Introduction

The contemporary form of the ancient debate about the ethics of wealth is the human-rights challenge to capitalism ... The well-being of many depends on this project. (Freeman, Chapter 1, p. 26)

Michael Freeman's 'Beyond capitalism and socialism' commences the first part of the book which considers conceptual and ethical issues. His contribution goes beyond the more familiar positive and negative empirical understanding of the relationship between capitalism and human rights and examines the way in which the two concepts relate to each other conceptually. Human rights concepts derive from the philosophy of natural law which formed the foundation for international law. On the other hand, 'capitalism' 'derives from late eighteenth and nineteenth century political economy, which was developed, especially in the works of Karl Marx, to displace not only the concept of natural rights – the conceptual ancestor of human rights – but also the natural-law philosophy that had provided its foundation'. Thus 'the two discourses could observe each other, but could not meet on the same epistemological terrain'. The empirical relationship is a different discourse again. Freeman points out that the relationship between capitalism and human rights is necessary only if they provide complementary or opposing understanding of human freedoms, if capitalism is necessary to the attainment of freedom or, on the contrary, if capitalism is associated with oppression and exploitation. In the light of these conflicting relationships it has become 'a common view that capitalism can, and should, be judged at the bar of justice, and that this includes, at least as an important component, its impact on human rights.' For Freeman, and, indeed, for all the contributors to this work, in its current manifestation, it fails. Details of particular failures follow in later contributions; Freeman's particular emphasis is on the conceptual relationship between our subjects and he sees the strongest foundation to their conceptual relationship to be theories of property rights. This insight provides a pervasive theme of the contributions, the 'freedom' to exercise property rights (including intellectual property rights and the right to trade) and the impact this has on human rights and justice are found in every contribution. The natural rights philosophy derived from theories of property. The commitment to 'rights' thus includes a strong commitment to private property 'and thus to complicity in the behaviour of capitalist organisations, even to acts which empirically can be seen as human

rights violations' (Freeman, Chapter 1, p. 6). Freeman unpacks the story of the property rights relationship which is revealed as more complex than it at first appears. Tracing natural rights discourse back to late medieval controversies and the struggle between the Franciscans' vows of poverty (including absence of power) with the opposing Catholic perspective and the relationship between man's understanding of his natural rights and his freedom to exercise them to the possible damage of fellow citizens, this debate reached the point at which the right to having, possessing, using, enjoying and disposing of things was understood as rooted in the divine creation of human freedom. Freeman here identifies 'some ideological materials for the justification of capitalism' (Freeman, Chapter 1, p. 12) and points up the close relationship between natural rights and property rights. Moving to the various and complex interpretations of Locke's theories, he shows that Locke himself had apparently inconsistent views on the relationship between individual property rights and a government's ability to regulate them. Locke clearly argued that the proper function of government was to secure natural rights (including property rights). However, the interpretation of Locke as an apologist for unlimited capitalist appropriation is much less clear, and his 'Christian-republican hostility to greed and luxury' makes it unlikely that Locke would be a present day apologist for the current regime. Nevertheless Freeman sees in Locke a precursor of 'a society in which Christian constraints and mercantilist goals were displaced by a secular society with limited government and a capitalist economy.' A further dimension of Locke's theories is their relationship with colonialism. This relationship raises severe problems for human rights theory in its relationship with indigenous peoples and their assertion of property rights conceptions opposed to the Lockean concepts. Freeman acknowledges the problem, calling for a revision of property rights dialogue. Freeman argues that it was Adam Smith, rather than Locke, who separated the right to property from social responsibility, leading to the current manifestation of capitalism where the utilitarianism of international capitalist trade meets the non-utilitarian liberalism of Locke and Kant, the consequentialist trading regime meets the deontological human rights discourse. 'Whereas rights may trump utility, utility may disregard human rights in the pursuit of its goals.' Freeman concludes by identifying 'mixed effects' of the relationship between our subjects; capitalism may erode civic virtue but it has had a role in the global rise of civil society; the concept of human rights has superseded socialism as the main discourse for the critique of capitalism; the property rights debate needs to be fought out in all the various arenas discussed in this work.

Freeman concludes 'The human rights idea has had important, though limited, success in eroding the concept of state sovereignty. Now it is taking on capitalism. The well-being of many millions depends on the success of this project.'

Sheldon Leader's chapter is concerned with studying how the application of human rights can be analysed so as to uncover the basis and implications of differing justificatory accounts of human rights practice. He argues that the justifications drawn upon directly affect the extent to which a human right is deemed valid and applicable. The setting for his analysis is labour law. In recent decades, human rights principles have increasingly seeped into the so-called 'private sphere' in an attempt to establish more rigorous standards of treatment and individual protection from potentially exploitative practices. The application of the spirit and the letter of human rights jurisprudence to relations between employer and employee appears to acknowledge this and represents a response to a view that many employees of capitalist enterprises are vulnerable to unfair treatment and exploitation as a consequence of a fundamental power imbalance. By extending human rights principles into fields such as these, it might appear as if the presence and effect of power has been acknowledged within capitalism, thereby dispelling the Marxist-inspired criticism that capitalist societies are constitutively incapable of recognising and responding to the inequalities which capitalist relations create and require. Leader cautions against drawing an overly optimistic conclusion that the mere extension of human rights principles to the field of private economic relations will ultimately eradicate persistent inequalities. The effective, rather than merely formal, application of human rights, he argues, must deal with the emergence and increasing influence of a justificatory account of the appropriate application of human rights which serves to subordinate human rights claims to a set of functional imperatives.

