

# **Human Rights the Confucian Way**

*Towards International Consensus on Human Rights From  
Within Cultural Traditions*

**Tommy Flakk**

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**Department of Political Science**

**University of Oslo**

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The more I look up at it the higher it appears. The more I bore into it the harder it becomes. I see it before me. Suddenly it is behind me.

The Master is good at leading one on step by step (Confucius' disciple Yen Hūan).

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# 1. INTRODUCTION

## 1.1 The Theme

Individuals live in two worlds. First, they are citizens of a global world community that transcends state borders and binds individuals together by virtue of their humanity. The other world is their local society, where they lead their lives in work and play with their neighbours, colleagues, friends and family. All individuals inhabit these two worlds and for most of the time the relationship between the local and the global world is in harmony. However, harmony breaks down regarding one important aspect. Based on their citizenship in the global world individuals have rights that protect important aspects of their self-interest. These are known as human rights. Although human rights are based on citizenship in the global world, they are exercised in the local world. Here they regulate the relationship between individual and society in fundamental ways. Conflict arises as the two worlds collide, and human rights become a matter of dispute. How these two worlds ought to be reconciled is the theme of this paper. The local world of focus will be Confucianism.

This paper aims to explore Confucianism as a cultural perspective on human rights. Based on the assumption that culture matters, we ask three main questions. First, to what degree are human rights and Confucianism compatible? Second, are there resources within Confucianism that can serve to justify the existence of human rights? And third, how does Confucianism interpret and specify human rights? The theoretical framework of the paper will be normative political theory on an overlapping consensus on human rights from within cultural traditions. We will refer to this approach as the cultural consensus thesis.

Human rights are universal in the sense that all humans possess them regardless of sex, ethnicity, language, culture or religion. The UN General Assembly adopted The Universal Declaration of Human Rights (UDHR) in 1948. In 1966 the assembly

adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These rights are widely acknowledged<sup>1</sup> and, as such, constitute the most politically interesting conception of human rights that exist. Throughout the paper, we will be referring to the rights stated therein when we speak of human rights. We will refer to them as the Universal Declaration Model (UDM).<sup>2</sup> It is beyond the scope of this paper to discuss all these rights in relation to Confucianism. We will therefore focus mostly on the ICCPR, especially the right to freedom of expression and the right to political participation. For reasons that will be explained later these rights are among the most interesting with regard to cultural perspectives on human rights.

A simplistic account of the relationship between culture and human rights is that culture is the source of all moral values (Donnelly 1989: 109). This implies that human rights have no moral status unless they are the products of a particular culture. This position is known as cultural relativism. Another account holds that certain values apply universally. According to this account culture has to give way if it conflicts with universal values. This position is known as universalism.

Both accounts are challenged by perspectives that seek to find ways of reconciling the division between culture and human rights. These perspectives claim that accounts which focus only on the cultural or the universal fail to present a valid image of political realities. Instead, these perspectives aim at solutions that leave ground for both cultural aspects and universal principles. Let us follow this line of reasoning and take the UDM as our starting point.

The UDM states that everyone has certain rights. These rights are stated in general terms. It says, for instance, that in the UDM everyone has the right to freedom of expression. The right to freedom of expression defends the principle that expressing

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<sup>1</sup> As of May 2<sup>nd</sup> 2003 149 states were parties to the ICCPR while 146 states were parties to the ICESCR (<http://www.unhchr.ch/pdf/report.pdf>).

<sup>2</sup> The term is from Donnelly (2001).

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oneself freely is something all individuals have an interest in. One could ask though, if this right protects the freedom to say or print anything one desires? What about libel, and what about pornography? The principle behind the right to freedom of expression does not answer these questions. Thus, one has to interpret the principle in order to form a meaning of what it entails before it is applied to real life. One could, therefore, say that (1), the rights formulated in the UDM express certain core principles of basic human interests but (2), the UDM does not give any detailed account of how these rights are to be applied. Since there is room for interpretation we can ask what place cultural considerations have when it comes to arriving at the proper interpretations of these general rights. It seems reasonable that different cultures would interpret these rights in ways that are in accordance with the values, goals and ideals of that culture. And since cultures differ on these points, so will interpretations and specifications of human rights. Thus, there seems to be a role for culture when making human rights specifications.

Human rights principles are universal in the sense that they reflect human interests that apply to all humans. We see, however, that these rights principles require interpretation to be applied. Since cultures will do this in different ways, human rights interpretations and specifications may be regarded as culturally particular.

Acknowledging that human rights have room for cultural variation, we may ask if we can speak of comprehensive cultural perspectives on human rights. Although there is an academic tradition for discussing the relationship between culture and human rights, comprehensive cultural human rights perspectives as such seem to have been ignored, albeit with some notable exceptions.<sup>3</sup> Instead the focus seems to have been on which set of universal values different cultures may be thought to agree upon.

Some thinkers discuss the possibility of reaching an overlapping consensus on human rights. The idea of an overlapping consensus refers to a model in which people

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<sup>3</sup> Chan (1999) and An-Na'im (1992) are examples of thinkers who have devoted serious attention to culture in human rights thinking. We will return to these thinkers later in the paper.

adhering to different religious, philosophical and moral doctrines agree to a political conception of justice (Rawls 1996: 133-134). A way of applying a model of an overlapping consensus on human rights is by discussing which rights the participants of an overlapping consensus may be thought to agree upon. Charles Taylor (1999) follows this line of argument. The aim is to identify the truly universal rights that all countries would agree to, their religious, philosophical and moral differences notwithstanding. While the content of human rights is central to the debate, justifications of these rights are left out of the picture.

Another way of approaching an overlapping consensus on human rights is from within cultural traditions. Instead of seeking to identify which human rights different cultures would adhere to, this approach may start with recognition of the UDM. Acknowledging the status of the UDM, one can, from the cultural perspective, see whether or not the cultures recognize the UDM, and then move on to how they would justify and specify the rights stated therein. Thus, close attention is devoted to culture as such and its bearings on human rights. This model does not leave human rights justifications out of the picture but draws on them as moral resources. The reason is plain. As we have already established, there is room for cultural variation of human rights. Different cultures justify and specify human rights differently. If cultures claim support for human rights but define human rights very differently, an overlapping consensus might amount to nothing but masked disagreement. Thus, if we are to find genuine consensus on human rights rather than masked disagreement regarding human rights, an approach that takes cultural justifications and specifications of human rights seriously should be more fertile. The latter approach seems to meet these demands.

Our model consists of reaching an overlapping consensus on human rights from within cultural traditions. We will refer to this as *the cultural consensus thesis*. In short, the cultural consensus thesis states that intercultural agreement on human rights (in the UDM) must take culture as its point of departure.

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## 1.2 Why Confucianism?

Some preliminary remarks are in order before we explain why we have chosen Confucianism as the research topic. The term Confucianism can have a variety of different meanings. It can be used to denote a way of life, political ideology, actual state politics and a philosophical tradition (Chan 1999: 213). In this discussion our focus will be on classical Confucian philosophy. Confucianism as a philosophical tradition was born of the thoughts of Confucius (551 - 479 BC). Confucius' thoughts were depicted in the literary work *the Analects of Confucius*, which were written after his death by some of his students. The thoughts of the Analects were both carried on and developed by Confucius' follower Mencius. The Analects and the Mencius are now regarded as the paradigm of Confucian philosophy (Chan 1999: 213). By limiting ourselves to classical Confucian philosophy, our view of Confucianism is static in the sense that we deal only with the original ideas of its founders, and not how these ideas developed. Insofar as cultures are continuously changing this seems to be a shortage of our approach. Regardless though, it is clear that we have to draw the line somewhere. Thus it seems reasonable to draw the line at Confucianism's origin, and the source for all Confucian ideas that were to follow.<sup>4</sup>

The paper explores Confucianism as a cultural perspective on human rights. However, we cannot equate Confucianism with culture in the sense that any modern culture or society today is purely Confucian. Among Confucian countries we count China where Confucianism originated, and where it served as official state ideology for nearly 2000 years, in addition to countries like Japan, Taiwan, Korea, Singapore and Hong Kong. The countries upon which Confucianism has had an influence on have also been influenced by other philosophies like Daoism and Buddhism. Any culture consists of a complex web of philosophical and religious inputs. However,

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<sup>4</sup> Limiting our focus of analysis to classical Confucianism is far from a controversial choice in contemporary debate about Confucianism and human rights. For instance, almost all the articles in *Confucianism and Human Rights* (Wm. Theodore de Bary and Tu Weiming (eds.), New York: Columbia University Press, 1998), which probably is the greatest modern contribution to the field, have made the same choice.

Confucianism is one of the philosophies that have exercised influence on East Asian culture, and that in itself makes it interesting as a research topic. Whether Confucianism may be regarded as the most important cultural influence in China, or other East Asian countries, requires empirical study, and is beyond the scope of this paper. There are, however, some reasons for why this paper deals with Confucianism and not with Daoism, Buddhism or other philosophical inputs, and these will be explained in the following section.

Bringing Confucianism into contemporary debates on human rights is interesting for several reasons. First, Confucianism was invoked repeatedly during the ‘Asian Values’-debate. The starting point for the debate was the Vienna convention on human rights in 1993. At the convention the universality of human rights was challenged. A group of Asian ministers presented the Bangkok Declaration, which emphasized “[...] the significance of national and regional particularities and various historical, cultural and religious backgrounds” in approaching human rights questions. The Bangkok declaration initiated the debate over ‘Asian Values’, which made extensive use of Confucian philosophy. Central to the debate has been the claim that Confucianism is at odds with a morality in which individual autonomy is emphasized at the expense of collective entities like the family and the community. In countries with Confucian cultural heritage, it was claimed that human rights had to adjust to fit into the Confucian context.

In China Confucianism has been under strong attacks before, but especially after, the start of the communist rule. Confucianism was attacked as outdated feudalism by the communist leadership who sought to outstrip political institutions of any Confucian remnants. But what dies on the surface may survive underneath, and Confucian ideas and ways of life have continued to influence the population of China, and other East Asian nations. For instance, Hu (2000: 60) claims that Confucian emphasis on family has had a great impact on both Chinese society and political culture. Randall Peerenboom, says: “[...] Confucianism continues even today to be the basis of the Chinese world view” (Peerenboom 1993b: 32). Thus there are those who think that

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Confucianism has a strong status in contemporary China. It is not for us to try to prove, or falsify these claims. Instead what we will do is take these views seriously.

Many of the arguments put forward in the ‘Asian Values’-debate have been regarded as cultural relativist tools for masking human rights violations in these countries (Freeman 1996: 352). Although that may be conceivable, another possibility is that the East Asian cultures might share their government’s positions.<sup>5</sup> At least we cannot exclude that there are such cultural beliefs in those countries. We cannot for sure explain this by Confucian influence, but neither can we exclude that Confucianism has a part to play in the sentiments of the population. Thus Peerenboom (1993b: 32n), might be correct when he says Confucianism is likely to “exert considerable influence on Chinese human rights.”

Even so that does not mean that the relationship between Confucianism and human rights is worthy of our attention. Philosophical disagreement notwithstanding, what is important is that human rights are applied, not that they are discussed. Be that as it may, practical political problems have philosophical dimensions and philosophical enquiry may, therefore, help illuminate these problems (Semb 1992: 12). An-Na’im (1992: 19) holds that human rights violations to a large degree are founded on insufficient cultural legitimacy of human rights. According to this reasoning, respect for human rights might be promoted by making human rights more acceptable to the cultures in question. In this regard cultural human rights perspectives might be useful. Basing human rights on less alien sources may make human rights appear more recognisable and reasonable to people. How to manage this while still accepting strict human rights standards is one of the challenges we will look at in this paper.

Human rights apply to individuals but are directed against the societies in which individuals live. This seems to involve a fundamental paradox. The aim of the paper

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<sup>5</sup> According to Peerenboom (2000a: 303), several studies have shown that people in China are more occupied with economic growth and stability than human rights. For further proof of how Chinese lack a democratic consciousness Peerenboom (2000b) points to how many of the student leaders of the 1989 demonstrations were reluctant in admitting voting rights to the uneducated masses. For instance many students were “[...] horrified at the suggestion that truly popular elections would have to include peasants” (ibid.).

is to resolve this paradox by analysing the legitimacy and implications of cultural perspectives on human rights. Based on the debates that have revolved on the relationship between culture and human rights in general, and Confucianism and human rights in particular, an analysis into the legitimacy and implementation of a Confucian human rights perspective present itself as an interesting and highly relevant research topic.

### 1.3 Normative Political Theory

This study belongs to the field of normative political theory. Normative political theory is concerned with what in moral terms can be described as right or good actions that are considered important for many people (Malnes 2001: 1). Human rights tell us something about how the relationship between state and citizen is to be regulated. Human rights leave constraints on the state concerning how it can treat its own citizens. Normative political theory on human rights tells us how the balance between state and citizen ought to be stricken. For our purposes the important questions are whether different cultures can strike this balance in different ways, and if so, how Confucianism strikes that balance. These questions are fundamental for the organization of legitimate societies.

Raino Malnes (1992: 119) depicts two approaches in normative political theory. One approach stresses the importance of interpreting existing ideas and conventions. This approach is called *interpretation*. The other approach emphasizes finding correct answers to normative questions. The focus is on the construction of theories and principles rather than interpretation of what already exists. This approach is called *construction*, or *philosophical reasoning*. Construction is a philosophical approach that aims at discerning general principles of right and wrong and to properly explain why these principles are right and wrong (ibid. 123-124). In the following outline we will demonstrate how we will utilize both interpretation and construction/philosophical reasoning in this paper.

The paper consists of two main parts. The first part presents the topic at hand, and provides the background for the analysis that takes place in part two.

The second chapter aims to give a theoretical approach to the topic, which helps to form the basis of the analysis that is to follow. Thus the focus will first be on human rights, and second on how human rights respond to culture. The UDM provides the starting point for the section on human rights. Interpretation and application of human rights will be the foci of attention. Three liberal human rights justifications (Locke, Rawls and Donnelly) will be presented. The relationship between culture and human rights will be discussed both empirically and normatively. The concept of an overlapping consensus on human rights is discussed and chosen as a fertile conceptual framework. Concerning normative political theory, this chapter is to a large degree based on philosophical reasoning. Empirical and normative judgements about the relevance of culture in human rights questions are not easily derived from the concepts themselves through mere interpretation. Thus, they require philosophical reasoning.

The third chapter depicts the essential characteristics of Confucian philosophy. The essentials of Confucian thought have to be identified before the analysis begins. This endeavour requires interpretation. Based on our interpretation of Confucian thought, we will create a model of Confucian political morality. This model will serve as the object for the following analysis.

The main part of the paper, the analysis, takes place in part two of the paper, consisting of chapters four to six. The analysis consists of three themes; recognition, justification and specification, and is divided accordingly in three chapters.

The analysis begins with chapter four. Recognition is the first task. If Confucianism is able to take part in an overlapping consensus on human rights, it has to recognize the basic ideas of human rights. Thus the discussion will be whether or not Confucianism is compatible with the ideas that human rights are based on humanity

and that the quality of humanity makes one entitled to promote rights-claims. The question will be: *To what degree are human rights and Confucianism compatible?*

In chapter five we will move on to see whether there are resources within Confucianism that can serve to justify human rights. We will confront Confucianism with the three liberal human rights justifications we depicted in chapter two (Locke, Rawls and Donnelly), to see whether there are resources within these that can help us form our own distinct Confucian human rights justification. Thereafter we will explore whether there are resources within Confucianism itself that can serve to justify human rights. The question will be: *How will Confucianism justify the existence of human rights?*

The sixth chapter deals with Confucianism and specifications of human rights. The chapter will depict how Confucianism specifies human rights with regard to common goods like public morals and order. The latter discussion will focus on the right to freedom of expression. Lastly, how Confucianism responds to the right to political participation will be discussed. The main question will be: *How does Confucianism interpret and specify human rights?*

These questions move beyond mere interpretation and are better defined as constructive or philosophical. However they are more than that. The questions we seek to answer touch upon one tradition in relation to another. From within Confucianism we seek to explore recognition, justification and specification of human rights principles. Joseph Chan (2002) refers to this approach as *philosophical reconstruction*, a term that seems to give a reasonable picture of our approach. The purpose is to interpret Confucianism in order to analyse its relationship with human rights, a theme not existent at the time of its origin. Insofar as we have to “rethink” Confucianism to explore its bearings on human rights, reconstruction seems to be a proper term for our project.

This approach has certain pitfalls. By reconstructing Confucianism in order to explore its bearing on human rights we must be careful not to create something that is

not longer Confucianism. Our analysis must be thoroughly based on the essentials of Confucian thought, which requires that chapter three presents a reasonable version of Confucian philosophy.

The theme discussed is diverse and the controversies are many. It will not be possible to discuss all of them, but to the best of our ability we will not pretend that they do not exist. However, the analysis rests on three pillars, recognition, justification and specifications. These will be the guiding lights and they will influence the choices we make during the course of our enquiry.

The paper closes with some final remarks and observations in chapter seven. Herein we will draw our findings from the different chapters together and see if we have gained any insights to the theme at hand.

## **2. A THEORETICAL FRAMEWORK**

### **2.1 Introduction**

In this chapter we will construct a theoretical framework for the study at hand. The aim is to provide a method for how to reasonably conceive of the relationship between culture and human rights. Conceptions of how these two are to be reconciled go deep. Sometimes individuals' cultural identity may conflict with their views on justice and human rights. Consider for instance the case of the inferior status granted to women in certain Islamic societies. While women in such societies may reasonably consider their treatment unfair in accordance with the equal status of the sexes stated in the UDM, they may at the same time understand their inferior status in light of their society's cultural traditions. They might even agree with this aspect of their culture.

A conventional liberal view on conflicts of this nature is that human rights are more important than culture. All Muslim women should, therefore, have the same status as men. While that may be the dominant view, it is not the only one. Nor does the fact that it is the conventional view necessarily imply that it is the correct view. In order to evaluate this we have to base ourselves on philosophical enquiry to get a grip on the moral dimensions involved.

The chapter will present a distinctive view on how the relationship between human rights and culture is best perceived. The chapter is divided in three sections. In the first section the concept of human rights is defined. The focus will be on the UDM and how the rights stated therein are to be applied and justified. The second part of the chapter discusses the relevance of culture in human rights questions. The topic will be discussed both empirically and normatively. The third and last part of the chapter consists of a discussion of the model of an overlapping consensus on human rights. The model presents a solution that brings the universal aspect of human rights

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and the particular aspect of culture together. It will be evaluated whether that is a fertile approach for the purposes of this paper. The chapter closes by outlining how the paper will proceed.

## 2.2 Human Rights: Legal and Philosophical Foundations

Human rights may be conceived of in both legal and philosophical terms. The approach of this paper is mainly philosophical. However, the rights in focus have a legal foundation in the UDM.<sup>6</sup> Our reason for focusing on the UDM is based on its political importance. The UDM is internationally acknowledged and functions in many ways as a moral yardstick against which governments are evaluated. Respect for human rights is applauded while violations of human rights are equally condemned. One can therefore say that the UDM constitutes the most politically interesting conception of human rights.

The UDM is but one conception of the concept of human rights. While the UDM may be conceived of as a legal entity, the concept of human rights is a philosophical entity. The concept of human rights refers first to the idea that people have rights, that is, they are justified in making certain claims based on these rights. Second, rights are universal, and so, they refer to certain types of treatment<sup>7</sup> that all humans are justified in claiming. Human rights conceptions on the other hand, explicate which rights people have. The UDM is the most influential of these conceptions.

Three main steps will be taken to provide a reasonable view of human rights. First, we will discuss the nature of rights. The nature of rights explicates what it means to have a right to something, and therefore is fundamental for our understanding of

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<sup>6</sup> The UDHR is only a declaration and may not be perceived legally binding as such. It may be discussed, though, if it is not part of common law. If so the UDHR is as legally binding as the covenants. However, these are matters for legal scholars to discuss, and we will not separate between the UDHR and the covenants in terms of legal status.

<sup>7</sup> These forms of treatment may on the one hand refer to positive actions on the part of certain others, or simply that others refrain from acting in certain ways.

human rights. Second, we will provide a detailed look at the UDM and its application. Third and last we will point to ways of justifying human rights. These justifications will be based on philosophical terms. Having depicted a reasonable picture of human rights, our next task will be to relate it to culture.

### **2.2.1 The Nature of Rights**

In order to fully understand the concept of human rights we need to examine what it means to possess a right to something. To have a right to X is to be specially entitled to X. Rights ground claims. These claims are rated above, or in traditional rights-language, trump all other considerations that are relevant for the specific case (Donnelly 1989: 9-10; Dworkin 1978: XI).

When someone is entitled to a right, it implies that someone else has a correlating duty (Waldron 1993: 576). Thus in a rights-relationship there is a right-holder and a duty-bearer. Insofar as the relationship between right-holder and duty-bearer rests on the right, the right governs this relationship, and the right-holder is in direct control of this relationship: “[T]he duties correlative to rights “belong” to the right-holder, who is largely free to dispose of those duties as he sees fit” (Donnelly 1989: 9-10).

The relationship between rights and duties can be described as such:

X has a right if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty (Joseph Raz 1986: 166).

Whether someone has a right or not depends on how important the interest of the right-holder is considered to be. One has a right only if the interest protected by that right is regarded so important that other person(s) have a duty to respect one’s rights.

