professions, the media, the universities, public and private bureaucracies, and international organizations. For knowledge class elites, the life-style rights seem to have special importance; for many members of the moneyed class, freedom from economic regulation has pride of place.

Many of these ideas are sped on their way by the borrowed, but unmerited, cachet of American constitutionalism. I say unmerited because the rights ideas that travel fastest are often little more than slogans yanked out of the social home countries. Without those contexts of checks and balances, positive laws, and social customs, liberty of any kind degenerates into materialism, self-indulgence, and the crudest of power politics. The libertarian influence is already quite noticeable in quarters where the dignitarian tradition might have been expected to be stronger,
such as the case law of the European Court of Human Rights, the new South African constitution, and recent UN documents such as the Convention on the Rights of the Child.

Special interest groups have instinctively seized the opportunity to exploit the confusion about rights that exists on the international scene. Take, for example, the slogan that became a mantra for the Beijing conference: "Women's rights are human rights, and human rights are women's rights." That slogan is half true, but only half true. Human rights are women's rights; that's what universality means. But it is not the case that whatever a particular nation state decides to call a woman's right is necessarily a universal human right. That slogan was basically just an attempt to smuggle abortion rights into the international human rights canon. In most countries, abortion is legally permitted, but does not have the status of constitutional right. Only the United States Supreme Court, so far as I know, has called abortion a woman's right--thereby immunizing it from most kinds of legislative regulation.

Many of the new rights proposed by modernizing elites are double-edged. Of course all rights are double-edged in the sense that one person's right entails an obligation for others to respect that right. But some rights are double-edged in a different way. Some rights in practice increase the personal autonomy of the sorts of people who are already accustomed to having a lot of control over their own lives, while giving the same people a lot of control over the lives of others who are less advantaged. I'm thinking here of so-called "right to work" laws, abortion rights, and the "right to die." Let's make no mistake about it--every bid to get something recognized as a "universal" right is a bid to place powerful instruments of social control in the hands of judges and bureaucratic administrators, as though such people had some special ability to know what's best for the rest of us.

The way that well-heeled litigation groups can use the courts to do an end run around ordinary democratic processes is depressingly familiar to us Americans. But it's less widely recognized that the field of international human rights is quietly becoming a smugglers' route to the same destination. Indeed, the UN's international conferences, so far removed from public scrutiny and democratic accountability, are increasingly becoming off-shore manufacturing sites for norms that can later be passed off as "international standards." That enables large public and private organizations to set policies affecting millions of lives without having to invoke their version of the golden rule ("We have the gold, we make the rule"). They can just say: "We follow UN guidelines."

Defense of the Universal Declaration from an Unexpected Quarter

To summarize thus far: as the 50th anniversary of the Universal Declaration approaches, the dignitarian language in which it is written has fallen into some disarray; a cafeteria approach to the rights it contains is spreading; and subsequent UN human rights documents are increasingly becoming bulletin boards where special interest groups try to post their agendas in the form of universal rights.

Thus the question may fairly be asked whether there will be any well-wishers at the 50th birthday party in 1998. Will there be any friends of the whole, inter-connected, body of principles to which the nations of the world have at least formally agreed? Or will those who like the social and economic rights line up on one side of the room, with those who favor property and entrepreneurial rights on another, and partisans of political and civil liberties on the third, while the devotees of life-style liberties do the macarena?
In this fourth section of my remarks, I want to predict that there will be at least one staunch supporter of all thirty articles of the *Universal Declaration* at that UN party in 1998. It will be the Holy See--for the simple reason that the Catholic Church is committed to a closely similar set of principles in the form of Catholic social thought. Moreover, the Church's encyclicals have been increasingly expressing those ideas about human freedom and social justice in the language of rights--indeed, in the purest form of dignitarian rights language that exists in the world today. Thus, to the surprise of many, the Catholic Church has emerged as intellectually and institutionally the most influential champion of all the freedoms enshrined in the Universal Declaration: intellectually, through its social teachings, and institutionally, through its advocacy in the UN, and through its 300,000 educational, health care and relief agencies serving mainly the poorest and most disadvantaged people in all parts of the world.

The Church's most important gift to that birthday celebration in 1998 may well be its contribution to the solution of a thorny problem that the founding fathers and mother of the *Universal Declaration* left hanging. When one reads what Charles Malik, Jacques Maritain, Richard McKeon, Eleanor Roosevelt and others wrote years ago, it is plain that they were well aware that their project was headed for tough sledding as it moved from paper into practice. Maritain once said it had been relatively easy in 1948 to secure agreement on the list of rights, so long as no one asked what they meant! But the Cold War was intensifying at the time, and the drafters took what they could get--leaving the problems of interpretation for another day.

That day has come. As Samuel Huntington points out in his new book on world politics, the post-cold-war era has been characterized by the dissolution of old alliances based on political ideology and superpower relations, and by the formation of new alliances based on culture and civilization. The UN, which had only 58 members in 1948, now has 185. Voices in many parts of the world are now claiming that "universal rights" are just a cover for western cultural imperialism. And the more that the preferences of modernizing elites are erected into rights, the more credibility that charge acquires.

Thus the questions that the founders deferred are now becoming urgent. Can the universality of human rights be affirmed without falling into the trap of cultural imperialism? And can cultural differences be expected without dissolving human rights into cultural relativism? Those are not easy questions, and the UN’s official response in the 1993 Vienna Declaration on Human Rights is not exactly confidence-inspiring. That Declaration simply asserts: "The universal nature of these rights is beyond question." That is hardly the kind of response that will satisfy critics. Nor is it good enough for friends.