Leader distinguishes between three different forms of justification typically offered in support of human rights claims: civic justification, consensual justification, and functional justification. Though not determined by the institutional settings to which they are applied, their application to the sphere of private economic relations reveals a certain bias, he argues, in favour of the self-declared imperatives of the commercial organisation over those of its employees. Leader applies this frame of analysis to a recent legal case concerning the dismissal of a homosexual employee, which was subsequently upheld by the courts. On the face of it, such blatantly discriminatory action would appear to violate a fundamental human right that all parties are bound to respect. However, Leader argues that appeal was successfully made by the employers, in effect, to a functionalist perspective whose application trumped the rights of the employee. This particular outcome, he suggests, is indicative of the growing supremacy of a functionalist logic within contemporary capitalist societies. From this perspective value is determined by the needs and aspirations of the commercial organisation in its pursuit of profit and new markets. The individual employees of such organisations are increasingly, in effect, conceived of as means to the ends of the organisation: human capital.

On this view attempts to protect individuals' rights where such protection is deemed adversely to affect the organisation's pursuit of its ends are rendered invalid. The application of human rights to the sphere of private economic relations is therefore vulnerable to a widespread assumption that the functional imperatives of commercial organisations must take priority over the fundamental rights of their employees.

Janet Dine believes that the human rights approach will need to take on board the propensity of the rich to believe whatever is most comfortable. This includes using companies as 'moral deflection devices' (quoting Thomas Pogge), that is as agents to carry out misdeeds from which the rich world profits while simultaneously taking the moral high ground by condemning companies and still continuing to profit from their activities. Adopting Thomas Pogge's view that an active application of human rights implementation means designing institutions to deliver human rights, Dine notes that the way in which society has designed companies to be profit maximisation machines means that they will inevitably fail this test. The property rights debate is relevant here and it is important to understand different underlying political viewpoints on property rights. The more 'absolutist' view, that property rights should be stringently protected is, as Freeman pointed out, based in political realities perceived by the thinkers writing at the time. These underlying assumptions still inform the property rights debate. So far as companies are concerned it is claimed that shareholders 'own' the company and may therefore use it to maximise their investment. This is an 'absolutist' or 'expansionary' property claim which ignores the context in which these rights operate; that they represent power over people (a theme taken up later in the book by Fernne Brennan in the context of slavery), in terms of the spacial, time and stringency debates which form the social and political background to the exercise of property rights (a debate addressed further by Blecher). Arguing for a human-rights-consistent design for companies, Dine seeks to use risk assessment methods to argue that directors should not be seen as merely the custodians of shareholder rights but should be responsible for ensuring that systems are in place within the company which can deliver a range of human rights, from participation in decision making to protection of labour rights and the environment.

Michael Blecher picks up Freeman's observation concerning the global rise of civil society by examining the development of the new global civil movements. He points out that each social sphere such as law, politics and economics evolves as a separate entity using core distinctions to define its preoccupations, for example, law uses legal/illegal, politics power/non-power. Social movements, including the new social movements which are visible at the European and World social fora, put pressure on these traditional distinctions, requiring a redefinition of the values inherent within them and consequent

changes in discourses and in the law. Going beyond the distinctions to question their own validity (is the legal/illegal distinction itself legal or illegal?) means that the way in which society may reorder itself becomes a matter of infinite complexity and possibilities. However, in all spheres the range of possibilities often leads to decisions being made that defeat the original object pursued. This paradox is present in all human activity. In the human rights context, because human beings are both individuals and part of society, full human rights can only be delivered by institutions established by societies. The paradox is that societies (now global) have a great capacity for human rights violations. This tension reflects the historic tensions Freeman considers between the origin of human rights in the natural law philosophy of freedom and the free exercise of property rights, and the evolution of the human rights discipline into the situation where it is opposed to the free exercise of property rights through capitalism.

Understanding these paradoxes is not necessarily negative, according to Blecher. It should lead to an aspiration to achieve the best possible result for all; in law to the achievement of justice. Realisation of true justice will remain out of reach because the criteria used to make choices will always be flawed and 'asymmetric', therefore, law must seek to improve continuously in order to tend towards the delivery of justice, requiring 'permanent political negotiation'. This requires continuous reconsideration of boundaries within law (such as the definition of 'public' and 'private' spheres), and between law and other 'social spheres', law must at all times be seen in its multi-disciplinary context.

The new social movements (which are broadly seen as 'anti-capitalist') reflect aspirations to provide the best possible solution for every individual. Democracy should respond to the pressures exerted by these movements by becoming 'liquid democracy' since every time a choice is made and an institution established it is immediately suspect, since the choices which led to its establishment will benefit some over others. This vision of institution building reflects Thomas Pogge's concept of creating institutions to maximise the delivery of human rights. The paradox for these movements is that they seek 'to enlarge the possibilities of global development without producing new mechanisms of inclusion/exclusion' (Blecher, Chapter 4, p. 88). To achieve any real change the movements must 'pass from simply "being against" existing forms of the social system to defining concrete alternatives for the solution of social problems' (Blecher, Chapter 4, p. 88). It is inevitable that in doing so the movement will fragment and that this will cause 'an increasing detachment from the movement's starting point' (Blecher, Chapter 4, p. 89). However, so long as the resultant structures remain open to continuous pressure this 'defeat' for the aspirations of the movement must be seen as only an episode in the development of a search for justice.

Law represents a main target for social movements since it is the most obvious embodiment of the choices made by a particular society. In a search for justice, law must therefore establish methods of taking account not only of its political, economic and social context but of the internal reasoning which disciplines concerned with those contexts use in order to reach 'adequate, that is temporarily justified, standards'. In doing so it is necessary to understand the 'constructive selectivity' which determines the internal understanding of each discipline and be aware that there is no such thing as objectivity. Law must use an 'empty space' and allow all social pressures to be voiced. This will involve continuous risk assessment to ensure that the 'natural immunity' to change of institutions embodied in the law is not enhanced but that they are always open to change. The recognition and acceptance of continuous pressure should not be 'by permission' of the established order but flow from an understanding that the 'irreducible diversity' represented by human beings is central to any attempt to achieve justice.