Applying the definition above to human rights, we see that people have human rights if an aspect of their interest is considered important enough to place others under a corresponding duty. The question is which interests are so important that they should be protected by rights and which should not. The concept of human rights does not explicate this. However, there are different conceptions as to which interests should

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be regarded as important enough to be labelled as rights. The next section will deal with a specific human rights conception, namely the rights stated in the UDM.

### **2.2.2 The Universal Declaration Model**

As stated in the UDM, human rights are universal in the sense that all humans possess them regardless of sex, ethnicity, language, culture or religion. The UDM consists of three UN documents: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR)<sup>8</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>9</sup>

While the UDM is widely acknowledged, the signing of the rights-documents therein was a political compromise. This is reflected in its contents in the sense that they do not constitute a comprehensive morality (Lindholm 1997: 11). The UDM sets only minimum standards (Freeman 1998: 36). The doctrines had to be adjusted to various circumstances based on economic, historical and cultural differences between the signers. This has resulted in various controversies.

One of the most challenging objections to the UDM is that it includes too many rights, and so blurs out the moral status of these rights. Even though few deny rights such as the right to life and freedom from torture, there are objections to what some conceive to be less obvious rights. These challenges have come from different camps. Liberal thinkers, like John Rawls (2001: 78-79), and autocratic governments, like Singapore, have claimed that fewer rights are universal than the UDM suggests.<sup>10</sup> Other rights are objects for controversies based on ideology. During the cold war

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<sup>8</sup> The ICCPR includes rights such as protection against slavery and torture, equal protection of the law, freedom of thought, conscience and religion, freedom of assembly and association, political participation and freedom of opinion, expression and the press.

<sup>9</sup> The ICESCR includes rights such as social security, food, clothing and housing, education and participation in cultural life.

<sup>10</sup> Rawls speaks of a “special class of urgent rights” that all reasonable states could agree on. The former minister of foreign affairs in Singapore, Wong Kan Seng claims that “the hard core of rights that are truly universal is perhaps smaller than we sometimes like to pretend” (Peerenboom 2000: 314n7.)

there was an ideological division with the communist states emphasising economic and social rights, and Western states emphasising civil and political rights (Donnelly 2001: 4). The same division was apparent in the ‘Asian Values’-debate in which it was claimed that political authoritarianism promotes economic growth (Sen 1999: 89). Even so, broadly conceived consensus seems to be the hallmark of the UDM. As Donnelly (2001: 4) points out almost all states are parties to both covenants, and very few are parties to just one.<sup>11</sup>

Another challenge to the UDM may be that the rights therein are vague and general, which leaves much room for interpretation.<sup>12</sup> If this argument holds, it might indicate that the vagueness of the rights-documents is the reason for their broad popular support by various governments. If so, serious disagreements on rights issues are masked, and any talk of international consensus on rights is made meaningless. Serious attention is devoted to this challenge in the next section.

### *The Application of Human Rights*

It is easy to imagine wide room for interpretation of the rights stated in the UDM. Consider the case of the right to freedom of expression as an example. Does this right entail the view that each individual should be free to say everything she desires every time she wants to and anywhere she pleases? Some might think so, but a more common view is that the freedom of expression has certain limits, for instance in cases of expressing libel and hate speech. Even so, the point seems to be that even if people agree about the principle of the right to free expression, they might have different interpretations concerning its application.

All the rights in the UDM have different interpretations. For instance, what is involved in a fair trial? Should a judge or a jury make the final judgement? And what about the right to protection from torture? This right appears to be quite clear but how

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<sup>11</sup> See supra note 1 for exact figures.

<sup>12</sup> Joseph Chan (1995) poses such a challenge, while generally being in favour of human rights.

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are we to apply it? With regard to whether torture of al-Qaeda suspects is legitimate, The Economist (January 11<sup>th</sup> 2003) says:

The definition of torture in international treaties is either so broad as to rule out even normal interrogation methods widely accepted in democracies or vague enough to allow some practise which might seem harsh.

The validity of this claim will not be discussed here but the passage illustrates the challenges that face society in specifying the meaning of rights. Of course, there are forms of treatment that almost all persons would recognize as torture, and for these cases the challenge does not concern rights interpretation but how to prevent the rights violation. At the same time, however, there are forms of treatment that belong to the grey area with regard to the definition of torture, and for these it might be more difficult to decide on effective remedies for preventing such atrocities.

The challenges involved, regarding reasonable interpretations of human rights, are probably due to the fact that the rights in the UDM are stated in general terms. While it says in the UDM that all humans have the right to protection from torture, the UDM does not explicate how torture ought to be defined. However, the right points to a principle, which says that torture is inhuman, and all humans should therefore be protected from such degrading treatment. There is therefore a core principle of justice at play. The right to protection from torture is therefore best conceived as a principle granted a status as a human right. Likewise, the right to life, the right to a fair trial and so on, all represent principles that protect basic human interests. We may refer to these principles as rights-principles. In applying these principles, they need to be interpreted and specified. The way from principle to practical application involves interpretation and specification.

Article 29 of the Universal Declaration of Human Rights may clarify some guiding lights concerning how human rights interpretations are to be formed. The article states (29: 2):

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 29(2) tells us something about how the scope of the respective rights is to be interpreted both with regard to restrictions and applications. However, it seems to leave considerable room for interpretation. Ronald Dworkin has said it thus: “[...] the process of making an abstract right successively more concrete is not simply a process of deduction or interpretation of the abstract statement but a fresh step in political theory” (in Chan 1997: 40). That probably stretches it too far. The rights-principles in question to a large degree define how they are to be applied in real life. As Jack Donnelly (1989: 117) points out, interpretations are not free associations. Interpretations have to be based on the core principle of the right in question. So even if there is considerable room for interpretations, these have to be reasonable. This means that the principle of the right in question must be respected.

Even if the specification of an abstract right must be based upon the core principle of the right in question, there might be considerable room for different interpretations that are in accordance with this principle. Article 29(2) illustrates that the examples mentioned earlier are not exceptional in this aspect. They rather illustrate what applies to all rights. They are all in need of interpretation.

### *The Challenge of Reasonable Interpretation*

There is no dominant theory of interpretation of treaties (Peerenboom 2000: 315n13). The UDHR was constructed after the Second World War, and sought to express the same values that Nazism and Fascism had violated (Freeman 2000: 44). By giving each human being a certain status by virtue of his or her humanity, the atrocities committed by these ideologies were to be opposed. Equal rights protect the status that each individual is acknowledged through the declaration. The UDM regulates the relationship between the state and the individual in a way that leaves constraints on the power of the state. Thus the rulers of the state cannot dispose of its citizens as

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they see fit, like the Nazi and Fascist governments did. Considering this background it is clear that the purpose of the UDM is to protect rights and freedoms.

It is a common view that human rights interpretations must be in accordance with the purposes behind the rights treaties.<sup>13</sup> In article 31 of the Vienna Convention of the Law of Treaties it says:

A treaty shall be interpreted in *good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and *purpose* (italics added).

Article 31 seems to provide some clear guidelines for how the human rights treaties (the UDM) are to be interpreted. This is how Peerenboom (2000a: 315n13) interprets article 31:

As the purpose of the rights treaties is to protect human rights and freedoms, rights should be interpreted broadly and restrictions on rights narrowly. Any restrictions should be for a legitimate purpose, and the restrictions should be necessary and proportional in light of the purpose of the restriction.

The question is whether we agree with Peerenboom's definition. As became clear in the last section there is considerable room for interpretations when specifying human rights. Therefore, the question whether rights should be interpreted broadly or narrowly becomes fundamental. The claim that rights interpretations should be in accordance with the purposes behind the rights treaties can thus become an important guiding light, which specifies the range of legitimate rights interpretations. Now, based on the indisputable fact that the purposes behind the UN treaties are to protect rights and freedoms, interpretations done in "good faith" should as a minimum seek to be in accordance with those purposes. That may well be conceived, I conclude, as a principle that states that rights should be interpreted broadly and restrictions on rights narrowly. Thus, we adopt the definition made by Peerenboom.

Interpretations of human rights form part of political theory. As mentioned above, Dworkin even stated that they are a "fresh step" in political theory. Normative

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<sup>13</sup> See for instance Chan (1995: 33) and Peerenboom (2000a: 301).

political theory is concerned with identifying which actions are good and bad in a moral sense. This, again, defines which goals and ideals should be pursued. In order for us to understand how human rights are specified, we must look closer at the philosophical principles that are invoked in order to justify human rights. Human rights justifications tell us something about which values and interests human rights are meant to protect, and thus also define how human rights are to be interpreted and specified.

### **2.2.3 Philosophical Justifications of Human Rights**

Justification of human rights refers to why humans should be entitled to rights in the first place. The condition of possession of human rights states that humans have rights because they are human. But why should one's humanity be a basis for rights? There are different ways of answering this question.

There exist different philosophical justifications of human rights. Since there is no dominant theory that all agree to, I have chosen to focus on three, which each has had a deep impact on how human rights are understood in contemporary society. First, however, we will discuss whether we are in need of philosophical human rights justifications. After all, the rights are already stated in legal documents. One might have argued that a right has status as a right, if and only if, a legal institution, through positive law, adopts it. In line with this argument would be that if a right is not manifested in any legal document, it has by definition no status as a right. We will refer to this argument as the "the positive law thesis."

The justification of human rights from the positive law thesis will point to the UDM, and hold that human rights have status as rights since they are manifested in these doctrines. It follows from such a justification that prior to, or independent of, these doctrines, no human rights exist (Gewirth 1982: 42). For our purposes, at least, that is not a very fertile perspective. The *idea of human rights* existed prior to the doctrines. It is true that human rights were not expressed in any legal texts prior to the UDHR but the moral principles that ground human rights existed no less than they do

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today. Thus, the positive law thesis, which implies that human rights *only* exist in legal texts, is counter-intuitive. It also fails to recognize the moral force within the UDM in the sense that the rights stated therein refer to moral rights grounded in humanity. Whereas legal rights are based upon law, moral rights are based upon moral principles (Donnelly 1989: 12). And insofar as the positive law thesis does not recognize such moral principles it does not seem to hold as a normatively valid justification for human rights.

I will basically depict three different approaches for justifying human rights, namely the natural rights theory of John Locke, the justice as fairness theory of John Rawls and the human dignity concept represented by Jack Donnelly. All theories belong to the school of political liberalism. Only the latter is directed against the content of the UDM in order to justify the rights stated therein. The other two theories justify the philosophical concept of rights. Yet it is not evident that they justify the full range of human rights stated in the doctrines. However, the perspectives are similar in the sense that they all point to moral criteria explaining that individuals have rights.

### *Natural Rights*

John Locke has elaborated what has been regarded as the paradigm for natural rights thinking.<sup>14</sup> Locke's is a philosophy, which was a response to contemporary claims about the divine right of kings, and also to all theories of the natural ordination of political authority (Waldron 1987: 7). The starting point for Locke is the state of nature, which is run by a natural law. The natural law is instituted by God and gives people rights. The state of nature is a state of "perfect freedom" and of "perfect equality" (Locke [1689] 2002: 269).

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<sup>14</sup> Locke speaks of natural rights, not human rights. We are aware of the distinction but do not let it prevent us from using Locke as a human rights theory. The reason is plain enough. Locke's natural rights are human rights since they apply to all humans equally. They are called natural rights because they are grounded on nature. Still, as far as this paper is concerned Locke's theory is applicable for justifying human rights, as they exist today in the human rights doctrines.

Locke claims that all men are born with natural rights: “[...] *equal right* that every Man hath, *to his natural freedom*, without being subjected to the Will or Authority of any other Man” (Locke [1689] 2002: 304). All men hold rights equally, and all men are naturally free. From this follows the idea that public authority can only be based on consenting men. It could only “[...] be the product of free and equal individuals coming together” (Waldron 1987: 10).

For Locke, natural rights are pre-social (Weigård & Eriksen 1998: 38). Their status is independent of society yet dependent on God’s natural law. Since rights are based upon the qualities of individual freedom and equality in the state of nature, they have a status that is independent of society.

### *Human Rights as Fairness*

In John Rawls’ theory, as it is depicted in his influential *A Theory of Justice* (1999: 10), they are described as just “[...] the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality”. Rawls refers to this approach as *justice as fairness*.

His starting point is the following: “Each person possesses an inviolability founded on justice that even the welfare of the society as a whole cannot override” (Rawls 1999: 3). Rawls therefore aims to show how the signing of a hypothetical contract between reasonable people in the original position gives legitimacy to certain social practices concerning the distribution of primary social goods (Malnes & Midgaard 1996: 309). Basic rights are referred to as one type of primary social goods. A Rawlsian justification of rights holds that if a group of persons was to choose the basic structure of society from behind a veil of ignorance (that is, in the original position) the group would provide that each person must have certain basic rights (Gewirth 1982: 44).

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### *Human Dignity*

Jack Donnelly (1989: 17) takes the UDM as his starting point for exclaiming the justifying basis of human rights. In the UDM it is stated that the source of human rights rests on “[...] the inherent dignity of the human person.” The source for human rights, therefore, is peoples’ inherent value, and human rights are needed in order to lead a life of dignity.

The essence of Donnelly’s position is that violations of human rights deny one’s humanity, and refuse one to lead a life worthy of a human being. Human rights are needed to protect the things necessary to live a life of dignity, where one’s humanity is respected. Humanity again, or man’s moral nature, entails a vision of human potentiality (Donnelly 1989: 17). Human rights are needed for a person to fulfil his potential. Dignity and human potential are closely associated in Donnelly’s theory: “Human rights are a social practice that aims to realize a particular vision of human dignity and potential by institutionalising basic rights” (ibid: 18).

### *Human Rights Justifications: Comparative Observations*

As we see there are different ways of pointing out the real source for human rights. All of the approaches above have sought to justify human rights by pointing to universal moral principles. The principles are universal insofar as they apply to all people equally; all persons have dignity, all persons are potential members of the original position and all people are part of nature.

Human rights involve a claim toward states to respect individuals’ personal integrity. All three perspectives seem to express the view that there are certain ways individuals cannot be treated by their states. The natural rights tradition ground human rights in the existence of natural freedoms in a pre-social state of nature. Men are born equal and free. The community of individuals, that is, the state, is the result of a social contract signed in order to secure these freedoms and so the state is in no position to violate them. The core of Donnelly’s position is that all persons have a certain moral character, and that they cannot be treated in ways that are incompatible with the

ability to live worthy lives. The core of Rawls' position is justice. The individuals in the original position choose a basic structure of society that is so structured that it leaves constraints on the part of the state for how it can treat its own citizens.

We remember that by pointing to which values and principles human rights are meant to protect, human rights justifications also tell us something about how human rights are interpreted and specified. We have no time for a detailed account here, though. Briefly stated, however, they all point out some clear basic guidelines. For instance, it is evident that for Locke, restrictions on rights should be few in the sense that it is part of natural law that all individuals are equal and free. The natural law is based on the existence of God. Thus, God has intended that all individuals should be equal and free, and so, human rights should be interpreted and specified in light of those divine intentions.

Societies draw upon human rights theories in their applications of human rights, knowingly or not. Whereas the UDM have reached international agreement, the three liberal perspectives are all Western. Whether other cultures may have roles to play in human rights thinking is the next theme in this chapter.

## 2.3 A Question concerning the Relevance of Culture

Human rights are universal and as such they apply to all people no matter whom, when or where they are. Still, people live in cultures and cannot be viewed independently from that culture. The question becomes whether culture matters in human rights questions. After all, people are entitled to their rights no matter what culture they live in. Yet the question is more complex than it might seem. The relationship between culture and human rights is the theme for this part of the chapter.

Let us begin by defining culture. Michael Freeman (1998: 28-29) states it thus:

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I shall take 'culture' to refer to the beliefs, values, norms, sentiments and practices that give meaning and (at least in favourable cases) value to human lives. [...] The content and practices will vary from one culture to another. But beliefs, values, norms, sentiments and practices are universal features of culture.

Freeman's definition explicates that cultures vary. Given that cultures are different, it seems reasonable to assume that some cultures may endorse human rights easier than others, and that some cultures might even reject human rights. What happens if the values of the culture conflict with human rights? There are two different schools of thought in this regard. Cultural relativism takes culture to be the source of moral values and as such gives no moral status to human rights (unless they are the results of that particular culture) (Donnelly 1989: 109). Universalism, on the other hand, holds that certain values apply universally, and if universal values conflict with culture, the latter has to give way.

Cultural relativism holds culture to be the source for moral values. The culture in question decides what is to be considered moral and what is to be considered immoral. External actors cannot make any judgements in this regard without a deep knowledge of the moral values of the culture. There are several problems with cultural relativism. One of them is that murder, rape and the worst atrocities imaginable are potentially justifiable if the culture in question endorses such actions.

Such views are contrary to universalism, which holds that certain values are universal, and that atrocities like the ones mentioned above are wrong and unjust no matter where they take place. A basic assumption is that we are all members of the human race and therefore have certain things in common. Brian Barry (2001: 285) illustrates the point by pointing out that when people are in position to make choices: "[they] strongly prefer life to death, freedom to slavery, and health to sickness." Insofar as this is a valid claim, and I think it is, truly universal human interests seem to exist.

However, do we have any basis for saying that human rights are really universal? The condition of possession for human rights is that one is human. A human right is a human right if and only if a person is entitled to it solely by virtue of being human. If

a person has a human right by virtue of her humanity, then, by implication, all other persons also have this right. Human rights are by implication universal (Chan 1995: 28). The universality of human rights is more a normative claim than an empirical fact (Donnelly 2001: 2). It is not so that all individuals enjoy human rights, but rather that they are entitled to have these rights. Still, human rights, philosophically speaking, are universal.

The question is whether the universality of human rights means that we reject cultural relativism. The problem with cultural relativism is that it justifies moral values by claims like “that is how we do it here.” Although such claims might be true in themselves they contain no moral force, insofar as they refer to *facts*, not *reasons*. To say that something is part of one’s tradition is a fact (if it is true) but does not constitute a reason for continuing to do it. Our path, therefore, lies not with cultural relativism. Universalism is not unproblematic either however. The biggest challenge is probably how to decide which values are universal and which are not. There is only a thin line between universalism and ethnocentrism. In their extreme forms, nor cultural relativism, nor universalism, serve the purposes of this paper. A more fertile approach may be to separate between different *levels* of universalism.

Michael Walzer (1994) uses the terms *thick* and *thin* in order to illuminate the distinction between cultural norms and universal values. According to Walzer, all societies share certain *thin* values and norms. These values and norms are in other words universal. Likewise, every society has certain *thick* norms and values that are unique for that particular society. The thin, universal values are encapsulated within the society’s thick, particular norms and values.

Can Walzer’s terms be used on human rights? If so, it seems that Walzer ingeniously reconciles cultural and universal claims. But how exactly may the concepts of thick and thin fit with the concepts of culture and human rights?

Jack Donnelly may be of further help in this regard. In addition to the extreme forms of universalism and cultural relativism that have already been depicted and rejected,

he separates between strong and weak forms of universalism, depending on how much room they open for cultural values. The argument is that although human rights are universal, they might have room for cultural variation, in terms of their practical application.

As established earlier in this chapter, the content of the UDM refers to certain principles that are expressed in rights-language. These rights-principles reflect basic human interests. Now, a government may be for or against any given right, but what it cannot do is to interpret the right as referring to ideas at odds with the principle behind the right. While the rights in the UDM might be general they all contain core principles that are indisputable. For instance, the right to not be tortured is incompatible with any forms of torture and no interpretation that claims otherwise can be legitimate. The core principles of human rights are not objects for cultural variation. They are the truly universal feature of human rights. In Walzer's terminology human rights principles are *thin*.

While the core principles of human rights are out of reach for legitimate cultural variation, different interpretations of rights are perhaps not. The intellectual resources that are mobilized in order to interpret and specify human rights will influence the nature of these specifications. Ideas are grounded in people, and people live in societies in which they are influenced by their cultures' religious, philosophical and moral mindsets. Their ideas can hardly be seen as independent of themselves and, by implication, their cultures. It is, therefore, conceivable that cultural norms and values are drawn upon to define human rights specifications when human rights are applied in different societies. Another question regards whether cultural specifications of human rights are *legitimate*. Based on the criterion of reasonable interpretation in light of the purposes behind the UDM,<sup>15</sup> the conclusion seems clear. Insofar as there is room for interpretations of human rights, it is hard to see why there should not be

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<sup>15</sup> See section 2.2 of this chapter.

room for distinct cultural interpretations as well. And applying Walzer again, the correct term for such specifications are *thick*.

While there are probably many interpretations that are not legitimate and not in accordance with the purposes behind the UDM, some may be. Thus, Walzer's terms nicely illustrates that human rights have both universal and particularistic aspects. Human rights principles are thin. Human rights specifications are thick.

Interpretations and specifications of human rights can vary from culture to culture, and this variation can be legitimate insofar as they respect the criteria for legitimate interpretations. Even so, having by way of reasoning established that cultural human rights interpretations may be important in the sense that there is legitimate room for such interpretations, we also wish to know whether they *ought to be important*.

### ***The Normative Relevance of Culture***

Earlier cultural relativism has been denounced as carrying no moral force. Claims like "because it is part of our culture", carry in themselves no ethical reasons. The previous conclusion though, does not exclude that culture ought to play a substantive role when it comes to specifying rights. Even though culture as such is not *morally* relevant for making human rights specifications, culture may be important for pragmatic reasons. Peerenboom (2000a: 314n8), for instance, holds that cultural beliefs may aid the promotion of human rights. Likewise, cultural beliefs and practise may also impede the promotion of human rights (ibid.).