To date, the most carefully thought out attempt to steer between the shoals of cultural imperialism on the one hand and cultural relativism on the other has come from the philosopher Karol Wojtyla, particularly in his October 5, 1995, speech to the United Nations. As a personalist philosopher, and speaking out of a tradition with long experience in the dialectic between universal principles and diverse cultures, John Paul II began that speech with a reflection on the nature of the human person—the common humanity that makes it possible for men and women of different cultures to deliberate about the human future. We are, he said, creatures of intellect and free will, immersed in a mystery which transcends our own being, and endowed with the ability to reflect and choose. (Note in that last phrase an echo of Hamilton in *Federalist Papers, No. 1*).

Universal rights and culture cannot be radically opposed, he pointed out: first, because rights emerge from culture, and cannot be sustained without cultural underpinnings; and secondly,
because rights, to be effective, must be implemented within different ethical, religious and cultural contexts. That means they have to be internalized, to become part of each people's culture. Different cultures, he went on, are "different ways of pondering the mystery of the meaning of human existence." Thus there can be a "legitimate pluralism" of forms of freedom, with different means of expressing and protecting fundamental rights. (This is a familiar concept to Catholicism, where a small core of authoritative principles has found many differing cultural expressions, which in turn have enriched and strengthened the tradition.)

Two other aspects of the Catholic intellectual tradition also help to place the universal human rights project on a sound footing. First, the insistence that freedom has a moral structure, a connection to moral truth. Even though truth is something we humans can apprehend only as through a glass darkly, to give up on the notion that there is such a thing as truth is to give up on universal rights. If there are no common truths to which all can appeal, there can be no role for reason in debates about rights--and no basis for dialogue across cultural and political divisions. How ironic it would be, if in our age of unprecedented ease of communications, deliberation about the most important questions were to break down!

The second aspect of the Catholic tradition that I wish to mention is that in today's world the Church is almost alone in insisting upon the essential interdependence between social and economic justice, on the one hand, and traditional political and civil liberties, on the other. As the Pope put it in his UN speech, the nations must live up to all the promises they made in 1948--they need to take the "risk of solidarity" as well as "the risk of freedom."

For all these reasons, I believe it is appropriate to compare John Paul II's 1995 UN Address to Abraham Lincoln's Gettysburg Address. Just as Lincoln stood upon a blood-soaked battlefield to lift up our own country's unfulfilled, and half-forgotten, promise of equality in the Declaration of Independence, so the Pope, standing at the end of the bloodiest century in human history, has reminded the nations of the solemn commitments they once made to democracy, solidarity, and freedom.

Conclusion

With its 50th anniversary only two years away, the prospects for the Universal Declaration and the international human rights project are far from clear. Perhaps the world is ceasing to remember or care why it once seemed important to try to place certain fundamental rights and obligations beyond the vagaries of politics, time, and place. Perhaps the great waters of opportunism are closing over wounds that in 1948 were still open and raw. Perhaps the Declaration will fall into the dust bin of history--one more overly ambitious human project like the ill-fated Tower in the valley of the land of Shinar.

But if so, the costs will not be negligible. One does not have to be motivated by any love affair with the United Nations to realize that the Universal Declaration is the single most important international point of reference for the discussion of human freedom and dignity. It is a fragile monument to the hope that our future on planet Earth can be determined more by reason and choice than by force and accident.

How well founded is that hope? Personally, I believe that the international human rights project could emerge strengthened from this time of testing. Earlier, I remarked that while MacIntyre's gloomy analysis of the confluence of different value systems is powerful, it is incomplete. The
fact is that contradictions and misunderstandings--so alarming to philosophers--are often the preliminaries to important advances in the practical fields of law and politics. What looks like a witches’ cauldron to the theoretician sometimes turns out in practice to be a crucible of creativity.

In the relatively new science of complexity (formerly known as "chaos science"), there's a picturesque term describing the state of affairs when a relatively settled system begins to change at an accelerated pace, and its component parts fly off into all directions before they enter into new combinations with new elements. That turbulent state is called "the edge of chaos." And it is not necessarily as scary as it sounds, because it's a place of opportunity as well as risk. In fact, some say it's a necessary phase of the system's adjustment to new challenges. Complexity science resembles the methodology of the philosopher Bernard Lonergan in that it teaches us to look for emergent probabilities in changing situations--and to be alert to ways in which the probabilities may be shifted for better or for worse.

So what makes the difference between witches' brew or elixir of health? Well, I suppose intelligence and our will to use intelligence; the operation of grace and our willingness to cooperate with grace; and politics, in Aristotle's sense of the art of ordering our lives together. And within the realm of politics, I would not sell short sturdy, second-order values like the rule of law, the separation of powers, democratic decision-making, and the great principle of subsidiarity which teaches that decision-making power should be located as close as possible to the people most affected.

I'd like to close with a thought of Lonergan's which has meant so much to me that I have taken the liberty of embroidering it a bit over the years. "There will always be," he once wrote, "a solid right determined to cling to a past that can never be recaptured, and a scattered left following now this, now that new idea. But what will count is a perhaps not numerous center"--sufficient numbers of men and women who are knowledgeable enough to be at home in the old as well as the new, imaginative enough to recognize the possibilities in the current situation, bold enough to explore them, and painstaking enough to work out the transitions one step at a time.