Companies and groups of companies are central to the current legal organisation of capital. These legally established institutions cannot, as Teubner argues, be opposed by 'free market forces' since, just as human rights evolved out of a property rights context and now sit in opposition to some property rights, so 'free market forces' have a paradoxical tendency to undermine freedom, creating a systematic bias in favour of the 'property rights' of shareholders, excluding responsibility to stakeholders. The addition of concepts of 'corporate social responsibility' cannot cure the fundamental error in the legal design of companies; the current model needs to be opened to other influences to create a model which is likely to deliver common welfare.

Paradoxes also abound within the human rights debate. A human rights framework seeks to deliver global welfare while limitations on achieving this are imposed by the framework itself, for instance by prioritising civil and political rights and by limiting delivery to nation states. The human rights debate must be open to embrace some of the 'rights' suggested in this book, such as the right to refuse repayment of sovereign debt in certain circumstances (Michalowski) or to reframe WTO rules with reparations for institutional racism in mind (Brennan). If positive freedoms are not delivered to those excluded from basic necessities, should there be a 'right' to take them?

Achieving justice will depend on a redefinition of the role of the judiciary (in the international sphere this would presumably include arbitrators) to enable them to take account of wider realities such as the hidden disparities of bargaining power behind apparent equality of position. It would also require significant procedural changes such as a greater role for collective actions, public participation and consultation in legal processes.

Taking one of the social movements' preoccupations, Andrew Fagan's contribution analyses a phenomenon that has received very little academic

attention: ethical shopping. Fagan questions whether it is possible to contribute to the protection and promotion of human rights through shopping; is the shopping mall a new human rights site? The very idea that ethical shopping, undertaken after all by individual consumers, may help to promote human rights presupposes the acceptance of a view which has become increasingly credible in recent years: that human rights obligations can and do fall upon private individuals and not just states or similar public bodies. On this view we may all possess certain obligations towards the general promotion of human rights 'at home' and 'abroad'. The 'ethical shopping' market is a small, but steadily growing, 'institution' within affluent, consumer societies. Advocates of ethical shopping argue that, in an increasingly globalised market-place, our consumer purchases do affect the living conditions of those who labour to produce the goods and services we consume in ever increasing numbers. Many consumer goods and services, it is argued, adversely affect the living conditions of those who produce them. Sweat shop or child labour, exploitative terms of exchange for agricultural producers, and the wholesale degradation of natural environments are presented as benefiting consumers (through lower prices, for example) while directly harming those whose livelihoods and dependants are exposed to these unfair and unethical practices. Ethical shopping represents both a condemnation of these practices and an opportunity to shop in an ethical manner. Ethical shopping casts consumption in a moral light. Casting his analysis in a philosophical framework, Fagan identifies ethical shopping as a harm-based approach to ethics. Advocates of ethical shopping define the practice as that which seeks to reduce the harm caused to others through our consumer choices and thereby promote the well-being of those at the other end of the shopping chain. This emphasis upon harm, Fagan argues, entails an appeal to an account of rights as serving to promote and protect people's basic interests, such as one may find in the work of Henry Shue. Shopping ethically is therefore related to human rights through the effects it has upon people's basic interests and the rights which aim to support these.

While ethical shopping may be associated with a long established tradition within moral philosophy, its ethical foundations are subject to critical scrutiny. Indeed, Fagan identifies and discusses three obstacles to a philosophical endorsement of the claims of ethical shopping: moral subjectivism; the view that ethical capitalism is, in effect, an oxymoron; and, finally, an argument that ethical shopping can only ever be a preserve of the more affluent consumers in the more affluent societies. Whilst acknowledging the apparent force of each of these objections, Fagan argues that shopping is a fundamental feature of contemporary, consumer societies to which we are all, irrespective of our very differing religious and ethical commitments, similarly exposed: few, if any, can avoid the need to consume. He proceeds to accept the claim

that the consumer choices we make can and do impact upon the lives and human rights of those who produce for us in a globalised consumer marketplace. Consuming ethical products can help to alleviate some degree of their suffering. One is, therefore, confronted with a series of choices between goods and services which, at the very least, do not harm people's human rights and those which do. To continue to opt for the latter is unethical. Fagan acknowledges that ethical products typically attract a financial surcharge; that ethical products tend to cost more precisely because they do not involve extensive exploitation. This does serve to restrict the equal capacity of consumers living within affluent societies to consume ethical products. However, drawing upon an argument presented by the philosopher Peter Singer, Fagan argues that a far greater capacity for ethical shopping exists within affluent societies than is currently being realised. Ethical products do cost more but many more people have the means for incurring this additional cost than are prepared to accept at present. Fagan concludes with the formulation of what he refers to as an 'axiom of ethical shopping': 'if one has sufficient means and opportunity to consume ethical products ... then one ought to do so.'

Global poverty cannot be overcome by shopping alone. The socio-economic rights of the impoverished and the exploited will not be secured solely and exclusively through 'buying right'; these tasks require concerted governmental and inter-governmental action and structural change. However, in the meantime some action is available to us as consumers. Ethical shopping provides a forum within capitalism for promoting, rather than violating, people's socio-economic rights. Through ethical shopping we can make an important positive contribution to the promotion and protection of human rights. To choose not to do so, given the means and opportunity, appears morally wrong.