Are pragmatic concerns good reasons for letting culture play a role in human rights specifications? It is if the following logic is applied:

An intelligent strategy to protect and promote human rights must address the underlying causes of violations of these rights. [...] the lack or insufficiency of cultural legitimacy of human rights standards is one of the main underlying causes of violations of those standards (An-Na'im 1992: 19).

The argument, thus, is that if people feel that human rights are consistent with, and part of, their culture, they will be more inclined to respect them. Joseph Chan (1999:

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212) argues that applying culture in human rights thinking may make the rights less alien and more receptive to the cultures in question.

Henry Rosemont (1988: 67) states: “[...] there are no culturally independent human beings.” That seems reasonable. One’s culture plays a part in who one is, and what one thinks, whether we are aware of it or not. An-Na’im (1992: 23) supports this claim, and holds that because cultural impacts on human behaviour are so deeply embedded in our self-identity and consciousness, the impact culture makes is often underestimated.

Even though we have denounced cultural relativism in its extreme form, we admit to the claim that cultures are ethically relevant in the sense that they give human life meaning and value (Freeman 1998: 29). Cultures provide a sense of belonging through a shared way of life and are therefore important for people. Since cultures are important for the people that share them, they are also important to consider in discussions on political philosophy. However, one should not overemphasize culture at the expense of universal moral principles, once such principles have been successfully identified. Human rights are such principles.

In fact we will hold that culture is only important in specifying human rights if two criteria are satisfied. First, the rights interpretations must be reasonable and made in good faith in light of the purposes of the UDM. Secondly, the content of the beliefs, values, norms, sentiments and practices of the culture has to be defined by those very same that take part in the culture, thus excluding that a political regime may use cultural arguments for the wrong reasons.

Concerning our second criterion, Freeman (1998: 30) states that the people are the most competent to define the exact content of their culture, not heads of state. This is important to keep in mind when we consider how autocratic regimes have used cultural arguments to curb individual rights. In such cases it might be hard for outsiders to separate culture from self-interest. Furthermore, by depressing human rights it is difficult to be sure as to whether the governments’ definition of the

contents of their culture is in accordance with their people's definition. In support of this point An-Na'im (1999: 155) says (the passage is in reference to the 'Asian Values'-debate):

No East Asian government or other government can be taken seriously in claiming the mantle of protecting culture and community against the 'cultural imperialism' of Western conceptions of human rights when the policies and practice of such a government undermine and repudiate the same culture and community in whose name it claims to speak.

Thus, our conclusion is that culture ought to matter if, and only if, the people of the culture are allowed to define its contents. This brings us to another related point, namely exactly how culture is to interpret and specify human rights. That is the theme for the next section that will present the concept of political morality.

### *Political Morality*

It is the political morality of a culture that defines the values, ideals and goals that are to be pursued for that culture. There are different models of political morality. Joseph Chan's (1997: 39) model of political morality consists of (1) fundamental values and moral principles, which constitute the foundation for the rest of the model, (2) basic political principles, which define the characteristics of good political rule, in light of (1), (3) midlevel principles, which define how political objectives are to be pursued and specified, and (4) policy recommendations, which put the above into action. This seems to be an adequately detailed and nuanced model consisting of different levels that range from general values to specific politics.

The particular culture forms its particular human rights specifications from universal human rights principles. As such there are both particular (thick) and universal (thin) aspects of human rights within each culture. In specifying human rights, the political morality of the culture has to come into play in order to form a distinctive meaning for the question at hand; a meaning that is consistent with the thick culture of the society.

A model of political morality aims at reconciling different interests. On the one hand, human rights specifications should be reasonable so as to be in accordance with the

purposes behind the UDM. This is the *external criterion*. On the other hand, the human rights specifications should also be in accordance with the values of the culture. This is the *internal criterion*. These criteria are reasonably well-defined but they may conflict with one another. Being aware of that possibility a model of political morality needs to find a proper balance between culture and human rights.

Human rights specifications should always be in accordance with the purposes behind the UDM. Cultures differ but this criterion stands firm, and applies to all cultures. A relevant question may be if all cultures are structured such that they may produce legitimate human rights specifications. Some thinkers have made use of Rawls' concept of an overlapping consensus, in order to explore the international implications of human rights and cultural diversity.

## 2.4 The Idea of an Overlapping Consensus on Human Rights

The idea of an overlapping consensus refers to a model in which people adhering to different religious, philosophical and moral doctrines agree to a political conception of justice (Rawls 1996: 133-134). The idea is that justice is best viewed as separated from any of these doctrines, so that even though people reasonably disagree about religion, philosophy and morality, they need not disagree on the principles of justice.

Charles Taylor (1999) employs Rawls' concept of an overlapping consensus and discusses the possibilities for different cultural traditions to reach an overlapping consensus on human rights. More specifically, Taylor seeks to identify certain norms of conduct that all cultures would reasonably agree on, albeit for their own reasons. The consensus Taylor depicts is limited insofar as it is the content of the rights that are agreed upon and not their justifications. Taylor's line of argument is that it is possible to agree that a right *is* important without agreeing *why* it is important. Different cultures may have different reasons for conceiving a right as important.

Thus, for Taylor, the content of human rights occupies centre stage while justifications are left in the periphery.

Does a model of an overlapping consensus match the earlier findings of this chapter? In the previous section it was noted that human rights specifications needed to be in accordance with the values of the culture, the way these are entailed in the culture's political morality. According to this line of reasoning it is the content of political morality of each respective culture that justifies and specifies human rights. This is in accordance with a model of an overlapping consensus in the sense that this model leaves justification and specification of human rights for the culture to define whereas the real consensus is limited to the content of human rights.

The cultures that take part in an overlapping consensus on human rights will on their own terms define how they justify and specify these rights. As previously established, however, human rights justifications are important not merely because they provide philosophical reasons for human rights, but also because they define the meaning of rights and contribute to specifying their content. That is, in the application of human rights one has to base oneself on human rights justifications to see which values, ideals and goals that should be pursued. Ideally one should aim at international agreement also regarding justification. One should at least be able to agree that some ways of justifying and specifying rights are acceptable and others are not. By leaving justification and specification out of the picture one risks that consensus on human rights has no substantial value, and that serious disagreements might be masked.

Another approach for an overlapping consensus on human rights could be to start from within cultural traditions to see if an overlapping consensus could emerge on the UDM. Instead of seeking to identify which rights an overlapping consensus would produce, one can start off by claiming that the UDM already has international legitimacy. For instance, Jack Donnelly (2001: 8-10) claims that there exists an overlapping consensus on the rights stated in the UDM. All cultures need to do is to recognize them. The task, then, is to explore whether the UDM provides a reasonable

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answer for different cultures to agree upon. Considering the wide international support for the UDM,<sup>16</sup> this view does not seem unreasonable.

In order to explore whether an overlapping consensus from within cultural traditions can emerge on the UDM, we must examine the moral resources of the cultural traditions, and discuss whether they are capable of firstly recognizing the UDM and then discuss how they may justify and specify these rights. This approach seems to give a detailed account of the relationship between human rights and cultures in the sense that it involves comprehensive cultural perspectives on human rights. This approach is different from a strict Rawlsian perspective the way it is applied by Taylor. Whereas that perspective leaves out philosophical, moral and religious doctrines, this approach draw on them as resources rather than hindrances. A challenge with this approach as far as intercultural consensus on human rights is concerned is that it may dig too deep, and instead of finding common ground between tradition and human rights, it finds fundamental incompatibilities. That is of course exactly what Taylor's approach avoids. Still, if the goal is to find real genuine consensus on human rights, rather than masked disagreement, this approach seems more promising.

Insofar as the goal is to envisage the relationship between Confucianism and human rights in a fundamental way, and not just touching on the surface, the latter model seems to be best suited. It will therefore be pursued in this paper. The model consists of reaching an overlapping consensus on human rights from within cultural traditions. In the following we will be referring to this as *the cultural consensus thesis*. In short, the cultural consensus thesis states that intercultural consensus on human rights (in the UDM) must make culture its point of departure, and thoroughly explore the moral resources within the culture in order to examine its bearings on human rights.

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<sup>16</sup> See supra note 1.

A challenge to our approach is that it is demanding in terms of resources. Ideally the approach would have to explore all the leading cultures in the world and their bearings on human rights, in order to see whether an overlapping consensus could emerge from this. That is certainly beyond the scope of this paper. By giving a thorough analysis of the relationship between Confucianism and human rights, our goal is merely to contribute to one step of the way. The purpose of the approach, broadly conceived, is captured by An-Na'im (1992: 21). He holds that when legitimacy for human rights has been achieved within each tradition, one can aim for intercultural legitimacy through intercultural dialogue about the meaning and application of human rights. Although intercultural dialogue would serve our purposes well, it will not be conducted here due to the limited scope of the paper. Even so, ideally the cultural consensus thesis aims for a genuine intercultural consensus on the content of the UDM. Although cultures need not agree upon all aspects of justifications and specifications of human rights, justifications and specifications of these rights must enter the picture through dialogue and common understanding, in order to promote the conditions for a *genuine* intercultural consensus on the rights-principles of the UDM. The first step of this endeavour is the exploration of cultural traditions and it is that step we will be taking in the following chapters.

## 2.5 The Task Ahead

We should now be able to make sound judgements regarding the relationship between Confucianism and human rights. Summing up the chapter, we have seen that human rights principles express universal aspects of basic human interests, and should be taken seriously. Culture is also important in the sense that individuals conceive of it as important. However, this is not a culturally relativistic paper. In itself culture carries no normative force but since it is important for people, and since people's actions decide which turns human rights should take, also culture must be

taken seriously. And since both human rights and culture are important they should both be taken into account.

The cultural consensus thesis allows for cultural variation of human rights. While an overlapping consensus can be created on the rights-principles of the UDM, justification and specification of human rights rest with the culture itself. However, consensus on human rights principles gives no meaning without justification and specification. Consensus must include that some ways of justifying and specifying human rights are acceptable and others are not. In order to move towards an overlapping consensus on human rights culture must be the point of departure. Cultural human rights perspectives stand on three pillars: recognition, justification and specification. By constructing cultural human rights perspectives we will be able to see how, or if, the culture in question recognizes human rights. In addition to this, cultural human rights perspectives enable us to see how cultures justify and specify these rights.

Cultural human rights perspectives are only legitimate insofar as the cultural values of the respective culture are agreed upon in the population that shares that culture. This means that neither can one culture place restrictions on the rights of the people of other cultures, nor can a majority culture place restrictions on a minority culture. The shared values must be fundamental, and they must not be used as excuses for restrictions on rights where such restrictions are not legitimate.

In order for cultures to take part in an overlapping consensus on human rights they must have certain moral resources. Ideally one should ask how the culture in question relates to the all rights stated in the UDM. However, that is beyond the scope of this paper. What one has to ask is whether the political moralities of different cultures recognize the concept of human rights. In other words, the culture has to recognize the defining characteristics of the concept of human rights, namely, that individuals have rights by virtue of their humanity and that this enables them to promote rights-claims.

One may ask how one is to evaluate if Confucianism recognizes these important characteristics. Searching for rights-friendly passages in the Confucian texts may constitute one way of conducting this. However, such an approach has clear weaknesses. By searching for rights-friendly aspects one may be ignoring aspects that are directly hostile to human rights. Such an approach is therefore not in accordance with the cultural consensus thesis, in the sense that important aspects of the culture may be ignored. The cultural consensus thesis aims for genuine and not masked recognition. However, another way of facing the task of recognition may be to confront the political morality of Confucianism head on with human rights.<sup>17</sup> By doing this one is able to consider whether Confucianism and human rights are compatible. This approach is clearly more fertile in the sense that the focus is on the most important aspects of Confucian thought, and not necessarily the most rights-friendly aspects. Thus, Confucianism is taken seriously. In accordance with the cultural consensus thesis this approach will be pursued.<sup>18</sup>

Before we can start constructing a Confucian human rights perspective, Confucianism must be properly presented. The values, ideals and goals of a culture are defined by the political morality of that culture. Therefore, we must depict the essence of a model of Confucian political morality. Then we can move on to discuss Confucianism in relation to the three pillars of cultural human rights consensus.

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<sup>17</sup> Joseph Chan (1999) follows this approach.

<sup>18</sup> We do not claim that recognition is logically derivable from compatibility. However, by following this approach we will at least be able to make some reasonable assumptions. One is that if culture and human rights are compatible, we have at least not been able to falsify that Confucianism recognizes human rights.

## 3. CONFUCIANISM

### 3.1 Introduction

The essentials of Confucian philosophy will be presented in this chapter. The aim is to present a reasonable version of Confucian political thought that can serve as the object for the forthcoming analysis. Although the main approach of this paper is philosophical reconstruction, the focus of this chapter is on interpretation. The objective is to form an unbiased understanding of Confucianism. Thus a presentation of Confucianism independently of contemporary academic and political debate is attempted. This is in accordance with the cultural consensus thesis in the sense that the understanding of the culture in question must be grounded on the culture's own terms.

In order to bring structure to how we conceive of Confucianism, we will use a model of Confucian political morality that differentiates between levels of Confucian political thought. The aim of the model is identification of the different elements of Confucianism that together form a coherent doctrine of political ideas. Thus, a model of political morality should form a nuanced understanding of Confucianism.

This chapter will start by defining what the term Confucianism refers to, and then present the content of that term. As a general part of Confucian morality we will outline Confucian ethics and Confucian norms of conduct. Then we will move on to describe Confucian *political* morality. The latter is obviously not independent of the former, so Confucian ethics and norms of conduct will also contribute to how Confucian political morality is conceived.

## 3.2 Defining Confucianism

The term, Confucianism, can have a variety of different meanings. It can be used to denote a way of life, political ideology, actual state politics and philosophical tradition (Chan 1999: 213). In this discussion we will concentrate on Confucianism as a philosophical tradition.

One reason for choosing to focus on the philosophical tradition of Confucianism instead of other aspects of Confucianism is that Confucianism as philosophy constitutes the basis or foundation for all sorts of Confucian ideas. It is in Confucianism as philosophy that we can expect to identify the real core of Confucian thought.

Besides, the Confucian influence on actual state politics is difficult to measure since state politics is influenced by a variety of different factors. The same can be said for political ideologies; namely that Confucian political ideology is diluted in the meeting with other thoughts and ideas that together form a coherent ideology. By choosing the Confucian philosophical tradition as the focus of analysis the original ideas are easily identified.

The Confucian philosophical tradition is diverse so for analytical purposes it is necessary to narrow the focus also within the philosophical tradition of Confucianism. As a philosophical tradition, Confucianism covers a wide spectre of different thinkers operating in different times of history. It stretches from the Warring States period, where Confucius himself belonged, to our present time. Confucianism as a philosophical tradition was born with the thoughts of Confucius (551 - 479 BC). Confucius' thoughts are depicted in the literary work *The Analects of Confucius*, which was written after his death by some of his students.

Confucius' thoughts from the Analects were both carried on and developed by his follower, Mencius, in the literary work *The Mencius*. I choose to base my analysis upon the Analects and the Mencius. My reason for choosing to focus exclusively on the two texts is that they are now being regarded as the paradigm of Confucian

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philosophy (Chan 1999: 213). Even though many later contributions to Confucian thinking emerged in the centuries that followed Confucius and Mencius, all later Confucian thinkers have followed in the footsteps of these two thinkers. Of course, some of the followers promoted ideas that moved far from the original Confucian thought in the *Analects* and the *Mencius*. However, also these new ideas, to a certain degree, were founded on the two original texts.

The *Analects* is the earliest work in the Confucian tradition. It poses certain challenges. Benjamin Schwartz (1959: 51) explains:

The founder himself [of a philosophic system] is seldom an academic philosopher bent on building a rigidly coherent system. More often than not, he is simply a man seized with an overwhelming vision which he must proclaim. He is not necessarily concerned with the mutual consistency of all his utterances, and on many problems his thought may be fruitfully ambiguous. [...] Nor is he generally concerned with aspects of reality which do not impinge on his vision. It is generally the followers who assume the burden of defending the vision against hostile challenge and who must attempt to relate the vision to those aspects of experience which the founder has left out of account. [...] Confucianism was such a vision and such a philosophy.

We must, therefore, be aware that essential values and principles of Confucian philosophy may be ambiguously explained and/or may conflict with each other. However, the discussion will not solely be based on Confucius' original ideas but also the thoughts of Mencius. Mencius elaborated on and clarified Confucius' thoughts. We make no separation between Confucius and Mencius in terms of importance so if they should contradict each other that will constitute a challenge. We will face such challenges as we go along.

The *Analects* and the *Mencius* were written in classical Chinese. For the most part, this paper makes use of the English translations by D.C. Lau<sup>19</sup>. This implies that the way Lau has interpreted central concepts in Confucian thought has an impact on this paper with regard to the terms that will be used. This will appear clearer in the section ahead when central Confucian virtues are presented.

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<sup>19</sup> However, some secondary sources that we use in quoting Confucius and Mencius may have made use of other translations.

### 3.2.1 Confucian Ethics

Confucianism is an ethics concerned with virtues. “In virtue-ethics, the focus is on the virtuous individual and on those inner traits, dispositions, and motives that qualify her as being virtuous” (Slote 2000: 177). According to Lee (1992: 241), a virtue-based morality is one in which the common good of all members of the community is emphasized. The common good consists of a shared life. Each individual has its role to play in contributing to that way of life. Virtues are necessary so that people contribute to the common good and act in accordance with their roles. Confucianism, Lee holds, is such a morality. Randall Peerenboom (1993a: 126) further explicates what a virtue-based morality refers to:

Whereas a morality of law sets the minimum, a morality of virtues aims at the maximum. The former tells you what is unacceptable, intolerable; the latter points to what is ideal, what is possible.

Whether all forms of virtue-based moralities take the form that Lee and Peerenboom proclaim, may be discussed but what is more important for us is whether their account of Confucianism, as a virtue-based morality entailing the characters above, is accurate. There are reasons to think that their view is correct. Peerenboom’s claim, concerning how virtue-based moralities point to an ideal, is nicely illustrated in a crucial point in Confucianism, namely the distinction between morality and self-interest. When morality conflict with self-interest one must choose morality no matter the cost (Lau 1970: 22-23). Mencius (6A: 10) says:

Life is what I want; dutifulness is also what I want. If I cannot have both, I would rather take dutifulness than life [...] there are ways of remaining alive and ways of avoiding death to which a man will not resort. In other words, there are things a man wants more than life and there are also things he loathes more than death.

When Mencius refers to “things a man wants more than life” he refers to dutifulness. Dutifulness refers to the proper display of virtues. Confucianism thus places moral virtues and right acts above life.

The most important virtues in Confucianism are *yen* and *yi*. *Yi* is often translated by dutifulness (as above), rightness and righteousness. In this paper we will apply

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righteousness when speaking about *yi*. *Yen* is often translated by altruism, love and benevolence. We will apply benevolence in this paper. This is in accordance with the general approach of the paper that utilizes the Confucian concepts the way they have been translated by D.C. Lau.

According to Chan (1999: 223), benevolence is the most important virtue a Confucian gentleman ought to possess. Chan describes benevolence as the basis of all human virtues, whereas Lau (1970: 12) describes it as the totality of moral virtues. Tan (1972: 1) describes benevolence as the “crucial principle” of Confucian philosophy. We need not doubt that benevolence is considered an important aspect of Confucianism but what does it refer to exactly?

The term benevolence involves among other things love for one’s fellow men (Analects 12: 22). Confucius also exclaims this rule to be part of benevolence: “Do not impose on others what you yourself do not desire” (Analects 12: 2). According to Confucius, benevolence is a rare quality but is something that is to be reached for. Even so, his disciples conceived of it as a heavy burden. Confucius’ disciple Tseng Tzu expresses this:

A gentleman must be strong and resolute, for his burden is heavy and the road is long. He takes benevolence as his burden. Is that not heavy? Only with death does the road come to an end. Is that not long?” (Analects 8: 7).

The passage indicates that the practice of benevolence requires commitment and dedication. However, according to Confucius all men had the capability of being benevolent:

Is there a man who, for the space of a single day, is able to devote all his strength to benevolence? I have not come across such a man whose strength proves insufficient for the task (Analects 4:6).

Even so, benevolence is a rare quality according to Confucius. This can be illustrated by the fact that he would not describe himself as benevolent (Lau 1979: 21). Nor would he easily describe others this way. According to Confucius then, benevolence is more of a quality that is to be reached for than a wide spread virtue that everyone possess. Interestingly, however, there is a distinction between Confucius and Mencius

regarding the acquisition of benevolence. Whereas Confucius regards benevolence as confined to solely a few, if any, Mencius conceives of benevolence as a potential that everyone has, and that everyone can choose (Bloom 1998: 100-101). That is not to say that everyone will develop benevolence but everyone has the potential for it. In what is considered to be the most famous passage in the Mencius (Bloom 1998: 101), the meaning of benevolence as the *heart of compassion* is illustrated:

My reason for saying that no man is devoid of hearts sensitive to the suffering of others is this. Suppose a man were, all of a sudden, to see a young child on the verge of falling into a well. He would certainly be moved to compassion, not because he wanted to get in the good graces of the parents, nor because he wished to win the praise of his fellow villagers or friends, nor yet because he disliked the cry of the child. From this it can be seen that whoever is devoid of the heart of compassion is not human (Mencius 2A: 6).