Turning to Part II which concerns specific inequities of the trading system, 'Gbenga Bamodu takes as a starting point the opposing views on globalisation and the consequent emergence of attempts to 'manage globalisation'. The UK has taken a leading role in developing strategies to manage globalisation through a White Paper and the subsequent Commission for Africa Report. Bamodu argues that as well as the practical proposals contained in these documents it is necessary to agree 'a clear agenda of a multi-layered approach encompassing doctrinal principles, internationally applicable norms'. At this level it is necessary to recognise the right of all people to democratic governance. In achieving this Bamodu calls for the use of the influence of the UK especially in respect of the repatriation of funds illegally siphoned from developing countries and use of economic leverage to insist on the eradication of official corruption. Taking the case of Nigeria, it is estimated that one family alone has looted some \$US 2–5 billion from the country. Examining selected issues covered by the two UK initiatives, Bamodu examines the calls

for the promotion of effective governance and the possible role of the UK as economic actor and as a political influence over the Commonwealth. The initiatives both call for the 'untying of aid', the abandonment of aid as a tool to advance economic or political objectives of the donors and an increase in the 'quality of aid' by working with the donee countries to create an overall development strategy. Bamodu also discusses the importance of debt relief and the disappointing achievements of debt relief initiatives to date. Bamodu welcomes the admission in both documents of the destructive role played by barriers to trade created by the subsidised markets of the developed nations. He also emphasises that the negative impression that many have of the climate for foreign investment in Africa is inaccurate although he accepts that further change to the investment climate is needed. One important policy initiative examined in some detail is the harmonisation of business laws via the OHADA Treaty which should engender co-operation rather than a destructive 'race to the bottom' to attract foreign investment. Bamodu is sceptical of the rather positive picture of the behaviour of investors which is presented in the Report and echoes Blecher and Dine in calling for a fundamental change in the aims of business, away from short term maximisation of profits. Most importantly Bamodu calls for the recommendations in the UK initiatives to be swiftly followed by actions and hopes that they will not merely remain empty rhetoric.

Another facet of globalisation has been the standardisation of intellectual property rights with the impact of the Agreement on Trade-Related Intellectual Property Rights (TRIPS). The recent report by the Commission on Intellectual Property makes clear that in developed countries there is good evidence that 'intellectual property is, and has been, important for the promotion of invention, and that for developing countries, like the developed countries before them, the development of indigenous technological capacity has proved to be a key determinant of economic growth and poverty reduction.'¹ Steve Anderman and Rohan Kariyawasam examine in some detail the unbalanced nature of the protection afforded to intellectual and other property of Multinational Companies (MNCs) not only by the multilateral regime in the form of the Agreement on Trade-Related Intellectual Property Rights (TRIPs) but also by the proliferation of Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs). They argue that some countries are unable to make use of the checks and balances apparently available under TRIPS (such as compulsory licences) and point to the erosion of 'policy space' that arises either as a result of legislative, judicial or administrative capacity, lack of absorption capacity or as a result of BITs and FTAs. They argue that the balance might be partially addressed by the provision of strong competition laws as a method of regulating the abusive exercise by MNCs of Intellectual Property Rights (IPRs).

Competition law recognises that not only do some IPRs amount to a monopoly but that they do so in a situation where the holder is in control of an 'essential facility', that is, something without which operators in a different market cannot function (such as control over a port without which ferries cannot dock). Competition restricts the use of power in those circumstances on public interest grounds (in a subsequent chapter Kariyawasam shows how this public interest is linked to the collective Right to Development). Competition law also regulates the terms of technology transfer agreements. Anderman and Kariyawasam show how competition rules can assist technology transfer by regulating the terms of technology transfer agreements, for example, by eliminating contractual terms requiring the 'grant-back' of improvements to the licensor or tie-ins of non-IP protected products as a condition of a licence to use a patent. They argue that this type of regulation protects 'follow-on innovation' and can be adapted to ensure the effective take up of technology transfer in developing countries. The authors accept that these mechanisms will only work where competition laws can be effectively enforced, but question whether the WTO rules should be seen as imposing an obligation on all WTO members not to discriminate between the protection of national and international markets so that licencing agreements which are currently out of the jurisdiction of developed states would nevertheless be subject to scrutiny under the competition rules in developed states. This could be justified on the grounds that abusive use of IPRs is a restraint of trade, and would provide one possibility for the integration of human rights considerations into trade rules, a chance to develop policy coherence as called for by Hunt (below).

Anderman and Kariyawasam then examine the treaties outside the ambit of the WTO which might well militate against such policy coherence. There are now some 2265 BITs covering Foreign Direct Investment (FDI) which frequently prohibit any requirement that foreign investors should meet 'performance requirements' including requirements of technology transfer. These are supplemented by FTAs and regional agreements such as the North American Free Trade Agreement (NAFTA). NAFTA prohibits member states from imposing or enforcing requirements 'to transfer technology, a productive process or other proprietary knowledge to a person in its territory'.

The provisions of these agreements, while not uniform, often prevent states from imposing a requirement to train local personnel or use locally sourced goods. Anderman and Kariyawasam see one cause of the proliferation of these agreements as the failure of the multilateral negotiations at Cancun.

In WTO negotiations this caused the rich 'Quad' nations to bow to the concerns of developing countries but in order to circumvent these concessions they have been concluding treaties which avoid those concessions and restrict the 'policy space' in a number of areas including the public policy exceptions to strict IPR protection under TRIPS.