The last sentence in the passage above reveals that there are certain qualities a person must possess in order to be human, and that compassion is one of these qualities.

Mencius depicts four germs or beginnings (Bloom 1998: 102) that all humans possess. These germs have certain correlative qualities that all are fundamental in Confucian thought. Compassion is the germ of benevolence. The feeling of shame is the germ of righteousness. Modesty and courtesy are the germs of observing the rites. Lastly, separating between right and wrong are the germs of wisdom (Mencius 2A: 6).

It is on shame that Mencius places the greatest importance. It is the feeling of shame that leads one to be a better person, because shame makes one pursue righteousness (Lau 1970: 16-17). Righteousness has been called the complement of benevolence (Bloom 1998: 103). While benevolence is based on the agent righteousness is focused on the act, and is thought to be “the standard by which all acts must be judged” (Lau 1979: 27). Righteousness refers more specifically to an act, which is morally right in particular contexts, or to a duty that the agent ought to do (Lau 1970: 12). When used in the general sense righteousness refers to acting moral (Lau 1979: 26-27). But no matter the circumstances the path of righteousness is to be followed: “The Master said, ‘In his dealings with the world the gentleman is not invariably for or against anything. He is on the side of what is moral’” (Analects 4: 10).

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Benevolence and righteousness may be described as the primary virtues in Confucianism. Benevolence involves unselfish assistance to others (Tan 1972: 2): “A man of *ren*<sup>20</sup> wishing to establish himself, seeks also to establish others; wishing to elevate himself, he seeks to elevate others” (Confucius cited in Tan 1972: 2). Thus the focus of these primary virtues is on the common good. Benevolent persons will love one’s fellow man, and on that ground act righteous and not selfish.

### 3.2.2 Confucian Norms of Conduct

Being virtuous also involves acting in accordance with the rites. The rites refer to rules of conduct meant to preserve social harmony and political order (Cheng 1998: 142) by acting in accordance with the accepted standard (Hu 2000: 59). As Lau states (1979: 20): “The rites (*li*) were a body of rules governing action in every aspect of life and they were the repository of past insights into morality.” The concept of rites in Confucianism extends any religious meaning associated with ritual sacrifice and ancestral worship (although it applies for those as well).

Rites may also be referred to as customs, traditions or rituals. We will, however, in accordance with Lau’s translation, continue to use ‘rites’ as the proper term. The rites are interlinked with virtues. We remember from Mencius’ four beginnings that the virtues of modesty and courtesy are the germs of the proper observance of the rites. In this passage, however, Confucius links rites with benevolence:

The Master said, ‘To return to the observance of the rites through overcoming the self constitutes benevolence. If for a single day a man could return to the observance of the rites through overcoming himself, then the whole Empire would consider benevolence to be his (Analects 12: 1).

Confucius places great emphasis on rites. This can be seen from his advice to his disciple Yen Yüan: “Do not look unless it is in accordance with the rites; do not speak unless it is in accordance with the rites; do not move unless it is in accordance with the rites,” (Analects 12: 1). From this it seems that according to Confucianism,

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<sup>20</sup> *Ren*, like *yen*, means benevolence.

everything one does should be done according to the accepted standard, or custom. There is only a narrow room for discrepancies.

Virtues are the basis for the rites (Cheng 1998: 142). Rites, therefore, come after virtues: “The Master said, ‘What can a man do with the rites who is not benevolent?’ (Analects 3: 3). The rites constitute an important principle in Confucian thought although its status does not extend to that of virtues.

### 3.3 Confucian Political Morality

Having depicted the Confucian view on virtues and rites this section of the paper will go deeper into how Confucian philosophy relates to political rule. In order to bring structure to the discussion, a model of Confucian political morality will be utilized.

The previous chapter defined a model of political morality as consisting of 1) basic values and moral principles, which constitute the most important ideals of the culture, 2) basic political principles, which define legitimate political objectives, in light of (1), 3) midlevel principles, which define how political principles are applied in the real world, and 4) policy recommendations, which put the above into action. The lowest level of the model, policy recommendations refer to practical political choices based on the levels above, in addition to the context of the situation in which the choice takes place. While policy recommendations will form part of the analysis that is to follow, we will not devote serious attention to it here. This is in accordance with the objectives of this chapter to present Confucian political thought from contemporary debate. Thus, in the following sections the aim is a presentation a more or less de-contextualized version of Confucian political morality.

For practical reasons, the presentation that follows is based on themes and will not be in accordance with the different levels of the model. The main themes that will be presented are social harmony and the importance of the collective. The themes may not be seen independently of each other so lines will be drawn between them. We will identify the different levels of Confucian political morality as we go along. The

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goal is to conduct this rather explicitly, which may interfere with the flow of the presentation.

### 3.3.1 Social Harmony

A primary goal of Confucianism is to obtain harmony in every realm of life; within persons and between persons. It is social harmony, or harmony between persons, that will be the centre of attention here. Xia Yong (2001: 385) defines harmony thus:

A harmonious society should be a mixture of division and merger, individual and collective, and part and whole. Being partial to any one aspect would cause disharmony.

The essence of Xia's definition seems to be balance. However, it is difficult to see how that balance is to come into place. Xia states that if one is partial to some aspects over others, it will create disharmony. Still, how to draw the balance so that partiality is avoided, remains unanswered. The definition seems too vague to make a clear meaning of the concept. We will therefore look for another definition. Randall Peerenboom (1998: 240) defines harmony this way:

[...] harmony is a contextual concept at odds with the idea of a single, objective, universal, normative order. The goal is to combine the [beliefs, values and traditions] of the many members of a particular society at a particular time into a single cohesive whole.

Peerenboom's definition is both clearer and more nuanced, and will be used in this paper. According to this definition, harmony involves a process of creating unity from plurality. Peerenboom (1998: 242) explains further that it is the responsibility of virtuous rulers to provide the task of reaching social harmony. A state is capable of following the way only if moral rulers are on the throne, as only moral insightful rulers are able to conceive of the proper way:

In theory, a ruler's personal and moral cultivation allows him to see things others do not. He is able to see a way (dao) to bring harmony out of diversity, to turn disorder into order [...] But to be successful [...] a ruler must persuade others to his vision (Peerenboom 1998: 242).

The concept of the way has a prominent position in Confucian thinking. The way, according to Lau (1979: 11) is a term that comes very close to the Western concept of

“truth” as it has been employed in Western philosophical and religious writings. The concept of the way applies both at an individual and a state level. As Schwartz (1985: 62) puts it:

[...] in its most extended meaning [the way] refers to nothing less than the total normative sociopolitical order with its networks of proper familial and proper sociopolitical roles, statuses and ranks, as well as to the "objective" prescriptions of proper behavior - ritual, ceremonial, and ethical - that govern the relationship among these roles," while it "[...] also embraces the "inner" life of the living individual.

Since there is only one way, the rulers must promote political unity. Political unity is not possible with more than one ruler on the throne (Hsü [1932] 1975: 73). The role of the one ruler is to guide the people in order for them to put self-interest aside for the common good. This involves unifying the people in their thoughts and their aims so that they will follow the correct way. When the way is followed social harmony will flourish. In this aspect Confucianism promotes perfectionistic methods.

Perfectionism holds that the state should promote valuable practices and ways of life (Chan 1997: 47n). However, the perfectionism that Confucianism advocates is non-coercive. The moral rulers who undertake the project of bringing unity and harmony to the people should renounce the use of force:

[King Hsiang of Liang] asked me, "Through what can the Empire be settled?"  
"Through unity," I said.  
"Who can unite it?"  
"One who is not fond of killing can unite it," I said (Mencius 1A: 6).

The non-conflicting character of Confucianism applies to government as well as individuals. Confucianism denounces the use of force in government. The ruler ought to rule by virtue, not force. When Chi K'ang Tzu asks Confucius whether he should kill the people who do not follow the Way, Confucius replies:

In administering your government, what need is there for you to kill? Just desire the good yourself and the common people will be good. The virtue of the gentleman is like wind; the virtue of the small man is like grass. Let the wind blow over the grass and it is sure to bend (Analects 12: 19).

The passage above illustrates Confucianism's emphasis on the ruler as a moral example. There is no need for the use of force. The virtues of the ruler are sufficient. However, if the ruler lacks virtues one cannot expect better of the people:

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The prevalence of thieves was a source of trouble to Chi K'ang Tzu who asked the advice of Confucius. Confucius answered, 'If you yourself were not a man of desires, no one would steal even if stealing carried a reward (Analects 12: 18).

If the people are ruled by virtue by virtuous rulers who function as moral examples for the population, the people will be virtuous themselves. Likewise, if the ruler behaves badly so will the people. It is therefore believed that rule by virtue is superior to rule by law and punishment:

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 (Analects 2: 3).

Rule by virtue and rites, then, are superior to rule by law. When the people are properly guided by moral rulers, laws are made largely irrelevant. This proper guidance by moral rulers involves, as we have already seen, use of non-coercive perfectionism. It also seems to involve moralism. Moralism holds that the state should promote morally worthy practices (Chan 1997: 47n). So when the state, represented by the ruler, promotes valuable practices (perfectionism) and defines the society's morals, the people will conceive of these practices as valuable, and thus pursue them. This is why Confucianism views laws as irrelevant.

If possible the use of legal mechanisms is to be avoided, and best of all is of course to make legal mechanisms superfluous. Consider this passage from the Analects (12: 13):

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.

This passage illustrates two things. Firstly, the ideal is that there is no need for laws. Secondly, the passage illustrates Confucianism's non-litigious nature. Confucianism prefers consensus rather than self-assertion and litigation. As stated earlier, modesty and courtesy were moral potentials depicted by Mencius that enabled individuals to follow the rites.

In order to find the way and achieve social harmony, Confucius advocates the necessity of each person knowing his place in society as prescribed by the rites. Social relationships with their accompanying roles define this place. This can be illustrated by the following passage:

Duke Ching of Ch'i asked Confucius about government. Confucius answered, 'Let the ruler be a ruler, the subject a subject, the father a father, the son a son' (Analects 12: 11).

Each person should act in accordance with his or her role. If they do not there will be chaos.

When Confucius is asked what his first task would be, if he should be given the responsibility to administer the state of Wei, Confucius says that he would start with rectifying names. He explains (Analects 13: 3):

When names are not correct, what is said will not sound reasonable; when what is said does not sound reasonable, affairs will not culminate in success; when affairs do not culminate in success, rites and music will not flourish; when rites and music do not flourish, punishments will not fit the crimes; when punishments do not fit the crimes, the common people will not know where to put hand and foot.

What is meant by rectification of names is that the duties and obligations that are associated with names and titles must be the correct ones. When they are not correct they need to be corrected, or rectified. Without a clear order in which names and titles function, as they should, there will be chaos. Harmony and order will fall. When people do not act in accordance with their roles the very foundation for social stability and public order is challenged.

To sum up, obtaining social harmony is both a top-down and a bottoms-up process. The top-down process involves virtuous rulers, who seek to unify the people the way he has set out to. Perfectionistic and moralistic methods are used in this capacity. The goal is for people to put self-interest aside for the common good. The bottoms-up process, therefore, refers to how people should act in accordance with their roles, and that they should act virtuously for the common good.

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So far we have explicated how the ruler should rule, but we have not said what his rule is mandated upon. Political legitimacy in Confucian philosophy is grounded in the Decree of Heaven. Heaven stresses the welfare of the common people, and it is the task of the emperor to take care of that welfare (Lau 1979: 28). In providing the common people with welfare the ruler needs to satisfy the people's material needs, their security needs and their moral needs. Material needs refer to food. Security needs refer to arms. And moral needs refer to trust in the ruler (Lau 1979: 32-33). Among these three requirements, Confucius places food above arms, and trust above food, because: "[...] when there is no trust the common people will have nothing to stand on (Analects 12: 7).

Even though it is Heaven that is the *de jure* basis for political rule, the people constitute the *de facto* foundation of rule, in the sense that the ruler's primary obligation is not to heaven but to the people (Cheng 1998: 143). To rule for the good of the people is therefore a central aspect of Confucian philosophy. In fact, according to Lau (1979: 32) it is the most basic principle of Confucianism that the welfare of the common people is the ultimate purpose of government.

In Confucianism the interests of the people are ranked above those of the ruler (Hu 2000: 58). Mencius (7B: 14) says: "The people are of supreme importance; the altars to the gods of earth and grain come next<sup>21</sup>; last comes the ruler." However, it is the ruler's task to fulfil the interests of the people. So far we have seen how Confucianism advocates the welfare of the people as being of supreme value in politics. It also starts to get clear, however, that it is the ruler, and not the people themselves, which are responsible for this welfare. The principle that best describes this philosophy is paternalism.

The ordering of society that Confucianism depicts is clearly paternalistic. Paternalism means "Government as by a father; the claim or attempt to supply the needs or to

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<sup>21</sup> The altars to the gods of earth and grain are a symbol of the state (Lau 1970: 37).

regulate the life of a nation or community in the same way as a father does those of his children” (Scruton 1982). There are clear elements of paternalistic thought in Confucianism. Mencius (in Cheng 1998: 151) says explicitly that the ruler is parent to the people. It is the task of the ruler to provide for the welfare of the people since the people are not capable of securing this themselves.

In Confucius’ view the common people are of limited intellectual capacity, which can be seen from the statement: “[t]he common people can be made to follow a path but not to understand it (Analects 8: 9).

Confucius’ lack of faith in the common people is perhaps best explained by his emphasis on the necessity for education and studying. The common people lacked both the capacity and the opportunity to educate themselves through study:

Those who are born with knowledge are the highest. Next come those who attain knowledge through study. Next again come those who turn to study after having been vexed by difficulties. The common people, in so far as they make no effort to study even after having been vexed by difficulties, are the lowest (Analects 16: 9).

Due to the lack of opportunity for education it was the supreme duty of capable and educated rulers to protect the interests of the people (Lau 1979: 36-37). This can be illustrated with a passage from Mencius: “There are those who use their minds and there are those who use their muscles. The former rule; the latter are ruled” (Mencius 3A: 4).

Thus, while one can say that Confucianism advocates government for the people, it does not seem to advocate government of and by the people (Bell 2000: 306; Hu 2000: 61). The ruler, or the emperor, is the government. The legitimate ruler rules with a view to the common good, in the sense that the interests of the citizens are the ultimate purpose of government.

### *Summing Up Categories*

The different levels of our model of Confucian political morality start to emerge at this stage. First we see certain mid-level principles at play. Paternalism is reflected in the sense that the ruler is parent to the people. Moralism can be seen in the sense that

the state should promote morally valuable practices (rule by rites and virtues). Perfectionism is apparent in the sense that people should be unified in thought (in order to follow the same way). Paternalism, moralism and perfectionism all represent mid-level principles that define how political objectives are to be pursued.

The section has also identified political principles that define the characteristics of legitimate political rule. The ruler's legitimacy rests with the mandate of heaven which constitutes an important political principle. However, the mandate of heaven is more symbolic than real. The ruler's obligations are to the people. Thus, in reality political legitimacy is based on the welfare of the people. This, then, constitutes another important political principle. Perhaps the most basic aspect of political rule is that it should be properly based on virtues and rites.

The most important level of the model in terms of status consists of basic values. Social harmony and the common good seem to represent basic values. These seem to be the ideal that everything points to. They are deeply attached to virtues both on account of the ruler and the population. Virtues are necessary in order for people to put self-interest aside for the common good. Social harmony also seems deeply attached with the fulfilment of social roles.

Social roles and relationships will be further depicted in the next section in which the theme is the importance of the collective.

### **3.3.2 The Importance of the Collective**

In the previous parts we have seen the emphasis placed on the common good. It seems that Confucianism focuses more on the collective than the individual. The ideal virtuous individual is more concerned with the collective interest than his own interest. The common good can both apply to the fact that the good life for different individuals has similar components and also that the good life is grounded in community with others (Føllesdal 2000). This part of the chapter is devoted to the importance of the collective in Confucianism, with special regard to the family.

Previously it was said that the rites are a normative standard of behaviour guiding people to do the right. The rites also guide the five basic, social relationships in Confucianism. The five basic relationships include: father - son, husband - wife, elder brother - younger brother, ruler - ruled and friend - friend. The two relationships that are not family-based are familial in character. The relationship between ruler and the ruled corresponds to the relationship between father and son, whereas the relationship between friends corresponds to the relationship between older brother and younger brother (Lee 1992: 253).

Family relationships form the basic core of Confucian morality. Confucius made the familial relationships and the love and duties that existed within them the basis of a general morality (Lau 1979: 18), in which the moral obligations of family life are the building blocks of society. The well-ordered moral society is thus built from the ground up (Fukuyama 1997: 26). In society at large, love for people outside one's family is looked upon as an extension of the love for members of one's own family (Lau 1979: 18). Ethical obligations radiates outside oneself and one's family in concentric circles (Bloom 1998: 103; Peerenboom 1998: 259n). Mencius (7A: 15) states it thus:

There are no young children who do not know loving their parents, and none of them when they grow up will not know respecting their elder brothers. Loving one's parents is benevolence; respecting one's elders is rightness [yi]. What is left to be done is simply the extension of these to the whole Empire.

According to Mencius, benevolence and righteousness have their origin within the family but once these virtues have been developed they can extend to the larger community. Benevolence toward one's parents is better known as filial piety.

Filial piety is a virtue that is strongly emphasized in, and strongly associated with, Confucianism. Filial piety has been called "[...] the virtue of virtues in the Confucian tradition" (Bell 2000: 96), the "[...] uttermost virtue in society" (Hu 2000: 60) and "the chief virtue of the Confucian system" (Hsü [1932] 1975: 72).

Filial piety involves compliance on the part of children to their parents. What does this mean? The Analects may yet again illuminate us: "Meng Yi Tzu asked about

being filial. The Master answered, ‘Never fail to comply.’” Does that mean blind obedience? No, Confucius continues: “When your parents are alive, comply with the rites in serving them, when they die, comply with the rites in burying them; comply with the rites in sacrificing to them” (Analects 2: 5). We see from this passage that compliance refers to serving one’s parents according to the rites. Let us look at one example.

The three years after the parents have died is a period of mourning, prescribed by the rites. Upon being questioned by Tsai Yü whether the three years of mourning was not too long Confucius says:

How unfeeling Yü is. A child ceases to be nursed by his parents only when he is three years old. Three years’ mourning is observed throughout the Empire. Was Yü not given three years’ love by his parents? (Analects 17: 21).

The passage illustrates that serving one’s parents should be in accordance with the rites and not what one feels is correct. Some thinkers, for instance Fukuyama have claimed that the emphasis placed on the family in Confucianism is so strong that it legitimates the negligence of the community as a whole. That seems like a serious challenge to some of the elements of our preliminary model of Confucian political morality in which fundamental value was attached to social harmony and the common good. However, our model also attached fundamental value to one’s role in a given context. Can it be that the role in one’s family precedes the importance placed on community values? This question needs answering, and the central issue seems to be how far the virtue of filial piety is supposed to reach. An answer is attempted in the next section, in which the focus is on the relationship between the family and another collective, namely the community.

### *The Relationship between Family and Community*

Fukuyama (1995: 226) claims that what characterizes classical Confucianism is a “[...] intense familism that [takes] precedence over all other social relations, including relations with political authorities.” This is not necessarily so however. It is true that ethical obligations have their starting point in the family, as the passage from

Mencius above explicates. Still, it does not follow that even if one's duties start within the family, they also end within the family. Rather it demonstrates that the family is important for the education and moral edification that is necessary to be a good citizen. Mencius advocates that the primary virtues that although learnt within the family should extend to the larger community. Confucius' disciple Yu Tzu says (Analects 1: 2):

It is rare for a man whose character is such that he is good as a son and obedient as a young man to have the inclination to transgress against his superiors; it is unheard of for one who has no such inclination to be inclined to start a rebellion [...] Being good as a son and obedient as a young man is perhaps the root of a man's character.

In this passage we see that being a good son and a good citizen are interlinked. Therefore, what Fukuyama conceives as an extensive emphasis on the family might also be regarded as arguments for promoting the welfare of the community as a whole.

That is not to say though, that Confucianism does not place great stress on the family. Confucius states in a hotly debated passage:

The Governor of She said to Confucius, 'In our village there is a man nicknamed "Straight Body". When his father stole a sheep, he gave evidence against him.' Confucius answered, 'In our village those who are straight are quite different. Fathers cover up for their sons, and sons cover up for their fathers. Straightness is to be found in such behaviour (Analects 13: 18).

In this passage we see that when the interests of the family and community collide, precedence should be given to the family. This makes Fukuyama's claim above, that Confucianism stresses an unlimited familism seem legitimate. Daniel Bell says (2000: 301): "[...] the requirements of filial piety justify breaking the law." This is a strong claim and it seems a serious challenge to Confucian philosophy. Still, there are other ways of conceiving of Confucian family loyalty.

As mentioned above, Confucius made the familial relationships and the love and duties that existed within them the building blocks of society. The well-ordered moral society is thus built from the ground up. In society at large, love for people outside one's family is looked upon as an extension of the love for members of one's own

family. Now, if one is not filial and goes against one's parents then the consequences will be severe for the society as a whole. It is within the family that one's virtues are developed. If one fails to be filial, one will not develop other basic virtues like benevolence and righteousness. Thus, filial piety has a strong position in Confucianism but it has to be interpreted with emphasis on the common good for the community at large.

### *Summing Up*

In sum the importance of the family in Confucianism does not contradict anything of the above. Based on the importance of virtues in Confucianism we understand the importance of the family since this is the proper arena for their development. Thus, rather than contradicting the Confucian community ideal, the emphasis on the family seems to fit in with our preliminary model of political morality. We should now have a basis for defining a fully detailed account of Confucian political morality. That will close this chapter. After that we will proceed to the analysis part of the paper.

## 3.4 Summarizing Units of Analysis

This section will summarize the elements of Confucian political morality that has been identified throughout the chapter. These elements constitute the units of analysis that the analysis will be grounded upon. To summarize the essentials of classical Confucianism within the confines of these is a challenge. However, by ordering things in accordance with their position in a model of political morality, structure should appear.

### *Fundamental Values*

First, some basic Confucian values and principles have been identified. Confucianism is a virtue-based morality, of which the most important virtues are benevolence and righteousness. Other important virtues are filial piety, courtesy, modesty and wisdom. Based on these virtues the basic values and principles that are to be pursued seem to

be collective goods, represented by the family and the community. We can call this the common good. Another basic value is social harmony, which is the ultimate goal of politics. Social harmony is dependent upon that people are concerned with the common good. This, again, depends on the proper development of virtues. All these are bound together by five basic social relationships. These are defined by the rites, which place great importance on fulfilling one's roles.

Confucianism has a communitarian outlook focusing on the common good, that is, on what benefits society as a whole. The common good is based on virtues. The rulers must have virtues in order to rule for the welfare of the people, and the citizens should also act on behalf of the common interest as opposed to self-interest. The rites and social relationships prescribe the actions of the citizens (and the ruler). It is therefore vital to live up to one's roles and to live in accordance with the rites. The proper virtues are needed for this fulfilment. When all the above succeed the way prevails and social harmony is obtained.

### *Political Principles*

Second, the chapter has identified certain political principles. Political legitimacy is based on the mandate of heaven, which really is a metaphor for the ruler providing for the welfare of the people. The ruler provides this by establishing trust. In order to do this, he must fulfil his role as ruler, and the yardstick for his success is social harmony. The ruler should rule by virtue and rites. If he succeeds, laws are made superfluous. He establishes order by letting each one have a defined role in society. If this does not function the ruler must "rectify names". Then he can sit quietly and let things happen by themselves.

### *Mid-level Principles*

Third, paternalism, perfectionism and moralism have been identified as mid-level principles. These principles leave the ruler with wide scope of power in providing for the people, and promoting valuable and morally worthy practices. These mid-level

principles point to how exactly the political principles mentioned above are to be pursued.

Here ends the chapter on Confucianism. The analysis that takes place from the next chapter and onwards will draw on the findings made in this chapter as well as in the previous one. The first task of the analysis is to explore whether Confucianism recognizes human rights.

## 4. CONFUCIANISM AND RECOGNITION OF HUMAN RIGHTS

### 4.1 Introduction

The recognition of human rights is fundamental for reaching an overlapping consensus on human rights. The central theme will be to what degree Confucianism recognizes human rights as a legitimate political concept. In order to evaluate this it will be discussed whether Confucianism is compatible with the basic ideas of human rights.<sup>22</sup>

It is beyond the scope of this paper to discuss Confucianism with regard to all the rights stated in the UDM. Instead we will base our discussion on some basic characteristics of the concept of human rights. The most central ideas of human rights, as we conceive them, are (1) that human beings have rights by virtue of their humanity, and, based on this, (2) people may promote individual rights-claims. These ideas will be central to the debate that follows.

Compatibility refers to principles and values that can co-exist. Whether Confucianism is compatible with human rights has been a controversial question, for instance in the ‘Asian Values’-debate. It is this question that now will be looked at. It will be explored how the political morality of Confucianism relates to human rights.

The chapter consists of two main sections. In the first section, some general observations on the relationship between rights in general and Confucianism will be made. The second section constitutes the main part of the chapter, and here the compatibility between Confucianism and *human* rights will be the topic of discussion.

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<sup>22</sup> See section 2.2.5 for why we have chosen to concentrate the discussion on compatibility.

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## 4.2 Confucianism and Rights

There was no expression for ‘rights’ in classical Chinese. Does that mean that there was no understanding of rights as well? Some people think so. Henry Rosemont (1988: 173) claims that not only was there was no expression for rights in classical Chinese; there was also no language to build anything similar to a rights-based morality upon. Chinese language lacked corresponding terms for words like individual, autonomy, freedom, principles and so on. So, according to Rosemont, Chinese language not only lacked an explicit expression for rights but also for a rights-related language as such. Rosemont takes this to mean that there was no understanding of rights in Confucianism (ibid: 173).

Another view is that one needs not have an explicit *expression* for rights in order to have a *concept* of rights. Thus, even if Confucianism holds no expression for rights it might still entail a concept for rights. The one does not exclude the other. Seung Hwan Lee expresses such an argument. Lee argues that even though there is no expression for rights in Confucian classical philosophy, there are many instances in the Confucian writings that clearly show recognition and understanding of rights (Lee 1992: 245-248). For instance, he asks how Confucianism could have an understanding of concepts like property, promise and contract, without having any conceptual basis for understanding rights (Lee 1992: 242). Lee argues, therefore, that there is a working understanding of rights in Confucianism.

There are passages in the Confucian texts that seem to support Lee’s claims, and his arguments are further supported by Kwok (1998). Let us look at an example:

Mencius said to King Xuan of Qi, “One of Your Highness’s ministers once entrusted his wife to a friend while going on a trip to Chu. Upon his return, he found that his wife had been neglected. What is to be done?” The king said, “Dismiss him” (Mencius cited in Kwok 1998: 88).

It is clear in this example that the friend had a duty to take care of the minister’s wife, and the minister had a corresponding right to have his wife taken care of (Kwok 1998: 88; Lee 1992: 247).

Further, central concepts in Confucianism like filial piety seem to imply a rights-duty relationship. Children have duties toward their parents, and the parents have corresponding rights towards their children. The same is true for the relationship between those rulers and ruled. The ruler is responsible for the welfare of the people, and the people has a corresponding right to have that welfare taken care of.

When Confucius receives pay for his teaching<sup>23</sup> it is self evident that he has a duty to teach the student, who again has a right to be taught. The right-duty relationship is implicit in the contract between the two parties.

I will therefore conclude that classical Confucianism entails a concept of rights even if it did not express it in a typical rights-language. Rights and duties still existed between members of society.

Even though Confucianism entails an understanding of rights it does not mean that there is room for human rights. Human rights are a group of rights characterized by their condition of possession; humans have rights because they are human. We will now move on to see whether Confucianism recognizes human rights the same way it recognizes rights, and we will start our endeavour by asking whether Confucianism is compatible with the concept of human rights.

### 4.3 Confucianism and the Concept of Human Rights

The following sections will discuss whether Confucian political morality is compatible with the concept of human rights. A fertile starting point may be some previous discussions on the topic. Seung-Hwan Lee (1992: 250-255) discusses three Confucian ideals that he claims are incompatible with human rights. Firstly, Confucianism sees the individual self as too closely tied to one's role in social relations. Thus, there can be no talk of rights on account of simply being human.

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<sup>23</sup> "I have never denied instruction to anyone who of his own accord, has given me so much as a bundle of dried meat as a present" (Analects 7: 6)

Secondly, Confucianism gives priority to the common good over the individual good, which is incompatible with individual rights-claims. And thirdly, the Confucian ideal of harmony fosters virtues like concession and compromise, which also are at odds with individual rights claims.

The three ideals Lee depicts are identified in our model of Confucian political morality as fundamental values. It seems reasonable to deploy the fundamental values of Confucian political morality in the forthcoming discussion since it is these values that serve as the basis for the other levels of the model. These values form some of the most basic ideas of Confucianism, which make them central to the debate.

Further, by focusing on Lee's arguments, we will be able evaluate if our respective arguments harmonize or contrast. By taking as our point of departure issues that have been raised before, we take part in an ongoing discussion and, by so doing, are able to talk to each other instead of through each other. In sum, there are good reasons to take Lee's arguments as our point of departure, and so we will.

The Confucian ideals that we will discuss are the following:

- 1) The Confucian Ideal of Social Relations.
- 2) The Confucian Ideal of the Collective (the common good).
- 3) The Confucian Ideal of Social Harmony.

In accordance with the claims made by Lee, the Confucian ideal of social relations will be discussed with regard to the condition of possession for human rights, namely that humans have rights by virtue of being human. The Confucian ideals of the collective and of social harmony will be discussed with special regard to the idea that individuals are entitled to promote individual rights-claims.

### 4.3.1 Human Rights and the Confucian Ideal of Social Relations

Lee (1992: 251) claims that in Confucianism humanity is not considered separate from roles. They hold that the emphasis on roles in the Confucian system makes it meaningless to speak of individuals holding rights by virtue of humanity. Rather Confucianism stresses people as role-bearers within hierarchical social relationships.

This section of the chapter will deal with two main questions. First, is the emphasis Confucianism puts on roles so strong that they render any talk of an independent human personality meaningless? Secondly, given the hierarchical system of social relationships, can rights and duties be distributed equally within such a system? The first question touches upon a fundamental aspect of human rights. People have human rights by virtue of their humanity. If no independent self in Confucianism exists, it seems difficult to base rights upon humanity since humanity normally is thought attached to one's personal self.

We begin our discussion by looking at the distinction between one's social role and one's personal self. What is the relationship between persons as moral agents and their roles? Lee (1992: 250) claims that in Confucianism persons cannot be viewed independently from their social context: "[...] man is not an isolated being but a relational being." Henry Rosemont (quoted in Chan 1999: 217) states it as follows:

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.

If persons have rights by virtue of their roles, then the rights in question are not human rights. They are something we can term role-dependent rights. Such rights are allocated unequally. Persons with higher status will have more rights than persons with lower status. Lee (1992: 251) claims that this is exactly how Confucianism relates to rights. The hierarchical structure of social relations in Confucianism will inflict on rights. Rights cannot be seen as separate from social status. In other words, from a Confucian perspective, rights and social roles are inseparable.

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Chan (1999: 216-219) argues that the Confucian emphasis on benevolence shows that Confucianism cannot be regarded as a pure role-based morality. Even though roles play an important part in Confucian morality, persons are primarily moral persons capable of realizing benevolence. We remember from chapter 3 that benevolence means love to the people at large. Mencius illustrates the meaning of benevolence by claiming that everybody would be moved to compassion upon seeing a child who is about to fall into a well. That is because everyone is sensible to the sufferings of others. This applies no matter what relationship, and what kind of role one has in relation to the person suffering.

Mencius demonstrates that benevolence applies even where none of the basic social relationships are involved. That implies further that individuals can somehow be evaluated independent of their roles, and so people have a certain personal character that belongs to the person himself and can be regarded as detached from his social relationships.

The emphasis on benevolence contradicts the view that Confucianism is a purely role-based morality in which peoples' moral duties and rights are solely based upon social relationships. However, we have not shown that Confucianism does not endorse that moral obligations to a large degree are based upon social relationships. Nor may that be possible. Social relationships and the obligations that run from them are of considerable importance in Confucianism. From the following passage we see the emphasis on people behaving in accordance with their roles:

Duke Ching of Ch'i asked Confucius about government. Confucius answered, 'Let the ruler be a ruler, the subject a subject, the father a father, the son a son' (Analects 12: 11).

The five social relationships are hierarchical. The son should play a submissive role toward his father. Likewise, the wife should be submissive toward the husband, the younger brother toward the elder brother, the younger friend toward the older friend and the citizen toward the ruler. At face value hierarchy does not seem compatible with an equal distribution of rights. Insofar as rights are attached to one's humanity and no human beings are "more human" than others, equality is the guiding light for

a fair rights-distribution. A strong emphasis on roles challenges an equal rights-distribution insofar as rights are attached to the particular role one has within a given social relationship.

We acknowledge that Confucianism endorses social relationships, and that they have a hierarchical structure. That does not necessarily mean that the social hierarchy in Confucianism has no room for human rights. Nor does social hierarchy imply that peoples' rights are violated within such a system. Having said that, it cannot be denied that the structure of the social relationships has a potential for rights violations, but in itself such a structure is not incompatible with human rights. In fact one may reverse the discussion and say that human rights are needed because these relationships entail an inherent potential for rights violations.

Let us conclude then that Confucianism is, first and foremost, a virtue-based morality, and not a role-based one. Let us also conclude that even though the Confucian emphasis on roles is at odds with human rights, it does not make Confucianism incompatible with human rights. Even if Confucian social relationships entail that one has more obligations to people closer to oneself, benevolence implies that all people have moral obligations to all other people. The way Mencius makes use of the term benevolence also implies that personal selves exist independent of personal roles.

### **4.3.2 Human Rights and the Collective Ideal**

Some argue that since Confucianism gives priority to the common good over the individual good, Confucianism and human rights are at odds with each other. The question is whether the prominent place of common goods in Confucianism, involves incompatibility with human rights. In other words, are human rights incompatible with the idea that one should put the good of the family, community or state above oneself?

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Rawls (1999: 3) claims that “[e]ach person possesses an inviolability founded on justice that even the welfare of the society as a whole cannot override”, while Dworkin (1978: XI) claims that rights “trump” collective goals. What both Rawls and Dworkin make quite clear is that human rights are to be placed above the common good if these two collide. Will Confucianism make the same choice? Let us take the Confucian emphasis on the family as our point of departure of this discussion.

Given the emphasis Confucianism gives the family, and the strict requirements of filial piety, surely one is expected to place the good of the family above oneself? We remember Confucius’ disappointment when Tsai Yü would not respect the three years mourning period after his parents had died. One is also expected to conceal the crimes of one’s parents.<sup>24</sup> As such there does not seem to be room for legitimate self-interest on the part of the children.

The picture is more complicated however. We remember how Randall Peerenboom conceives of virtue ethics as an ethics that reaches for the perfect and ideal. For instance one is expected to put self-interest aside and choose morality or more precisely, righteousness, even if it means death. The path of righteousness applies to everyone equally but it is especially important that people high up in the social hierarchies are righteous. Being a ruler in government and being a father in a family entails a special responsibility.<sup>25</sup> A father, therefore, has a special obligation to treat his children with love and respect. If he fails in that obligation, Confucianism lacks an explanation for what should be done.

Confucianism as a virtue-based ethics emphasizes the ideal. As such it sometimes fails to provide alternatives when conditions are not ideal. Confucianism stresses social relationships, but we have to ask what happens if they break down. We will see later on what happens if the relationship between citizen and ruled breaks down, but

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<sup>24</sup> These examples were mentioned in section 3.3.2.

<sup>25</sup> Which is one of the reasons that Confucianism advocates that moral rulers must be on the throne.

what about the relationship between father and son? Are there any alternatives if familial relationships break down?

There are elements in Confucianism that implies that justice should be preserved when virtue breaks down, as the following passage from the *Analects* illustrates:

Someone said, 'Repay an injury with a good turn.' What do you think of this saying? The Master said, 'What, then, do you repay a good turn with? You repay an injury with straightness, but you repay a good turn with a good turn' (Analects 14: 34).

As mentioned before, Confucius says that a son ought to behave like a son and a father ought to behave like a father. Wejen Chang (1998: 120) claims that it is only when a "father behaves as a correct father" that a son can be expected to behave as a correct son. Proper role-performance, in other words, defines how far filial piety can be stretched, so that it does not apply when social relationships break down. Thus, children should be allowed to protect their legitimate self-interest towards unreasonable parents. Keeping in mind the emphasis put on the family in Confucianism, the scope of how unreasonable parents might behave before children can invoke their rights is probably wider than in many other perspectives. Still, at the end of the day it is legitimate for children to protect their own self-interest against unruly behaviour by their parents.

If one in extreme circumstances can put the interest of oneself before that of the family, it seems logical that one can also put the interest of oneself before the collective goal of other groups like the community in which one lives, or the state.

From what has been said it seems that the Confucian emphasis on the common good is not incompatible with human rights. However, some further remarks may be in place since the discussion so far seems to be based on an erroneous premise, namely that human rights are a bad match for the common good.

In fact, instead of arguing that human rights contradict the common good, one can claim that (A) human rights serve to protect the common good, and (B) human rights help to clarify who is to define the common good. Let us look at A first.

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The Confucian emphasis on putting the good of the family, community or state above oneself is related to its emphasis on virtues, or, to be more precise, the development of benevolence and righteousness. These virtues are fundamental in Confucianism, and so, providing the ground for their development becomes very important.

Benevolence implies caring for one's fellow citizens. The ability to care for one's fellow citizens develops through education and moral edification. Learning, through education is *per se* not only compatible with human rights but also directly protected by human rights.<sup>26</sup> Human rights protect both right to education and the right of the family and so it seems that human rights are not only compatible with, but also serve to protect the common good. However, we will leave that discussion for the next chapter, and move on to human rights and the procedure of defining the common good.

Some peoples' notion of the common good may be incompatible with other peoples' notions. For example, even though community life in ancient Rome found common value in witnessing the slayings of gladiators in Coliseum, it is doubtful that the gladiators themselves shared the Romans' enthusiasm. In arguing against such traditions one is at odds with the ancient Romans' conceptions of the common good (by taking part in "cultural" activities), and as such one places the integrity of a few individuals over the good of the community. It is true that this form of argument places the individual above the group. Human rights narrow the scope of the common good by arguing that some forms of the common good are unacceptable.

By defining some collective goods as unacceptable, and by protecting acceptable forms of collective goods, human rights are at odds with some versions of the collective goods, and supportive of others. The conclusion should therefore be that human rights are *not necessarily* incompatible with collective goods, although they might be. Human rights define which collective goods that are acceptable and which

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<sup>26</sup> Article 13(1) of the International Covenant on Economic, Social and Cultural Rights states: "The State Parties to the present Covenant recognize the right of everyone to education."

are not. If some individuals' costs in contributing to the common good are so high that their human rights are violated in the process, we are back at the Coliseum again. And that is no arena for Confucianism.

Human rights protect everyone's equal right to take part in and contribute to the common good. Based on what has been said in this section concerning the relationship between Confucianism and the common good, the conclusion is that this part of Confucianism is compatible with human rights.

### **4.3.3 Human Rights and the Confucian Ideal of Social Harmony**

In chapter three harmony was identified as the perhaps most central value in Confucianism. According to Lee (1992: 254) harmony is to be obtained in every realm of life, included in the basic social relationships. When there is harmony within these social relationships, there will also be harmony within the community, as well as within society at large. Harmony in the microcosm leads to harmony in the macrocosm.

Based on the prominent status of social harmony in Confucian political morality, Lee (1992: 254) has argued that Confucianism is incompatible with human rights. Lee's claim rests on the assumption that harmony is incompatible with individual rights-claims. Lee holds that modesty and courtesy are fundamental virtues associated with social harmony whereas the self-assertion that is promoted through individual rights-claims distorts the ground for harmony. These are serious challenges to human rights, and they will be discussed.

Earlier in the paper we have seen how Confucianism emphasizes unity in achieving social harmony through following the one way. It is the task of the ruler to lead on by virtues and rites. Confucius' disciple Yu Tzu says: "Of the things brought about by the rites, harmony is the most valuable" (Analects 1: 12). With moral rulers on the throne, who rule by virtue and the rites, people will be well behaved and social harmony is an arms length away. When rulers are virtuous, people will be virtuous. In

such a system there is no room for individual rights-claims, as these will distort the emphasis on virtues and rites, thereby shaking the ground of harmony. Nor does it seem to be much need for human rights in such a system.

However, as Peerenboom (1998: 250) states:

In an ideal world, the privileged would deserve their privilege by virtue of moral self-cultivation. Those in the inferior position would defer to the moral excellence of their superiors, and in return their superiors would look after and serve the interests of those in the subordinate position. In the real world, the privileged have not always been so morally cultivated.

Peerenboom is right in claiming that virtue does not always hold in the real world. How does Confucianism respond? Confucianism and especially Mencius were well aware of the fact that virtues could fail. According to Mencius (in Lee 1992: 248), the people did not need to fulfil their obligations to the ruler if he treated them unfair:

The superiors of your State have been negligent, and cruel to their inferiors; in this situation people could pay him back by not loving their ruler and superiors and not dying for their officers. What proceeds [from you,] will return to you again.

In a famous passage Mencius claims that unfair rulers should be cast aside:

King Hsüan of Ch’i asked, ‘is it true that T’ang banished Chieh and King Wu marched against Tchou?’

‘It is so recorded,’ answered Mencius.

‘Is regicide permissible?’

‘A man who mutilates benevolence is a mutilator, while one who cripples rightness is a crippler. He who is both a mutilator and a crippler is an “outcast”. I have indeed heard of the punishment of the “outcast Tchou”, but I have not heard of any regicide.’ (Mencius 1B: 8).

For Mencius, killing a despot like Tchou did not constitute regicide (Hu 2000: 59). What is happening is an example of the rectification of names. Having failed to act according to his role, Tchou is no longer the legitimate ruler by virtue of the mandate of heaven (Graham 1989: 116).

If the state rules unjustly, then there will be no harmony. If the ruler is moral however, things will go by themselves:<sup>27</sup>

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<sup>27</sup> Peerenboom (1998: 239) and Lau (1979: 132n) make the same point.

If there was a ruler who achieved order without taking any action, it was perhaps, Shun. There was nothing for him to do but to hold himself in a respectful posture and to face due south<sup>28</sup> (Analects 15: 5).