These bilateral agreements will undoubtedly 'limit the ability of governments to obtain patented medications placed on foreign markets at cheaper prices. This move flies in the face of paragraph 52 of the Doha Declaration'. Even if IPRs are not specifically mentioned in these treaties, they may be covered by the protection of 'investment activity' and anti-discrimination clauses. Least Developed Countries (LDCs) and Developing Countries (DCs) are thus caught in a pincer movement with US and EU trade positions embedded in domestic law requiring the promotion and strong protection of IPRs. In the US the aims for Trade Representatives are embedded in law and require the attainment of international protection of IPRs equivalent to domestic US protection, one of the strongest in the world. Since LDCs and DCs are net importers of IP such strict protection militates against their growth. General Systems of Preference are also of dubious assistance to LDCs and DCs since they may be withdrawn unilaterally at any time. Indeed, they may be counterproductive as the threat of withdrawal may be used to gain commitments to BITs and other treaties that are unfavourable to the weaker countries.

In a separate chapter, Rohan Kariyawasam explores the possibility of implementing the UN Declaration on the Right to Development (RTD) by creating national and international measures to enhance and measure technology transfer. Picking up the property rights debate he argues that ensuring beneficial technology transfer will require balancing foreign investor rights to protect intellectual property with restrictions imposed by competition law and WTO surveillance to check the possible misuse of market power by multinational companies. The proposed mixture of measures should, he argues, provide incentives for FDI. In particular, he proposes the introduction of a 'Right to Development Tax Relief'. Kariyawasam argues that the progressive realisation of the RTD depends to a considerable extent on the availability of technological processes (such as the processes necessary to build refrigerated trucks) and consequently on the transfer of knowledge surrounding these processes. He argues that RTD creates not only individual but collective rights which link it closely to the rules that regulate economic activity 'for the public good'. There is clear evidence for this, including the Vienna Declaration of 1993 which links RTD to 'a favourable economic environment at the international level'. Kariyawasam argues that *investor* states have a clear obligation in international law to provide effective technology transfer including adequate 'spillover', that is the effective absorption of new technology by developing states which is far more important than formal technology transfer. This obligation lies on the parties to the International Covenant for Economic, Social and Cultural Rights. Kariyawasam advances the concept of a RTD tax relief which could be claimed by investing companies that satisfy a 'minimum set of technological transfer criteria' to be

established by the WTO Working Group on Technology Transfer. This incentive would assist in promoting FDI in the context of the 'new growth theory' which emphasises the importance of FDI yielding 'social return' rather than simply 'private return' thus avoiding the possibility of destructive FDI. Kariyawasam also develops a new 'symbolic' equation, which he calls 'Equation 5', for linking the Right To Development with FDI. By way of Equation 5, he indicates clearly the economic indicators that need to be further researched if governments are to be able to enforce the RTD through economic law.

Paul Hunt and Simon Walker view WTO agreements through the prism of the right to health, concentrating on the position of states in international human rights law. All state members of the UN (which includes all members of WTO) have agreed to the eight millennium goals, at least four of which are health related. Hunt and Walker argue that one of the greatest challenges confronting international human rights law is the problem of 'disconnected' policy making by governments, that is the absence of integrated policy making and, in particular the lack of understanding of human rights issues when trade policy is made. A coherent approach to the national and international obligations of states is required. While human rights law does not take positions for or against any particular trade rule or policy in principle this is subject to two important practical conditions; the rule or policy in question must actually enhance enjoyment of human rights, including for the disadvantaged and marginal; secondly, the process by which the rule is formulated, implemented and monitored must be consistent with all human rights and democratic principles. Thus human rights law requires reliable evidence that a chosen rule or policy is delivering positive right to health outcomes, including for the disadvantaged.

Hunt and Walker explain that the right to health is an inclusive right extending to timely and appropriate health care, including access to essential medicines, but also underlying determinants of health, such as access to safe and potable water and adequate sanitation, as well as non-discriminatory treatment. Hunt and Walker agree with Kariyawasam that the duty of progressive realisation imposes immediate obligations despite resource constraints.

These authors argue that the relationship between trade and health arises in several ways; trade's potential for increasing resources can contribute to the progressive realisation of the right to health, and resources arising from trade must be allocated in such a way that they do, and the state must establish effective and transparent mechanisms to monitor whether or not this is happening. The fundamental human and democratic right to participate in decision making must inform the development of both trade and health policies.

With Brennan and Kariyawasam, Hunt and Walker see developed nations as having a duty to work 'actively towards equitable multilateral trading,

investment and financial systems that are conducive to the elimination of poverty and the realisation of the right to health.' Hunt and Walker sees this responsibility as arising from the duty of international cooperation and assistance in the International Covenant on Economic, Social and Cultural Rights. This means that states should respect the right to health in all jurisdictions and ensure that no trade agreement or policy will adversely affect these rights. Representatives in all international organisations in all policy matters should therefore take due account both of the right to health and the duty of cooperation and assistance.

While states bear primary responsibility for delivering the right to health, all actors have responsibilities, including private businesses. These responsibilities are further explored in the context of access to essential medicines and Hunt and Walker echo Kariyawasam and Anderman in calling for flexibility of interpretation of the TRIPS regime and the use of compulsory licences and parallel importation. Hunt and Walker believe that access requires delivery mechanisms that will ensure that medicines reach disadvantaged groups such as slum dwellers, indigenous peoples and rural communities, and that medicines must be economically accessible and accompanied by accurate information. The duties to respect, protect and fulfil rights translate these access objectives into a legal framework.

Hunt and Walker see the General Agreement on Trade in Services (GATS) which will open health care services to a higher level of international competition as both opportunity and threat. It might lead to the increase of available resources but could also lead to the establishment of a two-tier health system primarily geared to the wealthy and thus contravening the norms of non-discrimination. Human rights theory differs from that of some trade and development theorists since it emphasises the delivery of rights to all rather than accepting that there will be 'losers' in the path to development.

The authors discern wide support for the development of human rights impact assessments of trade rules and suggests that WTO Trade Policy Reviews should consider this aspect in their country reviews.