This passage illustrates the Confucian ideal. Social harmony is obtainable with moral rulers on the throne. When rulers are not moral, the passages from the Mencius demonstrate that people should protect their interests. This is legitimate since unjust rulers are unable to create social harmony. One may therefore go against them. The logic we apply here is similar to sons who can protect their self-interest toward fathers who fail to perform their roles as fathers. If the ruler fails to perform his proper role, then the citizens do not have to perform their proper roles as citizens.

Some further remarks are in order. Human rights are primarily invoked when rights are violated or about to become violated (Donnelly 1989: 13). In such a turn of events it is unlikely that social harmony prevails. It is implicit in the term that social harmony does not apply for situations when individuals' integrity is violated. If the term social harmony is to be invoked, all individuals of the social entity for which it applies have to take part. It thus follows that when social harmony flourishes there is probably no imminent need for human rights. It is when harmony fails that rights are needed. It is when harmony sleeps that rights awake, and it is when harmony is awake that rights sleep. The fulfilment of social harmony involves at the same time the realization of human rights. Thus, in this aspect we agree with Xia (2001: 385) who claims that "[...] human rights not only are compatible with harmony, but they also promote each other."

## 4.4 Conclusion

The topic of the chapter has been to what degree Confucianism and human rights are compatible. The role-based aspect of Confucian ethics is at odds with, although not incompatible with, human rights. Basic values entailed by Confucianism, like social

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<sup>28</sup> The seat of the emperor faces south (Lau 1979: 133n3).

harmony and the common good, are not problematic with regard to human rights. Insofar as our discussion has been representative for the relationship between Confucianism and human rights, the conclusion is that they are compatible. Confucian morality does not contradict that human beings have rights by virtue of their humanity, or that people may promote individual rights-claims. Thus, one can claim that Confucianism recognizes human rights as valid political principles.

However, even if it has been found that the Confucian values in this discussion do not contradict human rights, one could perhaps imagine other Confucian values and principles that do. And if so, this chapter has not been able to show that the whole spectre of Confucian political morality is compatible with human rights. That is a valid claim but it should be emphasized that the Confucian values that were discussed in this paper were chosen mainly because of their prominent position in the model of Confucian political morality. Compatibility between human rights and the most central values of Confucianism is more important than possible incompatibility between human rights and less central values of Confucianism.

Thus, the conclusion stands firm. Human rights are not incompatible with Confucian political morality. However, it remains to be demonstrated that Confucianism will endorse all the rights provided in the UDM. Nor will this paper seek to do so. However, in the next two chapters (especially chapter six), it will be discussed how Confucianism responds to certain specific rights, in particular the right to freedom of expression and the right to political participation.

Justification and specification of human rights take the discussion one step further. From mere recognition of human rights the paper will now turn to determine whether there are resources within Confucianism that can serve to justify human rights, and then, in the last chapter, how Confucianism specifies these rights.

## **5. JUSTIFICATIONS OF HUMAN RIGHTS AND CONFUCIANISM**

### **5.1 Introduction**

Justification is the second pillar of cultural human rights perspectives, and will be the focus of this chapter. It will be explored whether there are resources within Confucianism that can serve to justify human rights. In chapter three, the fundamental characteristics of Confucianism were presented. These findings will be drawn upon in order to depict a reasonable version of a Confucian justification of human rights.

The fact that Confucianism never developed a theory of human rights does not mean that the essentials of Confucian philosophy cannot justify human rights. However, a Confucian justification of human rights will justify human rights differently than any of the three liberal justifications (Locke, Rawls and Donnelly) that were depicted earlier. In accordance with the cultural consensus thesis, a Confucian justification of human rights must ground human rights by the most basic elements of Confucian thought. Insofar as these elements are unequal to the basic elements of liberal human rights justifications, the Confucian justification will be different. It follows from this that also the way Confucianism interprets and specifies rights will be different since the procedures of interpretation and specification are grounded upon the nature of the justification.

Since the justifications of human rights are so important for how they are defined and specified, research into human rights justifications becomes highly relevant. To fully grasp the meaning of a Confucian perspective on human rights we should understand how Confucianism relates to liberal human rights theory. This might be valuable in the sense that there might be resources in the liberal perspectives that have resonance in Confucianism. On the other hand, if Confucianism does not recognize such

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resources that will imply an interesting finding in itself. Thus, if nothing else, such comparisons may help us to see what Confucianism is not.

## 5.2 Liberal Human Rights Justifications and Confucianism

This paper touches upon three liberal justifications of human rights. The natural rights theory of John Locke justifies human rights by nature, whereas John Rawls justifies human rights by justice and Jack Donnelly's theory justifies human rights by human dignity. Let us now look at the human rights justifications one at a time, and discuss how each one of them can be confronted with the basic ideas of Confucian philosophy.

### *Natural Rights Theory and Confucianism*

Locke grounds his natural rights theory on the existence of God. It is, one may say, a religious theory. Confucianism is obviously not a Christian theory but religious elements are existent. In chapter 3 it was said that Confucianism grounds political legitimacy in the Decree of Heaven. The concepts differ, however, in the sense that the mandate of heaven is a metaphor for the will of the people. Consider the following passage from Mencius (5A: 5):

Heaven does not speak but reveals itself through its acts and deeds.[...] When [Shun] was put in charge of sacrifices, the hundred Gods enjoyed them. This showed that Heaven accepted him. When he was put in charge of affairs, they were kept in order and the people were content. This showed that the people accepted him. Heaven gave it to him, and the people gave it to him.

Thus, the mandate of heaven is better conceived as the will of the people than as a supernatural entity.

Confucianism far from denies the existence of the supernatural, but its existence has no prominent position in Confucian philosophy. The spiritual is something one should keep one's distance from: "[...] to keep one's distance from the gods and spirits while showing them reverence can be called wisdom" (Analects 6: 22).

It is difficult enough as it is to understand the natural, if not the supernatural:

Chi-lu asked how the spirits of the dead and the gods should be served. The Master said, 'You are not able even to serve man. How can you serve the spirits?'

'May I ask about death?'

'You do not understand even life. How can you understand death?'

(Analects 11: 12).

While there appear to be similarities between the Confucian Decree of Heaven and natural law on the surface, the concepts are in reality totally different. While the Confucian concept of the Decree of Heaven is a metaphor, Locke conceives of God as real. Confucianism does not promote dealings with the supernatural, and as such rights grounded on a divine natural law seem to have little resonance in Confucianism.

### *Justice as Fairness and Confucianism*

A Rawlsian approach grounds human rights on justice. Human rights are just the argument goes, because they are chosen in the original position. Two points regarding Rawls' concept of the original position seem particularly at odds with Confucianism. Firstly, the character of the original position seems to be at odds with the part of Confucian morality that is role-based. Secondly, Rawls' presumption that the individuals in the original position base their choices on self-interest seems to be at odds with the Confucian emphasis on righteousness.

Rawls' individuals have no knowledge of their personal qualities or social status because knowing these things will lead to individuals making partial choices when they choose the basic structure of society. Since they are deprived of this knowledge they are unable to make partial choices.

We have already established that Confucian individuals are contextual to a large degree. In that sense the structure of the original position seems to make little sense. Rawls removes context in order to create fairness. In Confucianism, however, fairness is to a large degree grounded in context. The persons that constitute the original position can best be regarded as atomic individuals, with no knowledge of themselves. Since they have no knowledge of themselves they have no knowledge

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about their familial and other social relationships. To base the basic structure of society on such premises are foreign to Confucianism. Henry Rosemont (1988: 176) even states that grounding a decent society by "thoroughgoing amnesiacs" would bewilder Confucius.

Another issue outlined above concerns how the choosing of the basic structure of society is based on self-interest. We remember that when morality and self-interest conflict, the latter has to give way. One ought to follow the path of righteousness. Confucian morality is based on virtues and it would resonate better in Confucianism if the individuals were not to choose out from self-interest but from collective interest. It is true that Rawls model aims at the fulfilment of the collective interest, but neither benevolence nor righteousness have parts to play in the individuals' motivations for choosing like they do. And that is at odds with Confucianism.

In sum, the premises in Rawls' approach are the accumulated self-interests of contextually independent individuals. Such premises have no resonance in Confucianism.

### *The Human Dignity Concept and Confucianism*

The concept of human dignity grounds human rights by way of saying that human beings have rights because they have dignity. Our findings in chapter three and our emphasis on Confucianism as a virtue-based morality do not seem at odds with dignity, on the contrary. Still Confucianism is probably at odds with human dignity as a justifying concept for human rights as this section will demonstrate.

If human dignity is the foundation for human rights it has to be universal. All persons must have dignity. If not, human dignity cannot justify human rights. If some people have dignity while others do not, human rights will not apply to all persons but only to the persons with human dignity. In order for us to assess whether Confucianism is compatible with human dignity we can start with the claim that all persons have human dignity. When one holds that human dignity is universal one is also claiming that Adolf Hitler, Joseph Stalin and Osama Bin Laden have dignity. While that may

be natural for some, it might be counter-intuitive for others. Now is the task to see how Confucianism might react to such claims.

The Confucian emphasis on virtues seems interrelated to the human dignity concept. The concepts are different, though. While one *has* human dignity, one *develops* moral virtues. It is explicitly clear that in Confucianism not all persons are virtuous, although everyone has the moral potential to be so.<sup>29</sup> If we take human dignity to apply only to the virtuous we can conclude that Confucianism does not regard all persons to have human dignity.

This is supported by passages in Confucian texts that clearly seem to suggest that not all persons are equal in moral worth:

Yüan Yang sat waiting with his legs spread wide. The Master said, 'to be neither modest nor deferential when young, to have passed on nothing worthwhile when grown up, and to refuse to die when old, that is what I call a pest.' So saying, the Master tapped him on the shin with his stick (Analects 14: 43).

This passage does not prove that Confucianism does not consider human dignity to apply to all persons. What it suggests is rather that people who have not done anything to deserve our respect should not be respected. There does not seem to be any quality like dignity at play, which makes people deserving of respect independent of their achievements. Supporting the passage above, Confucius says:

It is fitting that we should hold the young in awe. How do we know that the generations to come will not be the equal of the present? Only when a man reaches the age of forty or fifty without distinguishing himself in any way can one say, I suppose, that he does not deserve to be held in awe (Analects 9: 23).

This passage seems to suggest that even though people vary in achievements they may be equal in potential. It follows that even if human dignity does not apply universally, everybody may have the potential for it. However, the passage also suggests that people should be evaluated based on merit, and not potential.

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<sup>29</sup> See section 3.2.1.

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Tore Lindholm's (1997: 3) value premise for justifying human rights may cast light on the discussion. The premise is based on the UDM and states:

All human beings are born free and equal in dignity; and they are, further, presumed to be sufficiently reasonable and conscientious to support a decent public order.

The passage states that all persons are *born equal in dignity*. Even though Confucianism is at odds with human dignity as a quality that applies to everyone equally, it could still think that all persons have dignity at the outset. However, it does not resonate well with Confucianism that people are born with human dignity, or any other virtue. As already mentioned, people in Confucianism seem to be evaluated based on merit, and not based on any personal quality that has moral status independent of their actions. Thus, dignity is not something one has, but something one achieves. This makes it pointless to speak of dignity by birth in Confucianism.<sup>30</sup>

A legitimate human rights justification has to be universally applicable, and as such it must be based on some aspect of Confucianism that applies to everyone in the Confucian universe. As such, human dignity is of little value.

### *Implications*

As has been made clear in the previous sections, Confucianism is at odds with central aspects of liberal human rights justifications. Although that is an interesting finding, we should be careful not to overestimate its significance. For instance, we should keep in mind that the three liberal theories are also at odds with each other. Two points should be noted though. First, the dissimilarities between the liberal justifications are overrun by similarity in one important aspect, namely that they can be characterised as deontological. We will look at what that implies in a short while. Secondly, the dissimilarities between Confucianism and the liberal justifications seem to point out some premises upon which a Confucian human rights justification cannot

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<sup>30</sup> Peerenboom (1993B: 41) even states that in Confucianism newborns are not different from other beasts. However, in this particular case his arguments are not very convincing, and as will soon be shown there is a difference.

be founded. These premises include divine ordinations, self-interest and human dignity.

The next section presents an attempt of identifying resources within Confucianism that can serve to justify human rights on Confucian terms.

### 5.3 Confucian Human Rights Justifications

Human rights justifications refer to moral principles that give human rights legitimacy. In accordance with the cultural consensus thesis, these principles have to satisfy two definitive criteria. First, the principles should be properly based on the political morality of the culture in question, so as to appear reasonable and recognisable for those who live there. Second, the nature of these principles must be such that they serve to give good reasons for human rights in a way that does not exclude their application to any persons based on sex, ethnicity, language, culture or religion. The first claim is normative, and refers to how things ought to be. The second claim is imperative and cannot be put aside, in any way that remains true to the meaning of human rights, namely that humans have these rights by virtue of being human.

We will try to identify Confucian principles that satisfy these two criteria. This seems challenging insofar as human rights apply to individuals whereas Confucianism focuses on the collective. One way of facing this challenge is by exploring whether the Confucian emphasis on collective goods may serve as a justification for human rights. After all, it is individuals that ultimately enjoy collective goods.

Collective goods refer to objects that apply to everyone insofar as everyone has an interest in their realization. Everyone has an interest in living in stable and well functioning societies. Peace is better than war; prosperity is better than poverty and so on. Confucian collective goals like the common good and social harmony clearly satisfy the criterion of culture in the sense that they are properly based on Confucian political morality. More uncertainty is attached to the criterion of universality. While

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it is true that in many cases it is in everybody's interests that collective goals are realized, it may not be true in all cases. Further, the road toward collective goals may be paved with violations of basic individual interests. A present case that seems to illustrate both points is the Three Gorges project in China, in which massive evacuation of people was conducted in order to construct a dam of a part of the Yangtze River. While the dam serve to fulfil a common good, over a million people have been forced to move from their homes.

However, there is an individual aspect of collective goals that might deserve a closer look. Confucian social goals are based on virtues in the sense that people must possess a certain amount of virtues if they are to rank collective goals above individual ones. We have already seen that virtues like dignity and benevolence apply unequally, in the sense that not everyone possesses them. That regardless, if not virtues as such apply equally the potential for developing them does. Says Joseph Chan (1999: 217): “[For Confucianism] human persons are first and foremost moral agents capable of realizing *ren* [yen].”

We remember that Mencius (2A: 6) depicts four germs or beginnings that all humans possess.<sup>31</sup> Although everyone possesses these germs not everyone develop their potential for them. Thus, even though everyone has a heart of compassion, not everyone develops the virtue of benevolence, and even if everyone has a sense of shame, not everyone develops the virtue of righteousness.

Even if it is Mencius that explicates the idea of human potential Confucius is not foreign to the idea: “Men are close to one another by nature. They diverge as a result of repeated practice” (Analects 17: 2). People, thus, start out with equal amounts of potential but as they grow up they develop their potential unequally.

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<sup>31</sup> Compassion is the germ of benevolence, shame is the germ of righteousness, modesty and courtesy are the germs of observing the rites and right and wrong are the germs of wisdom.

Individual virtues in Confucianism are strongly associated with collective goods. Virtues are in many ways the glue of the Confucian society. Confucian society with its emphasis on the common good and social harmony stands and falls on the proper development of virtues. The Confucian values will only be fulfilled if individuals place the good of the society above themselves. In order for individuals to do that, they must have developed their potential for benevolence and righteousness. It therefore seems reasonable that human potential should be protected.

Based on what we have said above, let us propose that in a Confucian justification of human rights, moral potential may serve as the principle that gives human rights legitimacy. Does this principle satisfy the criterion of internal legitimacy? It has already been stated that Confucianism focuses on the need for developing virtues to promote collective goods. It therefore seems reasonable to conclude in the positive; the principle of moral potential is properly based on Confucian political morality.

Does the principle satisfy the criteria of giving good and non-discriminatory reasons for human rights? The principle of moral potential is universal insofar as it refers to a capacity everyone possesses. Nor does it seem unreasonable to assume that moral potential is a good reason for human rights. However, that is a point that needs elaboration. Let us take a view on the UDM and explore whether it serves to protect moral potential.

### *Moral Potential and the UDM*

The justification for human rights that we have depicted above is based on the assumption that human rights serve to protect the development of moral virtues regarded as essential in Confucianism. Does the UDM protect moral potential? In the discussion concerning the compatibility between human rights and the common good we touched upon a claim that stated that not only were human rights compatible with the common good but human rights also provided the proper ground for developing the virtues necessary to promote the common good. There are at least two sources to moral edification, and they include education and socialization. Socialization refers

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firstly to the abilities one acquires through living in society and secondly how one is raised within a family.

These processes notwithstanding, the development of virtues depends on oneself, and oneself alone, and the way to develop these virtues is through learning: “[T]he gentleman perfects his way through learning” (Analects 19:7). Learning, through education, is protected by the UDM. Article 13(1) of the ICESCR states: “The States Parties to the present Covenant recognize the right of everyone to education.” Thus there is an explicit protection of education in the UDM. As such one can claim that the UDM protects at least one necessary condition for developing virtues.

In addition to education, human rights protect individuals’ ability to participate in social life in different ways. For instance the right to participate in religious worship in community with others (ICCPR: 18(1)), take part in the conduct of public affairs (ICCPR: 25(a)), and to take part in the cultural life of one’s community (ICESCR: 15(1a)). These rights protect individuals’ interests but the rights are social in scope in the sense that they protect individuals’ rights to participate in social life.

However, the most important basis for socialization in Confucianism is the family. Filial piety is nothing more than benevolence within the family. To make valid conclusions concerning the development of benevolence in Confucianism we have to look closer at the Confucian family concept. Is the Confucian emphasis on the family sympathetic to human rights? There is an indirect link between human rights and filial piety, in the sense that human rights provide the conditions necessary for family life to take place. Filial piety cannot exist without any family life. Article 23(1) in the ICCPR states that: “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Article 23 demonstrates that the human rights doctrines recognize the value of the family. Adding to this, article 18(4) of the ICCPR states that parents should undertake the moral edification of their children. Neither article 18, nor article 23 is specific about the contents of family life. The doctrines lay merely the conditions for family life, and it is the privilege of different cultures to fill the family life with their values.

Human rights, then, protect both education, one's ability to participate in the social life of one's community, and the family as a basis for moral edification. Thinking Confucian, it thus seems more likely to develop benevolence and righteousness in a society that respect human rights than in a society that does not.

Above we mentioned Lindholm's value premise for justifying human rights. It states:

All human beings are born free and equal in dignity; and they are, further, presumed to be sufficiently reasonable and conscientious to support a decent public order.

Although we demonstrated in section 5.2 that Confucianism is at odds with the first half of the statement, the second half of the statement seems to underpin what has just been said. Translating Lindholm's premise into Confucian it should read something like this:

All human beings are born equal in moral potential, and, based on its development, they are able to pursue their proper obligations towards others, and support a decent public order.

While this justification seems to put emphasis on duties or obligations, more than on rights, it is not incompatible with the UDM. On the contrary our justification seems to resonate well with article 29(1) of the UDHR, which says: "Everyone has duties to the community in which alone the free and full development of his personality is possible."

In fact duties play an important part in the UDM. One has duties to exercise one's rights responsibly. For instance the right to equality cannot be pursued to the point where someone else suffers inequality (International council on Human Rights 1999: 17). Further, human rights protect one's freedom but one is not free to hurt others: "[t]he right to freedom of expression does not allow a person to slander or libel someone" (ibid.: 17).

One's freedom, thus, is limited and one has a duty to observe these limits. Within those limits, however, there is freedom of choice, and ideally this should be used to pursue one's moral character. Moral development, however, is diverse. Jack Donnelly (1989: 17) says:

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Human potential is widely variable, and it includes both good and evil; there are probably at least as many potential rapists and murderers as there are potential saints. Society plays a crucial role in determining which potentials will be realized and how. Human rights specify in significant measure how that selection is to be made.

In this aspect Donnelly's view is in accordance with our Confucian human rights justification; human rights contribute to proper moral development. The development of moral virtues, however, is an ideal. The societies that human rights are part of will in many instances fail to provide the proper moral development. We must therefore explore how Confucianism responds to the fact that human rights protect not only the potential to do good, but also the potential to do bad. Thus, our focus of attention will be on freedom of choice.

A conventional view is that freedom of choice is highly regarded (Sen 1985: 3). Peerenboom (1998: 245) even states that if one is deprived of this freedom, one is denied the right to be oneself. Based on that claim, one may ask how one can develop one's moral potential without the freedom to choose what is moral.

Joseph Chan (1999: 228-233) argues that Confucianism endorses moral choice but that this freedom does not apply to choosing the bad. I agree with the first half of the statement but not with the second. Although moral potential is the basis for human rights in Confucianism, it is the welfare of society as a whole that is to benefit from its development in the sense that moral virtues promote Confucian values like social harmony. When our human rights justification is grounded on such instrumental terms like the promotion of the common good and social harmony, it seems that rights first and foremost protect the agent's ability to promote these values. In continuation of this, it does not seem that human rights protect one's ability to do something that violates against these values. As such it may seem that human rights first and foremost protect one's ability to do good, and that our view is in accordance with that of Chan.