Fernne Brennan argues that the rules of the international trading system, especially those overseen by the WTO, should be adjusted to take account of reparations for the slave trade. She argues that the slave trade benefited Western states, boosting their economies at the expense of the people and economies of the target nations. Inequalities were compounded by colonialism and continue today through the imposition of trading rules which are shaped by and imposed by those rich trading nations that have already benefited from slavery and colonialism. Brennan argues that the WTO is institutionally racist, in that as an organisation it fails 'to provide an appropriate and professional service to people because of their colour, culture or ethnic origin'. This type of racism is often to be found in processes within the

organisation and in the operation of its rules rather than in the rules themselves. Brennan takes the case of Guyana, pointing out that the dependence of its economy on sugar, rice and bananas is a direct inheritance of the plantation system which was sustainable only with slave and indentured labour and which was the fundamental driving factor in creating limited diversity in agricultural exports, simultaneously suppressing the export of manufactured goods or value-added items. The philosophy on which WTO rules are based is equality, but predicated largely on the basis of 'equality of starting points' and mitigated only by preferential treatment agreements which have come under increasing pressure (not least from multinational companies pressurising governments to take action) in recent years through the dispute settlement mechanisms of the WTO. Brennan agrees with Fredman that the paramouncy given to equality in WTO rules 'may in practice reinforce discrimination' (Brennan, Chapter 10, p. 267). The inequalities are compounded by the subsidies paid to farmers by the richer trading blocs, particularly the US and EU.

Turning to the debate about reparations, Brennan acknowledges that difficulties with claims for reparation have been encountered because of the remoteness of the episodes of slavery and colonialism which led to the economic disadvantages suffered by countries such as Guyana. However, she argues that slavery constituted a tort against African peoples which continues today in the form of institutional racism; 'acts of the total White community against the total Black community' including 'the continuous economic and social deprivation that they experience as a consequence of past wrongs' (Brennan, Chapter 10, p. 268) and that this institutional racism is evident in the way WTO rules, while preaching equality, rig the rules against the poor (especially African) nations in two ways. The first is by adhering to the concept of formal 'equality' of treatment giving little or no balancing weight to the past wrongs of slavery and colonialism and the havoc wreaked on economies as a result. The second is by prioritising the interests of rich nations in a number of ways, including prioritising the protection of intellectual property and permitting the retention of agricultural subsidies by the EU and US. Brennan argues that slavery and colonialism are a cause (although not necessarily the sole cause) of the current impoverishment of the nations formerly subject to those regimes and that lingering racist attitudes still inform the priorities evident in the trading system. Brennan argues that the communities harmed should displace the concept of individual plaintiffs and monetary compensation in the quest for reparations and justice, and instead call for justice in the reform of WTO trading rules.

Tom Sorell looks at the attempt by the UN to apply human rights standards to transnational corporations by the UN Sub-Commission on the Promotion and Protection of Human Rights which, in August 2003 adopted the 'UN

Norms on the Responsibilities of Transnational Corporations'. Sorell points out that the coverage of these norms is wide, applying to any business operating in more than one country. This would cover quite small businesses although the inspiration for the norms was 'what are taken to be the good and bad practices of the biggest transnationals'. Predictably, industry response has mostly been negative while leading human rights Non-Governmental Organizations (NGOs) have been supportive. Sorell's question is 'whether there is anything more than predictable reluctance to submit to regulation' in the negative responses. The Norms seek to indicate which existing human rights instruments are likely to have a bearing on the activity of transnationals. Importantly, they assert that those involved in running transnationals have human rights obligations. Those obligations are seen as varying according to the degree of influence of a given company. Particular obligations are 'not to discriminate; to protect the security of those affected by their operations; to respect workers' rights; to abide by domestic law; respect the rights of indigenous peoples and general economic, social and cultural rights; as well as refraining from bribes and other forms of corruption' and 'engage in consumer and environmental protection'. Companies are urged to integrate the Norms into their internal procedures, hint at bringing the activities of companies under UN monitoring bodies and urge states to 'make legal arrangements to give the Norms force' (Sorell, Chapter 11, p. 286). Thus 'The Norms are an attempt to get transnationals to support or prompt action by states to fulfil human rights obligations'. Sorell examines the industry criticisms of the Norms and finds that they are not rooted in the possible limitations of the applicability of human rights law but 'the main objection is that businesses are not the right sort of corporate bodies to have human rights obligations, and that the Norms are an attempt to conjure up new and onerous legal obligations for businesses out of thin air'. Sorell finds that the objection that the Norms leave 'real duty-bearer – the State – out of the picture' to be flatly contradicted by the wording. Reflecting Fagan's careful arguments about moral norms, Sorell argues that where serious violations of human rights, such as torture, are being carried out there is a 'pretty strict' moral obligation to protest and to attempt to stop such human rights violations. Sorell notes that where transnationals have failed to act on such obligations they have come to the attention of aggressive NGOs who may not have all the facts and 'who do not feel constrained to make sure their negative publicity is accurate, or fair to transnationals.' Sorell argues that, far from encouraging this behaviour (as some business lobbies suggest) it will have the opposite effect because the Norms are 'indirectly, a way of setting standards for reasonable criticism of transnationals by NGOs.' Sorell also argues that, in the case of torture being carried out by host countries 'low-profile activity' would be sufficient for compliance with the Norms; protests need not be in a blaze of activity.

However, where a government is known to carry out torture, Sorell argues that a transnational should not start operations in that country as to do so will be seen as a gesture of support for that government. Turning to a preoccupation central to the Norms, Sorell considers the economic, social and cultural rights embodied in the Norms and argues that these impose weaker obligations which may be rebutted by duties to others including shareholders. However, Sorell also argues that when companies make a commercial decision to start operations in a poor country they will gather commercial information which will reveal much about the vulnerabilities of the local communities. This knowledge is a good reason to impose a duty to fulfil economic, social and cultural rights unless the company shows that it is not in a position to do so.