That is, however, only on the face of it. Our Confucian human rights justification is instrumental insofar as the basis for it is the claim that a political system that endorses human rights serve to protect basic Confucian values more often than a system that

does not endorse human rights. However it is not so that human rights each time and every time protect the values held to be most dear for Confucians. Sometimes, because human rights protect potential to do good as well as bad, the opposite will happen. Still, authentic moral development will not take place unless individuals have the capacity to make moral choices in both good and bad. Confucianism has good reasons for supporting human rights if a political system containing human rights is more successful in providing the necessary conditions for moral development than a system without such rights. And since this section has pointed out how human rights may be conceived as instrumental in moral development, Confucianism should have some reasons for endorsing them.

## 5.4 Comments on the Distinctions between Confucian and Liberal Human Rights Justifications

We mentioned briefly above that the three liberal human rights justifications share a common characteristic in that they are deontological. Our Confucian human rights justification, on the other hand, is better described as virtue-based. However, it would probably be wrong to conceive of the justification as solely based on virtues. After all, the reason for grounding our justification on virtues is that collective goods are contingent upon citizens' virtues to be realized. The justification is therefore deeply associated with the promotion of collective goods. Even though the justification is based on virtues we cannot deny that it has a clear instrumental aspect. Virtues are not protected for their own sake but for the results they produce.

Virtue-based justifications need not necessarily be instrumental but ours is. In Confucianism, virtues are justified by their ability to promote the common good. In the following, we will make some remarks concerning instrumental human rights justifications in comparison with deontological human rights justifications.

There are certain challenges concerning instrumental justifications in general and instrumental justifications of human rights in particular. Instrumentalism is perhaps

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best known as utilitarian philosophy, where the goal is to choose the method (i.e. the instrument) most capable of maximizing happiness. By implication, instrumental justifications of human rights mean that human rights are to serve as instruments for reaching some higher goal. According to an instrumentalist line of reasoning, human rights will be set aside if they fail to serve the function for which they are intended, or if some other instrument is more capable of fulfilling the goal in question. As Bell (1995: 31) notes, if the procedures set (by human rights) fail to produce the desired outcomes there does not seem to be any reasons to follow such procedures. Thus, human rights are evaluated for how they produce virtuous citizens. If they fail, other means should be considered.

In contrast to instrumental human rights justifications, deontological human rights justifications grounded upon concepts like the inviolable status of the human being will not be set aside for the sake of some higher purpose. We remember that Jack Donnelly grounds human rights on human dignity. In Donnelly's view what is of ultimate importance is the protection of human dignity. Human rights are so intrinsically connected with the moral status of the human person (dignity) that they will not be set aside for some higher good, because human dignity is the highest good.

One might claim that instrumental justifications of human rights leave human rights with no moral status. That is a serious challenge and should be taken seriously. Deontological justifications are true to Rawls' statement that individual interests should not be overrun out of concern for the welfare of the society as a whole. In instrumental justifications, on the other hand, it seems that this is exactly what happens. In a moral sense, instrumental justifications seem to be weak whereas deontological justifications seem strong. That is at least so at face value.

Thomas Nagel (1991: 148) claims that when one holds that certain actions are *always* wrong, one gives them a superior status to arguments where the same actions merely are regarded as great evils. In the latter case it will sometimes be deemed necessary to violate such rights in order to avoid even greater evils. Says Nagel (*ibid.*):

Faced with the question whether to murder one to save five from murder, one may be convinced that fewer people will be murdered if one does it; but one would thereby be accepting the principle that anyone is legitimately murderable, given the right circumstances. This is a subtle but definite alteration for the worse in everyone's moral status. Whereas if one refuses, one is saying that all murders are illegitimate, including of course the five that one will have refused to prevent.

This seems like a legitimate point of view that further demonstrates the weakness of the instrumental approach. The charge may be legitimate but should not be overstated. Nagel's argument may not hold when faced with concrete examples of an even graver nature. One might ask for instance if it is not legitimate to kill someone, if that is the only possible way to prevent the person from detonating a nuclear bomb. And if the right to life may be overlooked in such extreme circumstances, it seem natural that other, less basic rights, will also be overlooked in less extreme circumstances.

Amartya Sen (1985: 6) says:

If disastrous consequences can be used as a ground for nullifying deep-seated rights, surely that completely undermines the consequence-independent way of looking at rights. If disastrous consequences would be adequate to nullify any rights (even the most important ones), perhaps bad-but-not-so-disastrous consequences would be adequate to nullify other, less central rights?

With this argument Sen removes the ground under deontologists' feet, and so deontological arguments fall to the ground. Or do they? We can at least say that some of their weaknesses have been exposed. It seems unrealistic to view human rights totally independent of consequences. There are therefore weaknesses with deontological approaches that do not apply for instrumental ones. This is just as well since instrumental justifications have their own weaknesses albeit of a different sort.

Instrumental justifications are nevertheless probably the only human rights justifications that can endure philosophical scrutiny. They are grounded on consequences and have room for the fact that sometimes rights may be legitimately overlooked. Our Confucian justification of human rights might include serious flaws. However, I contend that its instrumental nature is not one of them.

## 5.5 Conclusion

In accordance with the cultural consensus thesis, the major task in this chapter has been to explore resources for justifying human rights in a Confucian human rights perspective. None of the three liberal ways of justifying human rights have resonance in Confucianism. Confucian philosophy is at odds with human rights as grounded on God, the original position or human dignity. However, we have showed that there are moral resources within Confucianism that can ground human rights on Confucian terms. Confucianism has reasons for protecting human rights since human rights protect moral potential.

Human rights justifications have to satisfy a cultural criterion in the sense that the justification should be based on the political morality of the culture in question. They also have to satisfy a universal criterion in the sense that the justification applies to all humans. As has been demonstrated in this chapter, the principle of moral potential seems to satisfy both criteria.

It may perhaps be naïve to think that once the seed of moral potential has been planted, the UDM will grow there from. Nor has that been the intention. The intention has been to identify resources in Confucianism that satisfy both the cultural and the universal criteria for human rights justifications. Following the line of the cultural consensus thesis, in which culture is the point of departure, we have looked for Confucian reasons to endorse the UDM as a reasonable political practice. In this aspect we have provided but one of (probably) many possible answers.

The next step of the analysis will be to see how Confucianism specifies human rights. That is the last step of our approach in reaching for an overlapping consensus on human rights from within cultural traditions.

## 6. CONFUCIAN HUMAN RIGHTS SPECIFICATIONS

### 6.1 Introduction

This is the third and final step of the analysis. This chapter will focus on how Confucianism specifies human rights. Our Confucian human rights justification is targeted against the UDM in the sense that it is the rights stated therein that we seek to justify. The scope of this paper does not allow us to discuss each and every right in the UDM. Therefore special attention is devoted to the ICCPR with special regard to the right to freedom of expression, and the right to political participation. The reasons for choosing to focus on civil and political rights are first that they each on their own terms define how the relationship between society and individual is to be regulated, and second, that both rights belong to the group of rights for which intercultural consensus has proven challenging.<sup>32</sup>

Specifications of human rights define how human rights are applied in the real world. While cultures may agree on the rights-principles in the UDM, they will still apply the rights differently. In order to evaluate whether the UDM is object of a genuine overlapping consensus between different cultures, specification of human rights must be part of the picture. Specification is therefore the third pillar of an intercultural human rights consensus.

In accordance with the cultural consensus thesis, the assumption is that Confucianism has room for most of the rights in the UDM but that these rights will be specified in Confucian ways. Another approach could be to elaborate on our Confucian human rights justification and see which rights we ended up with. Although I think the result would be quite similar to the content of the UDM, some new rights might have been

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<sup>32</sup> For instance, as mentioned 2.2.2, certain autocratic regimes (especially Singapore) in the 'Asian Values'-debate has claimed that political authoritarianism promotes economic growth, and has on that ground curbed civil and political rights.

included. It has been suggested, for instance, that a Confucian human rights conception would include rights of the elderly. Joseph Chan (1999: 235-236) argues that the Confucian emphasis on filial piety implies that a Confucian human rights perspective will endorse rights of the elderly, or parental rights. Such rights actually exist in certain East Asian countries of today. Both China and Taiwan have laws stating that parents who are unable to support themselves have the right to be supported by their children (*ibid.*: 235-236). Chan's view seems reasonable, and it demonstrates an interesting feature, namely that a central Confucian virtue like filial piety may nicely fit into a framework of rights thinking.

The first part of the chapter discusses the status of human rights in Confucianism. Thus, focus will be on the scope human rights in general are granted in Confucianism and not on any specific rights in particular. The second section deals with some guidelines for Confucian human rights interpretations. This is done with a view to freedom of expression. The third chapter discusses how Confucianism responds to political rights.

## 6.2 The Status of Human Rights in Confucianism

As already established, Confucianism is a virtue-based morality focusing on social goals. This implies that virtues are supposed to guide individuals in their choices between right and wrong. If injustice has occurred the natural Confucian response is to call on the virtues to the parties involved in order to re-establish proper relationships. This follows from the fact that relationships are based on virtues and not on rights.

The part of human rights, therefore, does not exceed that of virtues. Human rights do not enter stage before virtues have failed. Chan (1999) claims that the role human rights will play in Confucianism does not extend the function of a fallback apparatus. One falls back on human rights only in cases where the proper display of virtues does not manifest itself. Human rights have a part to play in Confucianism but not the

leading role. They are the last resort for situations when virtue fails and harmony breaks down. Still, because virtue sometimes fails and harmony sometimes breaks down, human rights are needed also within Confucianism.

The function of human rights as a fallback apparatus carries certain implications. If the natural response to injustice is to call on the virtues of the parties involved, it seems reasonable that this is also the expected response of the parties. Thus if a person's legitimate interests are somehow undermined the person should not respond by making rights-claims before she has tried to call on the virtues to the other party. Individuals are expected not to make excessive rights-claims. Rights are invoked only as the last option.

There are some positive things that can be said of this solution. Firstly, delaying the call on rights may make it more likely that an agreeable solution, one that is satisfying to both parties, is obtained. Secondly, by this procedure both parties save face, which might make their relationship better in the long run.

Consider the right to safe and healthy working conditions (ICESCR: 7B) as an example. If workers are not satisfied with the safety of their working conditions it might be better to call on the goodwill of their management instead of making immediate rights claims. The management can then consider these claims and if it finds them legitimate, act on them. In this way the management saves face, receives goodwill from its employees, and restores its relationship with its employees at a good level.

However, it is also possible to conceive of negative consequences concerning the function of human rights as a fallback apparatus. If human rights are pushed too far in the background, individuals might have to endure serious rights violations before human rights are invoked. As such the legitimate interests of the right-bearer might be neglected. If human rights are to have any effect in a Confucian perspective some sort of balance needs to be obtained between keeping rights at a distance and

invoking them when necessary. It is justifiable to conceive of human rights as a fallback apparatus only if human rights are not neglected in such a system.

The danger of being easier set aside notwithstanding; there is probably not room for a rights apparatus in Confucianism that exceeds that of a fallback apparatus. Thus, we might say that there is less room for human rights in Confucianism than in liberal perspectives. This does not seem surprising given the collective outlook of Confucianism and the individual outlook of liberalism. The relationship between collective and individual interests in Confucianism is the theme for the next section.

### 6.3 Individual vs. Collective Interests

Human rights regulate the relationship between state and citizen in fundamental ways. How the balance of that relationship should be defined varies across cultures. How much control, if any, should the state have over the lives of its citizens? How much freedom does that leave the citizens? While all human rights in some sense regulate the relationship between state and individual, questions concerning freedom are especially associated with so-called civil rights. Civil rights are often referred to as *civil liberties* or *freedoms*, and they include among others freedom of expression, thought, religion and conscience.

These freedoms interact with the public sphere in different ways. For instance, the right to freedom of thought entails the principle that we are free to think the thoughts we want, while freedom of expression let us express them. The difference is that while the first right starts and ends in the personal sphere, the second, although starting in the personal sphere, ends in the public sphere, and so considerations for collective interests come into place. Few human rights define the relationship between individual and state more fundamentally than freedom of expression.

The focus of attention in this section will therefore be on the right to freedom of expression. By exploring the Confucian response to this right we should be able to

get a reasonable impression of how Confucian political morality regulates the relationship between state and individual.

We have argued that the Confucian emphasis on moral potential justifies human rights. Human rights justifications are important in the sense that they help to define how human rights are to be interpreted and specified. How does moral potential define how we are to conceive of freedom of expression? Numerous implications can be drawn and we will attend to several in the sections that follow.

### *Justifying Freedom of Expression*

To judge whether someone has the right to freedom of expression we have to consider the interests of (1) the speaker's interest, (2) the audience's interests, and (3) third-party interests (Chan 1997: 38). These interests have to be weighed against each other. In order to clarify how the different interests are to be reconciled, we may start by looking at how the right to freedom of expression is justified.

Jack Donnelly (1989: 25) holds that freedom of expression protects personal autonomy. The view seems to be that expressing oneself is considered an essential part of humanity, and denying people freedom of expression is to deny them the very essence of being human. Thus, according to this line of reasoning, one should give precedence to the speaker's interests before those of the audience and third parties.

However, the freedom of expression may also be justified instrumentally. Rawls (1999: 197) holds that freedom of expression is necessary for political affairs to be "conducted in a rational fashion". This view has wide support in contemporary debate. Francis Sejersted (2003) provides an instrumental justification for the right to freedom of expression, by claiming that people should be allowed to express themselves freely out of consideration for the good of the society at large. In a society that gives room for free expressions one can confront untrue and immoral statements. The public sphere has a cleansing function. In a society with narrow space for free expressions such a cleansing effect will not be obtainable to the same degree, and untrue and immoral ideas will stand unopposed.

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Donnelly's emphasis on personal autonomy in justifying freedom of expression seems to have little resonance in Confucianism. Insofar as Confucianism endorses individual autonomy it is because it is perceived instrumental in moral development, which again is instrumental for the good of the society at large. Confucians would not endorse individual autonomy *per se*, based on a belief that expressing oneself free serves some purpose of individual self-realization. However, the instrumental justification appears to be more sympathetic to Confucian thought. Consider the following passage from the Analects (13: 15): "But if what the 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?". The passage illustrates that differing opinions should be aired so that the best solution may be found and social harmony be achieved. This point is, if not exactly the same, at least in accordance with Francis Sejersted. Free "exchange of opinions" is instrumental in order to reach the best solution for the common good. This is in everybody's interest.

Confucius stresses the significance of speech when the message is important: "Either this man does not speak or he says something to the point" (Analects 11: 14). It seems that we can conclude, therefore, that speech has an instrumental function, and when properly used it is highly valued. I have at least not found any passages in the Confucian texts where speech is valued as such. It is therefore just an instrument, not an end in itself.

In accordance with our Confucian human rights justification in which human rights are justified by means of obligations towards others, speech should be pursued in search of truth. This will affect how the right to freedom of expression is specified in a Confucian perspective. As we proceed, the next two sections on public morals and public order should clarify this point further.

### ***Public Morals***

This section discusses where Confucianism draws the balance between collective and individual interests, with special reference to the relationship between public morals

and the freedom of expression. There are different views on how free one is in forwarding immoral expressions like offensive language and pornography. In USA, for instance, the Supreme Court has ruled that one can go quite far in using offensive language in public (Peerenboom 1998: 251). If the right to freedom of expression were without limits, there would be no problems involved with free expression of libel and free publication of pornographic material. However, most specifications of the right to freedom of expression have some restrictions to at least one of these two. The question is where Confucianism draws the line between public morals and freedom of expression.

Moralism is a mid-level principle in our model of Confucian political morality that states that the society's moral practices may be legitimately promoted by the state. Moralism implies that immoral actions will be restricted, whereas moral actions will be actively promoted. It follows that moral expressions may be legitimately promoted whereas immoral expressions may be legitimately restricted. By implication, expressions with immoral contents, like pornography, should be restricted. The collective interests in upholding a certain moral standard undermine the interests of the publisher and the audience.

The claim that Confucianism would seek to prevent pornography from being published highlights that there are forms of expressions that are at odds with Confucian morality. Our next question may be to ask how Confucianism responds to offensive language. There is a qualitative difference between pornography and offensive language, namely that the latter may carry important meanings. Confucius stresses the significance of speech when the message is important: "Either this man does not speak or he says something to the point" (Analects 11: 14). Speech, thus, has an instrumental function, and when properly used it is highly valued. However, the form of speech itself is also important considering the Confucian virtues of courtesy and modesty.

The stress Confucianism puts on the form in which speech should be conducted is perhaps best illustrated by Confucius' emphasis on studying the Odes. The Odes are a

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literary work well known at the time of Confucius, and it consists of 300 verses of poetry.<sup>33</sup> Study of the Odes is important in that they enable men to express opinions courteously. Like the anonymous author of the preface of the *Kuan ch'ü* puts it: “The one who speaks gives no offence, while the one who hears can take warning” (Lau 1979: 42). Consider the following passage from the Analects (17:9):

The Master said, ‘Why is it none of you, my young friends, study the Odes? An apt quotation from the Odes may serve to stimulate the imagination, to show one’s breeding, to smooth over difficulties in a group and to *give expression to complaints* (italics added).

In a conversation with his son Confucius claims, “unless you study the Odes you will be *ill-equipped to speak*.” (Analects 16:13, italics added). The importance of the Odes illustrates one important point. Expressions should be courteous in their form, and as such there are restrictions on how expressions may be given form in Confucianism. The Confucian ideal of courtesy should be preserved as far as possible.

When it comes to the content of expressions the scope of freedom is considerably wider, and the restrictions equally more narrow. Pornography and offensive language violate the Confucian ideal of courteous form and are therefore not acceptable. In principle, however, one enjoys freedom of expression provided the form is acceptable. Still, other than moral considerations may affect freedom of expression such as considerations of public order.

### ***Public Order***

Order and stability are highly valued in Confucianism as they may be considered to be intrinsic parts of social harmony. Since social harmony is a central value in Confucianism the balance between individual and collective interests seem to be in

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<sup>33</sup> The Master said, ‘The *Odes* are three hundred in number. They can be summed up in one phrase, Swerving not from the right path’.

favour of the latter part also here. Certain checks on individual freedom may therefore be in place.<sup>34</sup>

From our previous discussion on the compatibility between social harmony and individual rights-claims<sup>35</sup> we remember that one is legitimately entitled to oppose harsh rulers. We remember also the paragraph mentioned above, from the Analects (13: 15) where one is expected to go against a ruler who is about to make a mistake, otherwise the state will be lead “into ruin”. It thus seems that even if social harmony is the ideal it is not in fact inviolable. Interestingly though, it may also seem that it is not until social harmony has been violated that one is justified in standing up to those who ruin social harmony.

If the situation is so that social harmony prevails, and there is both order and stability, is one still free to express disagreement with government politics? The ideal is probably that one should not: “When the Way prevails in the Empire, the Commoners do not express critical views” (Analects 16: 2). However, Confucianism also regards speech as instrumentally important, and as such one may regard speech as instrumental for the preservation of social harmony. Thus, if the principle of freedom of expression more often than not serves to preserve the way, Confucianism should endorse it. Be that true as it may, this argument seems to be limited to information that is considered useful.

It is a common claim that freedom of expression has the potential to uproot social stability. The question is which alternative is most damaging to stability, freedom of expression or not freedom of expression? Although authoritative regimes often curb freedom of expression it is not certain that this helps to promote social stability. The

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<sup>34</sup> The view that collective interests should have rank has been dominant in the ‘Asian Values’-debate. In an interview with Fareed Zakaria, Singapore’s former Prime Minister Lee Kuan Yew said of America: “[...] I find parts of it totally unacceptable: guns, drugs, violent crime, vagrancy, unbecoming behaviour in public - in sum the breakdown of civil society. The expansion of the right of the individual to behave or misbehave as he pleases has come at the expense of orderly society” (Zakaria 1994).

<sup>35</sup> See section 4.3.3.

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development of severe acute respiratory syndrome (SARS) in China's Guangdong province the spring of 2003 is but one example of this. It is probable that the efforts of the authorities to hinder information about the disease helped its spread. The economic consequences for China are massive, not to mention confidence to the political regime.<sup>36</sup> Hindering freedom of expression for the sake of stability does not always work in practice albeit it might work in theory. In cases like this, social stability is not incompatible with freedom of expression but with its denial.

Our claim that freedom of expression may serve to preserve social stability and public order is limited insofar as it seems to refer mostly to political statements and important public information. Besides, the form the expressions take is also important, which may restrict expressions through public rallies and so on. Insofar as speech is valued for its instrumental value, instrumentally valuable forms of expressions will be promoted. However, that does not necessarily involve restrictions on the freedom of not-so-useful expressions. It just means that these forms of expression will not be promoted to the same degree. That needs not be controversial. For instance, in Norway newspapers are publicly subsidized while glossy magazines are not. Even though everyone does not agree to this, it does not seem to violate the right to freedom of expression.

### *Summing Up*

The society benefits from the pursuance of truth, and in order to conduct this, freedom of expression is instrumental. The main conclusion seems to be that while there are expressions that Confucianism does not endorse like disagreements with government politics and unimportant information, Confucianism does not reject such expressions. The only expressions that are rejected are the ones that are unacceptable in form, like libel and pornography. Thus, while Confucianism has room for free

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<sup>36</sup> Periodicals like the Economist and the Far Eastern Economic Review (FEER) have both devoted serious attention to the consequences China's handling of the SARS may have for communist party rule. For instance the Economist (April 26<sup>th</sup>-May 2<sup>nd</sup>) asks if the SARS virus could become China's Chernobyl, whereas FEER (May 1<sup>st</sup> 2003) holds that the next public uprising in China due to bad governance, will be more like Berlin 1989 than Beijing the same year.

expressions when it comes to content, it is important that the form of the expression is in accordance with Confucian morals.

A relatively open society that respects freedom of expression may be conceived to be more successful in providing the necessary conditions for moral development of its citizens than societies that do not respect this freedom. In societies that pursue the truth individuals will have to face moral choices between different alternatives (of the truth). The ability to make moral choices is a necessary condition for moral development.<sup>37</sup> Thus, without such choices the conditions for moral development are not existent. In sum, it is important that freedom of expression is respected in Confucianism so that truth can be pursued, untrue statements be opposed and moral development flourish.

## 6.4 Confucianism and Political Rights

In the previous parts we have discussed Confucianism with special regard to the right to freedom of expression. Now we will take the discussion one step further by focusing on political rights. While civil rights such as freedom of expression define how citizens live in society, in terms of how they are to pursue their goals in life, political rights tell us how they themselves can define the very structure of that society.<sup>38</sup>

In this section we will explore how Confucianism responds to the right to political participation. This right is inherently attached to democratic societies. The right to political participation is stated in article 25 of the ICCP. We will focus on 25(B), which reads:

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<sup>37</sup> See also section 5.3.1.

<sup>38</sup> However, it should be emphasized that respect for political rights is not necessarily a stronger claim than civil rights. The right to political participation is of little value if not accompanied by civil rights. See Zakaria (1997).

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Every citizen shall have the right and the opportunity [...], without unreasonable restrictions. [...] (B) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballots, guaranteeing the free expression of the will of the electors.

In interpreting political rights with Confucian lenses we must keep in mind that we must interpret in good faith and in light of the purposes behind the UDM so as to produce reasonable specifications. An example of a reasonable restriction to the right to vote is age limits for voting in general elections, whereas restricting political rights to men with green eyes would be an unreasonable restriction. Specifications of the right to vote are bound to have certain restrictions, so too a Confucian specification. The question is where the restrictions are set and that is among the things we will be looking at in the following when we discuss Confucian resources of the right to political participation.

### *Confucian Resources for Political Rights*

Confucianism advocates a single ruler on top. The ruler is both decision-maker and moral exemplar. But even though the ruler is the decision-maker, others too may influence political decisions. From what we said above we remember that the right to freedom of expression applies for political statements, provided they are expressed in a polite and respectful way. The ruler may, or may not, take these statements into consideration. The population at large, however, is for the most part left out of political *decision-making* in classical Confucianism. That does not mean that classical Confucianism does not contain the resources for the right to political participation.

In exploring how Confucianism responds to political rights, our Confucian human rights justification will serve as our point of departure. Stated in full it says:

All human beings are born equal in moral potential, and, based on its development, they are able to pursue their proper obligations towards others, and support a decent public order.

Confucian individuals are expected to develop their proper virtues so as to fulfil their obligations to different collectives, like the family and the society at large. This involves placing the common good above oneself, which again involves feeling a

sense of responsibility for one's social environment. It seems reasonable that people who have the power to influence their social surroundings will feel more social responsibility than people without this power. At least that is how thinkers like Hegel and Tocqueville have conceived it. Hegel held that participation in civil society leads to a broader notion of public spiritedness (Bell 1995: 39-40). Public spiritedness is required in order for people to place the common good above the individual good. Tocqueville holds that it is through participation in public affairs that one fully grasps the connection between individual efforts and the common good (Malnes & Midgaard 1996: 225).

According to the reasoning of Hegel and Tocqueville, people that have no sense of responsibility for their social habitat, will be less willing to make sacrifices for it, and egoistic interests are likely to prevail over concern for the common good. In such circumstances, social harmony is not likely to flourish. Do these arguments have resonance in Confucianism?

As virtue-producing mechanisms there does not seem to be any reason why Confucianism would not respond positive to these arguments. After all, it is a fundamental aspect of Confucian morality that peoples' virtues are developed. If political participation develops peoples' virtues then, all else being equal, Confucianism will endorse this principle. However, there are other aspects that need to be taken into account as well, and that regards the consequences brought about by the exercise of political rights. Even if the principle of political participation itself has resonance in Confucianism its consequences may not have. Therefore we will have to consider these too, before we can make any conclusions.

Confucianism advocates rule by one as the most efficient in promoting social harmony. But the emphasis on a single ruler does not exclude that the population can vote for the candidate they think is most fit to rule. The Confucian ideal is that moral rulers should be on the throne. Democracy, together with other forms of political regimes, stands short of guaranteeing that the most moral candidate will come to power. It is not clear-cut which political arrangement provides the population with

the most benevolent rulers. Let us not go through all possible forms of political regimes to evaluate this, but instead ask whether it is reasonable to conceive that democracy may provide the best solution in this aspect.

To date, democracy is the only form of political arrangement that responds satisfactorily to the demand of accountability. Political accountability leaves certain constraints on what the ruler can and cannot do insofar as he is dependent upon the will of the population to stay in office. Why does political accountability produce the most benevolent rulers? It does not necessarily lead to more moral rulers as such, but to rulers motivated to act morally, if nothing else, because they want to be re-elected. Keeping this in mind, there seems to be resources within Confucianism in support of democracy.

There are instances in the Confucian texts that seem to support that people should have a say in government decisions. Consider this passage from the Mencius (cited in Cheng 1998: 151):

If those close to a ruler recommend the execution of a person it is not to be listened to. If all those in rank and file also recommend the execution of the person it is not to be listened to. It is not until all people in the country recommend execution of the person that the ruler, taking a close look and finding the recommendation to be correct, will then order the execution. In this way it is the people of the country who order the execution. It is in this way that a ruler can be said to be parent to the people.

The passage both illustrates that there is a certain endorsement of influence by the people in Confucian government, and also that the ruler is parent to the people. The latter exemplifies Confucianism's paternalistic character. Paternalism itself is not necessarily undemocratic as long as the principle of popular participation is respected. Whether that is so will be discussed in the following section.

### ***To Vote and to be Elected***

It is symptomatic of Confucian paternalism that Confucianism advocates rule for the people but not of and by the people. It is mostly assumed that the limited intellectual capacity of the common people does not provide them with the skills to rule. Political

responsibility belongs to moral people who have developed their virtues through education. In the days of Confucius and Mencius education was not widespread, and the population at large was mostly uneducated.

We remember that being short of opportunity for study it was the responsibility of benevolent rulers to take care of the welfare of the population. However, it should be emphasized that in instructing his disciples Confucius does not stress rank or wealth: “I have never denied instruction to anyone who of his own accord, has given me so much as a bundle of dried meat as a present” (Analects 7: 6). The importance is instead placed on ability: “When I have pointed out one corner of a square to anyone and he does not come back with the other three, I will not point it out to him a second time” (Analects 7: 8). Confucius instructs the able, regardless of rank or wealth.

Confucianism’s claim that the uneducated should be left out of political rule is perhaps not as controversial as it may seem at face value. Most people would also today object to a ruler who could not read or write. However, the argument is outdated insofar as the education level today is at another level than at the days of Confucius. Today it seems that the Confucian idea that only educated people should have a say in government is respected, even by applying universal suffrage. Insofar as the argument that the uneducated should not be allowed to influence politics loses its ground, there does not appear to be serious reasons why people should not be allowed to vote. If this argument holds, then one may argue that Confucianism applied today have certain resources for democracy. Although I think the argument may hold for voting I do not think it holds for being elected. We will look at the right to vote first.

It is necessary for viewpoints to adjust when the conditions they have been based upon change. This applies for the Confucian position on popular participation in government. Insofar as people have a minimum level of education there does not appear to be evident reasons why people should not be allowed to vote in Confucianism. This is further backed up by the view on the Confucian view on political legitimacy. The people represent the ultimate purpose of Confucian

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government, and their welfare is the yardstick for political legitimacy. The most important aspect of welfare is that the people have trust in their rulers.<sup>39</sup>

If moral rulers are on the throne trust in the ruler is easy to obtain. Since the trust of the people is so vital for political legitimacy in Confucianism one may perhaps say that genuine political legitimacy applies only to governments that have been properly elected. Elections become a yardstick for political trust, and only democratically chosen governments can prove that they have the trust of the people. In such a perspective democracy becomes an institutionalization of people's trust.

In sum, there seem to be resources in Confucianism that are in support of voting rights, but how about the right to being elected?

What qualifies for rulership is not education as such but moral virtues such as benevolence and righteousness. This means that educated men should be on the throne only if they have developed benevolence. It is true enough that Confucianism holds that education is necessary in order to acquire benevolence but it is not so that education leads automatically to benevolence. One may also go through education without acquiring it. People may be more educated now than before, but education does not necessarily make one benevolent. It is therefore probable that in a Confucian perspective the influence of the population at large should not supersede the influence of benevolent men.

Daniel Bell (2000: 307) has suggested that a truly Confucian democracy could include two chambers: A lower house chosen through regular elections, and an upper house of intellectuals selected on the basis of competitive examinations.<sup>40</sup> This is an attempt to institutionalise benevolent rule. However, although competitive

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<sup>39</sup> See sections 3.3.1 and 3.4.

<sup>40</sup> Confucianism as state ideology was never put into practice during the lifetimes of Confucius and Mencius. However, when it was, competitive examinations became a method for choosing the most able public officials. The method is probably in accordance with the ideals of classical Confucianism but since it is not part of these texts we do not consider it a relevant Confucian characteristic as such in this discussion.

examinations on many occasions may be a good way of choosing the most able candidates, it seems difficult to conceive why competitive examinations should be successful in producing benevolent political rule. Nor does Bell's solution appear very democratic.

In itself the bicameral solution does not violate against the right to political participation but the question is whether it is in accordance with a perspective where the right to political participation is interpreted in good faith and in accordance with the purposes behind the UDM. It does not seem that Bell's specification is based on the right being interpreted broadly and limitations on the right narrowly. It looks more like the opposite: limitations on the right to political participation are interpreted broadly in the sense that power is stripped off the chosen representatives in favour of non-chosen intellectuals. It all depends of course on how much power that is granted to this house of intellectuals. Limiting its power to that of an advisory function<sup>41</sup> makes it seem legitimate and in accordance with the purposes behind the rights treaties. Granting it extensive political power does not. On the other hand, if the house of intellectuals is without any political power, then there might not be any reasons to institutionalise such a solution.

Regardless though, I think there are good reasons to consider another alternative that is more true to the purpose behind the right to political participation. The right to being elected should not be subject to unreasonable restrictions, and therefore benevolent candidates too should participate in competitive elections. The electorate should be able to evaluate all candidates. However, there are reasons to believe that in a Confucian society, people will vote for the candidates that have proven to be benevolent. It is on those candidates that people will have trust, and we remember that trust is considered to be the most important aspect of people's welfare. If the electorate gives preference to the intellectuals, then they will be elected. And this

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<sup>41</sup> That is perhaps how can conceive of the British House of Lords. However, while that is a remnant of an autocratic past, Bell's bicameral solution is thought to be a future solution for Confucian democracies.

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form of benevolent rule is probably the only one that is in accordance with democratic ideals. Nor is it untrue to Confucian ideals.

Even if the solution of institutionalising popular democracy is not untrue to Confucian ideals it does not guarantee that benevolent people will come to power. However, nor does Bell's bicameral solution. The difference between the two methods, then, is that popular democracy gives the power to elect their rulers to the people. If benevolent candidates are not elected to office, that might be due to a number of reasons. One reason may be that the people is lacking in education and do not know what is actually best for them. That is the autocratic response and this argument is dangerous since it may be used to justify all kinds of politics that go against the will of the people.

Another reason for why benevolent candidates are not elected to government is that the society in questions "is not Confucian". That is, the people do not hold Confucian values to be dear to them. If that is the case it is reasonable that they do not aim to pursue the same goals and ideals as Confucians do. However, it seems that only popular political participation can reveal this to be so. This argument may also be reversed. If the society in question endorses Confucian values, political participation is a way for them to express authentic commitment to these values.<sup>42</sup> The conclusion is therefore that popular democracy fits well with Confucian political morality. A Confucian society will vote for benevolent candidates and in that way express their trust to the political leadership and commitment to the values they represent.

### *Summing Up*

As stated early in this section, political participation seems instrumental in promoting moral development. The argument was that moral virtues are developed through participation in society. Thus, there are resources in Confucianism that may be

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<sup>42</sup> This point draws on Lindholm (1997: 12) who says that human rights protect unforced and therefore also authentic commitment to communally shared values.

conceived as supporting the right to political participation. Further, insofar as people are well educated there do not appear to be reasons in Confucianism for not allowing them to vote. Confucianism advocates that benevolent men should conduct political rule. In a true Confucian society popular democracy seems to be a method for achieving just that. Thus, there are clear elements in Confucianism in support of the right to political participation both in terms of political participation producing civic virtues and democracy as a means for achieving benevolent government. The conclusion is therefore that a Confucian specification of the right to political participation has narrow room for limitations. Votes should be conducted by universal suffrage and everyone should be allowed to run as candidates.<sup>43</sup>

In section 2.3 we said that culture only should matter if the people of the culture are allowed to define its contents. It is the bearers of the culture who must define its contents, and it is the bearers of Confucian cultural heritage who must choose Confucianism as their way of life. The right to political participation enables them to do so.

## 6.5 Conclusion

Human rights have a lesser status in a Confucian perspective than in a liberal perspective. That is also apparent when specifying human rights. Collective interests, based on public morals and public order, have priority before that of individual interests. Nevertheless, the scope of the right to freedom of expression is sufficiently broad to be in accordance with the purposes behind the UDM. The same is true for the right to political participation. There are clearly resources in Confucianism that support political rights. In a Confucian democracy everyone can run for office but it is probable that only benevolent people will be elected.

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<sup>43</sup> However, as already mentioned only people who have proved to be benevolent will be elected in a Confucian democracy. Thus, not everyone has the same chance of getting elected but the right to political participation does not apply for getting elected, just running as candidates.

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In order to reach an overlapping consensus on human rights from within cultural traditions cultural human rights specifications must be part of the picture. This chapter has demonstrated that Confucian specifications of the right to freedom of expression and the right to political participation seem to be in accordance with the purposes behind the UDM. This makes the prospects for an overlapping consensus on human rights promising from a Confucian perspective.

## 7. CONCLUSION

We have come to the end of our exploration of Confucianism as a cultural perspective on human rights. While we have made our conclusions along the way some final remarks are in order.

The theoretical framework for this thesis has been the cultural consensus thesis in which the aim is to reach an overlapping consensus on human rights from within cultural traditions. The framework is such constructed that recognition, justification and specification of human rights are left for each distinctive culture to define. In exploring Confucianism as a cultural perspective on human rights we have made the following findings:

1. We have established that Confucianism is compatible with the ideas that humans have rights by virtue of being human and that human rights entitle individuals to promote rights-claims. The discussion on this issue centred around three basic Confucian ideals, namely roles within social relationships, the common good and social harmony. While we found that the Confucian emphasis on social roles to a certain degree is at odds with the idea that humans have rights by virtue of being human, the other Confucian ideals resonated well with Confucianism. The conclusion, therefore, was that Confucianism recognizes the basic ideas of human rights as valid political principles.
2. A challenge with identifying Confucian resources for justifying human rights is that Confucianism has a collective focus whereas human rights apply to individuals. However, the Confucian emphasis on the development of virtues has a collective focus at the same time as it is based in individuals. We have, therefore, argued that moral potential for developing virtues may be conceived as a moral principle that may serve to justify human rights. While moral potential is grounded in individuals its focus is on the common good in the

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sense that it is collective entities that stand to benefit from the individual's proper moral development. The conclusion, therefore, was that Confucianism includes the resources to justify human rights on its own terms by way of human moral potential.

3. We have found that the status of human rights in Confucianism does not extend the function of a fallback apparatus. Human rights are invoked as a last option. The fact that collective interests have precedence over individual interests in Confucianism affects the way Confucianism specifies human rights. Even so, the scope of the right to freedom of expression in Confucianism is considerable as long as the *form* of the expression does not violate against public morals. A Confucian specification of the right to political participation will include popular democracy by universal suffrage. In a truly Confucian society the votes will go to the benevolent candidates. The conclusion is therefore, that a Confucian human rights specification interprets rights with a view to Confucian virtues and ideals at the same time as the rights are interpreted broadly and restrictions on rights narrowly, in accordance with the purposes of the UDM.

Perhaps the main reason for the revival of Confucianism in academic and political debate during the recent decade is the 'Asian Values'-debate. In these discussions it was claimed that Asians value family, harmony, and economic development more than freedom and individual rights. We have not said anything denying that Confucianism gives precedence to communitarian values. On the contrary, we have emphasized the Confucian stress on family, the common good and social harmony among other things. However, we have shown that there is room for individual interests also in Confucianism and that these interests may take the form of rights and freedoms. Confucianism is not at odds with human rights as such although it may be at odds with aspects of Western liberal political morality, and the way human rights are justified and specified therein.

Our theoretical approach has been the idea of an overlapping consensus on human rights from within cultural traditions. We have referred to our approach as the cultural consensus thesis. The premises of the thesis may be summarized from our discussions in chapter two: 1. The UDM is a valid political standard consisting of basic human rights. 2. Human rights should be interpreted and specified in good faith and in accordance with the purposes of the UDM. 3. There is some room for cultural variation of these specifications in the sense that cultures may reasonably disagree on how to justify and interpret human rights. 4. Although there is some room for disagreement, cultures should be able to agree that some ways of justifying and specifying human rights are acceptable and some are not. 5. Intercultural agreement on human rights should be approached through common dialogue and mutual understanding between the cultures. 6. Only through common dialogue and mutual understanding, can a genuine overlapping consensus emerge on the UDM. 7. An overlapping consensus on human rights can only be reached by cultures themselves, and therefore culture must be the point of departure.

Thus, based on these premises, the cultural consensus thesis states that a model of an overlapping consensus on human rights must take cultural traditions as its starting point, and explore how the culture in question recognizes, justifies and specifies human rights. The thick meaning of human rights must enter intercultural dialogues on human rights in order to reach for a genuine overlapping consensus on human rights.

While this paper has been in accordance with the cultural consensus thesis, we have not been able to evaluate the validity of the thesis itself. In chapter two we argued that the thesis constituted a reasonable and fertile theoretical framework. However, further studies are required to examine the legitimacy of the thesis as a valid theoretical framework. Still, within the scope of this paper some interesting findings have been made that may support the validity of the cultural consensus thesis. Most notably is perhaps that an ancient philosophy like Confucianism entails the moral resources to recognize the basic principles of human rights, justify the need for

human rights, and specify the meaning of human rights in a way that interprets rights broadly and limitations of rights narrowly. Based on this, one may perhaps dare to assume that most, if perhaps not all, cultures would be able to do the same, based on their own moral resources.

The paper belongs to the field of normative political theory. We have based our analysis on philosophical reconstruction. From within Confucianism we have explored its bearings on human rights in terms of recognition, justification and specification. Since the idea of human rights was not known at the time of the early Confucians, we have had to “rethink” Confucianism in order to make meaning of how human rights could fit into Confucian philosophy.

Bilahari Kausikan (1997: 30) holds that “[...] most Asian societies have such long histories and rich cultures that it is possible to “prove nearly anything” about them. Kausikan speaks of Asian culture as a whole, but he could just as well have been talking about Confucianism. Confucian philosophy in itself is complex enough to make findings in different directions. Even if we have based our discussions on the Analects and the Mencius only, our reconstruction of Confucianism is certainly not the only one possible. What is most important is that the model of Confucian political morality this paper builds upon, is properly based on the essentials of Confucian thought. Our approach has tried to stay clear of making any changes to the tradition but merely to understand it in its own terms. Insofar as we have succeeded in our effort it should not have been possible for us to “prove nearly anything” we wanted.

Of course, one could probably reach different conclusions than ours that were less sympathetic to human rights. For instance, by focusing more on the hierarchical elements in Confucianism like the rites, instead of focusing on virtues, like we did, Confucianism and human rights might have been found not to be compatible. However, the Confucian political morality that we have presented includes the basic elements of Confucianism and also their ranking. We have emphasized virtues over rites because rites come after virtues in Confucianism. We are therefore relatively confident that our conception of Confucianism has given ground for legitimate

conclusions regarding the relationship with human rights, and by so doing we have found that not only is Confucianism compatible with human rights, but it has also the potential to ground and specify rights on its own terms.

The scope of this paper is philosophical, not empirical. We have discussed the relationship between Confucian philosophy and human rights but we have not investigated any of the so-called Confucian societies in East Asia of today to see how strong Confucianism stands. Nor have we investigated the human rights record of these countries to see if these can be explained by Confucianism. We have therefore no basis for concluding that Confucianism is in fact important for these countries' human rights records. What we have established, however, is a philosophical basis for claiming that Confucianism *might* be important in this aspect.

We have contributed but one step of the project of moving towards an overlapping consensus on human rights from within cultural traditions, by exploring Confucianism with regard to human rights. Have we by so doing approached an intercultural consensus on human rights? That is beyond the scope of the paper to evaluate. The next step would be to reach for intercultural legitimacy of human rights through intercultural dialogue about their meaning and scope. Whether an overlapping consensus on human rights can emerge from such an endeavour remains to be seen. What we have demonstrated in this paper, however, is that Confucianism has the moral resources to take part in such a consensus.

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