However, the industry criticisms of the Norms are 'Friedmanite' in asserting that 'corporate social responsibility begins and ends with providing increased value for share-holdings and obeying local laws or local rules of the game'. Sorell finds this view old-fashioned and so finds no need to engage with the call by Dine and Blecher to consider fundamental reforms of company structure to change this position.

In some areas Sorell finds that the Norms 'stray into requirements that it is hard to see as obligatory at all, either because most transnationals are not equipped to comply' (Sorell, Chapter 11, p. 295) or because they are within the remit of others beyond the control of the companies. According to Sorell this includes suppliers, distributors and parties to contracts with transnationals. Sorell argues that the real value of the Norms lies in the possibility of influencing the 'companies in the middle', that is those neither cynically avoiding all obligations nor in the vanguard of social responsibility.

The third part of the book contains two studies focusing on South America but with wider significance in the debate concerning human rights and capitalism. Sabine Michalowski's contribution to this volume focuses upon the issue of the relationship between human rights and international debt from a legal perspective. Taking the case of Argentina as her example, Michalowski raises a number of important questions of wider significance for other countries whose impoverishment appears to be exacerbated rather than relieved by indebtedness. Her analysis is motivated by questions such as; does an indebted state have a legal right to refuse to service loans and repay debt where to do so will severely restrict its ability to protect the basic social and economic rights of its citizens? And, does the exposure of vulnerable economies to neo-liberal economic forces and institutions ultimately undermine the protection and promotion of the human rights of the poorer citizens of such countries? Underlying her analysis is, thus, a concern about the relationship between capitalism and social and economic rights, a concern which resonates with a number of other contributors to this volume.

Her analysis is timely. 2005 has been marked by increasing calls to write-off the debts owed by the 'South' to the 'North'. This campaign is conducted in an almost entirely moral discourse. International indebtedness of poor countries is identified as an important factor in maintaining the conditions such countries labour under, and is condemned as immoral for the suffering this inflicts upon those most exposed to the effects of poverty. The United Nations' stated desire to reduce by half the number of under-nourished people in the world by 2015 is an important component of this campaign. However, many of these aspirations have little or no legal force and rely almost entirely on the goodwill of affluent governments and their peoples. Appeals to morality, though effective in mobilising opinion, are limited by the cold force of law. Michalowski restricts her analysis to the legal domain. She questions whether there is any legal justification for Argentina refusing to continue to service and repay its debts to foreign creditors, quite apart from the moral arguments that have been offered in support of Argentina's shifting stance on this issue.

Michalowski argues that Argentina's exposure to neo-liberal economic forces and institutions has proven positively harmful to the human rights situation in that country in recent years. She states 'many of the acute problems that led to the breakdown of the Argentine economy are the results of Argentina's neo-liberal policies, backed and partly required by the IMF, the World Bank, and the G7 governments.' Adopting a strictly legal perspective entails an examination of the legality of the contracts Argentina entered into with its numerous foreign creditors. Her examination does not provide a simple, unequivocal answer, however. Some have argued that at issue here is a simple case of the fulfilment of a contract entered into under good faith and requiring that Argentina continue to fulfil its obligations to its foreign creditors who are entitled to their money, when all is said and done. Others have responded with the claim that the very fact that the bulk of these debts were incurred during a period of Argentina's rule by a military dictatorship renders any such agreement invalid. For her part, Michalowski focuses upon the Argentine constitution in her attempt to determine the legality of Argentina's indebtedness. From this perspective two questions emerge as central to the issue: first, who incurred the debt; second, for what purpose or end was the debt incurred?

A legal analysis of Argentine constitutional law in respect of the first question centres upon the division of powers between the executive and the legislative assembly. Given the fact that there was a military dictatorship at the time many of these debts were initially incurred, it is reasonable to conclude that the legislature played little role in seeking and validating these debts. However, the Argentine constitution insists that the legislature must validate any foreign loans sought by the executive. On this basis, one might begin to argue that the debts are unconstitutional. However, this issue con-

cerns the division of powers and does not, in itself, directly involve any appeal to human rights or the basic social and economic duties of Argentina to its citizens. These human rights based duties enter the scene through a consideration of the ends or purposes for which foreign debts are incurred. Michalowski argues, on this point, that the constitution is unequivocal: foreign debts can only be incurred if their purpose is compatible with the state's duty to protect the basic human rights guarantees enshrined within the constitution, guarantees which extend to include the protection of citizens' basic social and economic rights. In many, if not all, cases debt was not incurred for this purpose and discharging the contractual obligations of the state has further eroded citizens' basic living standards. On this view, the state is not a purely economically free agent but is legally bound to respect basic human rights guarantees. Human rights and not, say, military strength, thus stand as the principal end or justification of the authority and competence of the Argentine state. On this approach it is ultimately incumbent upon the courts to take the appropriate action on the issue of whether Argentina would be justified in refusing to repay its foreign creditors. On the face of it, the debts were incurred unconstitutionally and there may be a case, therefore, to cease payment. An appeal to human rights would ultimately underpin any such course of action. Michalowski notes, however, that the situation is complicated by some recent international case law findings which have explicitly refused debtors' attempts to avoid repayment on the grounds that such loans are, in effect, contracts entered into in good faith on the part of the creditors who are, therefore, entitled to repayment. A logical and fundamental principle of capitalism would appear to carry the day. This, of course, takes us into the very heart of the matter and Michalowski's conclusions are important in this respect (and conform to similar perspectives defended by several contributors). She argues that the state cannot be considered a completely free economic agent on terms analogous with those utilised for 'private' economic agents. Through their ratification of various human rights instruments and covenants, states are obliged to uphold and protect the fundamental interests of their citizens. Failure to do so is both morally and legally unjustifiable. International creditors (and the institutions which regulate them) must begin to acknowledge the obligations states are subject to when proposing loans and the terms of their repayment. After all, in the case of Argentina, had constitutional law been complied with, many loans would never have occurred. On this view, human rights commitments do, indeed, serve to impose legal constraints upon the actions of international creditors and indebted countries. Human rights, as a legal rather than merely moral force, stake their place within the global financial sector.

Todd Landman's analysis of the relationship between capitalism and human rights focuses upon Latin America in the last quarter of the twentieth

century; a turbulent and frequently bloody period of the continent's recent history. Landman is a political scientist interested in the relationships between development, democracy and human rights. This particular enclave of mainstream political science has been heavily influenced by modernization theory which holds, to cut a long story short, that democratic institutions can only take hold and begin to thrive once an economic threshold has been achieved within a given nation state or region. Increasing economic wealth, and the means for continual economic enhancement, is the most effective means for securing the end of democracy and, with it, the consolidation of those civil and political rights upon which democracy rests. Modernization theory has been subject to some extensive critical scrutiny in recent years. This chapter takes a similarly critical approach to the claim that human rights are best realised through the pursuit of those neo-liberal economic policies with which modernization theory has been closely associated.

Landman bases his substantive claims upon an extensive comparative statistical analysis of a range of indicators upon the social, political and economic conditions experienced by 17 Latin American countries spanning a period from 1976 to 2000. The sample countries, ranging from Argentina to Venezuela, underwent profound changes during this period. Most significantly, the principal economic model adhered to shifted from a state-led to a market-led model of economic development rendering the Import Substitution Initiative of the early to mid-seventies very much a thing of the past, while 'opening up' Latin American markets to foreign investment and credit. During the same period the countries replaced authoritarian and military dictatorships with democratically elected governments. Latin America, it might appear, has been the subject of a veritable human rights 'revolution', powered by the generation of economic wealth and increasing prosperity. On this view, modernization theory may appear vindicated and its advocates might begin to turn their attention to other continents and regions languishing under economic impoverishment and authoritarian rule.

Landman acknowledges the undeniable transformations achieved in Latin America. Latin America, he avers, has become a key terrain for the practice of human rights. However, he insists upon the need to examine these changes politically, that is to say, beyond and underneath the formality of legal ratification of human rights instruments and economic indicators of national wealth. Landman's comparative analysis reveals that violations of both civil and political and social and economic rights remain a prominent feature of many Latin American countries and are all too readily overlooked by those who are too readily satisfied with *de jure* changes. Landman argues that his empirical findings hold a number of significant and substantive implications for our understanding of how best to promote human rights in any given context. Thus, for example, he insists that Latin America represents an incidence of

'regional exceptionalism' for the universalising assumptions of modernization theory. Landman aligns himself, in effect, with academic specialists in other fields, such as anthropology and political economy, who have challenged the universalising assumptions of modernization theory. For Landman the crucial variable for explaining this particular 'defiance' of modernization theory is politics and the actions of political agents which are, ultimately, not simply reducible to some monolithic and global 'structure'. In support of this claim he points to the importance of regional political mechanisms through which human rights principles are pursued. In stressing the importance of 'politics' for human rights, Landman echoes a position advocated most recently by Michael Ignatieff and, before him, Richard Rorty. Landman's thesis suggests, perhaps most importantly, that the promotion of human rights across different regions of the globe cannot be best achieved by adherence to a 'one size fits all' explanatory model: academic dogma, irrespective of the influence it may wield over international financial organisations, must not cloud attempts to deliver genuinely objective and accurate insights into those conditions which enhance and those which obstruct the pursuit and realisation of human rights. Contained within this focus upon political factors and conditions is an assumption that we who cherish human rights should not be complacent in relying upon once and for all legal or economic mechanisms for the delivery of human rights – the challenge is ongoing, in Latin America and elsewhere.

CONCLUSION

The contributions to this volume represent a response to two imperatives of academic research in the field of human rights. First, human rights is a global and globalising phenomenon whose diffusion is closely related to the globalising spread of capitalism. All of the contributors aim to expose the extent and depth of this relationship. It should come as no surprise to discover that the relationship between human rights and capitalism is a complex, multi-faceted one. Understanding this relationship is crucial to the promotion and protection of human rights. To some, capitalism may appear inherently incompatible with the moral imperatives of human rights. To others, human rights may still appear to be little more than an attempt to cloak an exploitative system in a humane garb. This volume suggests that any such simple conclusions rest upon overly-reductivist and dogmatic assumptions. For the foreseeable future the fate of human rights is entwined with that of capitalism (as indeed, is that of us all). Those of us who make our living through the academic study of human rights cannot ignore this relationship. This volume points to the need to assimilate analyses of capitalism into the study of

human rights. The second imperative of the academic study of human rights is the need to pursue multi-disciplinary research. While the academic field has long been dominated by law, it should be abundantly clear that a single academic discipline cannot provide a sufficiently comprehensive nor detailed representation of the object of study. Contributing to the promotion and protection of people's human rights requires academic expertise in, at the very least, the academic fields represented by the contributors to this volume: law, moral philosophy, political science, and political theory. This combination of perspectives and academic skills is unlikely to yield a single, intellectually homogeneous outcome. Singly, human rights and capitalism are complex phenomena so one ought not to be surprised by the complex picture that emerges when the two are combined. This volume both testifies to that complexity and aims to initiate a discourse that sheds new light on the relationship between the two dominant globalising forces of the current age.

NOTE

1. Commission on Intellectual Property Rights (CIPR) report on Intellectual Property and Development, Chapter 1, p. 1, 2002.